

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000059-001 DT

06/08/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
K. Waldner
Deputy

STATE OF ARIZONA

THEODORE S BULLOCK

v.

KEVIN J VALE (001)

KEVIN J VALE
2700 N. HAYDEN RD APT. 2035
SCOTTSDALE AZ 85257

GILBERT MUNICIPAL COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 2011CT4193.

Defendant-Appellant Kevin J. Vale (Defendant) was convicted in Gilbert Municipal Court of exceeding posted speed limit by 20 mph or more. Defendant contends the State did not present sufficient evidence to support the conviction because it failed to authenticate the LIDAR reading, and further contends the State failed to establish the LIDAR technology was reliable. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On March 30, 2011, Defendant was cited for exceeding posted speed limit by 20 mph or more, A.R.S. § 28-701.02(A)(2). At trial, Officer Jacob Madueno testified he had taken the radar certification class and the LIDAR certification class. (R.T. of Aug. 19, 2011, at 8-11.) In addition, he had been trained in visual estimates wherein they have to be able to estimate speeds at plus or minus 5 mph of a vehicle's actual speed. (*Id.* at 9.)

Officer Madueno testified he was on duty on March 30, 2011, at the corner of Palo Verde and Gilbert Road, where the posted speed limit is 25 mph. (R.T. of Aug. 19, 2011, at 12, 13.) At 4:59 p.m., he saw a vehicle moving at a speed faster than the other vehicles. (*Id.* at 11, 14, 34, 52.) He visually estimated the vehicle's speed at 50 mph, so he used his LIDAR unit and obtained a speed reading of 48 mph. (*Id.* at 14, 23, 35, 54.) He testified the LIDAR unit he used was the one assigned to him; that he had the certificate of accuracy showing the unit had been calibrated and therefore certified for use; that he checked the unit before using it that day and described the checking procedure; and that from the time he received that unit until the date of

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this offense, that unit had never been taken out of service; and gave his opinion the unit was operating properly that day. (*Id.* at 15–16, 18–23.) He further testified he used the LIDAR unit to obtain speed readings at both 374 feet and 231 feet, and both readings were 48 mph. (*Id.* at 23, 28.) He also testified the driver was using his cell phone during this time. (*Id.* at 28–29.)

Once the vehicle passed by, Officer Madueno followed and then stopped the vehicle. (R.T. of Aug. 19, 2011, at 29.) He identified Defendant as the driver. (*Id.* at 32–33.)

The State then rested, and Defendant testified. (R.T. of Aug. 19, 2011, at 41.) Defendant estimated he had been driving at 35 mph when Officer Madueno stopped him. (*Id.* at 42–43.)

After hearing arguments from the attorneys, the trial court found Defendant guilty of the charge. (R.T. of Aug. 19, 2011, at 63.) The trial court then imposed sentence. (*Id.* at 64–66.) On September 2, 2011, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

A. Has Defendant waived any challenge to the reliability of LIDAR technology.

Defendant contends the State failed to provide evidence to show the use of LIDAR technology to measure speed supplies reasonably trustworthy information. Defendant did not present this claim to the trial court. Absent fundamental error, failure to raise an issue at trial waives the right to raise the issue on appeal. *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991); *State v. Gatliff*, 209 Ariz. 362, 102 P.3d 981, ¶ 9 (Ct. App. 2004). Fundamental error is limited to those rare cases that involve error going to the foundation of the defendant's case, error that takes from the defendant a right essential to the defendant's defense, and error of such magnitude that the defendant could not possibly have received a fair trial, and places the burden on the defendant to show both that error existed and that the defendant was prejudiced by the error. *State v. Soliz*, 223 Ariz. 116, 219 P.3d 1045, ¶ 11 (2009). This Court concludes Defendant has failed to show either that error existed that he was prejudiced by the error.

In September 2008, NASA used LIDAR (Light Detection and Ranging) technology on its Phoenix Lander to detect conditions on the Planet Mars. WIKIPEDIA (PHYSICS AND ASTRONOMY), <http://en.wikipedia.org/wiki/LIDAR>. It thus appears LIDAR technology is generally accepted in the scientific community of NASA scientists. In addition, other states have accepted testimony and results from LIDAR technology. *Van Nort v. State*, 250 Ga. App. 7, 7–8, 550 S.E.2d 111, 112–13 (2001); *State v. Stoa*, 112 Hawaii 260, 265–68, 145 P.3d 803, 808–11 (Ct. App. 2006); *State v. Williamson*, 144 Idaho 597, 599–600, 166 P.3d. 387, 389–90 (Ct. App. 2007); *People v. Mann*, 397 Ill. App. 3d 767, 771–72, 922 N.E.2d 533, 537–38 (2010); *Goldstein v. State*, 339 Md. 563, 576–77, 664 A.2d 375, 381 (Ct. App. 1995); *State v. Ali*, 679 N.W.2d 359, 364 (Minn. Ct. App. 2004); *State v. Abeskaron*, 326 N.J. Super 110, 118, 740 A.2d 690, 694 (App. Div. 1999); *In re LTI Marksman 20–20*, 314 N.J. Super 233, 252, 714 A.2d 381, 391 (1998); *People v. Deep*, 12 Misc. 3d. 1137, 1139, 821 N.Y.S.2d 381, 383 (Ithaca City Ct. 2006); *State v. Thompson*,

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2012 WL 1364996, *1 (Ohio Mun. Ct. Apr. 11, 2012); *State v. Jaffe*, 244 Ore. App. 453, 454, 258 P.3d 1293, 1293 (2011); *State v. de Macedo Soares*, 26 A.3d 37, 39–40 (Vt. 2011); *Jury v. State Dept. Lic.*, 114 Wash. App. 726, 735–37, 60 P.3d 615, 619 (2002). It thus appears LIDAR technology is generally accepted in the scientific community and that courts of other jurisdictions have accepted LIDAR technology as sufficiently reliable for the results to be admitted in court. Defendant thus has failed to show the trial court erred in admitting testimony based on the LIDAR technology, and has failed to show he was prejudiced by the admission of that evidence.

B. *Did the State sufficiently authenticate the results from the operation of the particular LIDAR unit used in this case.*

Defendant contends the State did not sufficiently authenticate the results from the operation of the particular LIDAR unit used in this case. The Arizona Rules of Evidence provide as follows:

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of witness with knowledge.* Testimony that a matter is what it is claimed to be.

....

(9) *Process or system.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

Rule 901, ARIZ. R. EVID. In the present case, Officer Madueno testified the LIDAR unit he used was the one assigned to him; that he had the certificate of accuracy showing the unit had been calibrated and therefore certified for use; that he checked the unit before using it that day and described the checking procedure; and that from the time he received that unit until the date of this offense, that unit had never been taken out of service; and gave his opinion the unit was operating properly that day. He further testified he used the LIDAR unit to obtain speed readings at both 374 feet and 231 feet, and both readings were 48 mph, which was within 2 mph of his estimate of the speed. This Court concludes that testimony was sufficient for the trial court to find the particular LIDAR unit used in this case had produced an accurate result.

Defendant contends, however, testimony about the certificate of accuracy for this particular LIDAR unit violated the Confrontation Clause, citing *Bullcoming v. New Mexico*, ___ U.S. ___, 131 S. Ct. 2705 (2011), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527 (2009). In *Melendez-Diaz*, however, the Court said the following:

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Contrary to the dissent's suggestion, . . . we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or *accuracy of the testing device*, must appear in person as part of the prosecution's case. . . . [D]ocuments prepared in the regular course of equipment maintenance may well qualify as non-testimonial records.

129 S. Ct. at 2532 n.1 (emphasis added). The certificate of accuracy for this particular LIDAR unit was relevant in establishing the accuracy of the testing device, and because it was prepared in the regular course of equipment maintenance, it qualified as a non-testimonial record. Admission of testimony about the certificate of accuracy therefore did not violate the Confrontation Clause.

III. CONCLUSION.

Based on the foregoing, this Court concludes LIDAR technology is sufficiently reliable for the results to be admitted in court, and the State sufficiently authenticate the results from the operation of the particular LIDAR unit used in this case, thus the State presented sufficient evidence to show Defendant was exceeding the posted speed limit by more than 20 mph.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Gilbert Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Gilbert Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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