

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County

Honorable Daniel D. Hall, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DEVIONNE DEVAIGHN MCCLAIN,

APPELLANT

APPELLATE CASE NO 2015-002595

FINAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

The trial court reversibly erred in ruling that Officer McNeely had probable cause to believe that Appellant was speeding where there was no evidence that McNeely had the necessary training or experience to visually estimate a passing vehicle's speed with sufficient accuracy and where there was no independent corroboration of Officer McNeely's visual speed estimate providing the requisite additional indicia of reliability necessary to support an objectively reasonable finding of probable cause to believe that Appellant was speeding.

STATEMENT OF THE CASE

On December 10, 2015, the York County Grand Jury indicted Appellant Devionne McClain for failure to stop for a blue-light. R. 93 – 94. On, December 15, 2015, Appellant proceeded to trial before the Honorable Daniel Hall and a jury. R. 1. Jessica Russo represented Appellant. Assistant Solicitor Hannah Grove represented the State.

The jury found Appellant guilty as charged. R. 83, l. 13 - 84, l. 4. The trial court sentenced Appellant to five years imprisonment. R. 85, l. 16 - 91, l. 16. In addition, the trial court ruled that Appellant's conviction violated the terms of his probation from an earlier possession with intent to distribute crack cocaine and possession with intent to distribute crack cocaine in proximity to a school convictions. *Id.*

The trial court revoked Appellant's probation in full and sentenced Appellant to nine years of imprisonment. The sentences are being served concurrently. *Id.*

ARGUMENT

The trial court reversibly erred in ruling that Officer McNeely had probable cause to believe that Appellant was speeding where there was no evidence that McNeely had the necessary training or experience to visually estimate a passing vehicle's speed with sufficient accuracy and where there was no independent corroboration of Officer McNeely's visual speed estimate providing the requisite additional indicia of reliability necessary to support an objectively reasonable finding of probable cause to believe that Appellant was speeding.

RELEVANT FACTS

At around three on the morning of April 30, 2015, Clover Police Officer Spencer McNeely, in his second month on the job, was driving on Kings Mountain Street heading toward downtown Clover when Appellant passed by him driving the opposite direction. R. 8, l. 5 - 9, l. 14. McNeely then turned his patrol car around, activated his blue-lights, and pursued Appellant. R. 35, l. 24 - 36, l. 9.

A short chase ensued, ending when Appellant crashed his car while attempting a sharp turn. *Id.* Appellant fled his vehicle. He was caught and taken into custody. No drugs or guns were found on Appellant or in the vehicle. There is no indication in the record as to why Appellant fled.

Pre-trial Motion to Dismiss for Lack of Probable Cause to Initiate Traffic Stop

At trial, Appellant moved to dismiss the charge for failure to stop for a blue-light arguing that Officer McNeely did not have "reasonable suspicion"¹ to believe that Appellant was speeding. R. 7, ll. 1-11. In response the State proffered McNeely's testimony.

¹ This was a misstatement that the trial court, defense counsel, and the solicitor should have been aware of the proper standard. Probable cause is the correct standard for initiating a traffic stop in Appellant's case, as the traffic stop was based on an alleged traffic violation. *State v. Banda*, 371 S.C. 245, 252, 639 S.E.2d 36, 40 (2006). Reasonable suspicion is the standard required to initiate a stop of a motor vehicle for investigative purposes when the officer believes the vehicle's occupants are engaged in criminal activity. *State v. Corley*, 383 S.C. 232, 240, 679 S.E.2d 187, 191-192 (Ct. App. 2009).

McNeely alleged that he “observed [Appellant’s vehicle] speeding pass me and at at the time go to turn around to initiate a traffic stop.” R. 9, ll. 2-5. Oddly, Officer McNeely was uncertain as to exactly how he determined Appellant was speeding:

Yes, when I stated - - or when I documented in my report that I visually saw that the vehicle was speeding. What I meant by that is that the radar unit itself is meant to confirm what you see in utilizing the radar unit. What I am saying is I visually tracked -- we refer to it as visually tracking the vehicle. I visually track the vehicle going approximately 45 in a 35.

R. 9, ll. 8-14 (*verbatim*). McNeely declined to identify what specific speed the radar in his patrol car had recorded Appellant’s car traveling. Instead, McNeely explained:

Q: And did you confirm that with the radar?

A: I did.

Q: So the radar stated that the car was going --

A: It’s confirming what I was visually seeing.

Q: Okay. So you visually tracked him speeding and then confirmed it with the radar?

A: That is correct?

R. 9, ll. 15-21 (*verbatim*).

Under cross-examination, McNeely admitted that his incident report, written just hours after the arrest, did not mention that he had confirmed Appellant’s speed by radar. R. 12, ll. 1-20. His report stated only that McNeely had “visually clocked” the speeding vehicle. *Id.* Further, McNeely never explained what training allowed him to accurately visualize a passing car’s speed or what method he used.

When confronted with the inconsistencies between his incident report and testimony, McNeely posited that “visually clocked” actually meant that he had used his car’s radar, but that

“the radar unit is really only a confirmation of what I am seeing and during the visual tracking of the vehicle with the visual tracking I determined that the vehicle was speeding approximately 45 in 35 mile per hour zone.” *Id.* at ll. 6-11 (*verbatim*).

Again McNeely never testified that the radar showed Appellant was speeding, only that the radar confirmed what he had “visually clocked”. McNeely conceded that his “visual tracking” was done while the vehicles were going in opposite directions, in the dark, at the end of his twelve hour shift. *Id.* at ll. 12-18.

The trial court declined to dismiss the charges for lack of probable cause to initiate the traffic stop. R. 13, ll. 1-9. Specifically, the court concluded that “the officer testified that he visually tracked the vehicle going 45 in a 35. He testified that his radar confirmed the 45 in a 35.” *Id.* The trial court never ruled on whether McNeely had the requisite training or experience necessary to visually estimate a passing car’s speed accurately.

Trial Testimony of Officer Spencer McNeely

McNeely testified again at trial. He repeated that he and Appellant drove past each other at around three in the morning on Kings Mountain Street. R. 23, ll. 6-10. As during the pre-trial hearing, his testimony on the technique he employed to determine that Appellant was speeding was vague and conclusory.

When asked to “break down” how he concluded Appellant was speeding, McNeely circuitously explained that:

When it comes to apprehending a speeder the main portion is the radar unit itself is just to confirm what you are seeing. Apprehending a speeder is the majority is visualization that that vehicle is actually speeding. You use the radar to confirm that. You just don’t look at the radar. The radar confirms what you’re already seeing before you look at. And I had visually referred to it. Visually tracking. I visually tacked this vehicle was going faster

than 35 it looked to be approximately 45 miles per hour. Ten miles over the speed limit.

Id. at ll. 13-22 (*verbatim*). McNeely again declined to provide a specific mile per hour speed that the radar reported Appellant was traveling. Instead, he conclusory asserted that “[t]he radar did confirm exactly what I was visualling.” *Id.* at ll. 23-25 (*verbatim*).

The State then offered into evidence the video footage from McNeely’s dash camera which recorded the two cars passing each other, McNeely activating his blue-lights, and the brief pursuit that followed. R. 31, l. 19 - 33, l. 11; State’s Exhibit 1. The State never sought to have McNeely qualified as an expert and never asked him to explain what training he had that would allow him to accurately gauge the speed of other vehicles.

Cross-Examination

Defense counsel’s cross-examination forced McNeely to again acknowledge that his incident report only referred to “visual tracking” of Appellant’s vehicle and never mentioned using radar to confirm that Appellant was speeding. R. 39, l. 4 - 40, l. 19. The defense then re-played the video from McNeely’s dash-camera.

McNeely testified that the dash-camera displayed detailed information about the patrol car such as: its speed, its GPS location, whether the brakes were being applied, and whether the siren and blue-lights had been activated. R. 40, l. 21 - 41, l. 5. The dash-camera system also recorded the police dispatch radio and McNeely’s belt-microphone. Defense counsel then asked if the dash-camera display section titled “radar” was where the dash-camera reported the results of the patrol car’s radar. R. 41, l. 6-10.

Suddenly less knowledgeable about his car’s equipment, Officer McNeely incoherently demurred that, “I can’t attest to the radar. That would not be -- anything in that view it would not have radar. It would predict -- project anything from the radar that is a separate unit from L-3

system.” *Id.* (*verbatim*). McNeely conceded that the radar display on his dash-camera registered a zero for the entire video. *Id.* at ll. 16-21.

Re-Direct Examination

On re-direct, the prosecutor attempted to rehabilitate McNeely. Now exhibiting an in-depth knowledge of his radar equipment, McNeely proffered that, notwithstanding the dash-camera display having a section marked “radar,” the dash-camera recording system was completely separate from the radar system. R. 43, ll. 14-24.

Therefore, since the two systems were not connected, McNeely explained that there would be no record on the dash-camera of the alleged radar confirmation that Appellant was speeding. *Id.* However, the dash-camera did record his patrol car’s speed, brake usage, blue-light activation, as well as, the police dispatch radio, McNeely’s belt microphone, and the GPS coordinates of McNeely’s car. He never explained why the radar display on the dash-camera recorded a zero instead of a blank if it was unconnected. According to McNeely, the radar was essentially the only electronic equipment in the car not linked to the dash-camera system.

Following the close of the State’s case and again following the guilty verdict, the defense renewed its motion to dismiss the charges as Officer McNeely lacked probable cause to initiate the traffic stop. R. 59, l. 9 - 81, l. 1; R. 86, ll. 5-16. Both times, the trial court denied the renewed motion. *Id.*

DISCUSSION

Officer McNeely claimed that, at three in the morning, he “visually tacked” Appellant’s dark colored sedan traveling approximately 45-mph in a 35-mph zone. R. 12, ll. 1-20. The State presented no evidence that independently corroborated McNeely’s visual estimate and presented

no evidence that McNeely had the necessary training or experience to accurately “track” the speed of a car moving in the opposite direction of his own at night.

The only supporting evidence adduced by the State was McNeely’s vague assurances that the radar “confirmed” his visual assessment of Appellant’s speed. R. 9, ll. 6-21. He declined to state what specific speed the radar recorded. He also admitted that his incident report never mentioned any radar corroboration. R. 12, ll. 4-20. Likewise, the video footage from his patrol car’s dash camera registered a zero in the space that displays radar results. R. 41, ll. 13-24.

A police officer must have probable cause to believe that a traffic violation has occurred prior to initiating a traffic stop.

The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. “When a police officer stops an automobile and detains the occupants briefly, the stop amounts to a seizure within the meaning of the Fourth Amendment.” *United States v. Digiovanni*, 650 F.3d 498, 506 (4th Cir.2011); *see also State v. Banda*, 371 S.C. 245, 639 S.E.2d 36, 252, 371 S.C. 245, 639 S.E.2d 36, 40 (2006) (holding that an automobile stop implicates the Fourth Amendment prohibition against unreasonable searches and seizures, imposing a standard of “reasonableness” upon the exercise of discretion by law enforcement).

Generally, an automobile stop is reasonable when the police have probable cause to believe that a traffic violation has occurred. *Banda*, 371 S.C. at 252-253, 639 S.E.2d at 40 (*citing Whren v. United States*, 517 U.S. 806, 809–810, 116 S.Ct. 1769 (1996) (holding that temporary detention of motorist who the police have probable cause to believe has committed civil traffic violation is consistent with Fourth Amendment’s prohibition against unreasonable seizures).

Probable cause exists if, given the totality of the circumstances, the officer “had reasonably trustworthy information ... sufficient to warrant a prudent [person] in believing that

the petitioner had committed or was committing an offense.” *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223 (1964); *see also Wortman v. City of Spartanburg*, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992) (holding that probable cause is a good faith belief that an individual is guilty of a crime where the good faith belief would “induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise”); *State v. Blassingame*, 338 S.C. 240, 250, 525 S.E.2d 535, 540 (Ct. App. 1999).

Absent other indicia of reliability, an uncorroborated visual speed estimate by a police officer cannot provide probable cause to initiate a traffic stop for speeding.

In *United States v. Sowards*, 690 F.3d 583 (4th Cir. 2012), the Fourth Circuit Court of Appeals held that an officer’s uncorroborated visual speed estimate could not provide probable cause to initiate a traffic stop for speeding. In that case, Sean Sowards was stopped for speeding by Deputy James Elliott on Interstate 77 in North Carolina. *U.S. v. Sowards*, 690 F.3d at 585.

Like Officer McNeely, Deputy Elliott claimed that he initiated the traffic stop based on “visually estimating” that Sowards’ vehicle was traveling 75-mph in a 70-mph zone. *Id.* Curiously, Elliott had intentionally positioned his car in manner that prevented him from obtaining an accurate radar reading. *Id.* During the traffic stop Elliott deployed a drug detection dog which signaled the possible presence of drugs in Sowards’ car. A search uncovered ten kilograms of cocaine. *Id.*

Sowards moved to suppress the drug evidence arguing that Deputy Elliott lacked probable cause to initiate the traffic stop. *Id.* Elliott testified that he was certified in the use of his car’s radar equipment and that, as part of the certification process, he had to make twelve visual speed estimates that “could not vary from the radar by greater than a total of 42-mph” for the entire test. *Id.*

Elliott admitted that he did not attempt to confirm his visual estimation of Sowards' speed by either pacing Sowards' vehicle or by using his radar. Mirroring Officer McNeely's testimony in the present case, Elliott averred that the radar only acts as a "second opinion" to an officer's visual tracking. *Id.* at 586. Also like McNeely, Deputy Elliott asserted that "you don't need a technique" to visually track car speeds as "it's all based on your training and experience. As long as you have a tracking history and you have experience in observing speeds." *Id.*

On cross-examination, Deputy Elliott was asked a series of questions about distance measurements. *Id.* Among many incorrect answers, Elliott's stated that there were twelve feet in a yard and that the number of inches in a yard stick "depends on the yard the stick." *Id.* The Fourth Circuit concluded that Elliott's responses showed "a notable absence of fluency in his knowledge of distance measurements." *Id.* at 590. Bizarrely, Elliott also declared that his visual estimation of Sowards' speed was not dependent on his ability to estimate the distance that Sowards' car traveled. *Id.* at 586.

In reversing the district court's finding of probable cause, the Fourth Circuit concluded that under the totality of the circumstances Deputy Elliott did not have reasonably trustworthy information sufficient to support a prudent person's belief that Sowards' was speeding. *Id.* at 594.

First, the Court found that Elliott lacked the necessary training and experience to accurately estimate speeds. *Id.* at 589-590. The Court was particularly concerned with Elliott's ignorance of distance measurements, but also stressed that the only training Elliott had was how to properly use his car's radar system. *Id.* This training was irrelevant to whether he was able to visually estimate a car's speed with any degree of accuracy.

Second, the Fourth Circuit rejected the government's argument that an officer's visual estimation, standing alone, provided probable cause to initiate the traffic stop when the alleged speeding car is traveling in only slight excess of the speed limit. *Id.* at 591. Here, the Fourth Circuit focused on the small speed differential, the percentage difference between the estimated speed and the legal speed limit. *Id.* at 591-592.

Where the speed differential is small, additional indicia of reliability are needed to support the reasonableness of the officer's visual estimate. The necessary corroboration could be supplied by a confirmed radar reading, pacing methods, or additional circumstances that bolster reliability of the officer's visual tracking. *Id.* at 592.

Applying these factors, the Fourth Circuit reversed the district court and suppressed the drug evidence, concluding that "Deputy Elliott's visual speed estimation was in fact a guess that was merely conclusory, without an appropriate factual foundation and simply lacking in the necessary indicia of reliability to be an objectively reasonable basis for probable cause to initiate a traffic stop." *Id.* at 594.

The trial court erred in ruling that Officer McNeely had probable cause to believe Appellant was speeding based solely on McNeely's uncorroborated visual speed estimate of Appellant's car.

The trial court erred in refusing to dismiss Appellant's charge for failure to stop for a blue-light. Appellant's case is on virtually "all fours" with *Sowards*. Officer McNeely's visual speed estimation was simply a guess. *Sowards*, 690 F.3d at 594. There was no evidence that McNeely had the necessary training or experience to accurately estimate a passing car's speed. R. 9, ll. 8-14.

His guess as to Appellant's speed was unsupported by any independent corroboration and it lacked any indicia of reliability capable of supporting the existence of probable cause to initiate the underlying traffic stop at the heart of Appellant's conviction for failure to stop for a

blue-light. R. 23, ll. 6-22. Therefore, this Court should reverse the trial court and dismiss Appellant's failure to stop for a blue-light charge.

The State failed to prove that Officer McNeely had the necessary training and experience to visually estimate the speed of a passing car with accuracy.

First, like Deputy Elliott in *Sowards*, Officer McNeely never testified that he received any specialized training to help him "visually track" passing cars so as to accurately determine their speeds. R. 9, ll. 6-18; R. 23, l. 11 – 24, l. 9; *Sowards*, 690 F.3d at 588-589. McNeely had only been a police officer for two months at the time of Appellant's arrest and never stated that he had any experience in visually estimating speeds.

Second, Officer McNeely never explained, in a coherent manner, the mechanics of his "visual tracking" or "visual clocking" technique. Instead, in a conclusory fashion, he repeatedly stressed that "I visually tracked -- we refer to it as visually tracking the vehicle. I visually track the vehicle going approximately 45 in a 35." R. 9, ll. 8-14; *see also* R. 23, l. 11 – 24, l. 9.

McNeely never testified as to the distance over which he observed Appellant's car. As the *Sowards* court observed, an approximate speed cannot be determined without having some idea of the distance the "tracked" vehicle was traveling. *Sowards*, 690 F.3d at 589-590. Taking his various explanations as a whole, it appears that McNeely's "visual tracking" amounted to simply a hunch or unsubstantiated feeling that Appellant was speeding.

Appellant's vehicle was traveling in only slight excess of the legal speed limit, thus Officer McNeely's visual speed estimation was inherently unreliable.

Accepting, for a moment, McNeely's testimony at face-value, Appellant's speed differential (the percentage difference between the speed limit and Appellant's estimated speed) was 28%. R. 23, l. 11 – 24, l. 9. The *Sowards* court and other court's that have addressed when a speed differential will provide sufficient indicia of reliability to support an officer's probable

cause determination have consistently concluded that this small speed differential is too slight to be accurately observed by the human eye. *Sowards*, 690 F.3d at 591-593; *City of Kansas City v. Oxley*, 579 S.W.2d 113, 116 (Mo. 1979) (holding that officer's uncorroborated opinion evidence of defendant's 45-mph speed in a 35-mph zone was insufficient); *State v. Kimes*, 234 S.W.3d 584, 589 (Mo. Ct. App. 2007) (holding that an officer's estimation that defendant was traveling 60-mph in a 55-mph zone was insufficient to support probable cause "because accuracy of human estimation of speed cannot easily, readily, and accurately discriminate between such small variances.").

For the speed differential to provide the requisite corroboration of an officer's visual estimation, the differential must be substantial. *People v. Olsen*, 239 N.E.2d 354, 355 (1968) (holding that visual estimation that defendant was traveling 50-55 mph in a 30-mph zone was sufficient to support speeding conviction); *see also State v. Butts*, 269 P.3d 862, 873 (Kan. 2012) (holding that estimated vehicle speed of 50-60 mph in a 30-mph zone supported finding of probable cause).

There was no independent corroboration of Officer McNeely's visual speed estimation.

Finally, the Fourth Circuit made clear that independent corroboration of a visual speed estimation can provide additional indicia of reliability so as to support the officer's finding of probable cause. *Sowards*, 690 F.3d at 592-593 (holding that the reasonableness of officer's visual estimation that a vehicle is traveling in slight excess of speed limit may be supported by radar, pacing methods, or other indicia of reliability that establish in the totality of the circumstances that the officer's estimation was reasonable).

In Appellant's case there was no independent corroboration of Officer McNeely's "visual tracking" estimate of Appellant's speed. The trial court erred in ruling that McNeely's testimony

about an alleged radar confirmation of his visual speed estimate supplied the necessary corroboration and additional indicia of reliability to support a finding of probable cause to initiate the traffic stop where there was no independent evidence of said radar reading. R. 13, ll. 1-9.

In fact, far from corroborating McNeely's visual estimation of Appellant's speed, the evidence produced at trial discredited the existence of an alleged radar confirmation and by extension the reasonableness of McNeely's speed estimation. The only evidence of a radar reading corroborating McNeely's speed estimation for Appellant's vehicle came from McNeely's own trial testimony. R. 9, ll. 8-21; R. 23, l. 4 – 24, l. 2.

All of the independent evidence presented at trial, strongly suggested that there was no radar reading. For instance, the dash-camera video display recorded a zero in the spot reserved for the radar reading. R. 41, ll. 3-22. Officer McNeely's explanation, that the radar is the only system in his patrol car not recorded by the dash-camera, would perhaps be credible if there was other evidence that the patrol car's radar was operating.

However, Officer McNeely's incident report, written just hours after Appellant's arrest, made no mention of a radar confirmation. R. 40, ll. 3-19. The report only notes that McNeely was "visually tracking" Appellant's speed. At trial, McNeely posited that "visual tracking" actually meant that the radar confirmed his visual estimation of Appellant's speed. R. 12, ll. 4-11. The failure to refer to any radar corroboration in his report, coupled with the zero recorded by the dash-camera strongly suggests that the radar was not operating at the time Appellant passed McNeely. At a minimum, this testimony fails to provide the kind of corroboration envisioned by *Sowards*.

In addition, when invited by the prosecutor to explain how the radar confirmed his “visual tracking” McNeely refused to provide any details beyond baldly asserting that the radar was “confirming what I was visually seeing.” R. 9, ll. 15-21. As with the explanation of his “visual tracking” technique, the only evidence of radar confirmation was McNeely’s oddly worded, conclusory assurances that “[t]he radar did confirm exactly what I was visualling.” R. 23, l. 13 – 24, l. 2 (*verbatim*); *see also* R. 12, l. 4-11. Throughout these assertions, McNeely declined to ever provide the exact speed his radar recorded.

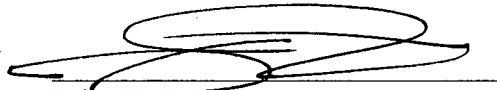
Officer McNeely’s undocumented, belated claims regarding possible a radar confirmation of his visual estimation of Appellant’s speed does not constitute corroborative evidence and provides no additional indicia of reliability supporting the existence of probable cause to believe Appellant was speeding.

Beyond being unsupported by any independent evidence, his assertions of a radar confirmation are contradicted by his own incident report and his patrol car’s dash-camera footage. His explanations for why the dash-camera and why his incident report fail to corroborate the existence of a radar reading, when taken together, are simply not worthy of belief.

Accordingly, the trial court reversibly erred in ruling that Officer McNeely had probable cause to believe Appellant was speeding where there was no evidence that McNeely had the necessary training or experience to visually estimate a passing vehicle’s speed with accuracy and there was no independent evidence corroborating Officer McNeely’s visual speed estimate that could provide the requisite additional indicia of reliability necessary to support a finding of probable cause to believe Appellant was speeding.

CONCLUSION

Based on the foregoing reason, Appellant respectfully requests that this Court reverse the ruling of the circuit court and dismiss Appellant's indictment for failure to stop for a blue-light.

A handwritten signature in black ink, consisting of several overlapping loops and a horizontal line at the bottom.

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of December, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

December 6, 2016



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