[Cite as *State v. Leonatti*, 2015-Ohio-1172.]

COURT OF APPEALS
MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
ADAM H. LEONATTI	:	Case No. 2014 CA 0010
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Municipal Court, Case No. 2014-TRD-5625
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	March 26, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
THOMAS J. SMITH 60 East High Street Mt. Gilead, OH 43338	ADAM H. LEONATTI, Pro Se 1311 West Second Avenue Grandview, OH 43212

Farmer, J.

{¶1} On July 26, 2014, appellant, Adam Leonatti, was cited for driving in excess of 55 m.p.h. in a construction zone with workers present in violation of R.C. 4511.21(D)(1). Appellant's speed was determined with the use of the LTI UltraLyte laser.

{¶2} A bench trial commenced on August 21, 2014. At the close of the state's case, appellant moved for acquittal, arguing insufficient evidence to prove the violation and to prove that the ticketing officer was qualified to operate the laser. The trial court reserved ruling. By journal entry filed September 24, 2014, the trial court denied appellant's motion for acquittal, permitted the state to amend the indictment to a violation of R.C. 4511.21(D)(5), and found appellant guilty. The trial court fined appellant $120.00 plus court costs.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT ERRED IN FINDING THAT THE STATE WAS NOT REQUIRED TO INTRODUCE INTO EVIDENCE THE TESTIFYING TROOPER'S TRAINING CERTIFICATION IN THE USE OF THE LTI ULTRALYTE LASER."

II

{¶5} "THE TRIAL COURT ERRED IN FINDING THAT THE STATE PROVIDED A PROPER FOUNDATION FOR THE INTRODUCTION OF THE TESTIFYING TROOPER'S RESULTS FROM HIS OPERATION OF THE LTI ULTRALYTE LASER."

III

{¶6} "THE TRIAL COURT ERRED IN RESERVING ITS DECISION ON THE APPELLANT'S CRIMINAL RULE 29 MOTION FOR ACQUITTAL MADE AT THE CLOSE OF THE STATE'S CASE; AND FURTHER ERRED BY AMENDING THE CHARGE TO ONE COMPRISING DIFFERENT ELEMENTS A MONTH AFTER TRIAL."

I, II

{¶7} Under these assignments, appellant challenges the testimony of the ticketing officer as to his qualifications and his certification to operate and testify about the results of the LTI UltraLyte laser device used to determine speed. Appellant claims the ticketing officer's training certificate was required to be introduced and the state failed to provide a proper foundation for the introduction of the results. We disagree.

{¶8} At the start of the trial, appellant made a motion to prohibit the state from calling any expert witnesses. T. at 3. The prosecutor stated he was not calling any expert witnesses, so the trial court granted appellant's motion. *Id.* Clearly the trial court found the ticketing officer set to testify was not testifying as an expert, and stated as much during the officer's testimony. T. at 7. In addition, the trial court determined it had previously found the LTI UltraLyte laser device was reviewed and approved as being accurate and reliable in the case of *State v. Cynthia Hicks,* Morrow M.C. No. 2013 TRD 4873 (December 18, 2013). T. at 8-9.

{¶9} The remaining issue is whether the testimony of the ticketing officer, Ohio State Highway Patrol Officer Keith Smith, was legally sufficient and credible.

{¶10} In its journal entry filed September 24, 2014, the trial court found Trooper Smith was "qualified to administer the speed-measuring device" based on his testimony

and was not required to present his actual training certificate. We agree with this determination based upon the following reasoning of our brethren from the Ninth District in *State v. Maher,* 9th Dist. Medina No. 2416-M, 1995 WL 553262, *1 (Sept. 20, 1995):

> The issue before the court below was whether the patrolman's training and experience qualified him to operate the radar device; the specific contents of his certification document were not relevant to the matter and not in dispute. The patrolman's certificate commemorates his certification in much the same way that a receipt commemorates a sale. Although each provides strong evidence of that which it commemorates, neither is essential to establish its existence, which can be proved by other evidence such as the testimony of a witness with knowledge. Here, the patrolman's testimony was sufficient to establish that the radar device was in good working order and that he was qualified to operate it. Accordingly, Maher's conviction was not against the manifest weight of the evidence and the assignment of error is overruled.

{¶11} Following the determination on the training certificate, the trial court then set forth the final issue in the case as follows:

> The final issue the court will address is whether the State created a proper foundation for the officer's testimony and whether that testimony

supports a conviction. Once judicial notice of the operation and reliability of a radar or laser device is taken, the Court must further determine:

(1) Whether the operator of the device was properly qualified to use the device

(2) Whether the device was in good operating condition and properly calibrated at the time of use; and

(3) Whether the police officer properly operated and read the device. *Cleveland Heights v. Katz,* 2001 Ohio 4281 (8th Dist.).

{¶12} In finding that Trooper Smith was qualified to use the laser device, the laser device was in good working order and properly calibrated at the time of use, and Trooper Smith properly operated the laser device, obtaining a reading of 75 m.p.h. in a 55 m.p.h. construction zone with workers present, the trial court stated the following:

The defendant argued that the State failed to create a foundation for the testimony of the witness, Trooper Smith. During the trial, Trooper Smith testified that he was trained and certified in the use of electronic speed-measuring devices after a weeklong course in 2006. Trooper Smith also testified that he recertifies in the use of electronic speed-measuring devices annually and most recently recertified in June of this year prior to Defendant's stop. This training and certification qualifies Trooper Smith to testify about the use of electronic speed-measuring

devices and therefore the State created a foundation for the Trooper's testimony.

Trooper Smith testified that he checked the accuracy of his UltraLyte laser on July 26, 2014 at 6:21 a.m., the day he ticketed the Defendant for speeding. He testified that he performed a scope alignment test and that the scope was properly aligned, that he ran an internal check which indicated that the internal mechanics of the device were working properly, and that the display was also checked and working properly. Trooper Smith also stated that he checked the calibration of his UltraLyte laser the following day and that it was still working properly. Defendant asserts that Trooper's Smith testimony does not support a conviction because Trooper Smith did not make an initial visual estimation, and therefore there is no proof that the Defendant's vehicle and the vehicle that was tracked with the laser device were the same vehicle. This argument is without merit. Trooper Smith testified that he clocked the Defendant's vehicle at 75 m.p.h. in a construction zone with a posted speed limit of 55 m.p.h. He supported this testimony by testifying that he knew he was tracking the right vehicle because he aimed the red dot at the front bumper area of the Defendant's vehicle, received the 75 m.p.h. readout and never lost sight of the Defendant's vehicle after he obtained that reading.

{¶13} We concur with the trial court's analysis of Trooper Smith's testimony. T. at 5-10. The trial court, as the trier of fact, found Trooper Smith's testimony to be credible. We note the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison,* 49 Ohio St.3d 182 (1990). The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger,* 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶14} Upon review, we find the trial court did not err in its determinations on the issues of the training certificate and a proper foundation.

{¶15} Assignments of Error I and II are denied.

III

{¶16} Appellant claims the trial court erred when it reserved ruling on his Crim.R. 29 motion for acquittal and when it amended the charge from R.C. 4511.21(D)(1) to R.C. 4511.21(D)(5). We disagree.

{¶17} Crim.R. 29 governs motion for acquittal. Subsection (A) states the following:

> The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

{¶18} At the close of the state's case, appellant raised the following issues in making his motion for acquittal: 1) lack of proper foundation testimony as to appellant's speed, 2) lack of a visual estimate of appellant's speed, 3) lack of a training certificate held by the ticketing officer for operating the laser device, and 4) failure to produce evidence of a violation of R.C. 4511.21(D)(1) in that the speed limit on the roadway in question (rural freeway) was 70 m.p.h. under R.C. 4511.21(B)(14). T. at 15-16. The prosecutor moved to amend the charge to fit the facts presented if R.C. 4511.21(D)(1) was incorrect. T. at 16-17.

{¶19} In its journal entry filed September 24, 2014, the trial court found the amendment request was proper under Crim.R. 7(D):

> The State moved to amend the charge to fit the evidence under Crim.R. 7(D) which provides:
>
> > The court may at any time before, during, or after a trial amend the . . . , complaint, . . . , in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged.
>
> Here, the amendment from R.C. 4511.21(D)(1) to R.C. 4511.21(D)(5) during the trial does not change the name or identity of the crime charged and does not prejudice the Defendant. The charge remains a minor misdemeanor speed charge. The initial citation issued to

> the Defendant provided notice of a R.C. 4511.21(D)(5) charge by clearly indicating that he was being charged with traveling seventy-five (75) mph in a posted fifty-five (55) mph construction zone with workers present. The amendment is proper.

{¶20} Appellant argues the amendment unduly prejudiced him. At the start of the trial, the trial court specifically stated the charge with no objections by appellant: "Adam H. Leonatti, charged with speed, 75 in a 55 miles per hour zone, uh with workers present, construction zone with workers present, so you're aware if found guilty the fine doubles up to one hundred and fifty dollars." T. at 3.

{¶21} The Uniform Traffic Ticket filed July 29, 2014, lists speed at "75 MPH in 55 MPH zone," has checked "Over limits" and "Construction Zone," notes "WORKERS PRESENT," and cites R.C. 4511.12(D)(1) which states:

> (D) No person shall operate a motor vehicle, trackless trolley, or streetcar upon a street or highway as follows:
>
> (1) At a speed exceeding fifty-five miles per hour, except upon a two-lane state route as provided in division (B)(9) of this section and upon a highway, expressway, or freeway as provided in divisions (B)(12), (13), (14), and (16) of this section;

{¶22} We find the ticket alone was sufficient to establish appellant was being charged with speeding, 75 m.p.h. in a 55 m.p.h. construction zone with workers present,

and the trial court's introduction of the case clearly put appellant on notice of the offense charged and the elements of the offense.

{¶23} The trial court's delay in ruling on the Crim.R. 29 motion did not prejudice appellant because no further witnesses were presented.

{¶24} Appellant's challenges to Trooper Smith's testimony as to the device and his certification were addressed above.

{¶25} Upon review, we find the trial court did not err in reserving its ruling on the Crim.R. 29 motion for acquittal and denying same, and in amending the charge.

{¶26} Assignment of Error III is denied.

{¶27} The judgment of the Municipal Court of Morrow County, Ohio is hereby affirmed.

By Farmer, J.

Delaney, J. concur and

Hoffman, P.J. concurs separately.

SGF/sg 304

Hoffman, P.J., concurring

{¶28} I concur in the majority's analysis and disposition of all three of Appellant's assignments of error. I write separately only with regard to Appellant's first assignment of error.

{¶29} The majority relies on *State v. Maher*, 9th Dist. Medina No. 2416-M, 1995 WL 553262, (Sept. 20, 1995) in its analysis and disposition of the first assignment of error. However the Ninth District Court of Appeals retreated from its the holding in *Maher* in *State v. Brown*, Medina App. No. 02 CA0034-M, 2002-Ohio-6463. In *Brown*, the Ninth District held,

> In light of the evidence presented at trial, we find that the radar unit was properly working; however, the State did not prove that Deputy Locher was qualified to operate the radar unit. Specifically, the only evidence presented as to the qualifications of Deputy Locher was the fact that he was trained on the radar unit on two separate occasions. Absent further evidence, such as a certificate of training, we cannot say that the State demonstrated that Deputy Locher was qualified to operate the radar unit. Consequently, we find that the trial court did abuse its discretion by permitting the State to introduce Deputy Locher's testimony as it related to his use of the radar unit.

{¶30} Later in *City of Barberton v. Jenney*, Summit L 1139347, 2009-Ohio-1985, the Ninth District held,[1]

[1] The Court in *Jenney* went on to affirm the conviction based upon the officer's visual estimation of the defendant's speed according to the officer's experience and training.

{¶31} Although Officer Santimarino testified that he is certified to operate the device, he did not produce any evidence of that fact beyond his testimony. Testimony by a law enforcement officer that "he was trained on the radar unit" is insufficient to establish that he is qualified to operate it. *Brown,* 2002-Ohio-6463, at ¶ 12. "Absent further evidence, such as a certificate of training, [this Court] cannot say that the [City] demonstrated that [Officer Santimarino] was qualified to operate the radar unit." *Id.* The municipal court, therefore, incorrectly permitted him to testify about how fast the device indicated Mr. Jenney was traveling.

{¶32} Despite the Ninth District's retreat from *Maher*, I find the Second District's holding in *State v. Brooks*, Montgomery Nos. 23386, 23387, 2010-Ohio-1119, persuasive and in accordance with the facts presented herein. The Second District distinguishes the holding in *Brown*, supra, and the Seventh District's similar holding in *City of New Middleton v. Yeager*, Mahoning App. No. 03 MA 104, 2004-Ohio-1549. In *Brooks*, the Court held,

> According to Brooks, the velocity reading "could not be used as evidence that the defendant was speeding absent evidence that officer was trained and qualified to administer radar device." Brooks relies upon *City of New Middletown v. Yeager,* Mahoning App. No. 03 MA 104, 2004-Ohio-1549, and *State v. Brown,* Medina App. No. 02CA0034-M, 2002-Ohio-6463. In *Yeager,* the issue before the court was "whether the state produced evidence that the radar machine was operating properly and that the officer was qualified to use the radar device." *Yeager,* ¶ 1. The citing officer "testified that he used radar to detect the speed of Yeager's

vehicle. * * * He also testified that the radar machine was calibrated and operating properly." Yeager argued that the state "failed to identify the type of 'radar' that was used and failed to establish [the officer's] qualifications for using the device." *Id.,* ¶ 5. In reversing the conviction for speeding, the trial court determined, "the unknown and unspecified radar device could not be used as evidence of Yeager's speed while operating a motor vehicle." *Id.,* ¶ 11.The court determined that the officer's testimony that the machine was calibrated and operating properly provides sufficient evidence to establish the machine was operating properly. *Id.,* ¶ 12. Finally, the court determined, "[t]he testimony as to the officer's qualifications to use the radar device, however, is nonexistent; the record is devoid of any evidence that the officer was trained and qualified to administer the radar device." *Id.,* ¶ 13.

In *Brown,* the court took judicial notice of the reliability of the radar unit at trial. *Id.,* ¶ 5. Brown argued in part that the State failed to prove that the radar unit was working properly and that the officer operating it was qualified to do so. *Id.* Based upon the officer's testimony regarding the testing he performed on the unit, the Ninth District determined that the unit was properly working, but that the State failed to prove that the officer was qualified to operate the unit; "[s]pecifically, the only evidence presented as to the qualifications of [the officer] was the fact that he was trained on the radar unit on two separate occasions. Absent further evidence, such as a

> certificate of training, [the court could not] say that the State demonstrated that Deputy Locher was qualified to operate the radar unit." *Id.,* ¶ 12.
>
> Here, the device used by Zollers is identified in his incident report as an LTI 20/20. Zollers stated that he was certified and experienced in its use, and he described his training in the use of the device. From the record before us, we conclude that Zollers is qualified in the use of the LTI 20/20, and that the trial court did not err in convicting Brooks based upon Zollers' testimony. Brooks' fourth and fifth assignments of error are overruled.

{¶33} I find the case sub justice substantially similar to *Brooks*. Accordingly, I concur the trial court properly found Trooper Smith was qualified to use the laser device, despite the absence of introduction of his certification and training.

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HON. WILLIAM B. HOFFMAN