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OPINION OF THE SUPREME COURT OF INDIANA (FEBRAURY 27, 2019)

IN THE INDIANA SUPREME COURT

ZACHARIAH J. MARSHALL,

Appellant (Defendant below),

v.

STATE OF INDIANA,

Appellee (Plaintiff below).

Supreme Court Case No. 18S-CR-00464

Appeal from the Porter Superior Court 4,
No. 64D04-1611-CM-010105
The Honorable David L. Chidester, Judge

On Petition to Transfer from the Indiana Court of Appeals, No. 64A05-1710-CR-02368

Before: GOFF, Justice, RUSH Chief Justice and DAVID, MASSA, and SLAUGHTER Justices.

Goff, Justice.

Zachariah Marshall challenges the propriety of his traffic stop for speeding under both the United States and Indiana Constitutions. He presents us with an interesting question: When a police officer's calib-

rated radar indicates an oncoming vehicle is speeding, the officer then verifies the radar speed exceeds the posted speed limit, but he ultimately fails to document the excessive speed, is there reasonable suspicion for a traffic stop? We answer yes and affirm the trial court.

Factual and Procedural History

During the early morning hours of October 29, 2016, as Reserve Officer Sean Dolan patrolled near State Road 8 and 500 West in Hebron, Indiana, in Porter County, he observed a vehicle approaching him through the darkness. That night Officer Dolan drove a marked police car equipped with a radar unit that was mounted on the dashboard, turned on, and properly calibrated. As the vehicle approached him, Officer Dolan heard the radar giving off a high-pitch tone. He later explained that the higher the tone's pitch, the faster the speed. Upon hearing the high pitch, Officer Dolan looked at the radar's target speed, compared it to the 50-miles-per-hour speed limit sign posted just north of him, and saw the oncoming vehicle was traveling faster than the posted speed limit. It was a clear, dry night and Officer Dolan had no trouble seeing his radar unit, the posted speed limit, or the approaching car.

One-hundred-percent sure the oncoming vehicle was speeding, Officer Dolan initiated a traffic stop, intending to cite the driver for speeding only. With the car stopped, Officer Dolan approached and found Zachariah Marshall was the driver. Explaining that he stopped Marshall for speeding, Dolan asked him for his driver's license and vehicle registration. While Officer Dolan ran a warrant and BMV check, his back-

up officer (Corporal O'Dea) arrived at the scene and talked with Marshall. Corporal O'Dea smelled alcohol on Marshall and noticed his slowed and slurred speech. With the routine speeding traffic stop now turned into an OWI investigation, Officer Dolan exercised his discretion and decided not to cite Marshall for speeding, later explaining: "I knew he was going to have plenty of money problems and legal problems ahead of him that were going to be costly and I decided to cut him a break on the citation for speeding." Tr. p. 15. Since Officer Dolan did not issue Marshall a speeding ticket or a written warning, he did not document the speed he clocked Marshall driving.

The State of Indiana eventually charged Marshall with three counts: (1) A-Misdemeanor Operating a Vehicle While Intoxicated, Endangering a Person; (2) C-Misdemeanor Operating a Vehicle with an Alcohol Concentration Equivalent to at least 0.08 but less than 0.15; and (3) C-Misdemeanor Operating a Vehicle While Intoxicated.

Marshall's counsel deposed Officer Dolan on June 15, 2017, nearly eight months after the traffic stop. During that deposition, Officer Dolan could recall neither the posted speed limit near the intersection of Route 8 and 500 West where he pulled over Marshall nor could he remember the radar reading of how fast Marshall was driving that night. Officer Dolan, however, stated that at the time of the traffic stop, he could see the speed limit sign posted on 500 West.

On August 4, 2017, Marshall moved to suppress all evidence from the traffic stop, alleging he'd been illegally seized under both the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution. Regarding the Fourth

Amendment, Marshall alleged Officer Dolan lacked reasonable suspicion to stop him for speeding that night. And concerning the Indiana Constitution, he alleged the traffic stop proved unreasonable considering the totality of the circumstances. Both arguments hinged upon the point that in his deposition testimony Officer Dolan could not recall how fast Marshall was driving before the traffic stop and could not remember the posted speed limit.

Officer Dolan testified at the suppression hearing, recounting the details surrounding the traffic stop and repeatedly acknowledging that he could not remember the posted speed or the radar speed during his deposition two months earlier. He testified he did not document Marshall's speed that night. He explained he returned to the scene of the traffic stop between his deposition and the suppression hearing and he could now definitely say the speed limit there is 50 miles per hour. Ultimately, Officer Dolan testified that he knew the posted speed limit the night of the stop and he was one-hundred-percent certain that Marshall was speeding before he stopped him.

The trial court eventually denied Marshall's suppression motion. The court's factual findings included that Officer Dolan "observed Defendant's car speeding and . . . [he] was using a radar." The trial court then concluded:

> Officer Dolan was sure, based on his experience and observations at the scene, on a clear night, that defendant approached the road in [question] traveling in excess of the posted speed limit. He was adamant that the defendant was traveling too fast. The Court thus finds that his stop of the defend-

> ant was based upon his observation that a traffic infraction was being committed. On that basis, the Court denies the Motion to Suppress.

Appellant's App. Vol. II, pp. 11-12 (emphases added). The trial court certified the order for interlocutory appeal and Marshall appealed.

The Court of Appeals accepted jurisdiction, and then reversed, holding: "Because Reserve Officer Dolan could not testify regarding the speed of Marshall's vehicle in more specific terms . . . he did not have specific articulable facts to support his initiation of a traffic stop, and therefore the traffic stop violated Marshall's Fourth Amendment rights." *Marshall v. State*, 105 N.E.3d 218, 222 (Ind. Ct. App. 2018). The Court of Appeals did not address Marshall's argument for suppression under Article 1, Section 11, explaining that "[a]s the Indiana Constitution provides broader protection than the Federal Constitution . . . and we have concluded the traffic stop did not meet the lower protection provided by the Federal Constitution, we need not address any argument regarding the Indiana Constitution." *Id.* at 222 n.6.

The State petitioned for transfer, which we granted, thereby vacating the Court of Appeals opinion. Ind. Appellate Rule 58(A).

Standard of Review

Trial courts enjoy broad discretion in decisions to admit or exclude evidence. *Robinson v. State*, 5 N.E.3d 362, 365 (Ind. 2014). When a trial court denies a motion to suppress evidence, we necessarily review that decision "deferentially, construing conflicting

evidence in the light most favorable to the ruling." *Id.* However, we "consider any substantial and uncontested evidence favorable to the defendant." *Id.* We review the trial court's factual findings for clear error, declining invitations to reweigh evidence or judge witness credibility. *Id. See also State v. Keck*, 4 N.E.3d 1180, 1185 (Ind. 2014) (explaining that "when it comes to suppression issues, appellate courts are not in the business of reweighing evidence" because "our trial judges are able to *see* and hear the witnesses and other evidence first-hand"). If the trial court's decision denying "a defendant's motion to suppress concerns the constitutionality of a search or seizure," then it presents a legal question that we review de novo. *Robinson*, 5 N.E.3d at 365.

Discussion and Decision

Traffic stops, for even minor violations, fall within the protections of the federal and state constitutions. When a law enforcement officer stops a vehicle for a suspected traffic infraction like speeding, that officer seizes the vehicle's occupants under the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution; and that traffic stop must pass constitutional muster. *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014) (citing *Brendlin v. California*, 551 U.S. 249, 255-59 (2007)); *Meredith v. State*, 906 N.E.2d 867, 869 (Ind. 2009) (Fourth Amendment); *State v. Quirk*, 842 N.E.2d 334, 339-40 (Ind. 2006) (Article 1, Section 11). Marshall here argues that his traffic stop offended both the state and federal constitutions. Even though the Fourth Amendment and Article 1, Section 11 share parallel language, they part ways in application and scope. The Indiana Constitution sometimes affords broader

protections than its federal counterpart and requires a separate, independent analysis from this Court. *Dycus v. State*, 108 N.E.3d 301, 304 (Ind. 2018). We, therefore, take Marshall's constitutional arguments in turn, analyzing his claim first under the Fourth Amendment, and then under Article 1, Section 11.

I. The Fourth Amendment

A. The Reasonable-Suspicion Standard Applies to Traffic Violations Generally

The Fourth Amendment safeguards our persons, our property, and our peace by requiring that law enforcement first have a warrant supported by probable cause before executing searches or seizures. *Robinson*, 5 N.E.3d at 367. This mandate notwithstanding, one exception to the warrant and probable-cause requirements allows police to seize a person without a warrant and on a level of suspicion less than probable cause—that is, the reasonable-suspicion standard for brief investigatory stops. We often call these encounters *Terry* Stops, where an officer may "stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot.'" *Id.* (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). Traffic stops typically fall into this *Terry* Stop category, and, therefore, must be based upon reasonable suspicion. *Meredith*, 906 N.E.2d at 869 (citing *Whren v. United States*, 517 U.S. 806, 809-10 (1996)).

Though admittedly "a 'somewhat abstract' concept," reasonable suspicion is not an illusory standard. *State v. Renzulli*, 958 N.E.2d 1143, 1146 (Ind. 2011) (quoting *United States v. Arvizu*, 534 U.S. 266,

274 (2002)). The reasonable-suspicion standard guards Fourth Amendment rights alongside the warrant and probable cause requirements. Law enforcement "may not initiate a stop for any conceivable reason[;]" they must have at least reasonable suspicion lawbreaking occurred. *Meredith*, 906 N.E.2d at 869 (citing *Whren*, 517 U.S. at 809-10; *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *Finger v. State*, 799 N.E.2d 528, 532 (Ind. 2003)). Nor can police rely on a "mere 'hunch'" simply suggesting a person committed a crime before making a *Terry* Stop, like a traffic stop. *Prado Navarette v. California*, 572 U.S. 393, 397 (2014) (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). To be sure, "[s]uch a stop 'must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.'" *Robinson*, 5 N.E.3d at 367 (quoting *Armfield v. State*, 918 N.E.2d 316, 319 (Ind. 2009)). Reasonable suspicion requires more than an officer's own subjective belief a person might be violating the law. *See Terry*, 392 U.S. at 21-22. In other words, the stopping officer must be able to articulate some facts that provide a particularized and objective basis for believing a traffic violation occurred. *See Keck*, 4 N.E.3d at 1184. That is reasonable suspicion—the constitutional floor—for a traffic stop.

Marshall argues that Reserve Officer Dolan lacked reasonable suspicion for a traffic stop since he did not document the radar speed, could not recall the posted speed limit in his deposition, and could not articulate Marshall's precise speed at the deposition or the suppression hearing. We disagree because the reasonable-suspicion standard does not become more exacting for speeding violations.

B. The Reasonable-Suspicion Standard Does Not Change for Speeding Traffic Stops Specifically

Applying the reasonable-suspicion standard to traffic stops, we've previously said that, generally, "[a]n officer's decision to stop a vehicle is valid so long as his on-the-spot evaluation reasonably suggests that lawbreaking occurred." *Meredith*, 906 N.E.2d at 870. While we abide by our prior statement, this case presents a variation on that jurisprudential theme by addressing what details must survive that on-the-spot evaluation for the traffic stop to hold up under the Fourth Amendment's weight. Marshall presents a more specific question: when an officer stops a driver for speeding, does the reasonable-suspicion standard demand that the officer document the driver's speed?

Marshall argues the answer to this question is yes, largely relying upon *United States v. Sowards*, 690 F.3d 583 (4th Cir. 2012). In that case, the police officer stopped the defendant based upon only his visual observation that the defendant was driving 75 miles per hour in a 70-miles-per-hour zone. *Id.* at 585. Even though the officer had radar equipment, he did not use it to verify the speed. *Id.* Likewise, the officer did not use pacing to gauge the defendant's speed. *Id.* That officer later testified there was no technique to visually assess whether a car was speeding, and he exclusively relied on his experience patrolling speeders. *Id.* at 585-86.

The Fourth Circuit held the officer's visual estimation of the defendant's speed alone did not provide sufficient suspicion for the traffic stop because it provided no factual foundation for speeding. *Id.* at 594. That court opined that when, based on a visual assessment only, an officer stops a driver for speeding in

slight excess of the speed limit, "then additional indicia of reliability are necessary to support the reasonableness of the officer's visual estimate." *Id.* at 591. The court explained that "[s]uch additional indicia of reliability need not require great exactions of time and mathematical skill that an officer may not have, but they do require some factual circumstance that supports a reasonable belief that a traffic violation has occurred." *Id.* at 593.

Marshall likens his case to *Sowards* and pushes for a similar result. He believes that had Officer Dolan documented his speed or even remembered how fast he was driving before the stop, then there would be some indicia of reliability here to make the traffic stop reasonable. But we *see Sowards* differently and notice two distinguishing points that limit its applicability here. First and foremost, the *Sowards* court evaluated that traffic stop for probable cause, not reasonable suspicion. *Id.* at 594. As we've said before, probable cause is a more demanding standard compared to reasonable suspicion. *See Renzulli*, 958 N.E.2d at 1146. Second, *Sowards* involved a speeding determination based solely on the officer's visual observation. Radar was not used, unlike here. Even if we did apply *Sowards* to these facts, Officer Dolan's radar indication would constitute sufficient indicia of reliability to support his determination that Marshall was speeding. *See Sowards*, 690 F.3d at 593 (suggesting that radar or pacing would provide sufficient indicia of reliability for a speeding assessment).

Sowards aside, Marshall, nevertheless, insists Officer Dolan lacked reasonable suspicion to stop Marshall for speeding because Dolan could not articulate, or even estimate, how fast Marshall was

driving that night. Marshall demands a number from Officer Dolan, reasoning that we cannot do a Fourth Amendment reasonable-suspicion analysis without one. In support of that argument, Marshall invites us to establish a bright-line rule requiring that officers document a driver's exact speed in some way—by remembering it, documenting it in a citation, a written warning, or a probable-cause affidavit, or by recording the radar speed via a dashboard camera. We disagree initially with Marshall's premise that the Fourth Amendment's reasonable-suspicion requirement needs a number for a speeding violation to pass constitutional muster. And we then reject Marshall's invitation to establish such a black-and-white rule.

First, we disagree with Marshall's premise that the Fourth Amendment requires that an officer provide a number for how fast a defendant was driving. The reasonable-suspicion standard does not demand such measures. Like probable cause, reasonable suspicion is not readily quantifiable and cannot be "reduced to a neat set of legal rules." *Sokolow*, 490 U.S. at 7 (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)). Rather, the reasonable-suspicion "standard takes into account 'the totality of the circumstances—the whole picture.'" *Prado Navarette*, 572 U.S. at 397 (citation omitted). Reasonable suspicion does not require that an officer know a crime occurred beyond a reasonable doubt or even by a preponderance of the evidence. *See id.* And so, in order to execute a constitutional traffic stop, "officers need only 'reasonable suspicion'—that is, 'a particularized and objective basis for suspecting'" the driver violated the law. *Heien*, 135 S. Ct. at 536.

Second, we reject Marshall's request for a bright-line rule for similar reasons and because we think such a rule unnecessary. As we just said, reasonable suspicion must be evaluated based on the totality of the circumstances of each particular case. And this individualized test does not lend itself to bright-line, widespread rules. What amounts to reasonable suspicion in one case may not be enough in a different case. What's more, reasonable suspicion is not an exacting standard, and it has not and cannot be reduced to a generic checklist. For speeding violations in particular, it makes sense that either pacing or radar would naturally provide articulable, particularized objective facts to rouse reasonable suspicion. But this case does not require us to speak in such definitive terms.

C. Reserve Officer Dolan Had Reasonable Suspicion That Marshall Was Speeding

Looking at the totality of these facts—the whole picture—Officer Dolan had reasonable suspicion to stop Marshall for speeding that night, meaning Dolan possessed and provided sufficient articulable facts or particularized, objective facts that Marshall was speeding. He testified at the deposition and the suppression hearing that he was using radar that night. He also testified the radar was mounted in front of him, turned on, and properly calibrated that night. Officer Dolan testified the radar's high-pitch tone first alerted him that Marshall's oncoming vehicle was speeding. He explained he looked down at the radar and compared the radar speed to the posted 50-miles-per-hour speed limit and concluded Marshall was speeding. Officer Dolan testified he was one-hundred-percent sure that Marshall was speeding when he stopped him. All told, Officer Dolan articulated enough

facts that gave him a particularized and objective basis for believing Marshall was speeding when he initiated the traffic stop.[1] We, therefore, hold that the traffic stop did not amount to an unconstitutional seizure under the Fourth Amendment.

II. Article 1, Section 11

The Indiana Constitution's Article 1, Section 11 also protects Hoosiers' persons, property, and peace from unreasonable State intrusion. *Quirk*, 842 N.E.2d at 339-40. To maintain its vigor in guarding citizens from unreasonable searches and seizures, we give Article 1, Section 11 "a liberal construction" when applying it. *Holder v. State*, 847 N.E.2d 930, 940 (Ind. 2006). Indeed, it is well settled that investigative stops, like traffic stops, receive protections under Article 1, Section 11. *Renzulli*, 958 N.E.2d at 1146. Although "[p]olice officers may stop a vehicle when they observe minor traffic violations[,]" they must do so under Article 1, Section 11's strictures. *Quirk*, 842 N.E.2d at 340 (citation omitted).

When a defendant challenges the propriety of an investigative stop under the Indiana Constitution, the burden falls to the State to "show the police conduct 'was reasonable under the totality of the circumstances.'" *Robinson*, 5 N.E.3d at 368 (quoting *State v. Washington*, 898 N.E.2d 1200, 1205–06 (Ind. 2008)). We decide whether a stop proved reasonable given the totality of the circumstances by applying our

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[1] We pause a moment to address Marshall's suggestion that Officer Dolan was not a credible witness. But we can only respond by noting that credibility determinations fall outside our purview in these cases. The trial court's order shows that it found Dolan credible, and we will not disturb that determination. *See supra* p. 4.

three-part *Litchfield* test, whereby we evaluate: "1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs." *Id.* (quoting *Litchfield v. State*, 824 N.E.2d 356, 361 (Ind. 2005)). Considering these three factors, we conclude Marshall's traffic stop was reasonable.

First, based on the radar unit's indications, Reserve Officer Dolan had a high degree of knowledge that Marshall was speeding. Officer Dolan testified his radar's high-pitched tone alerted him that Marshall was speeding and even explained that a higher pitch indicated a faster speed. Officer Dolan then compared the radar speed to the reflective 50-miles-per-hour speed limit sign posted before him. We find that Officer Dolan acted with a great degree of suspicion and then knowledge that Marshall was driving too fast when he stopped him for speeding.

Second, we find that this initial seizure—a traffic stop for speeding—amounted to a small intrusion on Marshall's ordinary activities. Officer Dolan stopped Marshall at approximately 2:40 a.m. on a road with little-to-no traffic. Upon making the stop, Dolan explained why he stopped Marshall and asked him for his license and registration in order to run a warrant and BMV check—all routine procedures. The stop escalated into an OWI investigation only when Corporal O'Dea spoke with Marshall and noticed his slowed, slurred speech and smelled alcohol.

Third, we acknowledge that law enforcement has at least a legitimate, if not a compelling, need to enforce traffic-safety laws, including speeding limits.

So long as governments set speed limits for public safety, those limits will need to be enforced.

Balancing these three factors, we hold Marshall's traffic stop for speeding did not violate Article 1, Section 11 of the Indiana Constitution. Officer Dolan possessed sufficient knowledge that Marshal was speeding, the initial stop was not intrusive, and law enforcement needs to be able to patrol speeding.

Conclusion

We hold this traffic stop passes muster under both the United States and Indiana Constitutions. As it relates to the Fourth Amendment, we find there were sufficient articulable facts to give Reserve Officer Dolan reasonable suspicion that Marshall was speeding. And for Article 1, Section 11, we find the traffic stop was reasonable in view of the totality of the circumstances. We, therefore, affirm the trial court's decision denying Marshall's motion to suppress evidence.

Rush, C.J., and David, Massa, and Slaughter, JJ., concur.

OPINION OF THE COURT OF APPEALS FOR INDIANA (JUNE 20, 2017)

IN THE COURT OF APPEALS OF INDIANA

ZACHARIAH MARSHALL,

Appellant-Defendant,

v.

STATE OF INDIANA,

Appellee-Plaintiff.

Court of Appeals Case No. 64A05-1710-CR-2368

Appeal from the Porter Superior Court
The Honorable David L. Chidester, Judge
Trial Court Cause No. 64D04-1611-CM-10105

Before: MAY, RILEY and MATHIAS, Judges.

May, Judge.

Zachariah Marshall appeals the trial court's denial of his renewed motion to suppress. He argues the traffic stop initiated by Reserve Officer Sean Dolan which led to Marshall's arrest violated Marshall's Fourth Amendment rights under the United States Constitution because Reserve Officer Dolan did not have reasonable suspicion to stop Marshall. We reverse and remand.

Facts and Procedural History

In the early morning on October 29, 2016, Reserve Officer Dolan initiated a traffic stop of Marshall's vehicle based on Reserve Officer Dolan's observation that Marshall "was going over the posted speed limit." (Tr. Vol. II at 39.) Reserve Officer Dolan explained to Marshall that Reserve Officer Dolan pulled Marshall over for speeding.

Soon thereafter, the stop escalated to an investigation of operating a vehicle while intoxicated. Reserve Officer Dolan's supervisor, Corporal Robert O'Dea, arrived on the scene and arrested Marshall. Reserve Officer Dolan testified he did not write Marshall a citation for speeding because

> Marshall's BMV check came back that he had no priors to speeding and also that Mr. Marshall was also under the investigation for an O.W.I., therefore, I knew that he was going to have plenty of money problems and legal problems ahead of him that were going to be costly and I decided to cut him a break on the citation for speeding.

(*Id.* at 13.)

On November 2, 2016, the State charged Marshall with Class A misdemeanor operating a vehicle while intoxicated, endangering a person;[1] Class C misdemeanor operating a vehicle with an alcohol concentration equivalent to .08 but less than .15;[2] and Class C misdemeanor operating a vehicle while intox-

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[1] Ind. Code § 9-30-5-2(b).

[2] Ind. Code § 9-30-5-1(a).

icated.[3] On August 4, 2017, Marshall filed a motion to suppress, alleging the traffic stop was unlawful. The trial court denied Marshall's motion on August 8, 2017.

On August 9, 2017, Marshall filed a renewed motion to suppress, again alleging the traffic stop was unlawful, and requested a hearing on the motion. The trial court granted Marshall's request for a hearing and held a hearing on Marshall's renewed motion to suppress on August 17, 2017. The trial court denied Marshall's renewed motion to suppress on August 18, 2017.

On September 6, 2017, Marshall filed a motion asking the trial court to certify its denial of his renewed motion to suppress for interlocutory appeal. The trial court granted Marshall's request for certification on September 12, 2017. Our court accepted jurisdiction over Marshall's interlocutory appeal on December 5, 2017.

Discussion and Decision

Our standard of review for the denial of a motion to suppress evidence is similar to other sufficiency issues. *Jackson v. State*, 785 N.E.2d 615, 618 (Ind. Ct. App. 2003), *reh'g denied, trans. denied*. We determine whether substantial evidence of probative value exists to support the denial of the motion. *Id*. We do not reweigh the evidence, and we consider conflicting evidence that is most favorable to the trial court's ruling. *Id*. But the review of a denial of a motion to suppress is different from other sufficiency matters in that we must also consider uncontested evidence

[3] Ind. Code § 9-30-5-2(a).

that is favorable to the defendant. *Id.* We review *de novo* a ruling on the constitutionality of a search or seizure, but we give deference to a trial court's determination of the facts, which will not be overturned unless clearly erroneous. *Campos v. State*, 885 N.E.2d 590, 596 (Ind. 2008).

The Fourth Amendment to the United States Constitution requires law enforcement officials obtain a valid warrant before conducting searches or seizures. A traffic stop is considered a seizure under the Fourth Amendment. *Bush v. State*, 925 N.E.2d 787, 789 (Ind. Ct. App. 2010), *clarified on reh'g* 929 N.E.2d 897 (Ind. Ct. App. 2010) (clarifying procedural history of case and addressing State's claim of waiver). "To be valid, a traffic stop must be supported by, at least, reasonable suspicion a traffic law has been violated or other criminal activity is afoot." *Id.* at 790. Reasonable suspicion must consist of more than general hunches or suspicions. *Abel v. State*, 773 N.E.2d 276, 279 (Ind. 2002). We consider the totality of the circumstances in determining whether an officer had reasonable suspicion. *Carter v. State*, 692 N.E.2d 464, 467 (Ind. Ct. App. 1997).

Marshall argues the trial court erred when it denied his renewed motion to suppress because Reserve Officer Dolan's traffic stop was unlawful. Specifically, Marshall contends Reserve Officer Dolan's testimony of his "visual speed estimate" was insufficient to prove Reserve Officer Dolan had reasonable suspicion to believe Marshall was exceeding the speed limit when Reserve Officer Dolan initiated the traffic stop. (Br. of Appellant at 14.) This is an issue of first impression in Indiana.

In its order denying Marshall's renewed motion for summary judgment, the trial court concluded that "an officer's testimony of speeding, without radar, pacing or some number, when based upon his or her expertise and ability to draw conclusions about the excessive speed of the vehicle, in general terms, is sufficient to establish a reasonable suspicion of a traffic infraction justifying a stop." (App. Vol. II at 11.) In support of its conclusion, the trial court cited four cases from other jurisdictions: *State v. Butts*, 269 P.3d 862 (Kan. 2012); *State v. Konvalinka*, 819 N.W.2d 426, 2012 WL 1860352 (Iowa Ct. App. 2012); *State v. Allen*, 978 So.2d 254 (Fla. Dist. Ct. App. 2008); and *State v. Barnhill*, 601 S.E.2d 215 (N.C. App. 2004), *review denied*.

All of the cases cited by the trial court in support of its conclusion are distinguishable from the facts in this case because they included testimony from the officer on the scene of the approximate speed the defendant was traveling prior to the initiation of the traffic stop. *See Butts*, 269 P.3d at 1076 ("Officer Hopkins first noticed Butts' vehicle traveling at a speed of about 45 miles per hour in a 30-mile-per-hour speed zone. The officer's speed determination was an estimate based upon his observations, training, and experience with radar and speed detection."); *Konvalinka*, at *1 (Officer "estimated Konvalinka to be travelling at approximately sixty miles per hour. The speed limit in the area was twenty-five miles per hour."); *Allen*, 978 So.2d at 255 (Although officer did not know the exact speed Allen was traveling, "Detective Rylott testified that the area has a speed limit of twenty-five miles per hour and that he had to drive well over fifty miles per hour to catch up to Allen.");

and *Barnhill*, 601 S.E.2d at 229 ("In Officer's [sic] Malone's opinion the vehicle was exceeding a safe speed, as he estimated the vehicle to be traveling 40 m.p.h. in a 25 m.p.h. zone.").

Here, the trial court noted as part of its order the relevant facts regarding Reserve Officer Dolan's testimony:

> Hebron police officer Sean Dolan was patrolling the area around State Road 8 and 500 West on October 19, 2016. He observed Defendant's car speeding and stopped the [D]efendant. Officer Dolan was using a radar, but he could not testify at hearing or at deposition 1) what speed the [D]efendant was traveling and 2) what the radar showed as [D]efendant's speed. He could only state the following:
>
> Q: How certain were you that the defendant was speeding?
>
> A: Very certain, a hundred percent.

(App. Vol. II at 10.) The facts in this case are more similar to those in *State v. Petzoldt*, 803 N.W.2d 128, 2011 WL 2556961 (Iowa Ct. App. 2011). In *Petzoldt*, Officer Jay King pulled over Petzoldt because Officer King thought Petzoldt was speeding. After speaking with Petzoldt, Officer King suspected Petzoldt was intoxicated, administered field sobriety tests, and arrested Petzoldt for operating a vehicle while intoxicated. *Id.* at *1. Petzoldt filed a motion to suppress, citing multiple grounds, including "lack of legal cause to stop [Petzoldt's] vehicle." *Id.* The trial court denied Petzoldt's motion to suppress based on the legality of

his traffic stop.[4] At his subsequent bench trial, the trial court found Petzoldt guilty as charged and sentenced him accordingly.

On appeal, Petzoldt argued the traffic stop was not justified by reasonable suspicion because "Officer King had no 'sufficient, specific, articulable facts to substantiate a particularized suspicion to justify making an investigatory stop.'" *Id.* at 3. The court stated:

> We believe that with proper foundation, an officer's visual estimation of speed may be sufficient to supply probable cause to stop a vehicle for speeding. But that is not the case here.
>
> Here, Officer King testified he was playing Solitaire when he observed Petzoldt's pickup truck briefly as it passed in front of his patrol car. Although he testified he believed the truck was travelling at a speed greater than the posted speed limit, Officer King made no estimate as to how fast the truck was travelling or how much over the posted limit he thought the pickup was travelling. The posted speed limit is not even in the record before us. Officer King's visual estimate of speed was not confirmed by any

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[4] Petzoldt also argued "improper administration of field sobriety tests, lack of grounds to request a preliminary breath test and/or invoke implied consent, violation of Iowa Code section 804.20, not requesting a breath specimen in writing, lack of certification to operate the DataMaster, and improper questioning of [Petzoldt] prior to Miranda warning." *Id.* at *1. The trial court denied Petzoldt's motion to suppress on all grounds except his argument regarding the grounds for the preliminary breath test.

> other means of corroboration of the speed, such as radar or pacing. Officer King observed no other traffic infractions or driving anomalies by the pickup. He reached his conclusion based upon "years of experience looking at vehicles and the speeds they are going," something he did every day in his job as a thirty-one-year veteran of the police force. Further, he said that as he attempted to catch up to the pickup, he "could tell that it was still going over the speed limit." Officer King did not charge Petzoldt with speeding. The speed of Petzoldt's truck cannot be discerned from viewing the video taken by Officer King's dashboard-mounted camera.

Id. (footnote omitted). As part of its analysis, the court relied on *Allen* and *Barnhill* as instances where the officer's visual estimation was sufficient to supply probable cause to stop a vehicle for speeding.[5] Based thereon, the court concluded:

> Officer King's testimony is solely conclusory. Having failed to articulate his observations of the movement of the Petzoldt truck in his testimony, Officer King's opinion lacks any factual foundation. Other than relying on his experience as a police officer, he failed to express any reasons for his belief the truck was speeding.

Id. at *4. Because Officer King had not supplied specific, articulable facts upon which he based his con-

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[5] As noted *infra*, those cases are distinguishable on the basis the officers involved testified to an approximate speed the defendant was traveling and to the speed limit in that area.

clusion that Petzoldt was speeding, the court concluded the traffic stop violated Petzoldt's rights under the Fourth Amendment of the United States Constitution and reversed Petzoldt's conviction.

Similar facts exist here. During a pre-trial deposition, Reserve Officer Dolan could not recall the posted speed limit at the location of the traffic stop, but he claimed he knew at the time of the stop what the speed limit was in the area. He testified he "thought maybe it was forty miles an hour[.]" (Tr. Vol. II at 22.) During the suppression hearing, Reserve Officer Dolan indicated he had visited the location of the stop prior to the hearing and that the speed limit was fifty miles per hour. Reserve Officer Dolan testified he did not pace Marshall's vehicle, did not write down the speed at which he observed Marshall traveling prior to the traffic stop, and did not observe Marshall commit additional traffic infractions.

Instead, he agreed when asked, "you're testifying that Mr. Marshall was doing something above [the posted speed limit]?" (*Id.* at 12.) Reserve Officer Dolan also testified his radar was properly calibrated and working at the time and while he did not know the exact speed Marshall was traveling, his radar indicated Marshall was going over the posted speed limit. Because Reserve Officer Dolan could not testify regarding the speed of Marshall's vehicle in more specific terms, we hold he did not have specific articulable facts to support his initiation of a traffic stop, and therefore the traffic stop violated Marshall's Fourth Amendment rights. *See L.W. v. State*, 926 N.E.2d 52, 59 (Ind. Ct. App. 2010) (officer did not have reasonable suspicion to conduct investigatory

stop of L.W. and thus the stop violated L.W.'s Fourth Amendment rights), *reh'g denied*.

Conclusion

The trial court erred when it denied Marshall's renewed motion to suppress because the traffic stop that resulted in Marshall's arrest for driving while intoxicated violated the Fourth Amendment to the United States Constitution.[6] Accordingly, we reverse and remand for proceedings consistent with this opinion.

Reversed and remanded.

Riley, J., and Mathias, J., concur.

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[6] At trial and on appeal, Marshall also argued the traffic stop violated his rights under Article 1, Section 11 of the Indiana Constitution, which also prohibits unreasonable search and seizure. The trial court's order did not address Marshall's Indiana Constitutional argument. As the Indiana Constitution provides broader protection than the Federal Constitution, *State v. Moore*, 796 N.E.2d 764, 767 (Ind. Ct. App. 2003) ("the Indiana Constitution may prohibit searches which the federal Constitution does not"), *trans. denied*, and we have concluded the traffic stop did not meet the lower protection provided by the Federal Constitution, we need not address any argument regarding the Indiana Constitution.

ORDER OF THE SUPERIOR COURT DENYING MOTION TO SUPPRESS (AUGUST 18, 2017)

IN THE PORTER SUPERIOR COURT
DIVISION FOUR (4) STATE OF INDIANA
COUNTY OF PORTER

STATE OF INDIANA

v.

ZACHARIAH MARSHALL

Cause No. 64D04-1611-CM-10105

Before: David L. CHIDESTER, Judge.

Defendant, Zachariah Marshall, filed a Motion to Suppress on August 8, 2017. Hearing was held on August 17, 2017. Witnesses sworn and evidence heard.

Facts

Hebron police officer Sean Dolan was patrolling the area around State Road 8 and 500 West on October 19, 2016. He observed Defendant's car speeding and stopped the defendant. Officer Dolan was using a radar, but he could not testify at hearing or at deposition 1) what speed the defendant was traveling and 2) what the radar showed as defendant's speed. He could only state the following:

> Q: How certain were you that the defendant was speeding?

A: Very certain, a hundred percent.

Ruling

The issue is whether quantification[1], or some exact speed is required, along with knowledge of the speed limit at the scene, for there to be reasonable suspicion that a traffic infraction was being committed, as a necessary requirement for stopping the Defendant, consistent with Fourth Amendment jurisprudence.

The State and Defense have ably briefed the issue, citing persuasive authority for their position under the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution. However, neither side was able to point the Court to that definitive case which holds that for speeding to form the basis of a stop, the excessive speed over the speed limit must be shown in the form of a number, such as 60 in a 50 mile per hour zone. And, Officer Dolan's testimony as to the speed limit posted at the scene is important, as the defense points out, because how can one know if a speed is excessive, if one does not know or recall the speed limit at the scene? The defense also attacks the credibility of the officer by pointing out that he never cited defendant for speeding but chose to issue a warning. Although discretionary, it increases the argument that the speed must not have been excessive.

Despite not recalling the speed limit at deposition in June of 2017 (eight months later), the officer did testify at hearing that at the time of the stop, there were ample road signs announcing the speed limit and

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[1] The court defines "quantification" as the lack of a score or speed, to determine driving in excess of the posted speed limit.

he was able to coordinate his knowledge of the speed limit with either the radar or his observations to observe that defendant was traveling in excess of the posted speed limit. He testified at hearing that the speed limit was 50 miles per hour.

The State cites the Court to *Vanderlinden v. State*, 918 N.E.2d 642 (Ind. Ct. App. 2009), but again in that case the Indiana Trooper had a definitive speed of 51 mph in a 35 mph zone. The State cites *State v. Sitts*, 926 N.E.2d 1118 (Ind. Ct. App. 2010), but that case involved crossing the center line, not speeding. *State v. Quirk*, 842 N.E.2d 334 (Ind. 2006) was cited, but that case involved a semi truck with one of its headlights out. None of the other cases cited by the State deals with the issue of speeding and the lack of quantification to determine probable cause for a stop.

The defense argues that without quantification in a speeding situation, the stop becomes pretextual, in violation of the Constitution, despite later smelling alcohol on defendant's breath.

> "It defies logic how Reserve Officer Dolan can claim the Defendant was speeding but not know the speed limit on the road on the road the Defendant was observed traveling or the speed of the Defendant's vehicle". (Defendant's Brief p. 5).

The Defense cites *Croom v. State*, 996 N.E.2d (Ind. Ct. App. 2013), but that case involved stopping a car with a temporary license plate, not speeding. Likewise, the Court is cited by the Defense to *Turner v. State*, 862 N.E.2d 695 (Ind. Ct. App. 2007). That case has similar aspects to the matter before the Court, however, in that case the officer testified that although he

used speeding as the basis for the stop and did not know the speed limit at issue, he was using the stop purposely as a pretext to stop the defendant to discuss burglaries in the area. No such admission of the stop being pretextual by design was admitted by Officer Dolan.

A review of the caselaw from other jurisdictions shows that an officer's testimony of speeding, without radar, pacing or some number, when based upon his or her expertise and ability to draw conclusions about the excessive speed of a vehicle, in general terms, is sufficient to establish a reasonable suspicion of a traffic infraction justifying a stop. *State v. Betts*, 46 Kan.App. 2d 1074, 269 P.3d 862 (Kan 2012); *State v. Konvalinka*, 819 N.W.2d 426, 2012 WL 1860352, at 6 (Iowa Ct. App. 2012); *State v. Allen*, 978 So.2d 254, 256 (Fla. Dist Ct. App. 2008; *State v. Barnhill*, 166 N.C.App. 228, 601 S.E.2d 215 (N.C. App. 2004).

Here, Officer Dolan was sure, based upon his experience and observations at the scene, on a clear night, that defendant approached the road in questing traveling in excess of the posted speed limit. He was adamant that the defendant was traveling too fast. The Court thus finds that his stop of the defendant was based upon his observation that a traffic infraction was being committed. On that basis, the Court denies the Motion to Suppress.

This matter is set for jury trial on Monday, August 28th. Should the defendant seek an interlocutory appeal, the court would grant such request as a novel question of law and fact in Indiana. Defendant must let the court know if his intent on this matter by August 22nd, so that the Court's preparation, as well as counsel's, can proceed.

DATED THIS August 18, 2017

/s/ David L. Chidester
Judge

CC: STATE/Attorney Campbell

TRANSCRIPT OF PROCEEDINGS
—RELEVANT EXCERPTS
(AUGUST17, 2017)

STATE OF INDIANA, COUNTY OF PORTER
PORTER COUNTY SUPERIOR COURT 4
SITTING AT VALPARAISO, INDIANA

IN RE THE MATTER OF:
ZACHARIAH J. MARSHALL,

Appellant,

v.

STATE OF INDIANA,

Appellee.

Appeal Number 64A05-1710-CR-2368

Lower Court Cause Number 64D04-1611-CM-10105

Before: David L. CHIDESTER, Judge

[Cross Examination; August 17, 2017; p.16]

A. Uh-huh. Yes.

Q. Okay. Now, you mentioned that you, that you know how to properly use the radar?

A. Yes.

Q. And that the radar at the time was properly calibrated?

A. Yes.

Q. And you mentioned that there is a patrol speed on the radar?

A. Yeah.

Q. And that, and that is your speed, correct?

A. Correct; yes.

Q. Okay. So, it's not the speed limit?

A. No.

Q. Speed? It's just how fast your vehicle was going?

A. Absol, yes.

Q. Okay. And then there's a target speed which is, which would be Mr. Marshall's speed, correct?

A. Yes.

Q. Okay. So, so nothing on the radar gives any indication as to what the actual speed limit on the road is, correct?

A. Correct.

Q. All right. Now, you indicated that you're a hundred percent certain that Zachariah Marshall was speeding?

A. Yes.

Q. All right. But, you didn't remember the speed limit on that road, isn't that correct?

A. Yes. During the deposition that you asked me to give at that exact point in time, when you asked me to recall what the speed limit was, I did not know at that time what the speed limit was on that road.

Q. Okay. And that was the deposition that was taken on June 15th, 2017?

A. Correct.

Q. Okay. And the stop occurred on October 29th, 2016?

A. Correct.

Q. All right. Would you agree that, now again, you indicated you're a ten out of ten familiar, familiarity with the Town of Hebron and its roadways, but would you also agree that the longer you work at a job, the, the more you learn?

A. Yes.

Q. And the better you are at that job even?

A. Correct.

Q. So, if your job is patrol then you would get to know the roadways even more as more time went on?

A. Yes.

Q. Would you agree with that statement?

A. Uh-huh.

Q. Okay. So, you're saying then that at some point, that according to your testimony on October 29th, 2016 at approximately 2:40 a.m. you knew what the speed limit was on the road where you observed Zachariah Marshall's vehicle traveling?

A. Yes.

Q. Okay. But at the deposition after having continued to work and indicating you patrolled that roadway extremely often—

A. Uh-huh.

Q. —you didn't know what the speed limit was?

A. Yes; correct.

Q. Okay. In fact, would you agree that during that deposition you stated numerous times that you did not know the speed limit on the road?

A. At that time, yes.

Q. At that—

A. At the—

Q. At that—

A. —time of giving your deposition, my deposition to you, yes, I did not recall what the exact speed limit was on that road.

Q. Okay. And here today you indicated that the speed limit's fifty miles an hour?

A. Correct.

Q. Okay. So, how did you get to this fifty mile an hour as opposed to not knowing?

A. Well, because I was subpoenaed to come here so I did my research before I came into court.

Q. Okay.

A. And then researched again exactly what the speed limit was on that road.

[. . .]

A. Correct.

Q. But you didn't do that did you?

A. No.

Q. Okay. In fact, you didn't do it and in your deposition you stated because you didn't think it was important?

A. Correct.

Q. Okay. But now that we're here on a suppression hearing, now you think it's important to go back and look?

A. Yes; correct.

Q. Okay. Now, you indicated here in court that your, or that you, that the speed limit was fifty miles an hour on the road where you observed Zachariah Marshall's vehicle traveling?

A. Yes.

Q. Okay. Do you recall in your deposition despite indicating several times that you didn't know the speed limit, but you thought maybe it was forty miles an hour?

A. Correct.

Q. Okay. So, at the time of your deposition you really didn't know at all what the speed limit was?

A. Correct.

Q. Now you went back and looked and thought it was fifty miles an hour?

A. Correct.

Q. But during the deposition where you insisted, you insisted during that deposition that Zachariah Marshall was speeding?

A. Correct.

Q. But the speed limit is different from what you state in your deposition as opposed to now?

A. That's correct.

Q. And your radar doesn't give the speed limit?

A. That's correct.

Q. You indicated too that you were slowing down at the intersection, correct?

A. Yeah; correct.

Q. So, your patrol speed was decreasing?

A. Yes; absolutely.

Q. Okay. So, your patrol speed even though, and it's not even the speed limit, but your patrol speed is decreasing as Zachariah Marshall's vehicle passes you on the other side of the intersection as he, as he's accelerating?

A. Yes.

Q. Okay. So, it would make sense that his vehicle would be traveling faster than your vehicle?

A. Yes.

Q. Okay. So, but just because he's traveling faster than your vehicle, it doesn't mean that it's speeding, correct?

A. That's correct.

Q. Okay. He still has to be over the posted speed limit?

A. Yes, that's correct.

Q. And that's the posted speed limit that at your deposition you didn't know?

A. Correct.

Q. Okay. But you claim you knew it at the time of the stop?

A. Absolutely; I did.

Q. Okay. And then you give us a different speed limit here today in court than what you testified you thought it may have been in your deposition?

A. Correct.

Q. Did you do any type of pacing?

A. No.

Q. All right. And you understand what pacing is?

A. Yes, I do.

Q. Okay. And you've been trained in that technique?

A. Yes, sir.

Q. Okay. So, when you pulled around behind Zachariah Marshall's vehicle you did not engage in any form of pacing?

A. No, I was just, he had already committed the infraction for speeding so I just turned around; I made a U-turn just, caught up to him to pull him over.

Q. He committed the infraction for speeding but you didn't know his speed?

A. I did know—

MR. HAMMER: Objection—

THE WITNESS:

A. —the speed—

MR. HAMMER: —Your Honor.

THE WITNESS:

A. —at that time.

THE COURT: Okay; let him answer this question because it's key, all right?

THE WITNESS: I did know he was speeding at that time.

CROSS EXAMINATION CONTINUING
BY MR. CAMPBELL:

Q. Okay; so you knew he was speeding at that time. Did you write that down any where?

A. No.

Q. No. And you say you didn't write it down because you gave a verbal warning?

A. That's correct.

Q. Okay. But when the stop escalated from just a routine, what may have just been a routine traffic stop into an O.W.I. investigation, who's the one that escalated that stop?

A. Corporal O'Dea.

Q. Okay. Let me rephrase that question. You were the only one who pulled Zachariah Marshall over that evening?

A. Correct.

MR. HAMMER: Objection. Counsel already made a, objection prior about talking about the O.W.I. since it wasn't relative to the stop here.

MR. CAMPBELL: Your Honor, it's simply going to the fact

[. . .]

A. Yes.

Q. Okay. So you knew everything that was going on?

A. Correct.

Q. Okay. And at any point in time, so you knew that, let me step back a moment. So, you knew that the stop was escalating from a routine, routine traffic stop into a, potential criminal charges?

A. Correct.

Q. Okay. And you understand as you've testified earlier that you need to have reasonable suspicion to substantiate pulling someone over?

A. Correct.

Q. And probable cause determine that, that you use the law regarding, supporting criminal charges?

A. Correct.

Q. And, so when you knew that this was turning out, that this was no longer a routine traffic stop and it was becoming an O, O.W.I. investigation, you never recorded Zachariah Marshall's speed?

A. Correct.

Q. And you never even put what the posted speed limit was?

A. Correct.

Q. Okay.

MR. CAMPBELL: Your Honor, if I may approach the witness. I'm going to try to do this a little quickly here as far as, I'm going to hand him defendant's

exhibits A through F and then go through them and then, um.

[. . .]

answer, can you answer his question?

THE WITNESS:

A. Yes. I, I knew how fast Zachariah Marshall was going at the date of him committing the infraction.

CROSS EXAMINATION CONTINUING
BY MR. CAMPBELL:

Q. Okay. And you based this simply off of your radar which has not had the actual posted speed limit attached to it or at least to a side of it—

MR. HAMMER: Objection; asked and answered.

THE COURT: Can you, can you rephrase that as to what was the quantification of the speed limit on the date of, moment of arrest?

MR. CAMPBELL: Certainly, Your Honor.

THE COURT: Whether you knew what the speed limit was at deposition or not. What was the quantification number of Mr. Marshall's vehicle on the date of arrest?

THE WITNESS:

A. Correct.

THE COURT: Do you know?

THE WITNESS:

A. It was, it was above fifty miles per hour.

THE COURT: Can you give a number?

THE WITNESS:

A. No, I don't recall. I mean, I don't remember at this, I mean, I just don't remember now. It's been so long. I don't remember the

[. . .]

Zachariah Marshall's vehicle pass by you.

THE COURT: Overruled on the objection; you may answer.

THE WITNESS:

A. It was, I, I do not remember because I do not remember the exact speed limit he was going. I just know that the number was greater than fifty miles per hour.

CROSS EXAMINATION CONTINUING
BY MR. CAMPBELL:

Q. Okay. And you're using that fifty mile an hour speed limit based on, on your testimony here today in court?

A. And the knowledge that I knew that at the date of the arrest.

Q. All right. Because when we asked you in your deposition—

A. Correct.

Q. —you didn't know the speed limit?

A. Correct.

Q. Okay.

MR. HAMMER: Objection; asked and answered.

THE COURT: That is sustained.

MR. CAMPBELL: Okay.

THE COURT: You've, we've gone over this now three times.

MR. CAMPBELL: Okay.

CROSS EXAMINATION CONTINUING
BY MR. CAMPBELL:

Q. So, again, all we had to go on essentially is your word and no objective proof; it's just simply your word that he was going over the posted speed limit?

A. Correct.

[. . .]