[Cite as *State v. Pavetic*, 2021-Ohio-4637.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

DOMINIC PAVETIC,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 21 MA 0076

Criminal Appeal from the
Mahoning County Court Area 4 of Mahoning County, Ohio
Case No. 2021 TRD 939

BEFORE:
Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Martin S. Hume, Assistant Prosecutor, *Atty. Ralph M. Rivera,* Assistant Chief, Criminal Division, Office of the Mahoning County Prosecutor, 21 W. Boardman Street, 6 Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Ronald D. Yarwood, *Atty. Edward A. Czopur,* DeGenova & Yarwood, Ltd., 42 North Phelps Street, Youngstown, Ohio 44503, for Defendant-Appellant.

Dated: December 16, 2021

Robb, J.

{¶1} Defendant-Appellant Dominic Pavetic appeals the decision of the Mahoning County Court Area 4 finding him guilty of speeding in violation of R.C. 4511.21(D)(3), a minor misdemeanor. The issue raised in this appeal is whether there was sufficient evidence presented to admit the results of the laser speed-measuring device.

{¶2} For the reasons expressed below, the results were admissible and there was sufficient evidence of speeding. Expert testimony and judicial notice is no longer required for the admissibility of the results of a laser speed-measuring device. However, evidence is required to be introduced concerning the accuracy of the device and the qualifications of the operator of the device. Evidence of both was introduced. The conviction is affirmed.

Statement of the Facts and Case

{¶3} Appellant was driving a 2018 white Volkswagen SUV on State Route 11 southbound in Austintown Township, Mahoning County on March 5, 2021 at 4:47 p.m. Trooper Eric Brown from the Ohio State Highway Patrol was stationary observing traffic on State Route 11. Tr. 10-11. The trooper visually detected Appellant speeding. Tr. 11. He then used his laser speed-measuring device to check Appellant's speed, which registered 86 miles per hour in a 65 miles per hour speed limit zone. Tr. 11. The trooper then proceeded to stop Appellant in Austintown Township, Mahoning County. Tr. 11-12.

{¶4} Appellant appeared, entered a not guilty plea, and waived his right to a speedy trial. 3/11/21 Written Plea of Not Guilty; 3/11/21 Waiver; 3/15/21 J.E. The matter proceeded to a bench trial.

{¶5} The only witness to testify at trial was Trooper Brown. The trial court found Appellant guilty of speeding in violation of R.C. 4511.21(D)(3) and ordered him to pay a $150.00 fine plus court costs. 6/23/21 J.E.

{¶6} Appellant timely appealed his conviction. 7/23/21 Notice of Appeal. He then filed a motion to stay the sentence pending appeal, which the trial court granted. 7/12/21 Motion; 7/19/21 J.E.

Assignment of Error

"The conviction was based on insufficient evidence for each of the reasons that follow."

{¶7} Appellant's sufficiency argument is based on the premise that the result of the laser speed-measuring device registering Appellant's speed at 86 miles per hour in a 65 miles per hour speed zone is inadmissible and the only other evidence Appellant was speeding was Trooper Brown's visual determination. Appellant contends expert testimony or judicial notice is required for the results of a speed-measuring device to be used as evidence of speeding. He asserts there was no expert testimony, nor was there judicial notice of the speed-measuring device. He argues if the trial court attempted to take judicial notice of the speed-measuring device, the attempt failed which made the evidence "inconsiderable." He also argues there was no testimony concerning Trooper Brown's training on the specific laser device used.

{¶8} The state counters citing the 2020 Ohio Supreme Court decision in *Brook Park* for the proposition expert testimony or judicial notice is not needed for the admissibility of the results of stationary laser speed-measuring devices. *City of Brook Park v. Rodojev*, 161 Ohio St.3d 58, 2020-Ohio-3253, 161 N.E.3d 511, syllabus and ¶ 19. It noted the fact-finder, i.e., trial court in a bench trial, is still required to determine if the accuracy of the device used and the qualifications of the person using it was sufficient to support the conviction based on the device's results. *Id*. The state contended Trooper Brown's testimony established he was qualified and properly checked the device's calibration.

{¶9} Whether the evidence is legally sufficient to sustain a conviction is a question of law dealing with adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Sufficiency involves the state's burden of production rather than its burden of persuasion. *Id*. at 390 (Cook, J., concurring). In reviewing the sufficiency of the evidence, the court views the evidence in the light most favorable to the prosecution to ascertain whether any rational trier of fact could have found the elements of the offense proven beyond a reasonable doubt. *State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). For a sufficiency review, the question is merely whether "any" rational trier of fact could have found the elements of the alleged offense were satisfied beyond a

reasonable doubt. *State v. Getsy*, 84 Ohio St.3d 180, 193, 702 N.E.2d 866 (1998), quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781 (1979).

{¶10} Appellant is correct, he cannot be convicted of speeding under R.C. 4511.21 solely on Trooper Brown's visual indication that he was speeding. R.C. 4511.091(C)(1). In this case, the evidence of speeding was Trooper Brown's visual indication of speeding and his use of a laser speed-measuring device indicating Appellant was driving his vehicle at 86 miles per hour in a 65 miles per hour speed zone. In order for the conviction to be supported by sufficient evidence, the result of the speed-measuring device had to be admissible.

{¶11} Trooper Brown testified the laser speed-measuring device he used to measure Appellant's vehicle's speed was Laser Technologies LTI 2020. Tr. 7. An expert did not testify as to accuracy of this device or how it works. Likewise, the trial court did not explicitly take judicial notice of the reliability of this speed-measuring device. However, it did make the following statements regarding this device:

> Q [Prosecuting Attorney]. And have you used that tech – laser in the past?
>
> A [Trooper Brown]. Yes.
>
> Q. And in accordance with your standards of operating procedure and the manual, what are you required to do in order to put that laser technology into full force and effect prior to the administering it on the highway?
>
> Mr. Czopur [Defense Counsel]: Objection, Your Honor. Assumes facts not in evidence.
>
> The Court: I'm going to overrule that motion. I believe this Court's taken judicial notice of the laser, so I'm going to overrule.

Tr. 7.

{¶12} Although the trial court did not explicitly state it was taking judicial notice of the device, the implicit meaning of that statement is it had previously taken judicial notice of the device and it was now again taking judicial notice of the device. This court does not need to decide whether that implicit meaning is adequate in this case to render the

results of the device admissible. As the state points out, the Ohio Supreme Court has indicated that neither expert testimony nor judicial notice is needed to render the results admissible:

> We hold that the results of a speed-measuring device using either radar or laser technology are admissible in court without expert testimony establishing, or the court taking judicial notice of, the reliability of the scientific principles underlying that technology. However, the fact-finder is required to determine whether the evidence presented concerning the accuracy of the particular speed-measuring device and the qualifications of the person who used it is sufficient to support a conviction based on the device's results.

Brook Park, 161 Ohio St.3d 58, 2020-Ohio-3253 at ¶ 19.

{¶13} Admittedly, Appellant does cite to Seventh District Court of Appeals decisions requiring expert testimony or judicial notice of the device. However, those cases were decided prior to *Brook Park*. *Brook Park* is controlling now. Thus, any argument that judicial notice or expert testimony was needed fails.

{¶14} That said, *Brook Park* does require the state to offer testimony concerning the qualifications of Trooper Brown and the accuracy of the device:

> Other substantive challenges to the results of a laser speed-measuring device—including challenges involving the angle at which the officer held the device in relation to the targeted vehicle, the device's accuracy-validation algorithms, the device's calibration and maintenance schedule, and the officer's qualifications to use the device—implicate the sufficiency and weight of the evidence, not its admissibility. *See State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶ 80 (a court may admit DNA evidence without conducting a preliminary hearing; questions regarding the reliability of DNA evidence in a particular case go to the weight of the evidence, not its admissibility). Our decision today, that the results of a speed-measuring device using radar or laser technology are admissible in court without expert testimony establishing, or the court taking judicial

> notice of, the reliability of the scientific principles underlying that technology, leaves determinations involving the sufficiency and weight of the evidence to be made on a case-by-case basis.

Id. at ¶ 18.

{¶15} Appellant argues there was no testimony that Trooper Brown was trained or proficient on this specific laser. This court disagrees with that assessment of the evidence; as the below recitation of the testimony demonstrates, there was evidence Trooper Brown was trained and evidence of the accuracy of the device.

{¶16} In discussing Laser Technologies LTI 2020 speed measuring device, Trooper Brown was asked what was required in the training manual and the operator's manual to operate the device in accordance with the manufacturer's recommendations. Tr. 7. He responded that the calibration of the laser was to be checked at the start of the shift. Tr. 7. He was then asked what steps are to be taken to make sure it is operating correctly, to which he explained:

> The method that we use is a three-point method. There's two signs that are located at the – the post parking lot. One is at 175 feet, the other sign is at 150 feet. So from a known stationary position, you will shoot those signs. So 175, 150. The difference between those is 25 feet.
>
> So the laser is set up for every six inches is one mile per hour. So if you take 25, times that by 2, you get 50. Once you put it through the testing sequence, it will show 50 miles per hour, and that's – –shows you that that device is calculating properly.

Tr. 7, 8.

{¶17} Trooper Brown also testified he has been a trooper for 24 years, he has been trained in the use of laser technology at the Ohio State Highway Patrol Academy, and that he uses that training in his everyday work experience. Tr. 5-6.

{¶18} This testimony was sufficient to show he is proficient in the use of laser technology and of the device used. His testimony as to how to check the calibration of the device is specific as to the device used and is evidence of the accuracy of the device.

His recitation of his training, although general, was sufficient to show knowledge of the use of laser technology. This evidence was sufficient to demonstrate the reliability of the speed-measuring device. The testimony in the case at hand is more specific than the testimony in the cases cited by Appellant; the testimony in those cases was generalized and vague. *Compare New Middletown v. Yeager*, 7th Dist. Mahoning No. 2003 MA 104, 2004-Ohio-1549, ¶ 14-15 (no testimony as to the qualification to use the radar device) and *State v. Riddle*, 6th Dist. Ottawa No. OT-10-040, 2011-Ohio-1574, ¶ 15-16 (testimony of trooper established initial training, but no specifics as to the device used).

{¶19} Admittedly, on cross-examination defense counsel did attempt to question the accuracy of the device and to show the trooper did not follow all procedures to ensure the accuracy of the device.

{¶20} Trooper Brown was asked whether he had ever confirmed the distance of the signs used to check the calibration of the device and he indicated he had not. Tr. 14-18. He explained that he had been a trooper for nearly 25 years and those signs have always been there. Tr. 15. He explained that he believed several years ago when the checking of the calibration of the device was established, someone measured the distance to the signs. Tr. 15. On redirect, he indicated he followed the policy for checking the calibration of the device. Tr. 21.

{¶21} Also, despite explaining the device calibration was checked in conformity to the policy, Trooper Brown admitted he did not follow the policy that the laser should be checked at the beginning and end of a shift. He testified his procedure is to check it at the beginning of every shift. Tr. 8, 22. He further explained while he did not follow the letter of the procedure in this matter, he did follow the purpose of the procedure:

> Because that – any – the purpose of that policy for the start and end of that day is to – let's say that there's a – second time that – time following day if there was a discrepancy in calibration of that laser, then your client's ticket would have been dismissed or we would have, what we call, voided it before it went to the Court because there would have been some error with the device.

> The following day, there was no error with that device, so that – –that is basically prior to, that on this day, March 5th, the laser was in working order. The next tour of duty of mine, it was in working order; so, therefore, it was in working order whenever Mr. Pavetic was stopped.

Tr. 22-23.

{¶22} Trooper Brown testified his patrol car is assigned to him and the laser device assigned to his car is laser 18. Tr. 9. No one else uses that car and device. Tr. 9. Therefore, there is no chance that someone else had checked the device and saw that it was not working properly.

{¶23} The state cites to a case, *State v. Bayus*, it contends stands for the proposition that calibration before use is enough to demonstrate the unit is properly calibrated. 11th Dist. Geauga No. 2005-G-2634, 2006-Ohio-1684, ¶ 19 ("The testimony of the officer who calibrated the radar device prior to its use is sufficient to demonstrate that a radar unit is properly calibrated."). While that case does make that statement, when the facts of the case are considered, the trooper in that case calibrated the radar device at the start and end of his shift. *Id.* at ¶ 16. Thus, that case does not clearly stand for the proposition that calibrating the device or checking the calibration of the device only at the start of the shift is the proper procedure.

{¶24} Regardless, the testimony about checking calibration and the testimony about the distance of the signs used to check calibration did not affect the sufficiency of the evidence; there was sufficient evidence of Trooper Brown's qualifications and the calibration of the device. The above testimony goes to whether or not those results should be trusted. Those are manifest weight of the evidence issues. Manifest weight of the evidence arguments were not raised in this appeal.

{¶25} In conclusion, the result of the laser speed-measuring device was admissible and was sufficient evidence of speeding. Expert testimony and judicial notice are no longer required for the admissibility of the results of a stationary speed-measuring device. However, evidence is required to be introduced concerning the accuracy of the device and the qualifications of the operator of the device. Here, there was evidence introduced as to both. Thus, the sufficiency of the evidence argument fails. Admittedly, evidence was introduced attempting to call into question the accuracy of the results. That

evidence, however, created a weight of the evidence argument, which was not raised. The sole assignment of error is meritless and the conviction for speeding is affirmed.

Donofrio, P J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Mahoning County Court Area 4 of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.