

ORIGINAL

IN THE SUPREME COURT OF OHIO

MARK W. JENNEY,

Plaintiff-Appellant,

v.

CITY OF BARBERTON,

Defendant-Appellee.

Case No. 2009-1069

On Appeal from the
Summit County Court of
Appeals, Ninth Appellate
District

Court of Appeals
Case No. 24423

MERIT BRIEF OF APPELLEE
CITY OF BARBERTON

John Kim (0066232)(COUNSEL OF RECORD)
529 N. Cleveland-Massillon Road
Suite 200
Akron, Ohio 44333-2457
(330)434-2000
Fax No. (330)665-1515
john@symphony-financial.com

RECEIVED
DEC 14 2009
CLERK OF COURT
SUPREME COURT OF OHIO

COUNSEL FOR APPELLANT MARK W. JENNEY

Michelle Banbury (0069027)(COUNSEL OF RECORD)
Assistant Prosecutor
City of Barberton Law Department
576 West Park Avenue
Barberton, Ohio 44203
(330)848-6728
Fax No. (330)861-7209

FILED
DEC 14 2009
CLERK OF COURT
SUPREME COURT OF OHIO

COUNSEL FOR APPELLEE CITY OF BARBERTON

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STATEMENT OF CASE AND FACTS

Appellee City of Barberton incorporates the statement of the case and facts presented in the Merit Brief of Amicus Curiae Ohio Attorney General Richard Cordray as if fully rewritten herein.

ARGUMENT

Proposition of Law No. I:

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

A. Appellee incorporates the Merit Brief of Amicus Curiae Ohio Attorney General Richard Cordray as if fully rewritten herein.

B. Appellant mischaracterizes facts, case law, and the proposition of law at issue.

Appellant Jenney creates confusion in the record where he mischaracterizes the officer's testimony and the nature of the case law supporting his claim. Both the Court of Appeals for the Ninth District and the trial court considered Officer Santimarino's testimony specifically upon Appellant Jenney's argument that the testimony was unclear. *Barberton v. Jenney*, (9th Dist.), 2009-Ohio-1985, ¶ 11-13, Appellant's Appendix ("App. Op.") at 6, Trial Tr. 57:5-14. Both the Court of Appeals for the Ninth District and the trial court found Officer Santimarino's testimony to be sufficiently clear and credible to sustain Appellant's conviction. *Id.*

Appellant realleges these same inconsistencies to this Court where he argues that the officer's testimony was unclear as to: (1) the speed at which Appellant Jenney was traveling that evening, ("App. Br.") Appellant's Merit Brief at 3-4, 11, 12; (2) the officer's own training and experience, App. Br. at 6, 11; and (3) the nature of the traffic on the highway that evening, App.

Br. at 4. The record establishes that Officer Santimarino testified he visually estimated the Appellant's "vehicle was going 70." Trial Tr. 13:20. The trial court adjudged Mr. Jenney guilty of traveling 70 miles per hour in a 60 mile per hour zone. Trial Tr. 60:15-18. Appellant does not point to a single instance in the record where the officer testified inconsistently regarding his visual estimation of the Appellant's rate of speed. See, App. Br. 2-13, and Trial Tr. 4-60.

Appellant does argue that the officer's testimony regarding speeds recorded from a radar device were inconsistent. App. Br. at 3,4. Previously, Appellant argued that the same testimony was inadmissible. *Barberton v. Jenney*, (9th Dist.), 2009-Ohio-1985, ¶ 7-8, and Trial Tr. 51:19-52:3. The Court of Appeals for the Ninth District agreed and found that that portion of the testimony concerning the radar device was inadmissible. *Id.* Additionally, the Court of Appeals for the Ninth District concluded that "Mr. Jenney cannot reasonably argue that the device's reading is not reliable enough to support his conviction because the City failed to lay a proper foundation for its admission but is reliable enough to impeach the officer's ability to do a visual estimation." *Id.* at ¶ 15.

The proposition of law at issue, as determined by this Court, is whether a police officer's unaided visual estimation of a vehicle's speed is sufficient to sustain a conviction for speeding. Appellant creates confusion in the record and argues outside this Court's proposition of law where he relies on inadmissible testimony regarding a radar device to call into question Officer Santimarino's visual estimation of Appellant's speed. App. Br. at 11-12.

Second, Appellant argues to this Court that the officer's testimony regarding his own training is inconsistent even though both the Court of Appeals for the Ninth District and the trial court clarified Officer Santimarino's testimony in their opinion and in the colloquy, respectively. *Barberton v. Jenney*, (9th Dist.), 2009-Ohio-1985, ¶ 15, and Trial Tr. 28:16-30:25. The veracity

of Officer Santimarino's testimony was not called into question during the trial. Instead, and for the third time, the Appellant presents the argument that because the officer's initial response to a muddled question was unclear, the officer's testimony as a whole should be found unreliable.¹ Appellant's argument speaks to the credibility of the witness; not whether a trained officer's unaided visual estimation of speed is sufficient to support a conviction for speeding.

Third, Appellant creates confusion in the record by mischaracterizing Officer Santimarino's testimony regarding the nature of the traffic on the highway that evening. App. Br. at 3, 4. Appellant then relies on that confusion to argue to this Court that Officer Santimarino's testimony was unreliable. *Id.* In his Merit Brief, Appellant argues that Officer Santimarino "said that over the years he has observed a large number of tractor-trailers traveling Route 21." App. Br. at 4. However, page 39 of the trial transcript reflects the following:

- Q. You've been an officer traveling 21 for thirteen years or so?
A. Yes.
Q. Is it safe to say that semi tractor-trailers travel frequently on Route 21?
A. Yes.
Q. Did you see any tractor-trailers traveling at the time [8:15 pm, July 3, 2009] of this stop?
A. No.

¹ Officer Santimarino was asked on direct examination, "when you were in this training, how many times did you *practice* making a visual estimation of a vehicle?" Trial Tr. 12:4-6, *emphasis added*. Officer Santimarino responded, "[p]robably hundreds of times *in the training*." Trial Tr. 12:7, *emphasis added*.

Appellant Jenney mixes and matches answers from Officer Santimarino's direct examination with questions from his cross examination. App. Br. at 6. Appellant presents that "[t]he officer also testified that he was certified as competent in visually estimating speed. He was asked how many visual estimates he did before he was adjudged to be certified. He said: 'Probably hundreds of times in the training.'" App. Br. at 6. Appellant mischaracterized both the line of questioning presented to Officer Santimarino, and the answers the officer gave. *Id.*

The record reflects that the trial court finally stepped in to ask of Officer Santimarino the clarifying question which Appellant cites. Tr. Tran. 30:7-18. The trial court asked the officer "how many visual estimations did you do before you were adjudged to be certified?" Tr. Tran. 30:15-18. To which Officer Santimarino directly responded to the trial court, "[p]robably five to ten. I was confused. I thought you meant over – since '95 to present." Tr. Tran. 30:18-22.

- Q. Not one?
A. No, I did not.

Finally, Appellant mischaracterizes case law and creates confusion as to the District Courts' stance regarding the sufficiency of an officer's visual estimation of speed to uphold a conviction for speeding. The overwhelming majority of the Districts in Ohio consistently hold that an officer's unaided visual estimation of speed is sufficient to support a conviction for speeding. *See, Cincinnati v. Dowling* (1987), 36 Ohio App.3d 198, *State v. Harkins* (Aug. 5, 1987), 4th Dist. No. 431, *State v. Wilson* (Nov. 20, 1996), 9th Dist. No. 95CA006285, *Columbus v. Bravi* (Mar. 5, 1991) 10th Dist. No. 90AP-1135, *Kirtland Hills v. Logan* (1984), 21 Ohio App.3d 67, and *State v. Jones* (Nov. 8, 1991) 11th Dist. No. 91-T-4508.

The Third and Eighth Districts are the only districts that consistently hold an officer's unaided visual estimation of a vehicle's speed cannot support a conviction for speeding. *See, State v. Westerbeck* (June 19, 1987), 3d Dist. No. 17-86-18, *Broadview Hts. v. Abkemeier* (1992), 83 Ohio App. 3d 633. Appellant relies on a 2003 holding from the Second District to create confusion in this case. *State v. Kincaid*, 2003-Ohio-4632. The *Kincaid* holding was clarified in 2006. The Second District held that the testimony of an officer trained and experienced in estimating speed and testifying to a specific speed can support a conviction for speed without more. *Compare, State v. Myers* (Dec. 9, 2000), 2d Dist. No. 2000 CA 49, *State v. Sapphire*, 2000 Ohio App. LEXIS 5767 at ¶ 16, and *State v. Konya* (2d Dist.) 2006-Ohio-6312.

CONCLUSION

For the foregoing reasons, Appellee requests this Court uphold the First, Fourth, Tenth, and Eleventh District's decisions and affirm the Ninth District's decision that an officer's unaided visual estimation may suffice to support a conviction for speeding.

Respectfully submitted,

Michelle Banbury, Counsel of Record

A handwritten signature in cursive script, reading "Michelle Banbury", written over a horizontal line.

Michelle Banbury
COUNSEL FOR APPELLEE,
CITY OF BARBERTON

Certificate of Service

I certify that a copy of this Merit Brief was sent via regular U.S. Mail to counsel of record for appellant, John Kim, 529 N. Cleveland-Massillon Road, Suite 200, Akron, Ohio 44333-2457 on this 11th day of December, 2009.



Michelle Banbury
COUNSEL FOR APPELLEE,
CITY OF BARBERTON