[Cite as *State v. Dawson*, 2016-Ohio-5605.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
DARRELL E. DAWSON	:	Case No. 16 CAC 01 0002
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Municipal Court, Case No. 15 TRD 14747

JUDGMENT: Affirmed

DATE OF JUDGMENT: August 19, 2016

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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Farmer, P.J.

{¶1} On October 25, 2015, appellant, Darrell Dawson, was cited for driving 85 m.p.h. in a 70 m.p.h. zone in violation of R.C. 4511.21(D)(4). Appellant's speed was determined with the use of the UltraLyte 20/20 Laser device.

{¶2} A bench trial commenced on December 14, 2015. During the trial, the trial court took judicial notice of the laser device. At the close of the state's case, appellant moved for acquittal, arguing the trial court could not take judicial notice of the scientific reliability of the laser device. The trial court denied the motion, and found appellant guilty. By judgment entry filed December 14, 2015, the trial court fined appellant $50.00 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 TO THE PREJUDICE OF THE APPELLANT AND ABUSED ITS DISCRETION BY TAKING JUDICIAL NOTICE AS TO THE SCIENTIFIC RELIABILITY OF THE ULTRALYTE 20/20 LASER DEVICE BASED UPON A PRIOR PROCEEDING OF THE TRIAL COURT WHERE SAID PRIOR PROCEEDING WAS NOT PART OF THE RECORD AS DEFINED IN APP. R. 9 AND THEREFORE NOT REVIEWABLE BY THE APPELLATE COURT."

II

{¶5} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT AND ABUSED ITS DISCRETIONARY (SIC) IN FINDING THE APPELLANT GUILTY OF VIOLATING OHIO REVISED CODE §4511.21(D)(4) WHERE THE COURT HAS

NOT HEARD EXPERT TESTIMONY RELATIVE TO THE CONSTRUCTION OF THE ULTRALYTE 20/20 LASER DEVICE, ITS METHOD OF OPERATION, AND ITS SCIENTIFIC RELIABILITY."

I, II

{¶6} Appellant claims the trial court erred in finding appellant guilty of speeding, as it improperly took judicial notice of the scientific reliability of the laser device based upon a prior proceeding in violation of App.R. 9. We disagree.

{¶7} Ohio State Highway Patrol Sergeant Robert Curry testified he visually observed a vehicle going 80 m.p.h. in a 70 m.p.h. zone. T. at 9. He utilized his UltraLyte 20/20 Laser device which registered a speed of 85 m.p.h. *Id.* Sergeant Curry was certified to use the laser device and his certification was current. T. at 7-8. He conducted the required checks on the laser device before and after his shift. T. at 12-13.

{¶8} In his brief at 7, appellant states he based his objection to the laser device on Evid.R. 702 and applicable case law which states "scientific evidence is **not admissible** unless the State lays a proper foundation by presenting expert testimony concerning the reliability of the specific procedures used, and the underlying scientific principle of theories of the speed measuring device." The trial court overruled the objection, and took judicial notice of the scientific reliability of the laser device based upon a prior case before the trial court wherein the scientific reliability of the laser device had been established. *State v. Poulos,* Delaware M.C. No. 02-TRD-8021 (Aug. 8, 2002).

{¶9} Appellant argues the manner of taking judicial notice was contrary to Evid.R. 201 which states the following in pertinent part:

> **(A) Scope of Rule.** This rule governs only judicial notice of adjudicative facts; i.e., the facts of the case.
>
> **(B) Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

{¶10} Under Evid.R. 104(A), preliminary rulings on admissibility rests with the trial court. The admissibility of an officer's testimony as to the speed registered on a laser device is based upon whether the device has been proven to be scientifically reliable. As acknowledged by the trial court in *State v. Carnes,* 5th Dist. Perry No. 14-CA-00029, 2015-Ohio-1633, ¶ 8, this court has embraced the standard opined by our brethren from the Third District:

> Evid.R. 201(B) governs the trial court's ability to take judicial notice of adjudicative facts: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be

questioned." The scientific reliability of a speed-measuring device can be established by "(1) a reported municipal court decision, (2) a reported or unreported case from the appellate court, or (3) the previous consideration of expert testimony about a specific device where the trial court notes it on the record." *State v. Yaun,* 3rd Dist. Logan No. 8-07-22, 2008-Ohio-1902, ¶ 12.

{¶11} As explained by our brethren from the First District in *Cincinnati v. Levine,* 158 Ohio App.3d 657, 2004-Ohio-5992, ¶ 12 (10th Dist):

> This holding does not mean that the prosecution must present expert testimony every time it presents evidence from an LTI 20–20 (or any other) laser device. Rather, it merely means that the prosecution must do it at least once. And the trial court may then take judicial notice of the device's accuracy and dependability, as well as hear testimony concerning any reading obtained from the device.

{¶12} The trial court's decision was based on prong three, "the previous consideration of expert testimony about a specific device where the trial court notes it on the record." During the trial, the following exchange occurred (T. at 18-20):[1]

[1]Appellant and defense counsel share the same last name, Dawson.

THE COURT: I have the power to take judicial notice during testimony or at the end of testimony.

MR. DAWSON: And the basis for taking judicial notice?

THE COURT: If I find that I should, based on prior cases that I've decided on this device, yes. The rule said - - the rule - -

MR. DAWSON: Even though you're not allowed to do that?

THE COURT: I think I can. I know I can. In our district, I can take judicial notice of the general reliability of the device based on either a reported case or an unreported case in my particular court where I heard expert testimony on that particular device.

MR. DAWSON: And are you prepared to recite a case that's - -

THE COURT: I am. I did hear expert testimony in State of Ohio versus Nicole R. Poulos, that's P-o-u-l-o-s, was Case No. 02-TRD-8021. I heard testimony from expert Wyatt Killigan, Professor at the University of Akron, a representative of Laser Technology, Inc. who testified in detail about the general scientific principles for calibration and operation of the LTI 2020 and laser technology in general.

As it relates to speed measuring devices, I did find that the LTI 2020 and this device was described as an UltraLyte 2020 is based on a valid scientific theory - - theory and is an acceptable method in the scientific community for accurately measuring the speed of moving automobiles and vehicles, and I did in that case take judicial notice of the

reliability of laser technology and, specifically, the 2020 device. So based on that case, yes.

{¶13} We fail to find any error by the trial court in following our specific dictates.

{¶14} Appellant argued this method is too broad and violates App.R. 9, and violates a defendant's right of cross-examination. Appellant did not specifically advance a "right to confrontation" argument to the trial court, but argued the following (T. at 26 and 28, respecitively):

MR. DAWSON: And the reason is - - is very simple. I guess the rationale of the law as to why you can't do that is - - is based on Appellate Rule 9.

And Appellate Rule 9 says, the trial Court may not take judicial notice of its own proceeding in other cases is based on the rationale that when judicial notice is taken of a prior proceeding, such proceedings are not part of the record as defined in Appellate Rule 9 and where the Court correctly interpreted such prior proceedings is not reviewable by the appellate court.

Now, and that makes sense for the following reasons: The record of the previous case is not part of the record of this case.

***

MR. DAWSON: ***There's no record to establish whether any witness who testified in the previous case was ever subject to cross-

examination. There's no record to establish whether any witness who testified in the previous case qualified under Evidence Rule 702 (B) as an expert.

So you're taking judicial notice of a case with expert testimony, it may be good for the case that you did that, but it's not good here.

I'm denied my right to cross-examine a witness. I don't know what happened in that case, Judge.

{¶15} We find the confrontation argument was not specifically preserved to the trial court. As stated by the Supreme Court of Ohio in *State v. Awan,* 22 Ohio St.3d 120 (1986), syllabus: "Failure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal."

{¶16} Appellant argues a violation of App.R. 9 because the record only contains the citation to the *Poulos* case which does not properly preserve the record for appeal.

{¶17} Although the inclusion of the written opinion in *Poulos* would have prevented this attack, we do not find it's omission to be fatal given our ruling in *Carnes, supra*. Rulings on admissibility are reviewed under the abuse of discretion standard. Any second-guessing of the trier of fact as to the admissibility of the UltraLyte 20/20 Laser device would be viewed under a limited scope. The trial court judge found the device to be scientifically acceptable.

{¶18} In *State v. Pierce,* 64 Ohio St.3d 490, 496, 1992-Ohio-53, the Supreme Court of Ohio explained the following:

> "Like our counterpart in Maine, we refuse to engage in scientific nose-counting for the purpose of deciding whether evidence based on newly ascertained or applied scientific principles is admissible. We believe the Rules of Evidence establish adequate preconditions for admissibility of expert testimony, and we leave to the discretion of this state's judiciary, on a case by case basis, to decide whether the questioned testimony is relevant and will assist the trier of fact to understand the evidence or to determine a fact in issue."***
>
> "The relevancy standard balances the probativeness, materiality, and reliability of the evidence against the risk of misleading or confusing the jury or unfairly prejudicing the defendant. This approach makes all expert testimony on generally recognized tests presumptively admissible and places the burden of excluding the evidence on the opponent."*** (Citations omitted.)

{¶19} We find the recitation given on the record cited above to be sufficient to dispel the App.R. 9 argument.

{¶20} Upon review, we find the trial court did not err in finding appellant guilty by taking judicial notice of the laser device.

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

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

By Farmer, P.J.

Delaney, J. concur and

Hoffman, J. concurs in part and dissents in part.

SGF/sg 721

Hoffman, J., concurring in part and dissenting in part

{¶23} I concur in most of the majority's analysis and its decision to reject Appellant's argument based upon App.R. 9.[2]

{¶24} I respectfully disagree with the majority's decision Appellant's confrontation argument was not specifically preserved for our review. While failure to raise a challenge to the constitutionality of a statute or its application results in waiver of such issue, this case presents a different scenario; i.e., the assertion of a constitutional right.

{¶25} As quoted in the majority opinion, Appellant's trial counsel specifically argued he was denied his right to cross-examine a witness [the expert in the *Poulos* case].[3,4] While counsel may not have made specific reference to his client's "constitutional right to confrontation", I find his reference to denial of his right to cross-examine the functional equivalent.

{¶26} I find Appellant was denied his constitutional right to confrontation. I would reverse the trial court's decision on the authority of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004).

HON. WILLIAM B. HOFFMAN

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[2] The majority states the inclusion of the **written opinion** in *Poulos* would have prevented this attack. Majority Opinion at ¶17. I believe the inclusion of the **written transcript** in *Poulos* would have done so.
I also disagree with the majority's application of an abuse of discretion standard of review on this evidentiary issue.

[3] Majority Opinion at ¶14.

[4] Although decided 9 months after *Crawford*, *Cincinnati v. Levine* did not address the appellant's denial of his right to confrontation argument because *Levine* was successful in securing reversal on another ground.