

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-700

DEPARTMENT OF STATE POLICE

vs.

MIKHAEL EL-BAYEH.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a de novo hearing, a judge in the District Court found the defendant, Mikhael El-Bayeh, responsible for the civil motor vehicle infraction of speeding. El-Bayeh appealed to the Appellate Division. The decision was affirmed, and the appeal was dismissed. El-Bayeh now appeals from the order of dismissal and challenges the admissibility of the radar reading that showed he had been traveling ninety-six miles per hour. He further contends that, without the radar reading, the evidence was insufficient to prove that he was speeding. We affirm.

Background. We summarize the evidence presented at the hearing at which State Trooper John Ciszek testified and El-Bayeh, who appeared pro se, presented his case. On July 26, 2018, just before 9 A.M., Ciszek was patrolling Route 3 in Burlington when he observed a Subaru Impreza in the left lane

"passing slower moving traffic." The trooper estimated that the vehicle was "traveling at a very high rate of speed, well above the posted [fifty-five] miles per hour speed limit." Using a hand-held light detection and ranging (LIDAR) unit, which measures the speed of vehicles using a laser, Ciszek determined that the vehicle was traveling ninety-six miles per hour. He stopped the car, identified the operator as El-Bayeh, and issued a citation.

El-Bayeh cross-examined Ciszek about his familiarity with the LIDAR unit and the accuracy of the reading Ciszek obtained when he pointed the device at El-Bayeh's car. In response, Ciszek described the two pre-operational tests that he performed on the LIDAR unit before using it on the day in question. Ciszek also described the manner in which he operated the device and acknowledged that he had targeted El-Bayeh's vehicle at a distance of 1,557.6 feet.

Thereafter, El-Bayeh introduced a number of exhibits in an attempt to show that the LIDAR device was not accurate at distances that exceeded 1,000 feet.¹ At the conclusion of the

¹ El-Bayeh introduced a photograph of his vehicle from the same distance at which Ciszek measured its speed with the LIDAR unit; the calibration certificate for the LIDAR unit that Ciszek used when stopping El-Bayeh; the National Highway Traffic Safety Administration's Minimum Performance Standards for LIDAR Speed-Measuring Devices and Systems; and out-of-State authority for the proposition that radar measurements made at distances over

hearing, the judge found El-Bayeh responsible for speeding, but reduced the amount of the fine from \$415 to \$300. As previously noted, the judge's finding was affirmed by the Appellate Division.

Discussion. As an initial matter, although El-Bayeh challenged the accuracy of the LIDAR reading at his hearing, a question that concerns the weight of the evidence, he did not contest the admissibility of the reading itself. Accordingly, his argument that the judge should have excluded the radar reading is waived. See Police Department of Groveland v. Gallant, 76 Mass. App. Ct. 912, 913 (2010).²

In any event, even if El-Bayeh had objected and preserved the issue, the radar reading was properly admitted. The evidence established that the radar device was not "untested" as El-Bayeh claims. During cross-examination, Ciszek testified that he was trained and certified to operate the LIDAR unit and described the two preoperational tests that he performed to confirm the accuracy of the device before using it on traffic patrol on the morning in question. First, Ciszek performed a "self test." If an error is detected during this test the LIDAR

1,000 feet should be admissible only with supporting expert testimony.

² Similarly, El-Bayeh did not request a Daubert-Lanigan hearing, and his claim that the judge failed to conduct one is also waived. See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993); Commonwealth v. Lanigan, 419 Mass. 15 (1994).

unit will not operate. The second test Ciszek performed was a "distance and accuracy" test. During this test, Ciszek used the LIDAR unit to measure two known distances. If the reading is within a "plus or minus one foot, then [it is] deemed to be accurate." Ciszek also described the manner in which he used the device to measure the speed of El-Bayeh's car. In addition, El-Bayeh himself produced the certification records showing that the radar device had been properly certified.³

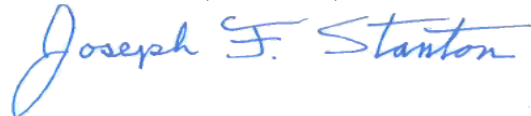
In light of our conclusion that the radar reading was properly admitted, we discern no merit to El-Bayeh's argument that the evidence he was speeding was insufficient. The radar reading alone supported the judge's finding. In addition, apart from the reading, Ciszek testified that he observed the defendant's car traveling on a road with a posted speed limit of fifty-five miles per hour "at a very high rate of speed," and

³ Commonwealth v. Whynaught, 377 Mass. 14 (1979), on which El-Bayeh relies, is not to the contrary. In that case, the Supreme Judicial Court held that "where radar readings from untested equipment are admitted over objection and without independent corroborative evidence, we shall undoubtedly reverse any judgment of guilt and order that a judgment of not guilty be entered." Id. at 20-21. Here, as noted, El-Bayeh did not object to Ciszek's testimony that Ciszek had tested the device before using it. In addition, there was independent corroborative testimony from Ciszek that the defendant's car was traveling in excess of the speed limit.

"passing slower moving traffic." This testimony formed an independent basis for the finding.

Decision and order of the
Appellate Division
affirmed.

By the Court (Vuono, Rubin &
Sullivan, JJ.⁴),



Clerk

Entered: February 26, 2021.

⁴ The panelists are listed in order of seniority.