[Cite as *Columbus v. Bell,* 2010-Ohio-2908.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellee,	:	
		No. 09AP-1012
v.	:	(M.C. No. 2009 TR D 186816)
Greg A. Bell,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 24, 2010

Richard C. Pfeiffer, *Jr.*, City Attorney, *Lara N. Baker*, City Prosecutor, *Melanie R. Tobias*, and *Orly Ahroni*, for appellee.

Greg A. Bell, pro se.

APPEAL from the Franklin County Municipal Court.

SADLER, J.

{¶1} Appellant, Greg A. Bell ("appellant"), filed this appeal seeking reversal of a judgment by the Franklin County Municipal Court convicting him on a charge of speeding in violation of section 2133.03 of the Columbus City Code. For the reasons that follow, we affirm.

{¶2} On September 1, 2009, Officer Joseph Baker was assigned to monitor traffic in the southbound lanes of Route 315. Officer Baker was using a Marksman LTI 20-20 laser device to check speeds of cars entering an area where the number of lanes dropped from three to two due to construction. The posted speed limit was 45 miles per hour.

{¶3} Officer Baker observed appellant driving a vehicle southbound at a speed he visually estimated to be in the mid- to upper-70s miles per hour range. Officer Baker used the Marksman speed detector to clock appellant's speed, resulting in three separate measurements ranging from 77 to 80 miles per hour. Officer Baker ordered appellant to pull over and issued him a ticket for speeding.

{¶4} The case proceeded to trial, with appellant representing himself. At trial, Officer Baker testified that he had been employed as a police officer by the city of Columbus for 14 years. Regarding his training, Officer Baker testified as follows:

> Q. Could you just tell us briefly, Officer, what training you have in the enforcement of traffic laws?
>
> A. During our six-month academy, we had several weeks of traffic laws; one of the weeks included laser and radar training.
>
> Q. And could you describe that training that you had with the laser devices?
>
> A. Like I said, during the one week, we went through classroom training which covered the practical and theory of laser and radar. And the following week we went out with an officer who was trained in radar and laser and we did estimating of speeds both of moving and stationary modes.

(Tr. 7.)

{¶5} Subsequently, Officer Baker testified further regarding his training to perform visual estimations of speed:

> Q. Okay. And can you describe how you do a visual estimate?
>
> A. As I stated, we had the training in the academy and it's - - we all do it, more or less, when we make a right turn on red to another street, and you think you had the time to do it, you're estimating the person's speed and you either think you can make the turn or not, it's the same aspect.

(Tr. 10.)

{¶6} Officer Baker also testified about the operation of the Marksman laser device he was using to measure speeds, including his check of the calibration of the device on the day in question. Appellant objected, arguing that there had been no foundation for Officer Baker's testimony about the laser device, and that the device should be produced so it could be properly inspected.

{¶7} The trial court overruled appellant's objection, stating that "[t]he LTI 20/20 has been declared in this Court, not only in this courtroom but also in Franklin County Municipal Court, as a device that is an acceptable device and proper for the use and apprehension of speeders." (Tr. 11.) Appellant asked to be heard on the propriety of the court's taking judicial notice regarding the laser device. The trial court denied the request, stating:

> Well, I'm saying that we've already ruled that that device does not need to be in here. The device has already been in here, an expert has already testified as to that device, and it has been deemed to be an acceptable device used in the detection and apprehension of speeding.

(Tr. 12.)

{¶8} Appellant testified on his own behalf at trial. Appellant stated that he had moved into the left hand lane in order to pass a tractor trailer that was traveling in the middle lane. Appellant testified that a vehicle approached behind him very quickly, and that he sped up to pass the tractor trailer before the left lane ended in the construction area. Appellant stated that he believed if he did not speed up enough to get well in front of the tractor trailer, he would have had to move in front of the tractor trailer and then slam on his brakes, creating a danger of a rear end collision occurring.

{¶9} Appellant attempted to enter into evidence a copy of an accident report in which he had been involved in a rear end collision with a tractor trailer, arguing that this supported his claim that he believed his actions were necessary to avoid another rear end collision. The prosecuting attorney objected to admission of the accident report on the grounds of relevance. The trial court sustained the objection, stating that, "[t]here is no defense, so to speak, of speeding as far as whether or not it was a reasonable decision." (Tr. 32.)

{¶10} In closing, the prosecuting attorney argued that appellant's own testimony regarding his decision to speed up in order to pass the tractor trailer constituted an admission that appellant had been driving at a speed in excess of the posted speed limit. Appellant argued that the law states that a person's speed should be safe given the conditions present at the time, and that under the conditions that existed at the time Officer Baker observed him, his speed was reasonable.

{¶11} The trial court found appellant guilty of speeding and imposed a fine of $100, which was doubled to $200 since the incident occurred in a construction zone, plus court costs. Appellant filed this appeal, and asserts three assignments of error:

First Assignment of Error

> THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY DENYING HEARING ON THE PROPRIETY OF SUA SPONTE TAKING JUDICIAL NOTICE.

Second Assignment of Error

> THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY DISALLOWING THE ADMISSION OF EXCULPATORY EVIDENCE.

Third Assignment of Error

> THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY FINDING DEFENDANT GUILTY AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶12} In his first assignment of error, appellant argues that the trial court erred when it took judicial notice of the accuracy of the Marksman LTI 20-20 laser device used to measure appellant's speed without holding a hearing. Pursuant to Evid.R. 201(B), a judicially noticed fact "must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Evid.R. 201(E) provides that a party is entitled upon timely request to a hearing on the propriety of a court taking judicial notice.

{¶13} The city concedes that appellant was entitled to a hearing on the propriety of the court's taking judicial notice regarding the accuracy and reliability of the Marksman LTI 20-20 device, but argues that appellant is not entitled to a reversal of his conviction. We agree.

{¶14} The scientific accuracy of a laser device used to measure speed is a fact that may be judicially noticed. *State v. Freed*, 10th Dist. No. 06AP-700, 2006-Ohio-6746. The accuracy of a speed measuring device may be established such that judicial notice of its accuracy can be taken in future cases in a jurisdiction by: (1) a reported municipal court decision from that jurisdiction, (2) a reported or unreported case from the appellate district covering that jurisdiction, or (3) the previous consideration of expert testimony about a specific device where the trial court notes it on the record. *Cincinnati v. Levine*, 158 Ohio App.3d 657, 2004-Ohio-5992. However, the fact that a court in one jurisdiction has taken judicial notice of a device's accuracy cannot serve as the basis for a court in another jurisdiction to take judicial notice. *Columbus v. Dawson* (Mar. 14, 2000), 10th Dist. No. 99AP-589.

{¶15} In this case, the trial court took judicial notice of the laser device used based in part on *Columbus v. Barton* (1994), 106 Ohio Misc.2d 17, in which the Franklin County Municipal Court determined the reliability and accuracy of the LTI 20-20 device, and in part on its own experience in cases involving the device. Appellant argues that he was entitled to a hearing on the propriety of the court taking judicial notice because a hearing would have afforded him the opportunity to explore whether the Marksman LTI 20-20 laser device was a different model than the device considered in *Barton*.

{¶16} Although appellant was entitled under Evid.R. 201(E) to a hearing regarding the court taking judicial notice of the accuracy and reliability of the LTI 20-20 device, we find that appellant could not have suffered any prejudice as a result of the failure to hold a hearing. First, there is nothing in the record that would provide any indication that the Marksman LTI 20-20 device is somehow different from other laser devices bearing the

designation "LTI 20-20." In addition, the trial court was taking judicial notice of the device's accuracy and reliability based not only on the reported decision in *Barton*, but also on its own experience with the LTI 20-20.

{¶17} Furthermore, even if appellant had been given the opportunity to show in a hearing that the Marksman LTI 20-20 is a different model from other LTI 20-20 devices, this distinction would have been irrelevant. In *State v. Wiest*, 1st Dist. No. C-070609, 2008-Ohio-1433, a defendant charged with speeding argued on appeal that the trial court had improperly limited cross-examination about different models of the LTI 20-20 device. The First District held that the trial court did not abuse its discretion by limiting the cross-examination in that manner, concluding that, "[i]t is the scientific principle underlying a device's reliability – and not the reliability of a specific model – that renders judicial notice proper. Accordingly, any evidence about the various models of the LTI 20-20 would have been irrelevant." Id. at ¶12.

{¶18} We agree with the rationale set forth by the First District in *Wiest*. Thus, if the trial court had held a hearing for the purpose of considering appellant's argument that the Marksman LTI 20-20 is a different model, the distinction appellant was attempting to make would have been irrelevant to the issue of whether the court could have taken judicial notice of the device's accuracy and reliability.

{¶19} Consequently, appellant's first assignment of error is overruled.

{¶20} In his second assignment of error, appellant argues that the trial court erred when it denied admission of evidence appellant argues was exculpatory. Specifically, appellant argues that the trial court erred when it refused to admit into evidence the report from a prior accident in which appellant was involved. Appellant argues that the report

would have supported his contention that his actions were reasonable under the circumstances because he believed it was necessary to increase his speed as he passed the tractor trailer in order to avoid another such accident.

{¶21} Appellant takes specific issue with the statement made by the trial court when it denied admission of the accident report because the court stated that there is no defense to a charge of speeding based on the reasonableness of a driver's decision. The Columbus City Code section under which appellant was charged, C.C.C. 2133.03(A), provides that: "[n]o person shall operate a motor vehicle at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface and width of the street or highway, and any other conditions." C.C.C. 2133.03(C) makes it prima facie unlawful to exceed posted speed limits. Thus, a defendant charged with speeding does have the ability to rebut the prima facie case made by a showing that the posted speed limit was exceeded by showing that the speed was reasonable under the conditions present at the time the defendant was charged with speeding. See *Columbus v. Josephson*, 10th Dist. No. 08AP-441, 2009-Ohio-244.

{¶22} C.C.C. 2133.03(A) tracks the language set forth in R.C. 4511.21(A). The Supreme Court of Ohio has held that for purposes of R.C. 4511.21(A), the phrase "any other conditions" means physical conditions in or connected with the highway. *State v. Saffell* (1975), 44 Ohio St.2d 39. In this case, the accident report appellant sought to introduce would not have related to any physical conditions in or connected to the highway, but instead involved appellant's personal experience and how it affected his subjective belief about whether his actions were reasonable. Because the accident report was irrelevant to the question whether appellant's speed was reasonable under the

conditions present at the time appellant was charged with speeding, the trial court did not err in denying its admission into evidence.

{¶23} Therefore, appellant's second assignment of error is overruled.

{¶24} In his third assignment of error, appellant argues that his conviction was against the manifest weight of the evidence. In determining whether a verdict is against the manifest weight of the evidence, the appellate court weighs the evidence in order to determine whether the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. However, in engaging in this weighing, the appellate court must bear in mind the fact finder's superior, first-hand perspective in judging the demeanor and credibility of witnesses. See *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The power to reverse on "manifest weight" grounds should only be used in exceptional circumstances when "the evidence weighs heavily against the conviction." *Thompkins* at 387.

{¶25} In support of his argument that his conviction for speeding was against the manifest weight of the evidence, appellant relies in part on the arguments made in support of his first two assignments of error, claiming that his conviction was based on improper judicial notice of the reliability and accuracy of the laser device, and on the improper exclusion of alleged exculpatory evidence.

{¶26} We have already concluded that although the court should have held a hearing as required by Evid.R. 201(E), no reversible error resulted because the trial court in all other respects properly took judicial notice of the device's accuracy and reliability. Thus, Officer Baker's testimony regarding appellant's speed as measured by the laser

device established that appellant exceeded the posted speed limit, thus establishing a prima facie case that appellant was speeding.

{¶27} Furthermore, we note that even if we were to conclude that the trial court should not have taken judicial notice regarding the laser device, we would nevertheless conclude that appellant could have been convicted on the basis of Officer Baker's testimony regarding his visual estimate of appellant's speed. Officer Baker testified that he had been trained in how to visually estimate a vehicle's speed, and that he had 14 years of experience as a police officer. Even in the absence of a laser or radar measurement, a defendant can be convicted of speeding based solely on a police officer's visual estimation of a vehicle's speed where the evidence shows that the officer has training and experience in such visual estimations. *Barberton v. Jenney*, Slip Op. No. 2010-Ohio-2420. See also *State v. Kafele*, 10th Dist. No. 07AP-42, 2007-Ohio-3554.

{¶28} We cannot say that the trial court in its role as finder of fact lost its way in rejecting appellant's contention that the prima facie case made that he exceeded the posted speed limit was rebutted by the evidence he offered that his speed was reasonable under the conditions present at the time. As previously stated, appellant's contention that his prior accident made it reasonable for him to believe that his actions were necessary in order to avoid another such accident is unavailing because the only conditions that make a driver's speed reasonable are physical conditions in or connecting to the highway itself. Appellant was able to present evidence regarding physical conditions present at the time, including the time of day, weather conditions, and traffic density. Appellant was also able to present his testimony and argument regarding his

decision to pass the tractor trailer and the vehicle approaching behind him at a high rate of speed.

{¶29} The trial court's statement that there is no defense to a charge of speeding based on whether a driver's decision was reasonable is somewhat troubling, since it suggests that the trial court may have disregarded the fact that it is a defense to a charge of speeding that the speed was reasonable under the conditions present at the time. However, there is a distinction between reasonableness based on the objective conditions present at the time, which does provide a defense to a charge of speeding, and reasonableness based on a particular driver's subjective belief. It was in the context of an argument based on the latter argument, and specifically involved an evidentiary ruling to exclude evidence that would have supported that argument, that the trial court made its statement regarding reasonableness as a defense.

{¶30} In announcing its decision finding appellant guilty of speeding, the trial court made it clear that it was considering appellant's argument regarding the conditions present at the time the charge arose. The trial court stated that "[t]he correct decision would have been to slow down so that you could get back in behind the tractor trailer so that you were not exceeding the speed limit and you were not making this maneuver." (Tr. 38.) Appellant takes some issue with this statement by the trial court, arguing that it constitutes rejection of uncontroverted evidence regarding the traffic conditions present, i.e., the presence of the tractor trailer and the approach of another vehicle at a high rate of speed behind appellant as he was attempting to pass that tractor trailer.

{¶31} However, that evidence was far from uncontroverted. The evidence showed that appellant entered a construction zone, with the attendant dangers present in

such zones, at a speed that, whether measured by laser or by visual estimation, greatly exceeded the posted speed limit of 45 miles per hour, and we cannot say that the trial court lost its way in rejecting appellant's contention that this speed was reasonable under the conditions present at the time.

{¶32} Therefore, appellant's third assignment of error is overruled.

{¶33} Having overruled appellant's three assignments of error, we affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

BRYANT and CONNOR, JJ., concur.

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