

ORIGINAL

In the  
Supreme Court of Ohio

MARK W. JENNEY,	:	Case No. 2009-1069
	:	
Defendant-Appellant,	:	
	:	On Appeal from the
v.	:	Summit County Court of Appeals,
	:	Ninth Appellate District
CITY OF BARBERTON,	:	
	:	Court of Appeals Case
Plaintiff-Appellee.	:	No. 24423
	:	

**MERIT BRIEF OF *AMICUS CURIAE*  
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IN SUPPORT OF PLAINTIFF-APPELLEE CITY OF BARBERTON**

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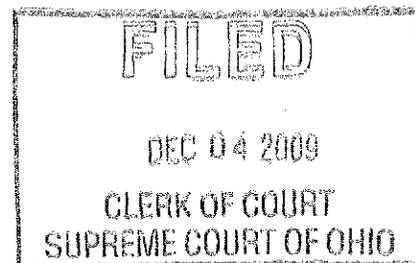
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## INTRODUCTION

Appellant Mark W. Jenney, through his proposition of law, seeks to adopt a rule that would eviscerate the trial court's well-established discretion to resolve evidentiary issues. Jenney asserts that a law enforcement officer's visual estimation of a vehicle's speed should *never* be sufficient, by itself, to establish a violation of R.C. 4511.21, Ohio's speeding law. But his proposal disregards the well-established rule that "the admission or exclusion of relevant evidence rests with the sound discretion of the trial court." *State v. Sage* (1987), 31 Ohio St. 3d 173, syl. ¶ 2. And given that a trial court is in the best position to consider the validity and credibility of evidence—be it an officer's visual estimate of vehicular speed or something else altogether—a rule that would deem such evidence insufficient to support a conviction under *any* circumstances invades the province of the trial court to make a reasoned evaluation of that evidence. What is more, Jenney's argument that an "estimated" speed is insufficient to establish a violation of R.C. 4511.21 beyond a reasonable doubt goes solely to issues of weight and credibility, not *admissibility*. Decisions from other States to have considered this issue are in direct accord.

In short, if a trial court finds a trained officer's visual estimate of a vehicle's speed to be credible based on the totality of the circumstances and determines that the estimate is sufficient to establish a violation of R.C. 4511.21 beyond a reasonable doubt, this Court should defer to those fact-bound determinations.

This Court should therefore affirm the trial and appellate courts' determination that Jenney violated R.C. 4511.21.

## STATEMENT OF AMICUS INTEREST

Ohio Attorney General Richard Cordray is Ohio's chief law enforcement officer. R.C. 109.02. Accordingly, he has a strong interest in the correct interpretation of Ohio's criminal

laws and procedure. The Attorney General supports a rule under which a police officer's unaided visual estimation of a vehicle's speed can suffice to establish a violation of R.C. 4511.21, or to support a conviction under that statute.

### STATEMENT OF THE CASE AND FACTS

At approximately 8:15 p.m. on July 3, 2008, Officer Christopher Santimarinio, a patrolman with the Copley Police Department, cited Appellant Mark W. Jenney for driving over the 60 mile-per-hour speed limit, in violation of R.C. 4511.21(A) and (D). *Barberton v. Jenney* (9th Dist.), 2009-Ohio-1985, ¶ 1 (“App. Op.”), Appellant’s Appx. at 3.<sup>1</sup> R.C. 4511.21(A) states, in relevant part: “No 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 . . . .” Likewise, the statute prohibits an individual from driving on a street or highway “[a]t a speed exceeding the posted speed limit upon a freeway for which the director has determined and declared a speed limit.” R.C. 4511.21(D)(6). Jenney contested both charges, and Officer Santimarinio and Jenney were the sole witnesses at Jenney’s September 2, 2008, trial.

Officer Santimarinio testified that on the night of July 3, he was parked in a marked vehicle on the side of the highway, where he observed Jenney driving a black SUV in the left lane and visually estimated that Jenney was driving faster than 70 miles per hour in a 60-mile-per-hour zone. App. Opp. ¶ 11. Officer Santimarinio explained that he was trained to visually estimate speed within three to four miles per hour of the posted speed limit. Trial Tr. 11:16-18, 12:13-14. Officer Santimarinio stated that he then observed that his stationary Doppler radar unit indicated

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<sup>1</sup> Jenney argued at trial and before the Ninth District that his due process rights were violated because Officer Santimarinio failed to indicate whether Jenney was cited for a violation of R.C. 4511.21(A) or 4511.21(D). But, over Jenney’s objection, the court amended the citation at trial to indicate that Officer Santimarinio had cited Jenney for violating both provisions, and the validity of that amendment is not at issue here.

that Jenney was driving 73 miles per hour, and later, 82 or 83 miles per hour. App. Op. ¶ 1. Officer Santimarino testified that he was certified to operate the stationary Doppler radar unit, Trial Tr. 27:5-6, and that he had confirmed that it was in working order before starting his shift. Trial Tr. 17:10-20:22.

Officer Santimarino stopped Jenney and cited him for violating R.C. 4511.21. App. Op. ¶ 1. Though his radar unit had clocked Jenney at 82 or 83 miles per hour, Officer Santimarino explained that he wrote “79 miles per hour” on Jenney’s citation so that Jenney could avoid the mandatory court appearance applicable where a driver speeds in excess of twenty miles per hour over the speed limit. App. Op. ¶ 12; Trial Tr. 24:8-15. On cross-examination, Jenney’s counsel questioned Officer Santimarino at length about his training in visually estimating speed and in using a stationary Doppler radar device to measure speed. Jenney then offered conflicting testimony, explaining that he had been driving 60 miles per hour in the right lane when Officer Santimarino pulled him over. Trial Tr. 56:21-22.

At the close of trial, the court admitted Officer Santimarino’s visual estimate and his radar readings over Jenney’s objection that they lacked a proper foundation, see Trial Tr. 52-53, and found Jenney guilty of violating R.C. 4511.21. The court explained that because Officer Santimarino had testified inconsistently about the speeds indicated on his radar unit, it would accept and rely on the officer’s visual estimate that Jenney had been traveling at 73 miles per hour. App. Op. ¶ 9; Trial Tr. 60:9-12. The court then amended Jenney’s citation to indicate that Jenney had been driving at 70 miles per hour rather than the 79 miles per hour indicated on the ticket (or the 82 or 83 miles per hour that Officer Santimarino offered as Jenney’s actual radar-detected speed), and fined Jenney fifty dollars plus court costs. App. Op. ¶ 7; Trial Tr. 60:15-18.

The Ninth District overruled all three of Jenney’s assignments of error and affirmed. App. Op. ¶ 17. In so doing, it specifically held that the trial court’s reliance on Officer Santimarinno’s visual estimate of speed was proper because “a conviction may be based solely on an officer’s testimony that he observed [a] defendant traveling in excess of the posted speed limit.” *Id.* ¶ 9 (internal citations omitted). The court also noted that it chose to “decline” Jenney’s “invitation” to reconsider its position on this issue. *Id.*

## ARGUMENT

### **Amicus Curiae Attorney General’s Proposition of Law:**

*A trained police officer’s unaided visual estimation of a vehicle’s speed can suffice to support a conviction under R.C. 4511.21.*

Currently, the only Ohio appeals courts to have considered whether an officer’s visual estimate of vehicular speed is sufficient to support a conviction under R.C. 4511.21 are split on the issue. The Third and Eighth Districts have found such estimates insufficient to sustain a conviction by proof beyond a reasonable doubt, while the First, Fourth, Ninth, Tenth, and Eleventh Districts have held the opposite. See *State v. Kincaid*, 124 Ohio Misc. 2d 92, 2003-Ohio-4632, ¶ 28 (citing cases). For its part, the Second District has issued inconsistent rulings on the question. Compare *State v. Meyers* (2d Dist.), 2000 Ohio App. Lexis 6177, at \*3 (finding that the trial court improperly relied upon the officer’s visual estimation of a defendant’s speed where there was no foundation for the opinion, and no other admissible evidence of a violation), and *State v. Sapphire* (2d Dist.), 2000 Ohio App. Lexis 5767, at \*15-16 (same), with *State v. Konya* (2d Dist.), 2006 Ohio App. Lexis 6284, 2006-Ohio-6312, ¶¶ 12-14 (distinguishing prior decisions on their facts and holding that where officer who cited defendant for speeding testified that he was trained in visual estimations and had eight years of experience, the magistrate judge

did not abuse her discretion in relying on the officer's visual estimate to determine that defendant had violated R.C. 4511.21).

Because this Court defers to the trial courts on evidentiary rulings absent an abuse of discretion, the Ninth District's affirmance of the trial court's reliance on Officer Santimarinno's estimate of Jenney's speed in this case was proper and should be upheld.

**A. Trial courts are in the best position to decide whether to admit or exclude relevant evidence, and such decisions should only be disturbed for an abuse of discretion.**

Jenney argues that a trained officer's visual estimation of a vehicle's speed should never be sufficient to establish a violation of R.C. 4511.21 or to support a conviction under that statute. That argument, though, ignores the well-settled principle that "a trial court enjoys broad discretion in admitting or excluding evidence." *Sage*, 31 Ohio St. 3d at 182; see also *United States v. Abel* (1984), 469 U.S. 45, 55 ("A district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules.").

As noted above, both provisions of R.C. 4511.21 at issue require police officers to determine whether a driver is exceeding the posted speed limit or is driving at a speed that is greater than what is reasonable or proper under the conditions. R.C. 4511.21(A) & (D)(6). This Court has explained that, although it is prima facie unlawful to travel in excess of the posted speed limit, the penultimate determination of "[w]hat is reasonable and proper under the circumstances, within the meaning of R.C. 4511.21, is a question of fact," that must be supported by sufficient evidence. *State v. Neff* (1975), 41 Ohio St. 2d 17, 18. Given that the trial court is in the best position to view the proceedings, hear the evidence of both sides, and weigh the credibility of witnesses, its decisions regarding evidentiary issues will not be disturbed absent an abuse of discretion. *Sage*, 31 Ohio St. 3d at 182. This Court has defined an abuse of discretion as demonstrating "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons*

v. *Ohio State Med. Bd.*, 66 Ohio St. 3d 619, 621, 1993-Ohio-122. Moreover, an appellate court “may not substitute its judgment” for that of the trial court. *Id.*

Trial courts make factual determinations like the one at issue in this case all the time, and Jenney provides no cogent reason for why trial court discretion over such matters should be circumscribed here. The trial court’s evidentiary rulings are governed by the Rules of Evidence, which permit a lay witness to testify to opinions which are “(1) rationally based on the perception of the witness” and “(2) helpful to a clear understanding of his testimony or the determination of a fact at issue.” Ohio Evid. R. 701. Rule 701 applies where a witness’s opinion concerns a subject upon which any ordinary intelligent person may possess special knowledge and experience, and this has found it applicable in considering a witness’s testimony about vehicular speed and other matters of “common observation” such as “height, temperature, speed, time, light, weight, identify, dimension, size and distance.” *State v. Auerbach* (1923), 108 Ohio St. 96, 98. The *Auerbach* court explained that such reliance was appropriate because “[w]hen the opinion is based upon personal observation of a subject upon which any ordinarily intelligent person may have expert knowledge and experience, qualification is not necessarily a prerequisite to stating the results of that observation and giving an opinion thereon.” *Id.*

In *Auerbach*, this Court affirmed a defendant’s conviction for vehicular manslaughter based on a witness’s visual estimate, and expressly held that *any* individual who has driven a car can testify as to vehicular speed, noting: “It is a general rule that any person of ordinary intelligence, who has had an opportunity for observation, is competent to testify as to the rate of speed of a moving automobile.” *Id.* at syl. ¶ 1. Other Ohio courts have applied that logic in other similar cases. See, e.g., *State v. Besancon* (5th Dist.), 2008 Ohio App. Lexis 5875, 2008-Ohio-7014, ¶ 20 (holding that trial court properly allowed three lay witnesses to testify to the

“high rate of speed at which” defendant’s vehicle was traveling in prosecution for aggravated vehicular homicide). Given that this Court has blessed the trial court’s reliance on a lay witness’s estimate of vehicular speed in convictions for vehicular manslaughter and vehicular homicide—crimes for which the punishment goes far beyond the payment of a fifty dollar fine in a speeding case—surely the testimony of a *trained* officer’s estimate suffices to support a conviction for speeding.

Because Jenney cannot dispute this Court’s position on witness testimony about speed, he skirts the issue completely, relying instead on a single Maryland case to argue that any estimate of speed is too inexact to prove “speeding” beyond a reasonable doubt. See Jenney Merit Br. at 12 (citing *Baltimore & Ohio R.R. Co. v. Wright* (Md. Ct. App. 1951), 84 A.2d 851, 855). But Jenney’s reliance on isolated dicta showcases the weakness of his argument. Jenney overlooks the first part of the paragraph that he cites, which states, “It is well settled that any witness qualified by observation and experience, expert or non-expert, may testify to the speed of a moving automobile which he has observed . . . .” *Baltimore & Ohio R.R. Co.*, 84 A.2d at 855. The significance of that statement is underscored by the fact that the Maryland court actually *affirmed* the trial court’s admission of the railroad trackman’s testimony as to the train’s speed. *Id.*

**B. Other States’ rulings on this issue offer further support for the Attorney General’s position.**

What is more, Jenney fails to acknowledge decisions by courts from other States to have considered this issue, all of which have found that an officer’s visual estimate alone can support a speeding conviction. This Court has noted its willingness to look to other States’ case law when similar statutes are involved, and this is such a case. *Lakeside Ave. Ltd. P’Ship v.*

*Cuyahoga Cty. Bd. of Revision* (1996), 75 Ohio St. 3d 540, 544; *Ratner v. Stark Cty. Bd. of Revision* (1986), 23 Ohio St. 3d 59, 61; *Cincinnati v. Kelley* (1976), 47 Ohio St. 2d 94, 95.

The Nebraska Supreme Court's decision in *State v. Chambers* (Neb. 1992), 486 N.W.2d 481, is instructive. There, the only trial witness, a sixteen-year veteran of the Nebraska state patrol who had worked in speed enforcement for two years, testified that using his radar unit, he had clocked the defendant's vehicle as traveling 76.6 miles per hour in a 65 mile-per-hour zone. *Id.* at 482. The officer testified that he had also visually estimated that the defendant was traveling "about 77 miles per hour." *Id.* The officer cited the defendant for speeding, and the trial court found the defendant guilty of violating Nebraska's speeding laws. *Id.* On appeal, the defendant argued that his conviction was based on unreliable evidence in violation of Neb. Rev. Stat. § 39-664(1), which states that "[d]eterminations made regarding the speed of any motor vehicle based upon the visual observation of any law enforcement officer *may* be corroborated by the use of radio microwaves or other electronic devices." (emphasis added).

Although it found the radar reading inadmissible for lack of foundation, the Nebraska Supreme Court affirmed the defendant's conviction, relying solely on the officer's visual estimation of the defendant's speed. *Id.* The court explained that the decision whether to admit and rely on the disputed evidence was "within the province of the trier of fact to determine the weight the [officer's] opinion should be given." *Id.* at 486. The court also noted that although the police department had a "policy not to issue citations solely on the basis of a trooper's opinion of a driver's rate of travel," because the statute used permissive language—"speed. . . *may* be corroborated" by other devices—the use of such devices was "not mandatory, and an officer's observation of speed alone, if otherwise admissible, is sufficient to sustain a conviction." *Id.* at 484. Thus, just as the *Chambers* court distilled defendant's argument to the

sole issue of whether the court abused its discretion in determining that the officer was “qualif[ied] as an expert by virtue of either formal training or actual practical experience in the field,” *id.* at 484, the sole issue here is whether the court abused its discretion in finding Officer Santimarino qualified to provide an opinion on vehicular speed in this particular case, not whether such evidence is *ever* sufficient to support a conviction under R.C. 4511.21.

Other States have also determined that a witness may testify as to vehicular speed if there is a reasonable basis upon which he could base his judgment. See *City of Vermillion v. Williams* (S.D. 1970), 174 N.W.2d 331, 333 (affirming conviction for speeding based solely upon an officer’s estimate of vehicular speed); accord *City of Milwaukee v. Berry* (Wis. 1969), 171 N.W.2d 305, 306; see also *State v. Noble* (R.I. 1962), 186 A.2d 336, 339 (affirming conviction for criminal negligence in the operation of a motor vehicle on a public highway based upon an officer’s estimate of vehicular speed).

It is noteworthy, moreover, that *no* other States have adopted a per se rule that such visual estimates are *inadmissible* to establish a speeding violation. That is because other States recognize that the issue of whether an officer’s estimate of a vehicle’s speed is sufficient to establish a speeding violation is an issue of the *weight* of the evidence, not one of its admissibility. See *Auerbach*, 108 Ohio St. 96, syl. ¶ 1 (“[T]he qualifications of the witness to judge [speed] accurately go[] to the weight which the jury may give his testimony rather than to its competency.”); see also *Noble*, 186 A.2d at 339 (explaining that the issue of whether an estimate of a vehicle’s speed is enough to prove speeding beyond a reasonable doubt “goes to the weight of the evidence and not to its admissibility”).

Thus, rather than stand alone as the only state to countenance a wholesale rejection of evidence of an officer’s visual estimation of a driver’s speed, this Court should join these other

States in deferring to the trial courts on evidentiary matters. Although an officer's estimation may not be reasonable or reliable in *every* circumstance, that evaluation should be made by the trial court—the only court with the opportunity to review all of the evidence and consider it accordingly.

In short, here—as is true of any other factual dispute at trial—the court was tasked to consider whether a witness's testimony was relevant to the issues, and, of course, reliable. Such determinations depend on the facts of each particular case, and should be left to the sound discretion of the trial court.

**C. The trial court properly exercised its discretion to evaluate the totality of the circumstances when it found that Jenney violated R.C. 4511.21 beyond a reasonable doubt.**

The trial court here properly evaluated the totality of the circumstances to determine that Officer Santimarino's visual estimate of Jenney's speed was reliable, and it did not abuse its discretion in relying on that estimate to find Jenney guilty of violating R.C. 4511.21 beyond a reasonable doubt.

At trial, Officer Santimarino testified that he had worked for the Copley Police Department for thirteen years. Trial Tr. 6:13. He further testified that he is trained in the area of speed enforcement. Trial Tr. 11. Specifically, Officer Santimarino stated that he is trained to observe and estimate a vehicle's speed within three to four miles per hour. Trial Tr. 11:8-10. Officer Santimarino is also trained to operate a stationary Doppler radar unit, and he was instructed on the proper procedure for calibrating the unit and verifying that it was operating properly. See Trial Tr. 16-21. At trial, he explained that on the day in question, he performed a calibration check on the unit prior to starting his shift, and determined that the radar was properly calibrated and functioning appropriately. See Trial Tr. 16-21. Although the trial court determined that Officer Santimarino was qualified to use the stationary Doppler unit, because Officer

Santimarino testified inconsistently about his readings of the radar unit—he stated that he clocked Jenney at 73, 82, and 83 miles per hour—the court relied on his initial 73 mile-per-hour visual estimate instead. Trial Tr. 60:12-15. Accordingly, the trial court amended Jenney’s citation, reducing both the speed and the corresponding fine. Trial Tr. 60:15-18.

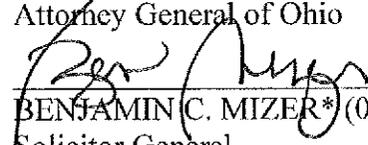
“[I]n a review for sufficiency of evidence, appellate courts look to the adequacy of evidence. In other words, the appellate court must decide whether the evidence, if believed, supports a finding of guilt beyond a reasonable doubt.” *State v. Campbell* (4th Dist.), 2007 Ohio App. Lexis 3965, 2007-Ohio-4402, ¶ 11 (internal citations omitted). The standard of review is whether, “after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found all of the essential elements of the offense beyond a reasonable doubt.” *State v. Hancock*, 108 Ohio St. 3d 57, 2006-Ohio-160, ¶ 34. Given that Officer Santimarino was trained to estimate vehicular speed, the trial court did not abuse its discretion in resolving the factual dispute between Jenney and the Officer in favor of a conviction. Thus, the Ninth District’s decision should be affirmed.

**CONCLUSION**

For the foregoing reasons, the Attorney General respectfully asks this Court to affirm the Ninth District's decision.

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## CERTIFICATE OF SERVICE

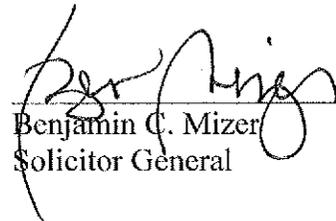
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