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

ROBERT ALDEN SWIFT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO.: 2012-CV-000036-A-O

Lower Case No.: 2012-TR-001565-A-O

DATE: October 8, 2013

Appeal from the County Court, for
Orange County, Florida
Carroll S. Barco, Traffic Court Hearing Officer

Robert Alden Swift, Esquire, Appellant.

No Appearance for Appellee.

Before WHITEHEAD, HIGBEE, and O'KANE, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING LOWER COURT

Appellant, Robert Alden Swift ("Swift") timely files this appeal of the lower court's Determination of Infraction entered on April 24, 2012. This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320.

Facts and Procedural History

On January 17, 2012, Swift was stopped and issued a traffic citation for speeding by Deputy Christopher Wood with the Orange County Sheriff's Office who was operating a stationary radar device on State Road 414 in Orange County. Swift challenged the traffic citation and a hearing was held on April 24, 2012 before Traffic Court Hearing Officer, Carroll Barco. Upon hearing testimony from both Swift and Deputy Wood, Hearing Officer Barco found Swift guilty of unlawful speeding per section 316.187(1), Florida Statutes, and entered a Determination of Infraction assessing a fine and costs of $362.00 and withholding adjudication of guilt.

Arguments on Appeal

Swift argues: 1) The lower court erred by incorrectly determining that the State of Florida met its burden of proof as to the investigating officer's qualifications for the use of radar; 2) The lower court erred by finding that the State of Florida met its burden of proof as to each element of the crime alleged; thus, he is entitled to a judgment of acquittal; and 3) The lower court erred by denying him due process and thus, he is entitled to a new trial.

Standard of Review

The standard of review applicable to a trial court decision based upon a finding of fact is whether the decision is supported by competent substantial evidence. *Wekiva Springs Reserve Homeowners v. Binns*, 61 So. 3d 1190, 1191 (Fla. 5th DCA 2011). The function of hearing officer as the trier of fact, like a judge, is to evaluate and weigh the testimony and evidence based the observation of the bearing, demeanor, and credibility of witnesses appearing in the cause. *Shaw v. Shaw*, 334 So. 2d 13, 16 (Fla. 1976). The standard of review of a trial court's application of the law to the facts is de novo. *State v. Pruitt*, 967 So. 2d 1021, 1023 (Fla. 2d

DCA 2007). As for a trial court's rulings on the admissibility of evidence and motions for new trial, the standard of review is abuse of discretion. *Carpenter v. State*, 785 So. 2d 1182, 1201 (Fla. 2001); *Allstate Insurance Co. v. Manasse*, 707 So. 2d 1110, 1111 (Fla. 1998); *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980). Lastly, the hearing officer's findings of fact and conclusions of law come to the appellate court with a presumption of correctness and will not be disturbed unless they are clearly erroneous. *Wright v. Wright*, 431 So. 2d 177, 178 (Fla. 5th DCA 1983).

Discussion

Swift's Argument that the lower court erred by incorrectly determining that the State of Florida met its burden of proof as to the investigating officer's qualifications for the use of radar:

At the hearing, Deputy Wood testified that he was running a stationary radar on State Road 414 in Orange County when he observed Swift's vehicle traveling in a construction zone which was marked from 55 mph, to 45 mph, and then to 35 miles per hour where the zone was marked twice on both sides of the road. He further testified that prior to Swift's vehicle reaching where he was standing at in the middle of the road, he estimated Swift's vehicle to be travelling at 64 mph at which point he activated the radar and confirmed his estimation. Swift then made an objection arguing that there was no foundation that Deputy Wood was qualified to testify regarding the radar. Thereafter, Hearing Officer Barco asked Deputy Wood as to when the radar was calibrated. Deputy Wood stated that it was calibrated on January 19, 2012 and before that on August 25th. Deputy Wood also testified that the radar was tested at the beginning of his shift at 6:00 a.m. and at the end of his shift at 4:00 p.m. Further, he testified that he has been radar certified for the last 14 years.

This Court finds that this argument lacks merit as Deputy Wood's testimony attesting to the calibrating and testing of the radar device and being radar certified for 14 years provided competent substantial evidence showing compliance with sections 316.1905 and 316.1906, Florida Statutes (2012) that govern electrical, mechanical, or other speed calculating devices, and radar speed-measuring devices. Further, regardless of whether the radar device and Deputy Wood's qualifications were in compliance with the governing statutes, Deputy Wood had the legal authority to cite Swift for speeding based upon his visual and aural perceptions. Ample case law exists holding that the law enforcement officer's testimony as to the visual estimate of speed and years of experience was sufficient to establish that the speeding violation occurred. *See State v. Allen*, 978 So. 2d 254, 255-256 (Fla. 2d DCA 2008); *State v. Joy*, 637 So. 2d 946, 947-948 (Fla. 3d DCA 1994); *Jasper v. State of Florida*, 14 Fla. L. Weekly Supp. 203a (Fla. 9th Cir. Ct. 2006); *Kolb v. State of Florida*, 15 Fla. L. Weekly Supp. 422a (Fla. 9th Cir. Ct. 2008).

Swift's Argument that the lower court erred by finding that the State of Florida met its burden of proof as to each element of the crime alleged; thus, he is entitled to a judgment of acquittal:

As the hearing progressed, Swift cross-examined Deputy Wood as to whether he had any independent recollection of him or as to what happened without reviewing the report. Deputy Wood answered "No, sir." The cross-examination continued with a dialogue including questions and answers about the specific location where the alleged speeding took place, the direction that Swift was driving, the location where Deputy Wood was standing when he was using the radar, and the posted speed limit signs.

Swift then asked Deputy Wood if he had a copy of the ticket with him and he answered that he did not. He then asked Deputy if he reviewed the ticket where he answered "I understand-yes, sir. I understand what you're trying to get at. You're trying to put yourself on the

other side." Swift then asked Deputy Wood about the location of the incident as stated on the ticket. Deputy Wood answered that the location he used when he wrote the ticket was at State Road 414/Martin Meadows Road. Deputy Wood further testified that when the incident took place, Swift was traveling east and that Swift was a half a mile away from him. Lastly, Deputy Wood stated "I know how I was in the roadway that day, yes, sir." Swift again asked Deputy Wood if he had any independent recollection and he answered "No." Swift then moved for a judgment of acquittal based upon Deputy Wood not having an independent recollection and the following colloquy ensued:

> **Hearing Officer Barco:** "He doesn't have to have an independent recollection. He can refresh - - because if he stops 5,000 cars during a period of a month, he couldn't remember every one of them vividly. I'm not going to worry about that, sir. What do you want to tell me as far as your defense is concerned?"
>
> **Swift:** "Judge, I was traveling on State Road 414 in my vehicle at a lawful speed in a 65-mile an hour zone. The officer then as I approached an intersection which was more than half a mile away, was standing in the middle of the roadway. I slowed down even further, he waived me over. I had no idea why he waived me over. He then said you're going 64 in a 35. I said that's impossible. And I asked him a question and then he said well, I'm going to mark you down for 44 in a 35 and I couldn't understand why he was doing that, but he indicated that if you want to plead not guilty and say you weren't speeding, then come to court. So I'm coming to court to tell you that I'm approaching an area that goes from 65 to 55 to 45 within a very short period of time. There was no construction ongoing."
>
> **Hearing Officer Barco:** "He didn't charge you in a construction zone, sir."
> **Swift:** "I'm not sure why he's charging me at all quite frankly, but –"
>
> **Hearing Officer Barco:** "He's charging you for going 64 miles an hour in a 35-mile zone, sir."
>
> **Swift:** "Again, the officer has no recollection of where I was, he's testified that it was only 200 –"
> **Hearing Officer Barco:** "You've said that, sir."
>
> **Swift:** "He testified that I was only 250 yards of a 35—mile zone, I was clear outside of that at the time that he clocked me."
>
> **Hearing Officer Barco:** "Well –"

Swift: "And there's certainly reasonable doubt and there should be an acquittal."

Hearing Officer Barco: "Based on the testimony of the officer, I find that you're guilty of the offense of going 64 in a 35-mile zone. The fine is $329, the court costs of $33. I give you 60 days to pay it and I withhold adjudication so you do not get any points on your drivers license."

Swift: "Okay."

Although Deputy Wood stated that he had no independent recollection as to Swift, he was able to substantially answer the questions both on direct and cross examination surrounding the incident. Further, during cross examination, Swift's references to the information contained in the traffic citation which was part of the record, also appeared to refresh Deputy Wood's recollection of the incident. *See* section 90.613, Florida Statutes; *Garrett v. Morris Kirschman and Company, Inc.*, 336 So. 2d 566 (Fla. 1976) (addressing the use of writing to refresh memory of a witness)

Accordingly, this Court finds that the totality of Deputy Wood's testimony provided competent substantial evidence to support Hearing Officer Barco's determination that Swift committed the traffic infraction as charged. Also, Hearing Officer Barco as the trier of fact was in the best position to evaluate and weigh the testimony and evidence based the observation of the bearing, demeanor, and credibility of both Deputy Wood and Swift. *Shaw v. Shaw* at 16. Further, this Court finds that Hearing Officer Barco's findings of fact and conclusions of law were not erroneous and therefore, should be presumed correct. *Wright v. Wright* at 178.

Swift's argument that the lower court erred by denying him due process and thus, he is entitled to a new trial:

Swift argues that the lower court misconstrued the burden of proof and acted as the State's representative at trial rather than taking a neutral position because the lower court failed to require the State, through Deputy Wood, to make a prima facie showing of a statutory

violation. Furthermore, he argues that the lower court's comments on the State's burden of proof and the required evidence coupled with the lower court's failure to require the Deputy Wood to satisfy the statutory radar requirements was fundamentally unfair to him; thus, depriving him of due process.

First, from review of the court record, specifically the hearing transcript, Swift did not raise this argument nor did he bring a motion for a new trial in the lower case including at the hearing. Therefore, this argument is barred from appellate review. In the absence of fundamental error, an appellate court will not consider an issue that has been raised for the first time on appeal. *Keech v. Yousef*, 815 So. 2d 718, 719 (Fla. 5th DCA 2002), cause dismissed, 829 So. 2d 918 (Table) (Fla. 2002). Further, even if this argument was not barred from appellate review, this Court finds that from review of the hearing transcript, there is nothing showing that Hearing Officer Barco was being unfair to Swift as he was provided ample opportunity to cross examine Deputy Wood and to present his version of the facts, defenses, and arguments. Accordingly, this argument lacks merit.

Conclusion

Based on the foregoing, this Court finds that Hearing Officer Barco afforded Swift due process and followed the correct law in rendering his decision that was based upon competent substantial evidence. Therefore, Swift fails to show that Hearing Officer Barco erred in entering the Determination of Infraction.

Accordingly, is hereby **ORDERED AND ADJUDGED** that the Determination of Infraction entered against Appellant, Robert Alden Swift on April 24, 2012 is **AFFIRMED**.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished to: **Robert Alden Swift, Esquire**, 1600 Anchor Court, Orlando, Florida 32804, Robert.swift@csklegal.com and **Bernice Rice, General Counsel, Orange County Sheriff's Office,** 2500 W. Colonial Drive, Orlando, Florida 32804, on this 17th day of October, 2013.

/S/
Judicial Assistant