

ACCEPTED  
234EFJ017250810  
FOURTEENTH COURT OF APPEALS  
HOUSTON, TEXAS  
13 January 2 P7:35  
CHRISTOPHER A. PRINE  
CLERK

IN THE FOURTEENTH COURT OF APPEALS

CASE No. 14-12-01057-CV

FILED IN  
14th COURT OF APPEALS  
HOUSTON, TEXAS  
12/31/2012 7:35:39 PM  
CHRISTOPHER A. PRINE  
Clerk

---

APPELLANT'S BRIEF

---

C.B, a minor

vs.

TEXAS DEPARTMENT OF PUBLIC SAFETY

---

ORAL ARGUMENT REQUESTED

---

Robert Eutsler  
Texas Bar No. 06702400  
Eutsler Law Firm  
9219 Katy Freeway, Ste 220  
Houston, TX 77024  
(713) 464-6461 (voice)  
(713) 465-7223 (fax)  
Attorney for Appellant

## IDENTITY OF PARTIES AND COUNSEL

C.B., a minor  
Appellant

Robert W. Eutsler  
Attorney for Appellant  
Eutsler Law Firm  
Bar No. 06702400  
9219 Katy Freeway, Ste 220  
Houston, Texas 77024  
(713) 464-6461 (voice)  
(713) 465-7223 (fax)

Texas Dept of Public Safety  
Appellee

Kevin M. Givens  
Appellate Counsel  
ALR Appeals  
P. O. Box 15327  
Austin, Texas 78761-5327  
(512) 424-5193

## TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSEL.....	2
TABLE OF CONTENTS.....	3
INDEX OF AUTHORITIES.....	4
STATEMENT OF THE CASE.....	9
STATEMENT REGARDING ORAL ARGUMENT.....	10
ISSUE PRESENTED.....	11
STATEMENT OF FACTS.....	11
SUMMARY OF ARGUMENT.....	13
ARGUMENT.....	14
PRAYER.....	44
CERTIFICATE OF SERVICE.....	44
APPENDIX I (Wikipedia.org speeding facts)	
APPENDIX II (Weather on date of incident)	
APPENDIX III (Online manual excerpts from TxDOT)	
APPENDIX IV (Trial court’s opinion in State v. Sloan)	
APPENDIX V (Administrative Decision and District Court Order)	

## INDEX OF AUTHORITIES

### Statutes

<i>Tex. Penal Code Ann.</i> , Section 2.05.....	21,22
<i>Tex. Penal Code Ann.</i> , Section 2.06.....	20, 21
<i>Tex. Trans. Code Ann.</i> , Sections 524 et. seq.....	14
<i>Tex. Trans. Code Ann.</i> , Section 524.035 (1)(B).....	14
<i>Tex. Trans. Code Ann.</i> , Section 524.035(1)(B)(23).....	23
<i>Tex. Trans. Code Ann.</i> , Section 524.043.....	15
<i>Tex. Trans. Code Ann.</i> , Section 543.010.....	19
<i>Tex. Trans. Code Ann.</i> , Section 545.062(a).....	42
<i>Tex. Trans. Code Ann.</i> , Section 545.351(a).....	15
<i>Tex. Trans. Code Ann.</i> , Section 545.352(a).....	16
<i>Tex. Trans. Code Ann.</i> , Section 545.352(h)(h-1).....	38
<i>Tex. Trans. Code Ann.</i> , Section 545.353(b).....	37
<i>Tex. Trans. Code Ann.</i> , Sections 724 et. seq.....	14
<i>Tex. Trans. Code Ann.</i> , Section 724.042(1).....	23

Cases

*Bigford v. Taylor*, 834 F.2d 1213 (5<sup>th</sup> Cir. 1988).....26

*Bradley v. State*, 09-10-00374-CR (TXCA9) (2012) (unpublished).....33

*Camara v. Municipal Court*, 387 U. S. 523 (1967).....25

*Castro v. State*, 227 S.W. 3<sup>rd</sup> 737 (Tex. Crim. App. 2007).....16, 31

*Commonwealth v. Cassidy*, 95 N.E. 214, 209 Mass. 24 (1911).....16, 28, 36

*Commonwealth v. Whynaught*, 384 N. E. 2<sup>nd</sup> 1212,  
377 Mass. 14 (1979).....19

*County Court of Ulster County v. Allen*, 442 U.S. 140 (1979).....22

*Christopher v. State*, 639 S.W. 2<sup>nd</sup> 932 (Tex. Crim. App. 1982).....30, 31

*Delafuente v. State*, 14-11-00500-CR (TXCA14).....29

*Deramus v. State*, 02-10-00045-CR (TXCA2)(unpublished).....17, 35, 37

*Dillard v. State*, 550 S.W. 2<sup>nd</sup> 45 (Tex. Crim. App. 1977).....33, 35

*Floeck v. State*, 34 Tex. Crim. Rep. 314, 30 S.W. 794  
(Tex. Crim. App. 1895).....20, 25

*Fowler v. State*, 266 S.W. 3<sup>rd</sup> 498 (Tex. App.-Fort Worth 2008  
en banc, pet. ref'd).....10,25,29

*Francis v. Franklin*, 471 U.S. 307 (1985).....22

*Gladden v. Roach*, 864 F.2<sup>nd</sup> 1196, 1199 (5<sup>th</sup> Cir.),  
cert. denied, 491 U.S. 907 (1989).....24

*Goudeau v. State*, 209 S.W.3<sup>rd</sup> 713 (Tex. App.- Houston  
[14<sup>th</sup> Dist.] 2006, no pet.).....25

<i>Hall v. State</i> , 297 S.W. 3d 294 (Tex. Crim. App. 2009).....	24
<i>Heredia v. State</i> , 08-06-00011-CR (TXCA8)(no pet.)	
<i>Highwarden v. State</i> , 846 S. W. 2 <sup>nd</sup> 479 (Tex. App.- Houston [14 <sup>th</sup> Dist.] 1993, overruled in part on other grounds).....	31
<i>Icke v. State</i> , 36 S.W. 3 <sup>rd</sup> 913 (Tex. App.- Houston [1 <sup>st</sup> Dist.] 2001, pet. ref'd).....	33, 36
<i>In re Winship</i> , 397 U.S. 358 (1970).....	20, 21
<i>Loesch v. State</i> , 958 S.W. 2 <sup>nd</sup> 830 (Tex. Crim. App. 1997).....	36
<i>Madden v. State</i> , 242 S.W.3 <sup>rd</sup> 504 (Tex. Crim. App. 2007).....	30
<i>Martin v. Thomas</i> , 973 F. 2 <sup>nd</sup> 449 (5 <sup>th</sup> Cir. 1992).....	24
<i>Marshall v. Barlow's, Inc.</i> , 436 U. S. 307, 312 (1978).....	25
<i>Mockowith v. Kansas City, St. J. &amp; C. B. R.R.</i> , 196 Mo. 550 (1906).....	44
<i>Ornelas v. United States</i> , 517 U.S. 690 (1996).....	15
<i>Overshown v. State</i> , 329 S.W. 3d 201 (Tex. App. – Houston [14 <sup>th</sup> Dist.] 2010, no pet.).....	24
<i>Payne v. State</i> , 2-09-100-CR (TXCA2) (2010) (unpublished).....	33
<i>People v. Perlman</i> , 15 Ill. App. 2d 239, 145 N. E. 2d 762 (1957).....	27
<i>Ruiz v. State</i> , 644 S.W.2 <sup>nd</sup> 194 (Tex. App.- San Antonio 1982, no pet.).....	33
<i>Sandstrom v. Montana</i> , 442 U.S. 510 (1979).....	22
<i>Sieffert v. State</i> , 290 S.W. 3 <sup>rd</sup> 478 (Tex. App.- Amarillo 2009, no pet.).....	34, 35
<i>State v. Bratten</i> , 14 Ohio App. 2 <sup>nd</sup> 93, 236 N. E. 2 <sup>nd</sup> 683 (1967).....	38

<i>State v. Fisher</i> , 2011-Ohio-2488, 10AP-746 (OHCA10).....	17
<i>State v. Police</i> , 377 S.W. 3 <sup>rd</sup> 33 (Tex. App.-Waco 2012, no pet.).....	26
<i>State v. Saffill</i> (1975) 44 Ohio St. 2d 39.....	39
<i>State v. Sloan</i> , 2008-Ohio-5811, No. S-08-017 (OHCA6).....	38
<i>State v. Trimming</i> , 89 Idaho 440, 406 P. 2 <sup>nd</sup> 118 (Idaho 1965).....	15, 28
<i>State v. Wall</i> , 115 Ohio App. 323, 185 N. E. 2 <sup>nd</sup> 115 (Ohio App. 10 Dist. 1962).....	16, 39
<i>Swenson v. Culberson County</i> , 925 F. Supp. 478 (W.D. Tex. [Pecos Div] 1996).....	24, 33
<i>Texas Department of Public Safety v. Barlow</i> , 48 S.W.3 <sup>rd</sup> 174 (Tex. 2001).....	14
<i>Texas Department of Public Safety v. Davis</i> , 04-10-00774-CV (TXCA4)(no pet.).....	33
<i>Texas Dept. of Public Safety v. Gilfeather</i> , 293 S. W. 3 <sup>rd</sup> 875 (Tex. App.- Fort Worth 2009, no pet.).....	33
<i>Tex. Dep't of Pub. Safety v. Gonzales</i> , 276 S.W.3 <sup>rd</sup> 88 (Tex. App.- San Antonio 2008, no pet.).....	29
<i>Texas Department of Public Safety v. Harris</i> , 33 S.W. 3 <sup>rd</sup> 406 (Tex. App.- Fort Worth, 2000).....	14
<i>Texas Department of Public Safety v. Lee</i> , 03-11-00532 (Tex. App.- Austin 2012).....	15
<i>Thomas v. City of Galveston</i> , 800 F. Supp. 2d 826 (S.D. Tex. 2011)...	26, 27
<i>Thomas v. State</i> , 474 S.W 2 <sup>nd</sup> 692 (Tex. Crim. App. 1972).....	15, 18, 20, 21, 30
<i>Tibbs v. State</i> , 01-06-00991-CR (TXCA1)(no pet.)(unpublished).....	34, 35

*Tollett v. State*, 219 S.W. 3d 593 (Tex. App. – Texarkana 2007, pet. ref’d).....15

*U.S. v. Castanon*, 229 Fed. Appx. 312, 2007 WL 1560127 (5<sup>th</sup> Cir.-Tex. 2007) (unpublished per curiam).....31, 32, 33

*U. S. v. Cole*, 444 F. 3d 688 (5<sup>th</sup> Cir. – Tex. 2006).....25

*United States v. Wadley*, 59 F. 3d 510 (5<sup>th</sup> Cir. 1995).....26

*Warren v. State*, 05-08-01431-CR (TXCA5)(unpublished).....32, 33

*Watkins v. State*, 245 S.W.3<sup>rd</sup> 444 (Tex. Crim. App. 2008).....40

*Whren v. United States*, 517 U.S. 806 (1996).....24

*Willis v. State*, 790 S.W. 307 (Tex. Crim. App. 1990).....21, 22, 32, 41

## **STATEMENT OF THE CASE**

This is an appeal of an administrative driver's license suspension (detectable amount of alcohol in a minor) based on an unconstitutional fourth amendment seizure arising out of an alleged speeding violation.

The minor driver appealed to the county court. The case was removed to the district court by statute because the county court judge was not a licensed attorney. The district judge sitting as an appellate court heard oral arguments after reviewing the administrative record, found that substantial evidence supported the decision of the administrative judge, that there was no error of law or an otherwise arbitrary or capricious decision or an abuse of discretion, and affirmed the decision of the administrative judge.

The minor asks the court to reverse and render due to an error of law based on undisputed historical facts.

## STATEMENT REGARDING ORAL ARGUMENT

This is in essence a criminal case, but procedurally it is civil.

Speeding is the most common traffic violation. See Appendix I. While at first blush this case may appear relatively benign, being “just a speeding case,” it is important because we all drive and inadvertently and/or purposefully exceed the posted speed limit from time to time. Speeding is the most common case tried in the municipal and JP courts, and the most common reason for stopping a motorist where additional suspicions lead to investigations and arrests for more serious crimes.

Surprisingly, very little Texas jurisprudence on the topic exists, and what does is confusing and contradictory. The Court of Criminal Appeals has issued opinions that do not reconcile. If the courts (and law enforcement) are wrong in understanding what constitutes an observed commonplace speeding violation, *Fourth Amendment* violations will continue to flourish.

There is a void in the law. The concepts are nuanced. The Court of Criminal Appeals can never review this case, since it is civil. It is suggested that it might even be appropriate for an en banc hearing at this juncture. The subjective nature of the crime is similar to *Fowler v. State*, 266 S.W. 3<sup>rd</sup> 498 (Tex. App.-Fort Worth 2008 en banc, pet. ref'd), with the added complication of an overlaying evidentiary inference.

## **ISSUE PRESENTED**

An error of law occurred when probable cause/reasonable suspicion was based strictly on exceeding the speed limit, while disregarding the totality of the other relevant circumstances known to the officer prior to initiating the stop that proved the speed to be reasonable and prudent.

## **STATEMENT OF FACTS**

A traffic stop occurred on February 19, 2012 (a Sunday), about 2:15 in the afternoon. CR44. The temperature was cool, with partly cloudy skies, relatively calm winds, 10 miles of visibility and dry pavement. Appendix II. APPELLANT, a minor under 21 year old, driving a Range Rover, was clocked by a state trooper using front moving radar at 75 mph in a 70 mph zone. APPELLANT was southbound on State Highway 6 near Navasota in Grimes County. APPELLANT admitted going 75 mph. CR44. DPS Trooper Dominguez was moving northbound at the time he clocked APPELLANT. CR50 (p 4, line 19-20). The divided highway consists of two southbound and two northbound lanes, separated by a grassy median about two lanes wide. CR50-51 (p 4, line 23-p 5, line 8). The traffic was medium to light, and came in spurts. CR51 (p 5, lines 8-13). The trooper observed a group of vehicles traveling in the southbound lanes, with APPELLANT driving the lead car in the inside fast lane. CR51 (p 5, lines 13-18). The trooper did not

recall any other traffic ahead of this cluster of vehicles. CR51 (p 5, lines 19-22). This group of cars crested a hill southbound when Trooper Dominguez was driving northbound, as he neared a crossover. After he clocked APPELLANT at 75 mph, the trooper turned into the crossover. There, about ten feet from the edge of the southbound fast lane in which APPELLANT was traveling, the trooper waited and watched. CR55 (lines 5-9); CR54 (p 8, lines 6-10). The officer did not believe there was anything unsafe or out of the ordinary except being five miles above the posted speed limit. CR52 (p 6, lines 1-5).

APPELLANT and the trooper made eye contact, which the trooper interpreted as evidencing a more than usual interest in the trooper. Due to this interest and being five miles over the speed limit, the trooper decided to pull him over. CR 54, p 8, lines 6-13, and CR 56, p 10, lines 1-9.

The officer testified that any speed over the posted speed limit is illegal, regardless of other factors, and admitted that he has on occasion stopped motorists going just one or two miles over the posted limit. CR52-53 (p 6, line 6 - p 7, line 1).<sup>1</sup>

---

<sup>1</sup> The trooper also listed a failure to signal the exit from Highway 6 as an additional ground for reasonable suspicion. CR 44. This basis for reasonable suspicion was not addressed in the administrative judge's decision, nor argued on appeal by the Department, because as was argued by Appellant's counsel at the administrative hearing, no signal is required a when exiting a highway.

## **SUMMARY OF THE ARGUMENT**

An officer must observe an actual traffic violation to constitutionally stop a motorist, if that is the only basis for the stop. In the case of speeding, the crime in Texas is very simply defined as a vehicle traveling at an unreasonable and imprudent speed for the circumstances then existing. Unlike some other states, the Texas speed limit is not a per se standard. The speed limit is not part of the gravamen of the crime. Instead, the speed limit is for the fact finder to use as guidepost. It is an artificial evidentiary device (a rebuttable permissive inference in legal parlance). The two judges' rulings wag the dog. Neither considered the actual, real evidence of the circumstances perceived by the trooper out on the highway elicited on cross examination. Instead, their probable cause/reasonable suspicion analyses rest solely on the speed exceeding the speed limit by 5 mph. Facts known to the officer establishing that the speed was nevertheless reasonable and prudent were ignored.

Any suspicion sparked by the radar reading was extinguished once the trooper looked away from his radar unit and assessed the totality of the circumstances through his windshield before making the stop decision.

## ARGUMENT

### I. PROCEDURAL POSTURE AND STANDARD OF REVIEW

Under the implied consent statutes governing licensed Texas drivers, a license may be suspended for either refusing to provide a breath or blood specimen, or by providing a specimen and failing such a test. *Tex. Trans. Code Ann.*, Sections 724 et. seq. and 524 et seq. This appeal is a failure case, inasmuch as APPELLANT failed the breath test by having a detectable amount of alcohol in his system (.04). Although well below the per se .08 blood alcohol limit defining intoxication, a minor may not have any detectable amount since it is illegal for a minor to consume alcohol.

The case emanates from *Tex. Trans. Code Ann.*, Section 524.035(1)(B) dealing with a minor with a detectable amount of alcohol in his system. The administrative judge's decision resulted in a 60 day driver's license suspension, now a permanent part of his driving record, subject to the ultimate appellate decision, and a \$125.00 reinstatement fee.

This court has jurisdiction under *Texas Department of Public Safety v. Barlow*, 48 S.W.3<sup>rd</sup> 174 (Tex. 2001) and *Texas Department of Public Safety v. Harris*, 33 S.W. 3<sup>rd</sup> 406 (Tex. App.- Fort Worth, 2000).

This court reviews the lower courts under a substantial evidence standard. *Tex. Trans. Code Ann.*, Section 524.043. Whether substantial evidence supports the administrative decision is de novo. *Texas Department of Public Safety v. Lee*, 03-11-00532 (Tex. App.-Austin 2012). When the review is of the application of undisputed historical facts to the law (a mixed question of law and fact), and thus a pure question of law, no deference is given to either the administrative judge or the district judge sitting as an appellate court. *Lee*. See also *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L. Ed. 2d 911 (1996).

## **II. SPEEDING IS DEFINED AS A SPEED GREATER THAN IS REASONABLE AND PRUDENT UNDER THE CIRCUMSTANCES THEN EXISTING, REQUIRING SPECIFIC, ARTICULABLE OBSERVATIONS**

An operator may not drive at a speed greater than is reasonable and prudent under the circumstances then existing. *Tex. Trans. Code Ann.*, Section 545.351(a). These are the elements of the crime of speeding. *Thomas v. State*, 474 S.W 2<sup>nd</sup> 692 (Tex. Crim. App. 1972); *Tollett v. State*, 219 S.W. 3d 593 (Tex. App. – Texarkana 2007) pet. ref'd. See also, *State v. Trimming*, 89 Idaho 440, 406 P. 2<sup>nd</sup> 118 (Idaho 1965). An unreasonable and imprudent speed is the gist of the crime when the law does not otherwise

establish per se numeric speed limits. See *State v. Wall*, 115 Ohio App. 323, 445, 185 N. E. 2<sup>nd</sup> 115, 121 (Ohio App. 10 Dist. 1962).

These cases and the plain meaning of the words of the statute make clear that speeds in excess of the posted speed limits are not necessarily prohibited. The confusion in the case law is engendered by the following evidentiary presumption: Speed in excess of the posted limit is prima facie evidence that the speed is not reasonable and prudent and that the speed is unlawful. *Tex. Trans. Code Ann.*, Section 545.352(a). Along with Texas, Ohio, Idaho, Massachusetts and other states have or had something similar. Thus, their cases can be instructive.

“The real question in all these cases now is whether the speed is greater than was reasonable and proper, having regard to traffic and the use of the way and the safety of the public, the burden being on the commonwealth to show that it was.....And hence in some cases a defendant may be convicted even if he has not exceeded the rate named in the prima facie clauses of the statute, and in some he may be acquitted even though he may have exceeded it.” *Commonwealth v. Cassidy*, 95 N.E. 214, 209 Mass. 24 (1911).

The crime of speeding is subjective in nature, requiring articulation of specific underpinning facts to prove. *Castro v. State*, 227 S.W. 3<sup>rd</sup> 737, 742

(Tex. Crim. App. 2007). As will be seen in Section V. of this brief below, most reported cases turn on only two simple facts: the actual speed and the posted speed limit. The record in those cases is mostly devoid of other relevant circumstances that bear on the issue of reasonable and prudent. In such cases, the prima facie presumption trumps an otherwise bare record.

On the other hand, there are a few cases where the speed and/or speed limit are not in evidence at all, and yet the court held there was enough other factual evidence to support probable cause of speeding. See *Deramus v. State*, 02-10-00045-CR (TXCA2)(unpublished). The speed and speed limit are irrelevant when the conditions are viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training. *State v. Fisher*, 2011-Ohio-2488, 10AP-746 (OHCA10), paragraphs 18-22.

No crime is committed and the actual speed and speed limit are irrelevant when the circumstances prove that at whatever actual speed the motorist is traveling, and whatever the speed limit may be, the movement of the vehicle in the totality of the circumstances is factually reasonable and prudent.

TxDOT publishes an online manual “to provide the information and procedures necessary for establishing speed zones and advisory speeds on

the state highway system.” Chapter 1: Introduction, Section 1: Overview, Appendix III. TxDOT recognizes reasonable and prudent principles as follows: “[C]omparative ‘before and after’ studies indicate that speed limit signs actually have very little influence on the driver’s choice of speed...Having recognized that normally careful and competent actions of a reasonable person should be considered legal, the Texas Legislature has passed legislation concerning speed zoning in order to assure this protection.” Chapter 1, Introduction, Section 2: Background, Value of Speed Zoning, p. 4 of 5, Appendix III.

**III. THE PRIMA FACIE LANGUAGE CREATES AN ARTIFICIAL EVIDENTIARY AID THAT INSTRUCTS THE JURY THAT IT MAY INFER GUILT, OR THAT IT MAY DISREGARD THE INFERENCE, AS IT SEES FIT**

The prima facie speed limit rule provides only some proof that a jury **may** consider on the issue of whether the actual speed was reasonable and prudent under the circumstances, and may be rebutted by other evidence; speeds in excess of the posted speed limit are by no means conclusively unreasonable and imprudent. *Thomas*. "No particular weight is assigned prima facie speed limit evidence by law except that the jury **may** find a verdict based upon it." *Thomas*, at p. 695 (emphasis added).

In *Commonwealth v. Whyngaught*, 384 N. E. 2<sup>nd</sup> 1212, 1217, 377 Mass. 14, 22 (1979), the Supreme Judicial Court of Massachusetts, Middlesex determined that the prima facie presumption “does not create a statutory element of the offense,” its purpose being “to assist the Commonwealth in carrying its burden of persuasion on the issue of reasonable and proper speed.”

The Transportation Code does require the summons (the traffic ticket) and the formal charging instrument (the complaint) to contain both the posted speed limit and the alleged speed in order to prosecute a Class C speeding case. *Tex. Trans. Code Ann., Section 543.010*. This undoubtedly was included to force at least something concrete to protect both the driving public and the jury from more vague law enforcement conclusions that a person was “speeding” in the opinion of the officer.

TxDOT discusses the Prima Facie Concept at Chapter 1, Introduction, Section 2: Background, Appendix III, as follows:

In Texas, all speed limits are **prima facie** limits. **Prima facie** are those limits that, “on the face of it,” are reasonable and prudent under normal conditions. To exceed a **prima facie** speed limit does not automatically constitute an infraction of the law, as reasonable and prudent driving behavior is, at times, possible at speeds in excess of the posted limit. However, the burden of proof of reasonable and prudent conduct under the existing conditions rests with the driver. *To afford a driver this opportunity to exceed a **prima facie** speed limit recognizes the fact that any posted speed limit cannot adequately reflect the*

*many different road conditions confronting the driver on the same highways at different times.* (italic emphasis added).

At the time of the *Thomas* decision in 1972, *Tex. Penal Code Ann.*, Section 2.06 (now repealed) provided “When a statute declares that given facts constitute a prima facie case, proof of such facts warrants submission of a case to the jury with the usual instructions on burden of proof.” Since this language authorized the case to go to the jury regardless of other negating factors, it had the effect of forcing the jury to consider the case, and forcing the accused to affirmatively rebut the inference. The case cited by *Thomas, Floeck v. State*, 34 Tex. Crim. Rep. 314, 30 S.W. 794 (Tex. Crim. App. 1895), recognized that prima facie presumptions are a rule of evidence (not substantive law), and approved the following instruction: “...By ‘prima facie’ evidence is meant, not that the evidence is conclusive, but that it may be rebutted or overcome by the contrary...” In other words, a rebuttable presumption.

Rebuttable presumptions in a criminal case decrease the state’s burden of proof to prove its case by proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970) discusses the due process requirement of proof beyond a reasonable doubt in criminal cases.

On September 1, 1975, in the wake of *Winship* and *Thomas*, perhaps with the realization that as written and construed, the prima facie

presumption might be unconstitutional under *Winship*, *Tex. Penal Code Ann.*, Section 2.06 was repealed. It was replaced with *Tex. Penal Code Ann.*, Section 2.05.

*Tex. Penal Code Ann.*, Section 2.05 augmented *Thomas*' treatment of the prima facie presumption by adding verbiage to the instruction that makes clear that the jury can give speed in excess of the speed limit (and other evidentiary presumptions in the Penal Code or elsewhere) whatever weight it so chooses, including completely disregarding it should it so choose. Also, the amendment mandates that the judge take the case out of the hands of the jury in cases with sufficient proof of rebutting facts.

The statute provides that if the court finds that the evidence as a whole precludes a finding of the presumed fact beyond a reasonable doubt (in other words, it is rebutted by actual facts as a matter of law), the issue of the presumed fact (an unreasonable and imprudent speed) is never submitted to the jury. Thus, the inference is negated and it disappears. Anything else, and the jury must be charged that it “**may find**” that the presumption that the speed above the speed limit supports an unreasonable and imprudent speed, “**but it is not bound to so find.**” (emphasis added).

Thus, this amended language creates a permissive inference, not a mandatory rebuttable presumption that instructs a conviction unless rebutted.

See *Willis v. State*, 790 S.W. 307, 310 (Tex. Crim. App. 1990). If the government proves beyond a reasonable doubt the speed limit and any speed above the limit, the jury must be instructed that it may give it controlling weight, some weight, or no weight, as the jury may choose.

These statutory amendments foreshadowed a trilogy of U.S. Supreme Court decisions that followed *Winship*, to wit, *Sandstrom v. Montana*, 442 U.S. 510 (1979), *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979) and *Francis v. Franklin*, 471 U.S. 307 (1985).

Now, it is clear that due process is implicated in how Texas interprets evidentiary presumptions in criminal cases. In the context of our speeding statutes, if proof of the speed limit and a speed above it is interpreted to constitute an unreasonable and imprudent speed as a matter of law, regardless of other facts, it would be a conclusive presumption (also known as an irrebuttable presumption). Likewise, if the case would stand proved unless rebutted by other evidence, it is a mandatory rebuttable presumption. Both of these interpretations offend the constitution. *Willis* is the key Texas case in this area.

Under the SCOTUS cases above, the prima facie instructions required by *Tex. Penal Code Ann.*, Section 2.05 satisfy due process except to the extent that the presumption is illogical under the specific facts of a given

case. The permissive inference must rationally connect the presumed facts to the facts supporting the presumption. For example, as the speed and the speed limit converge and eventually come together, due process will be offended. Since it is not rational that a speed one mile over the limit logically infers an unreasonable and imprudent speed as compared to the presumptive reasonable and prudent speed under the circumstances, especially at higher divided highway speeds, it is unconstitutional.

**IV. THERE MUST BE PROBABLE CAUSE/REASONABLE SUSPICION THAT AN ACTUAL TRAFFIC VIOLATION OCCURRED**

Among the issues that the administrative driver's license statute says must be proved in a "failure" case by a preponderance of the evidence is "whether reasonable suspicion to stop or probable cause to arrest the person existed." *Tex. Trans. Code Ann.*, Section 524.035(1)(B)(23). Interestingly, the parallel provision in the "refusal" counterpart of the statute reads somewhat differently. There, the legislation asks "whether reasonable suspicion or probable cause existed to stop or arrest the person." *Tex. Trans. Code Ann.*, Section 724.042(1). The latter implies that probable cause and reasonable suspicion is a possible standard for the initial stop; the former is

restricted to reasonable suspicion.<sup>2</sup> The inconsistent language statutory treatment for “failure” and “refusal” cases furthers the confusion of the distinction between reasonable suspicion and probable cause.

A garden variety traffic stop is a seizure for *Fourth Amendment* purposes, and probable cause that a traffic violation has occurred, rather than reasonable suspicion, even if it is a pretext stop, is the correct standard.

*Whren v. United States*, 517 U.S. 806 (1996); *Hall v. State*, 297 S.W. 3d 294, 298 (Tex. Crim. App. 2009); *Overshown v. State*, 329 S.W. 3d 201 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2010, no pet.). See also, *Swenson v.*

*Culberson County*, 925 F. Supp. 478 (W.D. Tex. [Pecos Div] 1996), where Senior District Judge Bunton held police must make a determination of probable cause of speeding before any significant pretrial restraint of liberty, citing *Martin v. Thomas*, 973 F. 2<sup>nd</sup> 449, 453 (5<sup>th</sup> Cir. 1992). He wrote that “a police officer has probable cause to arrest if, at the time of the arrest, he or she had knowledge that would warrant a prudent person’s belief that the person arrested had already committed or was committing a crime,” citing *Gladden v. Roach*, 864 F.2<sup>nd</sup> 1196, 1199 (5<sup>th</sup> Cir.), cert. denied, 491 U.S. 907 (1989).

---

<sup>2</sup> Texas jurisprudence is also riddled with opinions that use the terms “reasonable suspicion” and “probable cause” interchangeably. This writer is of the opinion that the state of the law is therefore confusing, and should be clarified. For purposes of this brief, “probable cause” will be used for the most part, rather than the term reasonable suspicion.

Under these and many other cases, it is arguable that reasonable suspicion, a lower amount of proof than probable cause, is insufficient constitutionally in a plain Jane traffic stop. It just depends on what is meant by reasonable suspicion when that term is employed. In this case, whether reasonable suspicion or probable cause is the proper standard, neither existed at the time the trooper turned on his emergency light to effectuate the stop.

The stop will not be justified if an officer in good faith believes that a traffic violation occurred when in fact he is misinterpreting the traffic code, inasmuch as the legality of the stop rises or falls on whether an actual traffic violation occurred. “Otherwise, the potential for abuse seems boundless and the costs to privacy rights excessive.” *U. S. v. Cole*, 444 F. 3d 688 (5<sup>th</sup> Cir. – Tex. 2006). We impose a standard of “*reasonableness*” upon the exercise of discretion by government officials, including law enforcement officers, in order to “*safeguard the privacy and security of individuals against arbitrary invasions...*” *Marshall v. Barlow’s, Inc.*, 436 U. S. 307, 312 (1978) (quoting *Camara v. Municipal Court*, 387 U. S. 523, 529 (1967)).

If an officer has a good faith but mistaken understanding of the law, there is no probable cause if under the facts there is no traffic violation. *Fowler*, at pp. 504-05, citing this court’s *Goudeau v. State*, 209 S.W.3<sup>rd</sup> 713 (Tex. App.- Houston [14<sup>th</sup> Dist.] 2006, no pet.).

The question is whether a peace officer of reasonable caution, looking at the facts available to the officer at the moment of the investigation, would believe that a traffic violation occurred. *State v. Police*, 377 S.W. 3<sup>rd</sup> 33, 36 (Tex. App.-Waco 2012, no pet.). Of course, a reasonable officer is one who by definition properly understands the law of speeding.

**V. IT IS AN ERROR OF LAW NOT TO TAKE INTO ACCOUNT IN THE TOTALITY OF CIRCUMSTANCES KNOWN TO THE OFFICER THAT REBUT THE PERMISSIVE INFERENCE AND THEREFORE ELIMINATE PROBABLE CAUSE**

The probable cause inquiry looks at the “totality of facts and circumstances within a police officer’s knowledge at the moment of arrest.” *United States v. Wadley*, 59 F. 3d 510, 512 (5<sup>th</sup> Cir. 1995). This sounds a lot like the portion of the speeding statute that requires a contemporaneous assessment “*under the circumstances then existing.*”

Officers may not disregard facts tending to dissipate probable cause. *Bigford v. Taylor*, 834 F.2d 1213, 1218 (5<sup>th</sup> Cir. 1988). Even if a suspect has violated a penal code provision, if the officer is possessed of additional facts that establish an affirmative defense, it is relevant to and cancels out probable cause. *Thomas v. City of Galveston*, 800 F. Supp. 2d 826 (S.D. Tex. 2011) (following all other federal jurisdictions that have decided this issue). For

example, the legislature could have defined speeding as any speed in excess of the posted speed limit, and also established an affirmative defense if the speed is reasonable and prudent under the circumstances then existing. In that scenario, affirmative proof of a reasonable and prudent speed nullifies probable cause under *Thomas v. City of Galveston*.

The Illinois Supreme Court in 1957, construing a similar reasonable and prudent speeding statute, held

...the defendant by his evidence may show that the conditions existing at the time and place of the arrest with reference to traffic, condition of the roadway, etc. were such that **he would be taken out of the purview of the statute**...All that the presumption which is raised by a violation of the posted speed limit does is to create a prima facie case, and, standing alone and with no conflicting evidence it would be sufficient to support a judgment. This presumption fails when the testimony of the State's witness is inconsistent with the presumption and in its very essence rebuts it. *People v. Perlman*, 15 Ill. App. 2d 239, 245, 145 N. E. 2d 762, 765 (1957) (emphasis added).

Likewise, Massachusetts expresses it this way.

The real question in all these cases now is whether the speed is greater than was reasonable and proper, having regard to traffic and the use of the way and the safety of the public, the burden being on the commonwealth to show that it was. If the speed was such to make out a prima facie case for the prosecution, still the burden does not change. The jury are to give due weight to the prima facie case taken in connection with the other circumstances disclosed by the testimony

whether coming from witnesses called by the government or by the defendant, and if they are satisfied that the speed is greater than was reasonable and proper, having regard to traffic and the use of the way and the safety of the public, they should convict the defendant; otherwise they should acquit him. **And hence in some cases a defendant may be convicted even if he has not exceeded the rate named in the prima facie clauses of the statute, and in some he may be acquitted even though he may have exceeded it.** *Commonwealth v. Cassidy*, 95 N. E. 214, 215, 209 Mass. 24, 28 (1911) (emphasis added).

An interesting 1965 opinion by the Supreme Court of Idaho surveys the reasonable and prudent laws of the various states at the time. The court was testing whether “driving a motor vehicle on a public highway in excess of the posted speed limit, in and of itself, constitutes a crime, particularly in the absence of any showing of conditions as to render the speed unreasonable and imprudent.” *Trimming*, p. 442, 119. The stipulated facts were as follows: the speed limit was 60 mph; the appellant was in the right hand lane for ½ mile at 75 mph; there were no circumstances other than the rate of speed which constituted a violation of law; there were no conditions which rendered the speed unreasonable or imprudent; and, there was no actual or potential hazard that then and there existed, including weather, road hazard or condition of appellant’s automobile. The Idaho court held that the crime of speeding did not occur.

A speeding case is fact specific, just like following too closely, failure to maintain a single lane in safety, and impeding traffic. Thus, the lines of cases under these other subjective traffic violations shed light on how to apply this standard. See for example *Fowler*, dealing with failure to maintain a single lane in safety, and *Delafuente v. State*, 14-11-00500-CR (TXCA14) dealing with impeding traffic unreasonably.

A speeding car should be assessed by law enforcement in the field as if no speed limit presumption even exists, because it is irrelevant in and of itself. The proper way that law enforcement should enforce speeding is to first conclude by observation whether or not the speed seems unreasonably fast. Next, the speed should then be confirmed by radar or laser equipment. Defining a speeding violation in a vacuum simply by measuring the time it takes an invisible radio or light wave to return, thereby giving the number of feet per second, is not the law.

Is it or is it not a reasonable speed, just the same as “[S]low driving, in and of itself, is not a violation of the statute; a violation only occurs when the normal and reasonable movement of traffic is impeded. *Tex. Dep’t of Pub. Safety v. Gonzales*, 276 S.W.3<sup>rd</sup> 88, 93 (Tex. App.- San Antonio 2008, no pet.).

## V. SPEEDING CASES WITH PROBABLE CAUSE/REASONABLE SUSPICION ISSUES

There are a number of Texas cases wherein the speeding stop was challenged as insufficient probable cause/reasonable suspicion. In none of the cases are specific facts developed of surrounding circumstances then existing that prove the speed to be reasonable and prudent. In very few of the cases is the phrase “reasonable and prudent” even mentioned. Much less are there discussions of the purposes and nuances of “prima facie.”

All found probable cause for the stop [except in the one instance when the officer did not first conclude on naked eye observation that the vehicle was driving in excess of the speed limit and the laser device was not properly authenticated. *Hall*.

*Christopher v. State*, 639 S.W. 2<sup>nd</sup> 932 (Tex. Crim. App. 1982) and *Madden v. State*, 242 S.W.3<sup>rd</sup> 504 (Tex. Crim. App. 2007) both conflict with *Thomas*. In *Madden*, the defense did not raise a probable cause issue based on the speed being above the speed limit. Instead, there was a factual dispute as to whether the speed limit was actually exceeded. The court in dicta declared in essence that any speed over the posted speed limit proves speeding. The court even described any argument to the contrary absurd, immaterial and not crucial. *Madden*, at pp. 513, 517-518. Then in footnote 7, the court said, “Of course, evidence that the appellant was not, in fact,

speeding is highly probative of whether Officer Lily was reasonable in thinking he was speeding.”

In *Christopher*, with no evidence of the surrounding circumstances, the speed or the speed limit, the court summarily concluded that the officer’s bare testimony that the suspect was exceeding the speed limit sufficed. This conflicts with *Castro*’s requirements for articulable specificity. In *Highwarden v. State*, 846 S. W. 2<sup>nd</sup> 479 (Tex. App.-Houston [14<sup>th</sup> Dist.] 1993, overruled in part on other grounds, *Richards v. State*, 150 S. W. 3<sup>rd</sup> 762 (Tex. App.-Houston [14<sup>th</sup> Dist.] 2004, pet. ref’d), reasonable suspicion was justified because the speed exceeded the speed limit.

The two Court of Criminal Appeals opinions and *Highwarden* illustrate why this case is so important, and why it is so crucial that the law of Texas speeding law be explored in depth, and then enunciated clearly and correctly. To be fair, Appellant’s arguments surely were not briefed in these cases, perhaps because there were no facts in support of a reasonable speed.

In *U.S. v. Castanon*, 229 Fed. Appx. 312, 2007 WL 1560127 (5<sup>th</sup> Cir. Tex. 2007), an unpublished per curiam opinion, the evidence was undisputed that the defendant was driving 71 mph, and that the speed limit was either 70 or 65. Even though the investigating officer gave a conclusory opinion that the speed was reasonable, there were no specific, articulable facts in the

record to support his conclusion. There was no issue raised under *Willis* that the prima facie presumption lacks due process as applied to 71 mph in a 70 or 65 mph zone. Nor does the court explain what the prima facie language stands for, or what the elements of a speeding violation consist of. The Fifth Circuit summarily held that being over the posted speed limit alone was sufficient to satisfy probable cause.

In *Warren v. State*, 05-08-01431-CR (TXCA5)(unpublished), the officer testified that he did not observe unsafe driving, just 70 in a 65, facts very close to this case and *Castanon*. To counter appellant's argument that the speed was safe and prudent, the Court simply and superficially reasoned that probable cause for speeding existed merely because 5 miles over the speed limit "constituted prima facie evidence that that the speed of appellant's vehicle was unsafe and imprudent, thus giving Burnett reasonable suspicion to believe appellant was violating the speeding statute." There was a conclusory opinion of reasonable speed, but no specific, articulable facts supporting the conclusion. The Dallas court undertook no analysis of what "prima facie" really means. The court even wrote that no speeding violation must occur, since the defendant was not being prosecuted for speeding.

In both *Castanon* and *Warren*, since the defense did argue reasonable and prudent, the courts should have explored the meaning of prima facie and the ultimate elements of speeding, and then remanded for full development of the surrounding circumstances underlying the officers' opinion of reasonableness.

The following is a list of some of the cases where probable cause was found with no rebutting circumstantial facts of surrounding conditions in the record:

*Bradley v. State*, 09-10-00374-CR (TXCA9) (2012) (unpublished) - pacing 61 in a 45; *Payne v. State*, 2-09-100-CR (TXCA2) (2010) (unpublished) - 68 and 71 in a 55; *Heredia v. State*, 08-06-00011-CR (TXCA8)(no pet.) - 65 in a 50; *Ruiz v. State*, 644 S.W.2<sup>nd</sup> 194 (Tex. App.- San Antonio 1982, no pet.) - 31 in a 20; *Icke v. State*, 36 S.W. 3<sup>rd</sup> 913 (Tex. App.- Houston [1<sup>st</sup> Dist.] 2001, pet. ref'd) - 57 in a 45; *Texas Dept. of Public Safety v. Gilfeather*, 293 S. W. 3<sup>rd</sup> 875 (Tex. App.- Fort Worth 2009, no pet.) - 68 in a 55; *Texas Department of Public Safety v. Davis*, 04-10-00774-CV (TXCA4)(no pet.) - 72 in a 65; *Swenson* - 67 in a 55.

In *Dillard v. State*, 550 S.W. 2<sup>nd</sup> 45 (Tex. Crim. App. 1977), the officer was of the opinion that there was at an excessive rate of speed, being over the 35 mph limit through an intersection. He was unable to use his

radar. The defense argued insufficient evidence since the state could not prove the exact speed. The court disagreed, stating that a speeding violation occurs “whenever a person drives a vehicle on a highway at a speed that is greater than is reasonable and prudent and it shall be prima facie evidence that the speed is not reasonable if it is in excess of the speed limit in a specified area.” Here, at least the court understood the basic elements of speeding and there was evidence of speeding through an intersection.

Lacking in the opinion is a discussion of the prima facie concept.

In a similar vein is *Tibbs v. State*, 01-06-00991-CR (TXCA1)(no pet.)(unpublished). The officer was unable to remember the radar reading, but testified the speed he observed exceeded the 40 mph speed limit and was not reasonable or prudent. The appellant argued that the weather may have been good, and the state’s proof was not conclusive of speeding. The court rejected this, relied on the prima facie presumption, and held the officer only had to have a reasonable belief that a violation was occurring. Again, no proof was in the record that affirmatively negated the conclusion of an unreasonable and imprudent speed.

In *Sieffert v. State*, 290 S.W. 3<sup>rd</sup> 478 (Tex. App.- Amarillo 2009, no pet.), defense counsel failed to raise what may have been the better *Fourth Amendment* argument, depending on the circumstances. The stop

was based on 40 mph in a 35 mph zone. The officer testified he had “already decided the traffic stop would evolve into something more because the SUV was coming from a high crime area.” *Sieffert*, at p. 485. The court noted that the officer did not observe any activity prior to the stop that would indicate might have engaged in any illegal activity, other than slow driving.

*Deramus* is very similar to both *Dillard* and *Tibbs*. Because there was no exact speed clocked, the prima facie aspect did not come into play. The officer testified, similar to *Dillard*, that he observed “a vehicle coming through the intersection at a high rate of speed” and that he estimated it was going about 50 mph. He was unable to verify the speed with radar. The trial court’s findings of facts determined that the officer “saw a vehicle that, based on his generous amount of experience in viewing vehicles in that very intersection, was traveling noticeably faster, in his opinion, above the posted speed limit for that street, which was 40 mph.”

The *Deramus* court at least recognized that the ultimate issue is reasonable and prudent, holding that the officer “has a reasonable suspicion<sup>3</sup> that *Deramus* was committing a traffic offense based solely on his visual observation of *Deramus*’ speed through an intersection and his determination that *Deramus*’ speed was not reasonable and prudent.”

---

<sup>3</sup> Note the use of the term reasonable suspicion instead of probable cause.

An interesting comment was made in *Icke*, citing *Loesch v. State*, 958 S.W. 2<sup>nd</sup> 830, 832 (Tex. Crim. App. 1997). “Facts that do not show reasonable suspicion in isolation may do so when combined with other facts.” This is also true in reverse. Facts that may weigh in favor of reasonable suspicion in isolation (speed in excess of the speed limit), when combined with other facts, can negate reasonable suspicion/probable cause. This is the point that the Massachusetts court was making in *Cassidy*.

We don’t know the crime scene circumstances in most of the cited cases above. Perhaps such conditions weighed in favor of an unreasonable speed. In the absence of such facts, it seems reasonable that when the record has evidence of speeds above the speed limit, without more, there is adequate support for a finding of probable cause. It might be said that the burden of persuasion to offset the permissive inference was not met by the defense.

While an officer might use radar as the triggering event that peaks his or her interest and begins a probable cause analysis, this should signal just the beginning of the probable cause inquiry. It could be said that when an officer is in his or her vehicle, and the instrument displays a reading above the speed limit, reasonable suspicion of probable cause exists. In some cases, when the officer is armed with an accurate understanding of the speeding law

looks away from the instrument and at the scene, the circumstances will justify the conclusion of an unreasonable and imprudent speed. In other cases, the circumstances will belie this conclusion, and instead reveal reasonable and prudent driving. Probable cause never fully manifests in the latter situation. The initial reasonable suspicion brought about by the instrument reading is extinguished by other facts.

**VI. THE UNDISPUTED HISTORICAL TOTALITY OF THE CIRCUMSTANCES IN THIS CASE REBUT THE PERMISSIBLE INFERENCE AND PROVE A REASONABLE AND PRUDENT SPEED**

The rule is one of reasonableness and degree, and is fact specific. Had the motorist in *Deraumus* been traveling at 7% over the limit (about 43 mph), as in the case at bar, the officer probably would not have made the stop, instead concluding the speed to be reasonable. In our case, the trooper did not testify that he first visually determined that APPELLANT was traveling at a high rate of speed. The only fact was his radar reading. 75 mph is about 7% over 70 mph. In *Deraumus* the driver was going 50 mph, 25% above 40 mph, determined to be “noticeably faster than the speed limit” by the experienced officer with his naked eye, and it occurred in an intersection.

Texas creates a default prima facie speed limit of 70 mph outside of urban areas. *Tex. Trans. Code Ann.*, Section 545.353(b). Authority is granted

for 75 and 80 prima facie limits under *Tex. Trans. Code Ann. 545.352(h)(h-1)*).

The legislature recognizes that in these modern times, when the highway is engineered correctly and conditions are right, the posted speed limit can be as high as 80 mph, and 75 mph is now common. There is now a segment of highway between Seguin and Austin with an 85 mph limit.

An Ohio court concluded no speeding violation occurred in spite of the vehicle traveling 80 mph in a 70 mph limit where the weather was good, the pavement was concrete and in good condition on a 6 lane divided interstate highway, there were no passing cars, and there was plenty of room to stop. *State v. Bratten*, 14 Ohio App. 2<sup>nd</sup> 93, 236 N. E. 2<sup>nd</sup> 683 (1967).

In a case much like the case at bar, a trial judge granted a motion to suppress in a probable cause “reasonable and prudent” speeding case with a speed over the speed limit. (*State v. Sloan*, 2008-Ohio-5811, No. S-08-017 (OHCA6)). There, the trial judge held under the specific facts set out in the opinion, no speeding offense occurred, and thus, there was no basis for a stop. The case was appealed by the state, but the state failed to file a transcript. Nevertheless, the appellate court gave deference to the credibility determinations of the trial judge, and found that substantial justice was done.

Attached in Appendix IV is a certified copy of the court's opinion.

Therein, at unnumbered pp. 4-5, the court writes as follows:

...Reasonable or proper depends of traffic, surface, width of street, and other conditions connected with the highway. *State v. Saffill* (1975) 44 Ohio St. 2d 39. 4511.21 sets limits for specific circumstances, and declares greater speed to be prima facie unlawful. The prima facie provision is merely a rule of evidence. It establishes rebuttable presumption of lawfulness or unlawfulness. It does not define the offense. It may be overcome by evidence showing that in the circumstances the speed was neither excessive nor unreasonable. *State v. Wall* (1962) 115 Ohio App. 323.

The Court must determine that at the time and place and under the circumstances and all existing conditions, was the defendant's speed reasonable and proper. The Court must find that a violation of a traffic law occurred to give rise to a reasonable suspicion to make an investigating stop of the vehicle. The facts as found by the Court are the officer observed the defendant traveling up to 33 m.p.h. in a 25 m.p.h. zone on Wednesday, January 30, 2008 at 2:03 A.M. The road is a 4-lane divided street going through Fremont, traffic was light, per Exhibit B, the surface was wet, the box for icy checked, the weather was snowy, and the officer did not check the box that the defendant's speed was unsafe for the condition. The officer testified the only reason for the stop was speed. Although this is a close case, the Court cannot not say that the defendant was in violation of 4511.21 (C) from the facts as found.

The *Sloan* case is directly on point in its analysis. The court correctly understands the interplay of the prima facie presumption, the reasonable and prudent standard, and how factual circumstances on the scene according to the officer's perceptions determine whether probable cause/reasonable suspicion exists.

Here, APPELLANT has more compelling facts with a weaker prima facie permissive inference in his favor as opposed to Ohio's rebuttable presumption more favorable to the state. We only assess a limited segment of Highway 6 in specific, particularized circumstances. There is nothing to suggest (other than the speed limit) at this point in time, in this snapshot of traffic, weather, etc., in this very limited linear distance with clear sailing ahead, a speed of 75 mph would not be reasonable and prudent.

The appellate court can take judicial notice of the weather in the area. *Watkins v. State*, 245 S.W.3<sup>rd</sup> 444 (Tex. Crim. App. 2008). The temperatures were in the mid 50's; it was partly cloudy; winds were relatively calm; 10 mile visibility; and dry pavement. See Appendix 3. The officer testified nothing was out of the ordinary. The officer, already knowing APPELLANT's 75 mph speed and having just traversed points southward on Highway 6, nevertheless placed himself 10 feet from APPELLANT's passing car. CR55 (lines 5-9); CR54 (p 8, lines 6-10). Taking into consideration the weather, that it was early afternoon in broad daylight, the layout of the divided four lane highway, other vehicles trailing behind with no evidence of them following too closely, the lack of any traffic ahead, the 75 mph speed, the officer's opinion that the driving was safe, there can be no

other conclusion except that APPELLANT's 75 mph speed was reasonable and prudent in that limited stretch of roadway and window of time.

The court must limit its analysis to the relevant time and space, and not speculate on what was "around the bend." We cannot assume that APPELLANT would continue forever at 75 mph, and not adjust his speed downward according to subsequent circumstances. Furthermore, as applied to the facts in this case, due process is lacking under *Willis*. There is no rational connection as between 70 mph being a reasonable and prudent speed and 75 mph being an unreasonable and imprudent speed in the circumstances that APPELLANT found himself in that Sunday afternoon.

### **CONCLUSION**

The statute encourages drivers to pay attention to clusters of traffic on the road, not clusters of instruments on the dashboard. This is sound public policy and the law. Unfortunately, the courts have reversed these priorities. If APPELLANT was instead one of the trailing vehicles in the pack, spaced between other southbound vehicles, he is required to "maintain an assured clear distance between the two vehicles so that, considering the speed of the vehicles, traffic, and the conditions of the highway, the operator can safely stop without colliding with the preceding vehicle or veering into another

vehicle, object or person on or near the highway.” *Tex. Trans. Code Ann.*, Section 545.062(a).

With cars at 75 mph trailing behind, for either the lead car or a car between two others to drop its speed from 75 mph to 70 mph would be dangerous. The aggregate speed of the group of vehicles motoring together with APPELLANT down the road has to be factored into what is reasonable and prudent in the circumstances. The speeding law does not criminalize all risk of harm, only unreasonable safety risks in light of the practical reality of highway driving.

We as drivers (and troopers as law enforcement) can only consider the immediately relevant driving conditions in a totality of the circumstances calculus. We are constantly taking in information through our senses, and making conscious and unconscious adjustments. As Mr. Miyagi instructed his student in *The Karate Kid*, “just remember, license never replace eye, ear and brain.” The same is true of the motorist on the highway. At many times, our speed will comport with the posted speed limit, assuming it is not set too high or too low for average traffic conditions at the particular spot on the highway. Other times, it won’t. While it is simple and easy to administer, a robotic adherence to the artificial permissible inferences meant for jury deliberations is not intended to be substituted for reality.

The decisions of the courts below justify an officer hiding just inside a 45 mph zone as it drops from 55 mph, and picking off drivers who are slowing down, but are not quite down to 45 mph when they pass the 45 mph sign, in spite of otherwise driving at a reasonably safe speed. Likewise, a soccer mom leaving a 20 mph school zone, in the last 100 feet with no children or driveways between her and the end of the school zone, who begins to accelerate with just 5 minutes left in the school zone period as she is about to enter a 35 mph zone, can be legally stopped for speeding.

The rulings in this case thus far sanction virtually unbridled law enforcement allowing an abusive and arbitrary “gotcha” mentality that can unconstitutionally infringe on the rights of privacy and serves no public safety purpose. Not only is it poor public policy, impractical and a physically dangerous precedent to restrict all drivers to the posted speed limit in all situations, it does not comport with Texas speeding statutes.

The decisions in this case thus far permit the police to stop your car, peer through its windows, ask who you are, where you are coming from and where you are going, check for outstanding warrants, make you hand over your license and insurance, observe how you move, talk and react, smell your breath and the odor coming out of your car, and generally investigate you, your passengers, and the contents of your car in plain view, all for

going only one mile over the speed limit, at any time, at any place, regardless of conditions. Period. No exceptions. The question of whether or not the motorist is driving at a reasonable and prudent speed has been rendered irrelevant, in spite of it being the essence of a speeding violation.

Texas speeding statutes create a flexible, practical, and dynamic sliding scale of reasonableness and prudence, depending on the traffic, pavement conditions and roadway design, weather, etc. It can even criminalize driving below the speed limit, if the speed is either too high or too low for the conditions.

In beautiful poetic language, the Missouri Supreme Court said this more than 100 years ago about evidentiary presumptions: they “may be looked on as bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts.” *Mockowith v. Kansas City, St. J. & C. B. R.R.*, 196 Mo. 550, 571 (1906).

The trained reasonable officer knows that the law only criminalizes those driving at unreasonable and imprudent speeds, irrespective of the radar readout or the speed limit.

## **PRAYER**

There being no probable cause of a speeding violation in this record, Appellant respectfully requests that the Court reverse the decision of the District Court and render judgment, and grant any other relief it deems just.

December 31, 2012

/s/ Robert W. Eutsler  
Robert W. Eutsler, Lawyer  
Texas Bar No. 06702400  
Eutsler Law Firm  
9219 Katy Freeway, Ste 220  
Houston, Texas 77024  
(713) 464-6461  
(713) 465-7223 (fax)  
Email: robeutsler@gmail.com  
Attorney for Appellant

## **CERTIFICATE OF SERVICE AND COMPLIANCE**

I certify that on December 31, 2012, I served a copy of this document by email to lead appellate counsel for the Texas Department of Public Safety, Mr. Kevin M. Givens, at kevin.givens@dps.texas.gov.

I further certify that my word processing program (Microsoft Word for Mac) calculated a total of 7,190 total words in the Argument portion of the brief.

/s/ Robert W. Eutsler  
Robert W. Eutsler

# APPENDIX I

## Dear Wikipedia Readers:

Thank you for supporting Wikipedia this year. We're thrilled to introduce you to the editors around the world who create Wikipedia and to invite everyone to join in editing. Please watch a message from our editors.

Meet some of the awesome people who make Wikipedia

This 4-minute video is hosted by YouTube under its Terms of Use and Privacy Policy. If you prefer, watch on Wikimedia Commons.



**Meet Our Editors**

# Moving violation

From Wikipedia, the free encyclopedia

A **moving violation** is any violation of the law committed by the driver of a vehicle while it is in motion. The term "motion" distinguishes it from other violations such as parking violations, equipment violations, or paperwork violations relating to insurance, registration, inspection, etc.

## Contents

- 1 Theory
- 2 Types
- 3 Costs
- 4 Examples of moving violations
- 5 References
- 6 See also

## Theory

In theory, moving violations are more likely to directly cause physical harm to persons and property. The other forms of violations include:

- **equipment violations** that cause theoretical risk (nonfunctional taillight)
- **paperwork violations** like failure to maintain insurance, expired registration.

## Types

While some violations, like parking violations, are civil matters involving a vehicle's owner, moving violations are charged against the actual driver.

Moving violations are usually classified as infractions or misdemeanors, but serious violations such as hit and run, driving under the influence, and road rage can be considered felonies.

The most commonly enforced moving violation, and the overwhelmingly most frequent reason for a vehicle pullover (regardless of type of citation issued, if any), are violations of the speed limit. Measurements of motorist speed throughout time have found many roadways where compliance with speed laws is very low, making many motorists liable to be pulled over at the discretion of law enforcement.

## Costs

Moving violations involve fines which must be paid as well and sometimes punitive *points* assessed to the license of the driver. As a driver accumulates points, he or she may be required to attend defensive driving lessons, re-take his or her driving test, pay additional taxes, or even surrender his or her license. Additionally, drivers with more points on their driving record often must pay more for car insurance than drivers with fewer.

Sometimes tickets are used in a speed trap as a form of fundraising. For example, a local government that is suffering a budget shortfall may ticket more aggressively within its jurisdiction to increase revenue.<sup>[1][2][3]</sup>

In the United States, citation fines can vary widely between jurisdictions for the same behaviour, usually between \$25 and \$1000. In countries such as Finland, however, they are specific proportions of the violator's income, and fines in excess of \$100,000 can be assessed to wealthy individuals. In Canada, each province is individual in how they treat similar behaviour and each violation usually includes a set fine and demerit points against the driver's license. For example, a speeding ticket in Ontario of 50+ km over is 6 demerit points against the driver's licence with the approximate fine calculated as (km over x 9.75) x 1.25, as well it carries a one week automatic licence suspension and car impoundment. In Manitoba speeding in excess of 49 km is 8 demerit points and a fine of 557 dollars.

## Examples of moving violations

- speeding, which can be exceeding a limit or simply driving an unsafe speed
- running a stop sign or red traffic light
- failure to yield to another vehicle with the right-of-way
- failure to signal for turns or lane changes
- failing to drive within a single lane
- crossing over a center divider, median or gore
- driving on the shoulder where it is considered illegal under certain conditions
- failure to use a seat belt
- window tints and obstructions
- failure to stop for a pedestrian in a crosswalk
- failure to stop for a school bus when children are boarding or exiting
- failure to secure a load to a truck or lorry
- driving in a car pool lane illegally
- operating a telecommunications device while driving (in countries such as Australia and certain U.S. jurisdictions such as California)
- driving a vehicle outside the conditions of one's license

More serious moving violations include:

- driving under the influence
- reckless driving
- street racing
- vehicular homicide

## References

- ↑ http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DN-sherifftraffic\_17met.ART0.North.Edition1.4ddc526.html
- ↑ http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/072308dnmetsheriffbudget.7ea14cec.html
- ↑ http://www.2theadvocate.com/news/26942504.html

## See also

- Traffic ticket
- Traffic court
- Traffic school

Retrieved from "http://en.wikipedia.org/w/index.php?title=Moving\_violation&oldid=507136608"

Categories: Crimes | Traffic law

## Navigation menu

---

- This page was last modified on 13 August 2012 at 02:23.
- Text is available under the Creative Commons Attribution-ShareAlike License; additional terms may apply. See Terms of Use for details.  
Wikipedia® is a registered trademark of the Wikimedia Foundation, Inc., a non-profit organization.

## APPENDIX II

# History for College Station, TX

Sunday, February 19, 2012

Sunday, February 19, 2012

« Previous Day

February ▾

19 ▾

2012 ▾

View

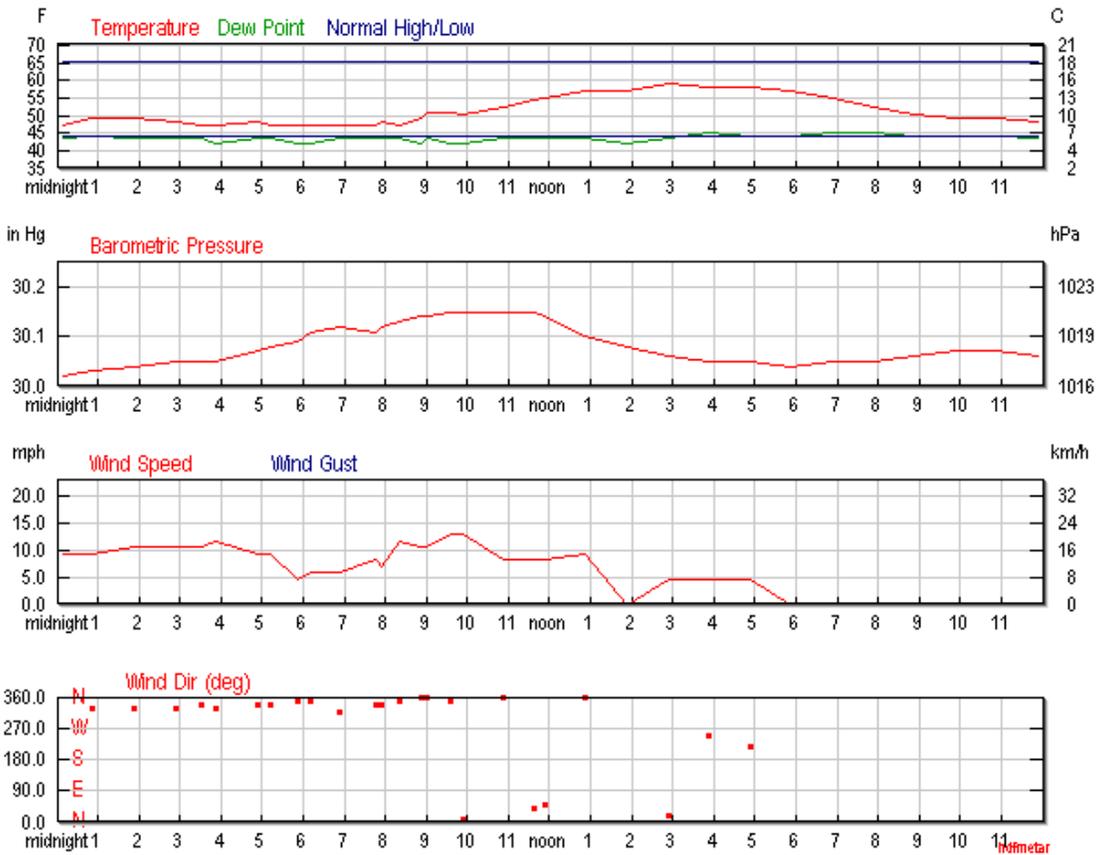
Next Day »

**Daily** Weekly Monthly Custom

	Actual	Average	Record
<b>Temperature</b>			
Mean Temperature	54 °F	55 °F	
Max Temperature	61 °F	66 °F	89 °F (1986)
Min Temperature	47 °F	45 °F	22 °F (1978)
<b>Degree Days</b>			
Heating Degree Days	11	10	
Month to date heating degree days	199	225	
Since 1 July heating degree days	1067	1303	
Cooling Degree Days	0	1	
Month to date cooling degree days	8	16	
Year to date cooling degree days	19	27	
Growing Degree Days	4 (Base 50)		
<b>Moisture</b>			
Dew Point	44 °F		
Average Humidity	71		
Maximum Humidity	86		
Minimum Humidity	55		
<b>Precipitation</b>			
Precipitation	0.00 in	0.11 in	2.33 in (1911)
Month to date precipitation	9.30	1.99	
Year to date precipitation	12.08	5.23	
<b>Sea Level Pressure</b>			
Sea Level Pressure	30.09 in		
<b>Wind</b>			
Wind Speed	5 mph (NNW)		
Max Wind Speed	16 mph		
Max Gust Speed	21 mph		
Visibility	10 miles		
<b>Events</b>			

T = Trace of Precipitation, MM = Missing Value

Source: NWS Daily Summary



[Certify This Report](#)



### Hourly Observations

Time (CST)	Temp.	Dew Point	Humidity	Pressure	Visibility	Wind Dir	Wind Speed	Gust Speed	Precip	Events	Conditions
12:08 AM	48.2 °F	44.6 °F	87%	30.02 in	10.0 mi	NNW	9.2 mph	-	N/A		Overcast
12:53 AM	50.0 °F	45.0 °F	83%	30.03 in	10.0 mi	NNW	9.2 mph	-	N/A		Overcast
1:53 AM	50.0 °F	44.1 °F	80%	30.04 in	10.0 mi	NNW	10.4 mph	-	N/A		Overcast
2:53 AM	48.9 °F	44.1 °F	83%	30.05 in	10.0 mi	NNW	10.4 mph	-	N/A		Overcast
3:31 AM	48.2 °F	44.6 °F	87%	30.05 in	10.0 mi	NNW	10.4 mph	-	N/A		Overcast
3:53 AM	48.0 °F	43.0 °F	83%	30.05 in	10.0 mi	NNW	11.5 mph	-	N/A		Overcast
4:53 AM	48.9 °F	44.1 °F	83%	30.07 in	10.0 mi	NNW	9.2 mph	-	N/A		Overcast
5:11 AM	48.2 °F	44.6 °F	87%	30.08 in	10.0 mi	NNW	9.2 mph	-	N/A		Overcast
5:53 AM	48.0 °F	43.0 °F	83%	30.09 in	10.0 mi	North	4.6 mph	-	N/A		Mostly

											Cloudy
6:11 AM	48.2 °F	42.8 °F	82%	30.11 in	10.0 mi	North	5.8 mph	-	N/A		Overcast
6:53 AM	48.0 °F	44.1 °F	86%	30.12 in	10.0 mi	NW	5.8 mph	-	N/A		Overcast
7:45 AM	48.2 °F	44.6 °F	87%	30.11 in	10.0 mi	NNW	8.1 mph	-	N/A		Scattered Clouds
7:53 AM	48.9 °F	44.1 °F	83%	30.12 in	10.0 mi	NNW	6.9 mph	-	N/A		Partly Cloudy
8:21 AM	48.2 °F	44.6 °F	87%	30.13 in	10.0 mi	North	11.5 mph	-	N/A		Mostly Cloudy
8:53 AM	50.0 °F	43.0 °F	77%	30.14 in	10.0 mi	North	10.4 mph	-	N/A		Mostly Cloudy
9:00 AM	51.8 °F	44.6 °F	76%	30.14 in	10.0 mi	North	10.4 mph	-	N/A		Scattered Clouds
9:36 AM	51.8 °F	42.8 °F	71%	30.15 in	10.0 mi	North	12.7 mph	-	N/A		Mostly Cloudy
9:53 AM	51.1 °F	43.0 °F	74%	30.15 in	10.0 mi	North	12.7 mph	-	N/A		Mostly Cloudy
10:53 AM	53.1 °F	44.1 °F	71%	30.15 in	10.0 mi	North	8.1 mph	-	N/A		Overcast
11:38 AM	55.4 °F	44.6 °F	67%	30.15 in	10.0 mi	NE	8.1 mph	-	N/A		Scattered Clouds
11:53 AM	55.9 °F	44.1 °F	64%	30.14 in	10.0 mi	NE	8.1 mph	-	N/A		Partly Cloudy
12:53 PM	57.9 °F	44.1 °F	60%	30.10 in	10.0 mi	North	9.2 mph	-	N/A		Partly Cloudy
1:53 PM	57.9 °F	43.0 °F	58%	30.08 in	10.0 mi	Calm	Calm	-	N/A		Clear
2:53 PM	60.1 °F	44.1 °F	55%	30.06 in	10.0 mi	NNE	4.6 mph	-	N/A		Mostly Cloudy
3:53 PM	59.0 °F	46.0 °F	62%	30.05 in	10.0 mi	WSW	4.6 mph	-	N/A		Partly Cloudy
4:53 PM	59.0 °F	45.0 °F	60%	30.05 in	10.0 mi	SW	4.6 mph	-	N/A		Clear
5:53 PM	57.9 °F	45.0 °F	62%	30.04 in	10.0 mi	Calm	Calm	-	N/A		Clear
6:53 PM	55.9 °F	46.0 °F	69%	30.05 in	10.0 mi	Calm	Calm	-	N/A		Clear
7:53 PM	53.1 °F	46.0 °F	77%	30.05 in	10.0 mi	Calm	Calm	-	N/A		Clear
8:53 PM	51.1 °F	45.0 °F	80%	30.06 in	10.0 mi	Calm	Calm	-	N/A		Clear
9:53 PM	50.0 °F	45.0 °F	83%	30.07 in	10.0 mi	Calm	Calm	-	N/A		Clear
10:53 PM	50.0 °F	45.0 °F	83%	30.07 in	10.0 mi	Calm	Calm	-	N/A		Clear
11:53 PM	48.9 °F	44.1 °F	83%	30.06 in	10.0 mi	Calm	Calm	-	N/A		Clear

[Show full METARS](#) | [METAR FAQ](#) | [Comma Delimited File](#)



OMNI-HEAT  
KEEP YOUR WARMTH, NOT YOUR SWEAT.

LEARN MORE

AdChoices

Columbia

The advertisement features a bright yellow Columbia Omni-Heat jacket with a silver reflective lining, set against a background of snow-capped mountains under a clear blue sky. The text 'OMNI-HEAT' is prominently displayed in a bold, white, sans-serif font, with the tagline 'KEEP YOUR WARMTH, NOT YOUR SWEAT.' underneath it. A blue button with the text 'LEARN MORE' is positioned on the left side. In the top right corner, there is a small 'AdChoices' icon. The Columbia logo is located in the bottom right corner of the banner.

**History for Brenham, TX**

Sunday, February 19, 2012

Sunday, February 19, 2012

[« Previous Day](#)

February

19

2012

View

[Next Day »](#)



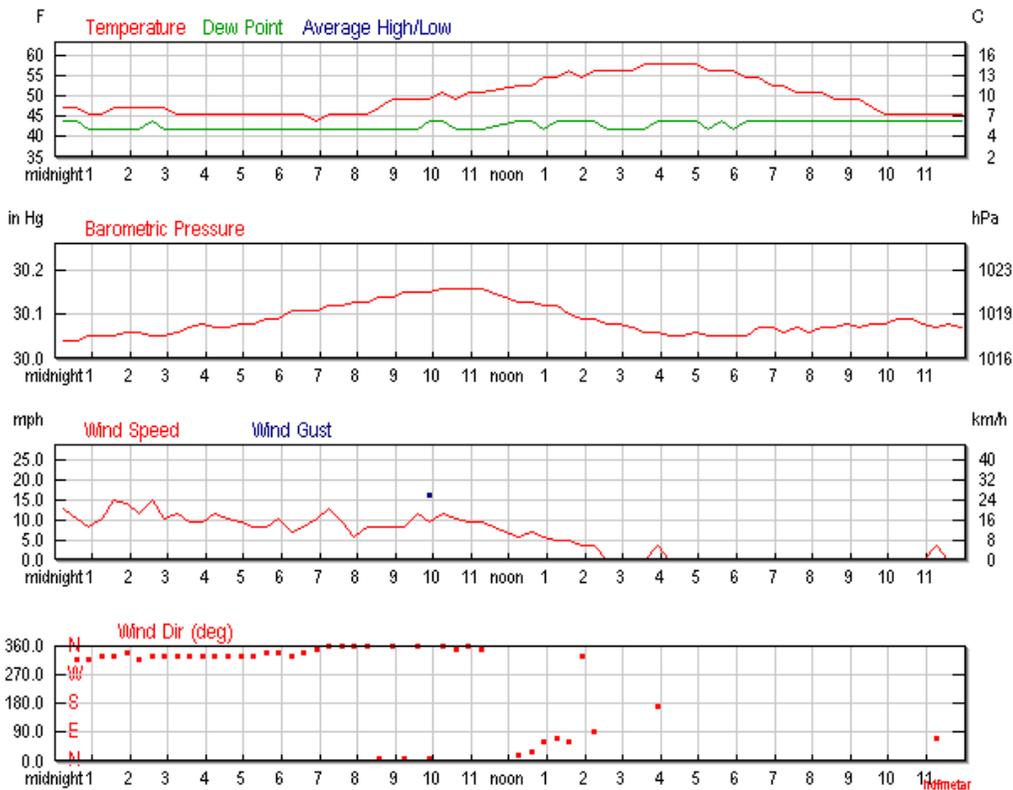


	Actual	Average (KCLL)	Record (KCLL)
Temperature			
Mean Temperature	52 °F	55 °F	
Max Temperature	59 °F	66 °F	89 °F (1986)
Min Temperature	44 °F	45 °F	22 °F (1978)
Degree Days			
Heating Degree Days	14	10	
Month to date heating degree days		225	
Since 1 July heating degree days		1303	
Cooling Degree Days	0	1	
Month to date cooling degree days		16	
Year to date cooling degree days		27	
Growing Degree Days	2 (Base 50)		
Moisture			
Dew Point	44 °F		
Average Humidity	76		
Maximum Humidity	93		
Minimum Humidity	55		
Precipitation			
Precipitation	0.00 in	0.11 in	2.33 in (1911)
Month to date precipitation		1.99	
Year to date precipitation		5.23	
Sea Level Pressure			
Sea Level Pressure	30.09 in		
Wind			
Wind Speed	8 mph (North)		
Max Wind Speed	15 mph		
Max Gust Speed	18 mph		
Visibility	10 miles		
Events			

[Click here for data from the nearest station with official NWS data \(KCLL\).](#)

**T** = Trace of Precipitation, **MM** = Missing Value

**Source:** NWS Daily Summary



[Certify This Report](#)



**Joss & Main**  
Free Membership

**BRIGHT.  
BOLD.  
BEAUTIFUL.**



Designer Bedding  
Up to 70% off

[SHOP NOW](#)

Hourly Observations

Time (CST)	Temp.	Windchill	Dew Point	Humidity	Pressure	Visibility	Wind Dir	Wind Speed	Gust Speed	Precip	Events	Conditions
12:15 AM	48.2 °F	-	44.6 °F	87%	30.04 in	10.0 mi	NW	12.7 mph	-	N/A		Overcast
12:35 AM	48.2 °F	-	44.6 °F	87%	30.04 in	10.0 mi	NW	10.4 mph	-	N/A		Overcast
12:55 AM	46.4 °F	42.4 °F	42.8 °F	87%	30.05 in	10.0 mi	NW	8.1 mph	-	N/A		Scattered Clouds
1:15 AM	46.4 °F	41.5 °F	42.8 °F	87%	30.05 in	10.0 mi	NNW	10.4 mph	-	N/A		Scattered Clouds
1:35 AM	48.2 °F	-	42.8 °F	82%	30.05 in	10.0 mi	NNW	15.0 mph	-	N/A		Overcast
1:55 AM	48.2 °F	-	42.8 °F	82%	30.06 in	10.0 mi	NNW	13.8 mph	-	N/A		Overcast
2:15 AM	48.2 °F	-	42.8 °F	82%	30.06 in	10.0 mi	NW	11.5 mph	18.4 mph	N/A		Overcast
2:35 AM	48.2 °F	-	44.6 °F	87%	30.05 in	10.0 mi	NNW	15.0 mph	-	N/A		Overcast
2:55 AM	48.2 °F	-	42.8 °F	82%	30.05 in	10.0 mi	NNW	10.4 mph	17.3 mph	N/A		Overcast
3:15 AM	46.4 °F	41.1 °F	42.8 °F	87%	30.06 in	10.0 mi	NNW	11.5 mph	-	N/A		Overcast
3:35 AM	46.4 °F	41.9 °F	42.8 °F	87%	30.07 in	10.0 mi	NNW	9.2 mph	-	N/A		Overcast

3:55 AM	46.4 °F	41.9 °F	42.8 °F	87%	30.08 in	10.0 mi	NNW	9.2 mph	-	N/A		Mostly Cloudy
4:15 AM	46.4 °F	41.1 °F	42.8 °F	87%	30.07 in	10.0 mi	NNW	11.5 mph	-	N/A		Mostly Cloudy
4:35 AM	46.4 °F	41.5 °F	42.8 °F	87%	30.07 in	10.0 mi	NNW	10.4 mph	-	N/A		Mostly Cloudy
4:55 AM	46.4 °F	41.9 °F	42.8 °F	87%	30.08 in	10.0 mi	NNW	9.2 mph	-	N/A		Mostly Cloudy
5:15 AM	46.4 °F	42.4 °F	42.8 °F	87%	30.08 in	10.0 mi	NNW	8.1 mph	-	N/A		Mostly Cloudy
5:35 AM	46.4 °F	42.4 °F	42.8 °F	87%	30.09 in	10.0 mi	NNW	8.1 mph	-	N/A		Scattered Clouds
5:55 AM	46.4 °F	41.5 °F	42.8 °F	87%	30.09 in	10.0 mi	NNW	10.4 mph	-	N/A		Clear
6:15 AM	46.4 °F	42.9 °F	42.8 °F	87%	30.11 in	10.0 mi	NNW	6.9 mph	-	N/A		Clear
6:35 AM	46.4 °F	42.4 °F	42.8 °F	87%	30.11 in	10.0 mi	NNW	8.1 mph	-	N/A		Clear
6:55 AM	44.6 °F	39.2 °F	42.8 °F	93%	30.11 in	10.0 mi	North	10.4 mph	-	N/A		Scattered Clouds
7:15 AM	46.4 °F	40.7 °F	42.8 °F	87%	30.12 in	10.0 mi	North	12.7 mph	18.4 mph	N/A		Overcast
7:35 AM	46.4 °F	41.9 °F	42.8 °F	87%	30.12 in	10.0 mi	North	9.2 mph	-	N/A		Mostly Cloudy
7:55 AM	46.4 °F	43.5 °F	42.8 °F	87%	30.13 in	10.0 mi	North	5.8 mph	-	N/A		Scattered Clouds
8:15 AM	46.4 °F	42.4 °F	42.8 °F	87%	30.13 in	10.0 mi	North	8.1 mph	-	N/A		Clear
8:35 AM	48.2 °F	-	42.8 °F	82%	30.14 in	10.0 mi	North	8.1 mph	-	N/A		Clear
8:55 AM	50.0 °F	-	42.8 °F	76%	30.14 in	10.0 mi	North	8.1 mph	17.3 mph	N/A		Clear
9:15 AM	50.0 °F	-	42.8 °F	76%	30.15 in	10.0 mi	North	8.1 mph	-	N/A		Mostly Cloudy
9:35 AM	50.0 °F	-	42.8 °F	76%	30.15 in	10.0 mi	North	11.5 mph	16.1 mph	N/A		Overcast
9:55 AM	50.0 °F	-	44.6 °F	82%	30.15 in	10.0 mi	North	9.2 mph	16.1 mph	N/A		Overcast
10:15 AM	51.8 °F	-	44.6 °F	76%	30.16 in	10.0 mi	North	11.5 mph	-	N/A		Mostly Cloudy
10:35 AM	50.0 °F	-	42.8 °F	76%	30.16 in	10.0 mi	North	10.4 mph	-	N/A		Mostly Cloudy
10:55 AM	51.8 °F	-	42.8 °F	71%	30.16 in	10.0 mi	North	9.2 mph	-	N/A		Mostly Cloudy
11:15 AM	51.8 °F	-	42.8 °F	71%	30.16 in	10.0 mi	North	9.2 mph	-	N/A		Mostly Cloudy
12:15 PM	53.6 °F	-	44.6 °F	72%	30.13 in	10.0 mi	NNE	5.8 mph	-	N/A		Scattered Clouds
12:35 PM	53.6 °F	-	44.6 °F	72%	30.13 in	10.0 mi	NNE	6.9 mph	-	N/A		Scattered Clouds
12:55 PM	55.4 °F	-	42.8 °F	63%	30.12 in	10.0 mi	ENE	5.8 mph	-	N/A		Scattered Clouds
1:15 PM	55.4 °F	-	44.6 °F	67%	30.12 in	10.0 mi	ENE	4.6 mph	-	N/A		Scattered Clouds
1:35 PM	57.2 °F	-	44.6 °F	63%	30.10 in	10.0 mi	ENE	4.6 mph	-	N/A		Scattered Clouds
1:55 PM	55.4 °F	-	44.6 °F	67%	30.09 in	10.0 mi	NNW	3.5 mph	-	N/A		Scattered Clouds

2:15 PM	57.2 °F	-	44.6 °F	63%	30.09 in	10.0 mi	East	3.5 mph	-	N/A	Scattered Clouds
2:35 PM	57.2 °F	-	42.8 °F	59%	30.08 in	10.0 mi	Calm	Calm	-	N/A	Mostly Cloudy
2:55 PM	57.2 °F	-	42.8 °F	59%	30.08 in	10.0 mi	Calm	Calm	-	N/A	Scattered Clouds
3:15 PM	57.2 °F	-	42.8 °F	59%	30.07 in	10.0 mi	Calm	Calm	-	N/A	Scattered Clouds
3:35 PM	59.0 °F	-	42.8 °F	55%	30.06 in	10.0 mi	Calm	Calm	-	N/A	Clear
3:55 PM	59.0 °F	-	44.6 °F	59%	30.06 in	10.0 mi	South	3.5 mph	-	N/A	Clear
4:15 PM	59.0 °F	-	44.6 °F	59%	30.05 in	10.0 mi	Calm	Calm	-	N/A	Clear
4:35 PM	59.0 °F	-	44.6 °F	59%	30.05 in	10.0 mi	Calm	Calm	-	N/A	Clear
4:55 PM	59.0 °F	-	44.6 °F	59%	30.06 in	10.0 mi	Calm	Calm	-	N/A	Clear
5:15 PM	57.2 °F	-	42.8 °F	59%	30.05 in	10.0 mi	Calm	Calm	-	N/A	Clear
5:35 PM	57.2 °F	-	44.6 °F	63%	30.05 in	10.0 mi	Calm	Calm	-	N/A	Clear
5:55 PM	57.2 °F	-	42.8 °F	59%	30.05 in	10.0 mi	Calm	Calm	-	N/A	Clear
6:15 PM	55.4 °F	-	44.6 °F	67%	30.05 in	10.0 mi	Calm	Calm	-	N/A	Clear
6:35 PM	55.4 °F	-	44.6 °F	67%	30.07 in	10.0 mi	Calm	Calm	-	N/A	Clear
6:55 PM	53.6 °F	-	44.6 °F	72%	30.07 in	10.0 mi	Calm	Calm	-	N/A	Clear
7:15 PM	53.6 °F	-	44.6 °F	72%	30.06 in	10.0 mi	Calm	Calm	-	N/A	Clear
7:35 PM	51.8 °F	-	44.6 °F	76%	30.07 in	10.0 mi	Calm	Calm	-	N/A	Clear
7:55 PM	51.8 °F	-	44.6 °F	76%	30.06 in	10.0 mi	Calm	Calm	-	N/A	Clear
8:15 PM	51.8 °F	-	44.6 °F	76%	30.07 in	10.0 mi	Calm	Calm	-	N/A	Clear
8:35 PM	50.0 °F	-	44.6 °F	82%	30.07 in	10.0 mi	Calm	Calm	-	N/A	Clear
8:55 PM	50.0 °F	-	44.6 °F	82%	30.08 in	10.0 mi	Calm	Calm	-	N/A	Clear
9:15 PM	50.0 °F	-	44.6 °F	82%	30.07 in	10.0 mi	Calm	Calm	-	N/A	Clear
9:35 PM	48.2 °F	-	44.6 °F	87%	30.08 in	10.0 mi	Calm	Calm	-	N/A	Clear
9:55 PM	46.4 °F	-	44.6 °F	93%	30.08 in	10.0 mi	Calm	Calm	-	N/A	Clear
10:15 PM	46.4 °F	-	44.6 °F	93%	30.09 in	10.0 mi	Calm	Calm	-	N/A	Clear
10:35 PM	46.4 °F	-	44.6 °F	93%	30.09 in	10.0 mi	Calm	Calm	-	N/A	Clear
10:55 PM	46.4 °F	-	44.6 °F	93%	30.08 in	10.0 mi	Calm	Calm	-	N/A	Clear
11:15 PM	46.4 °F	45.2 °F	44.6 °F	93%	30.07 in	10.0 mi	ENE	3.5 mph	-	N/A	Clear
11:35 PM	46.4 °F	-	44.6 °F	93%	30.08 in	10.0 mi	Calm	Calm	-	N/A	Clear
11:55 PM	46.4 °F	-	44.6 °F	93%	30.07 in	10.0 mi	Calm	Calm	-	N/A	Clear

[Show full METARS](#) | [METAR FAQ](#) | [Comma Delimited File](#)





## APPENDIX III

# Manual Notice: 2012-1

**From:** Carol T. Rawson, P.E

**Manual:** *Procedures for Establishing Speed Zones*

**Effective Date:** April 01, 2012

## Purpose

The purpose of this manual notice is to advise users of *Procedures for Establishing Speed Zones* that the manual has been revised to include new and updated information on changes in speed limit laws and procedures for establishing various types of speed zones.

## Contents

The contents of *Procedures for Establishing Speed Zones* have changed as follows:

Updated information throughout the manual to reflect changes in speed limit law as a result of legislation passed in the 82<sup>nd</sup> Legislative Session.

Updated information throughout the manual to remove references to different day and night speed limits and different speed limits for trucks, as these were abolished during the 82<sup>nd</sup> Legislative Session.

Removed all references to the Trans Texas Corridor as a result of legislation to repeal Section 545.3531 of the Transportation Code.

Added a subsection to Chapter 1, Section 3, on the authority of municipalities and counties to establish accident reconstruction speed limits under Section 545.3561 of the Transportation Code.

Added a paragraph to Chapter 3, Section 4, describing provisional traffic and engineering investigation requirements for raising a speed limit from 70 to 75 mph.

## Review

The Traffic Operations Division worked with the districts in revising the material that went into this revision. The TxDOT Office of General Counsel and Audit Office reviewed the draft of this manual and all comments were addressed in the revision.

## Contact

Address questions concerning content of the revised manual to:

Darren McDaniel, P.E.

Phone: 512-416-3331

E-mail: [Darren.McDaniel@txdot.gov](mailto:Darren.McDaniel@txdot.gov)

Fax: 512-416-3299

## **Archives**

Past manual notices are available in a [PDF archive](#).

# Chapter 1: Introduction

## Section 1: Overview

### Purpose of Manual

The purpose of this manual is to provide the information and procedures necessary for establishing speed zones and advisory speeds on the state highway system.

### Users of Manual

This manual is intended for use by entities with authority to set speed zones. It is only required to be used by the Texas Department of Transportation (TxDOT) and cities when establishing speed zones on the state highway system.

### Responsibilities

*The Traffic Operations Division (TRF) will:*

- prepare procedures for establishing speed zones and advisory speeds
- assist districts as necessary with speed zone studies
- review and approve district recommendations for speed zoning and prepare minute orders for Transportation Commission action.

*TxDOT districts will:*

- conduct engineering and traffic studies associated with the establishment of speed zones and advisory speeds
- submit recommendations for speed zoning, along with results of studies to the Traffic Operations Division (TRF)
- request cities to pass ordinances establishing speed zones when necessary
- erect and maintain necessary speed limit and advisory speed signs and notify local enforcement authorities upon installation of the signs.

*Cities will:*

- request that the district conduct engineering and traffic studies associated with the establishment of speed zones on the state highway system, or conduct the studies themselves
- upon approval by TRF, prepare and pass city ordinances establishing speed zones.

*A commissioners court of a county may by resolution request, through the local TxDOT district office, that the Texas Transportation Commission determine and declare a reasonable and safe **prima facie** speed limit lower than that established by Section 545.352 of the Transportation Code on any part of a farm-to-market*

or ranch-to-market road without improved shoulders located in that county.

## Section 2: Background

### Basic Speed Law

Transportation Code, Chapter 545, Subchapter H, “Speed Restrictions,” contains the following sections governing speeds in the state:

- Section 545.351, Maximum Speed Requirements
- Section 545.352, Prima Facie Speed Limits (see also Transportation Code, Section 623.101, Speed Limit: for Manufactured House or House Trailer Being Towed)
- Section 545.353, Authority of Texas Transportation Commission to Alter Speed Limits
- Section 545.3531, (repealed by L 2011, Chap 259(14). eff 6/17/11)
- Section 545.3535, Authority of Texas Transportation Commission to Alter Speed Limits on Certain Roads
- Section 545.354, Authority of Regional Tollway Authorities to Alter Speed Limits on Turnpike Projects
- Section 545.355, Authority of County Commissioners Court to Alter Speed Limits (see also Transportation Code, Section 251.154, Maximum Reasonable and Prudent Speeds on County Roads)
- Section 545.356, Authority of Municipality to Alter Speed Limits
- Section 545.357, Public Hearing to Consider Speed Limits where Certain Schools Are Located
- Section 545.358, Authority of Commanding Officer of United States Military Reservation to Alter Speed Limits
- Section 545.359, Conflicting Designated Speed Limits
- Section 545.360, Duty of Texas Transportation Commission and State Board of Education to Provide Information and Assistance
- Section 545.361, Special Speed Limitations
- Section 545.362, Temporary Speed Limits
- Section 545.3625, Confidentiality of Violation Information: Fuel Conservation Speed Limit
- Section 545.363, Minimum Speed Regulations
- Section 545.364, (repealed by L. 1999, Chap. 1346(3), eff 9/1/99)
- Section 545.365, Speed Limit Exception for Emergencies; Municipal Regulation.

Collectively, these sections are referred to as the “basic speed law.” The basic speed law is founded on the belief that the majority of motorists are willing to modify their driving behavior properly, as long as they are aware of the conditions around them. Speed zone regulations are based on Section 545.351, which states in part: “An operator may not drive at a speed greater than is reasonable or prudent under the circumstances then existing.”

### Prima Facie Concept

In Texas, all speed limits are considered **prima facie** limits. **Prima facie** limits are those limits that, “on the face of it,” are reasonable and prudent under normal conditions. To exceed a **prima facie** speed limit does not automatically constitute an infraction of the law, as reasonable and prudent driving behavior is, at times, possible at speeds in excess of the posted limit. However, the burden of proof of reasonable and prudent conduct under the existing conditions rests with the driver. To afford a driver this opportunity to exceed a **prima facie** speed limit recognizes the fact that any posted speed limit cannot adequately reflect the many different road conditions confronting the driver on the same highways at different times.

## Authority to Set Speed Zones

The provisions of the Transportation Code, Chapter 545, Subchapter H, Section 545.353, give the Texas Transportation Commission the authority to alter maximum speed limits on highway routes both within and outside of cities, provided the *Procedures for Establishing Speed Zones* are followed and the Commission determines that the speed being established on a part of a highway system is a safe and reasonable speed for that part of the highway.

## Higher Maximum Speed Limit

The Commission may establish a speed limit of:

- 75 miles per hour on any portion of the state highway system.
- 80 miles per hour on parts of Interstate Highway 10 and Interstate Highway 20 in Crockett, Culberson, Hudspeth, Jeff Davis, Kerr, Kimble, Pecos, Reeves, Sutton, and Ward counties, or
- Up to 85 miles per hour on a highway designed to accommodate travel at the speed being established.

## Local Authority and TxDOT

The altering of the general statewide maximum speed limits to fit existing traffic and physical conditions of the highway constitutes the basic principle of speed zoning.

Transportation Code, Chapter 545, Subchapter H, Sections 545.355 and 545.356, give counties and cities the same authority within their respective jurisdictions. Counties with a population of more than 2.8 million and cities have the authority to establish a *prima facie* maximum speed limit of 75 miles per hour. The law also provides that any speed zone on highway routes in cities established by Transportation Commission minute order will supersede any conflicting zone set by city ordinance.

Except in very unusual circumstances, the zoning on state highway routes within cities should only be set by city ordinance based upon the recommendations of TxDOT. The usual practice, even for speed zones established by city ordinance, is for TxDOT to make the necessary speed studies and recommend the most appropriate zoning to the city. Cities that have a traffic engineering staff may also make speed studies on state maintained highways and recommend proper zoning. The procedure is permissible, as long as TxDOT is afforded an opportunity to review and approve the recommended city zoning.

County commissioner courts and governing bodies of incorporated cities, towns, and villages may alter maximum **prima facie** speed limits on roadways under their jurisdiction in accordance with the provision of

the Transportation Code, Chapter 545, Subchapter H, Sections 545.355 and 545.356 respectively. However, alteration of maximum **prima facie** speed limits on any designated or marked roadway of the state highway system (even within the corporate limits of a city or town) typically requires an engineering and traffic investigation (as described in Chapter 3, Speed Zone Studies, of this manual) and the approval of TxDOT.

A county that increases the **prima facie** speed limit on a county road or highway is also required to conduct an engineering and traffic investigation. However, for a county road or highway outside the limits of the right-of-way of an officially designated or marked highway or road of the state highway system, the county commissioners court may declare a lower speed limit of not less than 30 miles per hour, if the commissioners court determines that the **prima facie** speed limit on the road or highway is unreasonable or unsafe.

County authority does not extend to any segment of the state highway system; however, the commissioners court of a county, by resolution, may request the Texas Transportation Commission to determine and declare a reasonable and safe **prima facie** speed limit that is lower than a speed limit established by Section 545.352 of the Transportation Code on any part of a farm-to-market or ranch-to-market road without improved shoulders located in that county.

The Transportation Commission shall give consideration to local public opinion and may determine and declare a lower speed limit on any part of the road without an engineering and traffic investigation, but the Transportation Commission must use sound and generally accepted traffic engineering practices in determining and declaring the lower speed limit. Sound and generally accepted engineering practices for these FM and RM roadways without improved shoulders are described in Chapter 3, Section 4, Speed Zone Design of this manual.

County Authority is different from the authority of cities, who may exercise concurrent authority subject only to commission override. In exercising their authority, cities must base any speed zones on engineering and traffic investigations, unless the roadway meets all of the following criteria:

- It is not an officially designated or marked highway or road of the state highway system.
- It is a two-lane, undivided highway or part of a highway.

If the roadway meets the above criteria, the city may declare a lower speed limit of not less than 25 miles per hour if the governing body determines that the **prima facie** speed limit on the highway is unreasonable or unsafe.

The authority of regional tollway authorities, regional mobility authorities, and the commanding officer of a United States military reservation to alter speed limits is addressed in Transportation Code, Sections 370.033, 545.354, and 545.358. These decision-making authorities are required to follow the speed zone procedures as adopted by TxDOT when altering, on the basis of an engineering and traffic study, speed limits on off-system turnpikes or on-system highways within the confines of a military reservation.

## Value of Speed Zoning

Although comparative “before-and-after” studies indicate that speed limit signs actually have very little influence on the driver’s choice of speed, speed zoning is necessary and does serve a worthwhile purpose. Realistic speed zoning will serve to protect the public and to regulate the unreasonable behavior of an

individual. Having recognized that normally careful and competent actions of a reasonable person should be considered legal, the Texas Legislature has passed legislation concerning speed zoning in order to assure this protection. If a speed zone is determined by the actions of the majority of drivers on a highway, then it is hoped that speed zoning will facilitate the orderly movement of traffic by increasing driver awareness of a reasonable and prudent speed.

Properly applied speed zoning can:

- help drivers adjust their speed to the conditions
- make enforcement easier by furnishing police officers with a reasonable indication of what is excessive speed
- result in more motorists driving within the same speed range at each of the locations along the highway
- reduce the frequency and severity of crashes when accompanied by enforcement.

The Michigan Department of Transportation made a study entitled “Comparison of Speed Zoning Procedures and Their Effectiveness” dated September 1992. The following are some of the study’s conclusions:

- Posting speed limits within 5 miles per hour of the 85th percentile speed has a beneficial effect, although small, on reducing total crashes but has a major beneficial effect on providing improved driver compliance. (See Chapter 3, Speed Zone Studies, for a discussion on the 85th percentile speed.)
- Posting speed limits more than 5 miles per hour below the 85th percentile speed does not reduce crashes and has an adverse effect on driver compliance.
- Speed zoning should not be used as the only corrective measure at high crash locations in lieu of other safety improvements.
- The use of radar to collect speed data appears to underestimate the 85th percentile speed by approximately 3 miles per hour.

## Guidelines for Selecting Speed Limits

All authorized entities using these procedures should observe the following guidelines when selecting speed limits:

- Speed limits on all roadways should be set based on spot speed studies and the 85th percentile operating speed (see Chapter 3, Speed Zone Studies, of this manual). Legal minimum and maximum speeds should establish the boundaries of the speed limits. If an existing roadway section’s posted speed limit is to be raised, the roadway’s roadside features should be examined to determine if modifications may be necessary to maintain roadside safety.
- It is appropriate for posted speed limits to be based on the 85th percentile speed, even for those sections of roadway that have an inferred design speed lower than the 85th percentile speed. Posting a roadway’s speed limit based on its 85th percentile speed is considered good and typical engineering practice. This practice remains valid, even where the inferred design speed is lower than the resulting posted speed limit. In such situations, the posted speed limit would not be considered excessive or unsafe.

- Arbitrarily setting lower speed limits at point locations due to a perceived shorter than desirable stopping sight distance is neither effective nor good engineering practice.
- If a section of roadway has (or is expected to have) a posted speed in excess of the roadway's inferred design speed and a safety concern exists at the location, then appropriate warning or informational signs should be installed to warn or inform drivers of the condition. Slightly shorter than desirable stopping sight distances do not present an unsafe operating condition, because of the conservative assumptions made in establishing desirable stopping sight distances. It is important to remember that any sign is a roadside object and that it should be installed only when its need is clearly demonstrated.
- New or reconstructed roadways (and roadway sections) should be designed to accommodate operating speeds consistent with the roadway's highest anticipated posted speed limit based on the roadway's initial or ultimate function.

## APPENDIX IV



using a K-4 radar unit and he testified he checked its calibration and it was working properly. The officer further testified the radar reading was consistent with his visual observation of the defendant's speed. It had been snowing and the road was slippery, with light traffic. Upon the stop, the defendant immediately exited his vehicle and came back toward the officer, who was 10 feet behind defendant. Subsequent events lead to the defendant's arrest for OVI. The defendant's brief filed after the motion hearing in support of his motion argues the issue as to whether the original traffic stop was permitted. The defendant was charged with ORC 4511.21 ( C ). The defendant argues he was not speeding because he was operating his vehicle at a speed that was reasonable and proper at the time. Absent an offense, there is no basis for a stop. The defendant argues Officer Vitte chose to cite the defendant under ORC 4511.21 ( C ) - which states that it is prima facie unlawful for any person to exceed any of the speed limitations in divisions B (1) a, (2), (3), (4), (6), and (7) (in this case as to B (2)) of ORC 4511.21.

The Court finds from the officer's testimony that the defendant was first visually observed by the officer in the early morning hours of January 30, 2008 on East State Street in Fremont. East State Street is a four lane road with two westbound lanes and two eastbound lanes. The officer was in uniform and in a marked cruiser. The defendant was in a 25

m.p.h. zone. The traffic was light at the time. The defendant was about 400 feet from the officer when Trooper Vitte first observed the defendant and then checked his speed by radar at 32 and 33 in a 25 m.p.h. zone. The defendant was approaching a 35 m.p.h. zone. The trooper testified his K-4 radar was checked for calibration and working properly and the speed reading was consistent with his visual observation and the audio tone emitting from the radar unit. The officer testified it was slippery and had been snowing. The officer admitted on cross-examination per defendant's Exhibit (A), the officer's statement of facts, in pertinent part that there were no vehicles behind the defendant and the officer was able to turn around because there were no other vehicles near him. The statement of facts refers to the defendant spinning his wheels on the slippery surface after the light turned green as he approached the defendant at the next intersection after he followed the defendant. However, he testified the only reason for the stop was the defendant's speed. There was substantial testimony as to the defendant's subsequent actions in leaving his vehicle and the officer's observations which lead to the defendant's OVI arrest. The essence of the defendant's argument is because the evidence appears there was no traffic in front of defendant and the statute only requires the defendant to stop for traffic, (with assured clear distance ahead), there was no

violation of 4511.21 ( C ) and therefore no probable cause to stop the defendant at all. The State argues that there was sufficient probable cause to stop defendant; and then, from the totality of the circumstances, including the subsequent observations of the officer and field tests and the defendant's statements were sufficient for the OVI charge.

Observations by police of any violaton of a traffic law provides legal basis for making a stop, regardless of the officer's motive, Whren vs. U.S. (1996) 517 US 806; Dayton vs. Erickson (1996) 76 Ohio St. 3d 3. The standard for making a traffic stop is the presence of reasonable and articulable suspicion that a crime is being committed. The determination of probable cause for arrest is based on the totality of the circumstances surrounding the incident. The defendant argues the State's reliance on the prima facie speed limit under 4511.21 ( C ) is misplaced. The speed must be reasonable or proper under existing conditions; speed must permit stopping within the assured clear distance ahead. These are factual determinations for each case. State vs. Neff (1975) 41 Ohio St. 2d 17. Reasonable or proper depends on traffic, surface, width of street, and other conditions connected with the highway. State vs. Saffill (1975) 44 Ohio St. 2d 39. 4511.21 sets limits for specific circumstances, and declares greater speed to be prima facie unlawful. The prima facie provision is merely a rule of

evidence. It establishes a rebuttable presumption of lawfulness or unlawfulness. It does not define the offense. It may be overcome by evidence showing that in the circumstances the speed was neither excessive nor unreasonable. State vs. Wall (1962) 115 Ohio App. 323.

The Court must determine that at the time and place and under the circumstances and all existing conditions, was the defendant's speed reasonable and proper. The Court must find that a violation of a traffic law occurred to give rise to a reasonable suspicion to make an investigating stop of the vehicle. The facts as found by the Court are the officer observed the defendant traveling up to 33 m.p.h. in a 25 m.p.h. zone on Wednesday, January 30, 2008 at 2:03 A.M. The road is a 4-lane divided street going through Fremont, traffic was light, per Exhibit B, the surface was wet, the box for icy was checked, the weather was snowy, and the officer did not check the box that the defendant's speed was unsafe for the conditions. The officer testified the only reason for the stop was speed. Although this is a close case, the Court cannot say that the defendant was in violation of 4511.21 ( C ) from the facts as found. See, for example, State vs. Glasscock 111, Ohio App 3d 371, page 375, where the Court found "the record indicated the officer merely observed a minor traffic irregularity, not suggestive of impaired driving." The Court finds Trooper Vitte lacked reasonable suspicion to stop the defendant under the

circumstances. Motion to suppress granted. Continue defendant's driving privileges previously granted April 22, 2008 and set case for status hearing in three weeks.

  
Michael L. Burkett, Judge

cc: Prosecutor Robert Hart  
Andrew Mayle, Atty. for defendant

JOURNALIZED  
6/3/08

FREMONT MUNICIPAL  
COURT  
2008 JUN -3 P 1:35  
FILED  
RAQUEL MOLINA  
CLERK

I, Raquel Molina, Clerk of Court, do hereby certify that the foregoing is a true and correct copy of the original pleadings now on file in said Clerk's office in this cause. In testimony whereof, I have hereunto set my hand and seal of this Court of Fremont, Ohio this 3rd day of June 2008.

 Clerk  
 Deputy Clerk

# APPENDIX V

TEXAS DEPARTMENT OF PUBLIC SAFETY

VS.

CONNOR R. BLAND  
Defendant

2012 JUN 11 10 58 AM

BEFORE THE STATE OFFICE  
OF  
ADMINISTRATIVE HEARINGS

**ADMINISTRATIVE DECISION**

On 6/8/2012, the Defendant appeared personally or through counsel and announced ready. The Department appeared through its attorney or representative and announced ready. Having heard and considered the evidence, the Administrative Law Judge finds that the State Office of Administrative Hearings has jurisdiction over this cause and further makes the following findings of facts and conclusions of law:

**FINDINGS OF FACT**

- 1) On 2/19/2012 reasonable suspicion to stop the Defendant existed, in that: The arresting officer observed the Defendant's vehicle traveling over the posted speed limit. The arresting officer determined by radar that Defendant was traveling 75 MPH in a 70 MPH speed zone. Defendant was operating a Range Rover on State Highway 6 in the city of Navasota, Grimes County, Texas, at the time of the stop.
- 2) The Defendant was identified on the scene by his Texas driver's license.
- 3) The Defendant was found to be under 21 years of age.
- 4) On the same date, probable cause to arrest the Defendant existed, in that probable cause existed to believe that Defendant was operating a motor vehicle in a public place while intoxicated, because in addition to the facts in No. 1: The Defendant had an odor of alcohol coming from Defendant's breath. The Defendant also admitted he consumed alcoholic beverages prior to operating the vehicle.
- 5) Defendant was operating a motor vehicle in a public place with a detectable amount of alcohol in his system.

**CONCLUSIONS OF LAW**

Based on the foregoing, the Judge concludes the Department proved the issues set out in Tex. Transp. Code Ann. § 524.035 and that Defendant's license is subject to a **suspension for 60 days** pursuant to Tex. Transp. Code Ann. § 524.022.

In accordance with the above findings and conclusions, the Judge hereby enters the following order:

**ORDER**

The Department is authorized to suspend or deny Defendant's driving privileges for the period indicated above.

Signed on June 11, 2012.



STEVEN M. RIVAS  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

AT 2:50 FILED  
O'CLOCK P M

SEP 24 2012

IN THE  
DISTRICT COURT OF  
GRIMES COUNTY, TEXAS  
BY \_\_\_\_\_  
CLERK, District Clerk  
GRIMES COUNTY, TEXAS  
DEPUTY

Cause No. 32,522

CONNOR ROBERT BLAND,  
Appellant

V.

TEXAS DEPARTMENT  
OF PUBLIC SAFETY,  
Appellee

12th JUDICIAL DISTRICT

**ORDER**

Be it remembered that on September 24, 2012, came for consideration the appeal of CONNOR ROBERT BLAND from an administrative decision rendered by the State Office of Administrative Hearings on June 11, 2012, sustaining the Department's suspension of his driver license. After reviewing the administrative record and hearing the argument of counsel, THIS COURT FINDS that the decision was supported by substantial evidence; and/or that the decision was not arbitrary or capricious; and/or that the decision was not characterized by an abuse of discretion or other error of law.

IT IS THEREFORE ORDERED THAT the decision of the State Office of Administrative Hearings is hereby AFFIRMED.

IT IS FURTHER ORDERED THAT any stay of Appellant's license suspension permitted by Texas Transportation Code section 524.042 is hereby terminated;

AND THAT all other relief not expressly granted is hereby DENIED.

SIGNED this 24 day of September, 2012.

\_\_\_\_\_  
JUDGE PRESIDING

Approved as to form:

\_\_\_\_\_  
SBN \_\_\_\_\_  
Attorney for Appellant,  
CONNOR ROBERT BLAND

\_\_\_\_\_  
SBN \_\_\_\_\_  
Attorney for Appellee,  
Texas Department of Public Safety