

TECHNICAL MEMORANDUM

TEXAS TRANSPORTATION INSTITUTE

Cooperative Research Program
with
State Department of Highways and Public Transportation

TO: Gary Trietsch
FROM: Kay Fitzpatrick *JK* and Tom Urbanik
SUBJECT: Automated Enforcement -- Legal Issues
STUDY NO. 1232
AREA NO. III
DATE: August 23, 1990

Attached is a Technical Memorandum on legal issues specific to Texas on Automated Enforcement. The source for this material is the Traffic Monitoring Technology's Legal Information Package. Ed Shaddock of the General Counsel Division reviewed the memorandum. His comments are attached as Appendix D. Please contact me if you have any questions (857-1535).

Several directions are currently available for this task. If the interest is in having an Automated Speed Enforcement demonstration project, a logical next step is for a meeting with SDHPT, TTI, and agencies who have potential interest in participating in an ASE program. This meeting could include a presentation of TTI findings and discussions on the direction the use of automated enforcement in Texas is heading. TTI could prepare advance material for distribution prior to the meeting, if we want to maximize the time available for discussion.

cc: Sandy Tucker

INTRODUCTION

This memorandum is to supplement the information contained in the April 1990 Technical Memorandum on Automated Enforcement. Material was obtained primary from the Traffic Monitoring Technology's Legal Information Package. Ed Shaddock of the General Council Division (Texas State Department of Highways and Public Transportation) reviewed the material in this memorandum. His comments are included in Appendix D.

LEGAL HISTORY

In *Commonwealth v Buxton* (1910) 205 Mass 49, 91 NE 128, a speeding conviction was sustained on evidence derived from electronic devices involving the use of photography. The evidence was obtained by a "Photo-Speed-Recorder" which operated by taking two pictures, at a measured time interval, of the speeding automobile, and then calibrating the difference in the size of the automobile in the two photographs so as to determine, by a mathematical formula, the distance traveled in the time elapsed. The Recorder was found legally successful, however, logistically it was impractical for continued use.

In *People v Hildebrandt* (1955) 308 NY 395, 126 NE2d 377, 49 ALR2d 449, a speeding conviction based upon evidence obtained by a "photo-traffic" camera (takes two photographs of a moving vehicle at a set time interval) was reversed because of the absence of any evidence to show that the defendant, who was not notified of the alleged offense until 2 weeks after it was supposed to have happened, was operating the car at the time the pictures were taken. The courts of appeals held that it could not be inferred that the owner of automobile was the driver at time of speed violation. The defendant could not be convicted of the traffic infraction without evidence that he was the driver at the time of the infraction. Since the device only took photographs of the rear of the vehicle to obtain the

license plate number, the identify of the driver could not be established. This case clearly established the requirements that the operator of the vehicle must be identified.

In the late 1960s, Orbis III was tested in a demonstration project by the City of Arlington. The legal acceptance of Orbis III was not raised during the demonstration project, however, the problem of not being able to identify the driver was solved since the driver was also photographed. For additional discussion on a legal analysis of ORBIS by Glater, see the April 1990 technical memorandum.

The most recent legal action occurred in Arizona where the use of photo-radar by the Town of Paradise Valley, Arizona was challenged by Cortright with cooperating attorneys from the American Civil Liberties Union. TMT reports that "the Town of Paradise Valley has a rebuttable presumptive ordinance which holds the owner responsible for a speeding violation. The Supreme Court of the State of Arizona declined to accept jurisdiction of the petition for special action in the case in April 1989." The arguments on both sides were very extensive; TMT will provide a copy of the case upon request.

TEXAS ISSUES

In 1970, the Attorney General of Texas wrote an opinion on whether the operation of a system consisting of a sensing device, a computer, and a camera which photographs the front view of the vehicle, the driver, its registration plate, and showing the date, time, location, and posted speed limit is legal. The complete opinion is included as attachment

A. In summary, the Attorney General of Texas found:

"There is no actionable invasion of the right of privacy of a person whose photograph is taken on a public highway by a traffic surveillance system when
- such photo is used solely for speed enforcement or-traffic surveying purposes.

Such photographs would be admissible in evidence as proof of identification of defendants and their speed of driving, provided they comply with the rules of evidence applicable thereto."

In November 1987, Andrews and Kurth (attorneys) provided to TMT a Memorandum on Prosecutions of Speeding Violations Documented With TMT Photo Traffic Radar System. They identified four issues for considerations. A summary of their comments follow:

1. Identification and compulsion of court appearances of the driver. The driver of the automobile shown in the photographs may be identified and prosecuted in a number of different ways under current Texas law and procedural rules.

Notice of Violation. The registered owner of the automobile as reflected in the Department of Public Safety Records can be mailed a Notice of Violation requesting identification of the driver. If the owner responds and identified the driver, then another Notice of Violation can be mailed to the operator. If the registered owner, or the person identified as the driver by the owner, ignores a notice, there are two options available for identifying and ultimately prosecuting the driver of the vehicle in question: examining trial (or in a court of inquiry) or further investigation by police.

Ordinance or Statue Creating Presumption that Registered Owner Responsible for Unlawful Operation. Some municipalities (including Houston) have ordinances creating a *prima facie* case against the registered owner of a vehicle for parking violations. Such an ordinance allows the immediate filing of a complaint against the registered owner of an illegally parked vehicle and places the burden on the owner to produce evidence of who is responsible for the illegal parking. In order to facilitate the collection of fines relating to speeding violations documented with the TMT System, a similar ordinance could be adopted

by municipalities or states which accomplishes the same result with regard to operation of the vehicle in a manner contrary to law. Although the driver can be identified and prosecuted under current law and procedures, such an ordinance would facilitate the prosecution of moving traffic violations documented with photographic evidence. A form of such an ordinance is attached as Appendix B. Appendix C is a copy of the Town of Paradise Valley Ordinance.

2. Admission of the photographs and radar readings as evidence. The photographs will be admissible as evidence subject to compliance with certain procedures.

3. Illegal searches and seizures and claims of invasion of privacy. The photographs of the automobile and its driver which are in plain view of the public will not constitute an illegal search or invasion of privacy under the Fourth Amendment.

4. State Certification or restrictions on use. The State of Texas has no statute or regulation regarding the certification of radar units or the posting of signs warning of the use of police radar.



THE ATTORNEY GENERAL OF TEXAS

CRAWFORD C. MARTIN
ATTORNEY GENERAL

AUSTIN, TEXAS 78711

September 14, 1970

Honorable A. Ross Rommel
Traffic Safety Administrator
Executive Department
Drawer P
205 Sam Houston Bldg.
Austin, Texas 78711

Opinion No. M-692

Re: Several questions rela-
tive to whether a particu-
lar traffic surveillance
system is legal.

Dear Mr. Rommel:

Your request for an opinion as to whether the operation of the described traffic surveillance system is legal, presents the following questions:

1. Is there an actionable invasion of the right of privacy of a person whose photograph is taken on a public highway by the described traffic surveillance system when the photo is used solely for speed enforcement purposes?
2. Is there an actionable invasion of the right of privacy of a person whose photo is taken on a public highway by the above system when used for traffic surveying purposes?

Your third question has been withdrawn and is therefore omitted.

4. Assuming that the chain of possession of the film is unbroken from the time it is placed in the camera until the time of trial of a defendant to a speeding violation, would the photograph be admissible in evidence as proof of identification of the defendant and of the speed at which he was driving

when the traffic surveillance unit is left unattended during its operation?

5. With the same assumption as stated in Question 4, would the photograph be admissible in evidence as proof of identification of the driver and of the speed at which he was traveling when the traffic surveillance unit is attended by a police officer who does not apprehend the defendant at the time of violation?

According to your letter, this system consists of a sensing device, a computer, and a camera with illuminating attachment to measure the speed of a motor vehicle, photograph the front view of the vehicle, the driver, its registration plate, and showing the date, time, location and posted speed limit. The only service requirement is the occasional change of film cassettes, and no attendant is required for the operation of the system. Its primary intended uses are for traffic speed control and traffic engineering survey purposes. Your questions raise issues of first impressions in Texas, as there are no court decisions which have decided these issues.

With reference to your first two questions, it is well settled that the individual's right to preserve his personal seclusion must give way to the state's reasonable exercise of the police power. Consequently, for example, statutes making reasonable provision for taking and keeping fingerprints and photographs of persons accused of crime have been sustained. 14 A.L.R.2d 761, Right of Privacy, Sec. 9, Police Power.

In the case of Voelker v. Tyndall, 75 N.E.2d 548 (Ind. Sup. 1957 app. denied 333 U.S. 834 reh. denied 333 U.S. 858) appellant was arrested on a misdemeanor charge and claimed an invasion of his right of privacy. The Court, in upholding the right to take his fingerprints and photograph, said:

"The purpose is single, clear and quite salutary to promote the public safety, by achieving greater success in preventing and detecting crimes and apprehending criminals. The accomplishment of this

object has been an important duty of government in all times. Not infrequently a lack of accurate identification has been a serious handicap in clearing up a crime. It is probable that an accurate identification system, faithfully administered, may be an assistance not only in finding the guilty criminal, but in clearing an innocent suspect."

The rule generally is also stated in 41 Am.Jur. 945, Privacy, Sec. 27:

"It is generally held that the customary photographing and measuring of a prisoner for the purpose of police records do not amount to an invasion of the prisoner's right of privacy."

It is our opinion that a person driving on a public highway in an automobile, is subject to public view and to the state's reasonable exercise of the police power to promote the public safety. Accordingly, we answer your questions 1 and 2 that there is not an actionable invasion of the right of privacy. We find no case authorities recognizing such a right of privacy. Our Courts have so far confined their decisions in upholding a right of privacy to matters relating to marriage, family and sex. 56 American Bar Assn. Journal 673-677, and see California v. Belous, 80 Cal.Reptr. 354, 458 P2d 194 (1969); Griswald v. Connecticut, 381 U.S. 479 (1965). The Courts have refused to extend a right of privacy where public health or safety or other police powers of the state are a competing interest. Public Utilities Commission v. Pollak, 343 U.S. 451 (1952); Frank v. Maryland, 359 U.S. 360 (1959).

Your letter expresses concern as to whether the described system can become accepted as a scientifically reliable speed testing device.

The evidentiary proof required in Court for the reception of evidence in this system would be the same as for any other photographic system in a criminal case.

The rule stated in Wigmore, The Science of Judicial Proof, p. 450, as quoted in Wilson v. State, 160 Tex.Cr.

Hon. A. Ross Rommel, page 4 (M-692)

439, 328 S.W.2d 311 (1959), applies to your questions 4 and 5:

"... since the additions made possible to our unaided senses are due to the use of instruments constructed on knowledge of scientific laws, it is plain that the correctness of the data thus obtainable must depend upon the correctness of the instrument in construction and the ability of the technical witness to use it. Hence, the following three fundamental propositions apply to testimony based on the use of all such instruments:

" 'A. The type of apparatus purporting to be constructed on scientific principles must be accepted as dependable for the proposed purpose by the profession concerned in that branch of science or its related art. This can be evidenced by qualified expert testimony; or, if notorious, it will be judicially noticed by the judge without evidence.'

" 'B. The particular apparatus used by the witness must be constructed according to an accepted type and must be in good condition for accurate work. This may be evidenced by a qualified expert.'

" 'C. The witness using the apparatus as the source of his testimony must be one qualified for its use by training and experience.'"

As stated in Wilson v. State, supra, "... there must be proof that the machine has been properly set up and recently tested for accuracy."

As to your questions 4 and 5 regarding the admissibility in evidence of photographs from the traffic surveillance system as proof of identification of defendants and speed of driving, the established rules of evidence would apply and the burden is upon the prosecution to qualify the evidence for submission and to connect up and prove the identity of the defendant committing the offense. This

Hon. A. Ross Rommel, page 5 (M- 692)

would probably be more difficult when the system's units are left unattended and the defendant is not apprehended at the time and at the scene of the speeding violation. The Court would have to be satisfied that the photographs comply with the usual rules of evidence and accurately depict what they purport to represent. However, admissibility of the photos does not necessarily require identification by an attendant or an eye witness. See Scott, Photographic Evidence, 2nd Ed., Sec. 1026; Vardilos v. Reed, 320 S.W.2d 419 (Tex.Civ.App. 1959, no writ.)

The speed of motor vehicles may be measured by use of a "phototraffic camera", and the "Foto-Patrol" which operates on an electronic impulse which activates a strobe light camera. "It has been held that expert testimony as to the scientific principles underlying it and as to its accuracy at the time of an alleged speeding offense is necessary in order to base a conviction thereon." 7 Am.Jur.2d 871, 872, Sec. 328, Automobiles and Highway Traffic, which cites People v. Pett, 13 Misc.2d, 975, 178 N.Y.S.2d 550.

In People v. Hildebrant, 308 N.Y. 397, 126 N.E.2d 377, N.Y.Ct.App.(1955), the offense was speeding. Police officers, to measure the speed, had used a "phototraffic camera." The Court said, "there should be applicable the criminal-law rules of presumption of innocence and necessity of proof of guilt beyond a reasonable doubt." The Court, holding that the identity of the driver must be proven, and that proof of vehicle ownership alone will not give rise to a presumption that the owner was the driver, said:

"....Apparently, the question is a new one, but that is because speeders are usually pursued and arrested after pursuit, whereas this identity question arises because of the use of a photographic speed recorded, without pursuit or arrest. The device used may be efficient and scientifically trustworthy, its use may make pursuit and immediate arrest inconvenient or unnecessary, and highway safety may be promoted by eliminating such pursuits. But it takes more than necessity to validate a presumption in a criminal case. Tot v. United States, 319 U.S. 463, 467, 63 S.Ct. 1241, 87 L.Ed. 1519, and here we do not even have a presumption."

Hon. A. Ross Rommel, page 6 (M-692)

However, positive identification of the defendant is not required if a witness can testify that the photo is a fair and accurate representation of the scene. U.S. v. Hobbs, 403 F.2d 977 (6th Cir., 1968).

In Commonwealth v. Buxton, 205 Mass. 49, 91 N.E. 128 (1910), a speed violation case, the question was the competency of an instrument known as a "photo-speed recorder." The Court said:

"As a rule the question whether evidence of experiments shall be admitted depends largely upon the discretion of the trial judge; and his action in the exercise of this discretion will not be reversed unless plainly wrong. In this case the result of the experiments did not depend upon the fluctuations of human agencies, nor on conditions whose relations to the result were uncertain, but upon the immutable working of natural laws; and upon the evidence the presiding judge may well have found that such experiments were likely to be more reliable as to the speed of the automobile than the conjectural statement of an eye witness or the interested statement of a chauffeur. We cannot say as a matter of law that the evidence would not justify the judge in coming to the conclusion that the experiments would be useful in determining the speed of the car. Indeed, it would seem desirable to have some machine whose action being dependent upon the uniform working of the laws of nature would record the speed of a moving object."

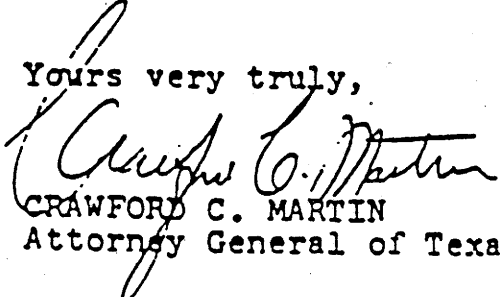
It is, therefore, our opinion in answer to your questions 4 and 5 that the traffic surveillance photographs would be admissible in evidence as proof of identification of defendants and their speed of driving, subject to the requirements and rules of evidence hereinabove stated.

Hon. A. Ross Rommel, page 7 (M-692)

S U M M A R Y

There is no actionable invasion of the right of privacy of a person whose photograph is taken on a public highway by a traffic surveillance system when such photo is used solely for speed enforcement or traffic surveying purposes. Such photographs would be admissible in evidence as proof of identification of defendants and their speed of driving, provided they comply with the rules of evidence applicable thereto.

Yours very truly,


CRAWFORD C. MARTIN
Attorney General of Texas

Prepared by Ben M. Harrison
Assistant Attorney General

APPROVED:

OPINION COMMITTEE

KERNS TAYLOR, Chairman
W. E. ALLEN, Co-Chairman

Houghton Brownlee
Jim Broadhurst
Howard Fender
John Banks
Tom Bullington

MEADE F. GRIFFIN
Staff Legal Assistant

ALFRED WALKER
Executive Assistant

NOLA WHITE
First Assistant

PROPOSED ORDINANCE

Section _____. It shall be unlawful for any person, having registered in his name or owning or operating or having in charge any motor vehicle, knowingly to allow or suffer or permit the same to be operated on any street or highway within the [insert name of the municipality or county] in any manner contrary to law or the ordinances of this [municipality/county].

Section _____. When any motor vehicle is operated in any manner contrary to law or the ordinances of this [municipality/county], proof that the vehicle was, at the date of the offense alleged, owned by the person charged with the offense shall constitute prima facie evidence that the vehicle was being operated at the time of the alleged offense by the owner and/or that the owner knowingly permitted the operation of such vehicle in the alleged manner, but the owner shall have the right to introduce evidence to show that such vehicle was not being operated by him and that he did not knowingly permit the operation of such vehicle in the alleged manner as charged in the complaint.

When recorded, return to:

Paradise Valley Town Attorney
6401 East Lincoln Drive
Paradise Valley, Arizona 85253

RECORDED IN OFFICIAL RECORDS OF MARICOPA COUNTY, ARIZONA	
MAR 27 '89 -4 55	
HELEN PURCELL, County Recorder	
FEE	7- PGS
	BJ

ORDINANCE (OF)

ORDINANCE NUMBER 207

89 137225

AN ORDINANCE OF THE TOWN OF PARADISE VALLEY, MARICOPA COUNTY, ARIZONA, AMENDING ARTICLE 11-2 OF THE TOWN CODE BY REVISING SECTION 11-2-18 PRESUMPTIVE OPERATOR.

BE IT ORDAINED:

Section 1: That present Section 11-2-18 of the Paradise Valley Town Code, Registered Owner of Vehicle Presumed Responsible For Certain Violations is revoked.

Section 2: That new Section 11-2-18 of the Paradise Valley Town Code, Presumptive Operator is adopted, reading:

A. If any vehicle unoccupied by a licensed driver is found upon a street or roadway in violation of any provision of this Article Title 28, Chapter 6, Article 14 of the Arizona Revised Statutes.

or if any vehicle has been driven in violation of the speed restrictions of this Article or Title 28, Chapter 6, Article 6 of the Arizona Revised Statutes or A.R.S. § 28-797, then

proof of the identity of the person in whose name such vehicle is registered pursuant to Title 28, Chapter 3 of the Arizona Revised Statutes may be sufficient evidence that such person was responsible for such violation, in the absence of probative contrary evidence and if the magistrate is so persuaded.

B. Nothing in this Section shall limit the defenses to or evidence otherwise probative and admissible concerning such violation or responsibility therefor.

C. The registered owner of such vehicle, if not the person responsible for such violation, shall upon request inform the magistrate or town attorney of the identity of the person responsible for such violation, if known.

89 137225

PASSED AND ADOPTED by the Mayor and Council of the Town of Paradise Valley, Arizona, this 23rd day of March, 1989.

Robert W. Plenge
Robert W. Plenge, Mayor

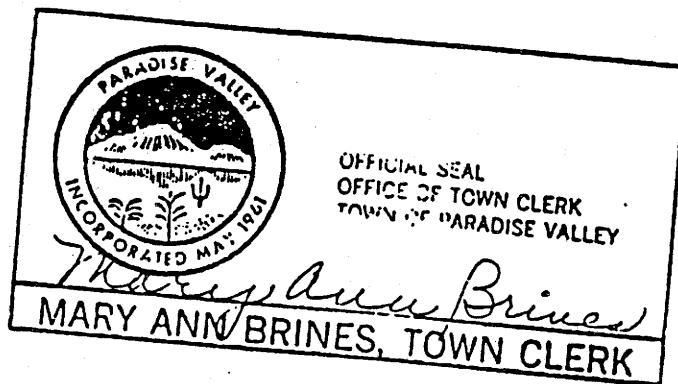
ATTEST:

Mary Ann Brines
Mary Ann Brines, Town Clerk

APPROVED AS TO FORM:

Charles E. Ollinger
Charles E. Ollinger, Town Attorney

ORD297/ORS





COMMISSION

ROBERT H. DEDMAN, CHAIRMAN
RAY STOKER, JR.
WAYNE S. DUDDLESTEN

**STATE DEPARTMENT OF HIGHWAYS
AND PUBLIC TRANSPORTATION**

DEWITT C. GREER STATE HIGHWAY BLDG.

11TH & BRAZOS
AUSTIN, TEXAS 78701-2483
(512) 463-8585

ENGINEER-DIRECTOR
ARNOLD W. OLIVER, P.E.

August 21, 1990

CONTACT:

Ms. Kay Fitzpatrick
Texas Transportation Institute
Texas A&M University System
College Station, Texas 77843

Dear Ms. Fitzpatrick:

As you requested, my staff and I have reviewed TTI's Technical Memorandum and related materials regarding automated enforcement of speed laws. The following is a summary of major legal concerns regarding this issue.

Constitutional Law

TTI discussed several constitutional issues, and we agree with their conclusions that these issues are not serious threats to automatic enforcement legislation. There is one issue, however, that was not raised by TTI. A criminal law that does not require personal guilt may violate the due process clause of the fifth amendment of the United State Constitution. Scales v. U.S., 367 U.S. (1961). Therefore, any statute holding the owner of the vehicle vicariously liable may be unconstitutional.

TTI has suggested enacting a statute similar to municipal parking ordinances creating a presumption that the owner of a vehicle is responsible for illegal parking. Such a presumption would be legitimate and does not create vicarious liability. If the speed enforcement device only photographs the vehicle, a rebuttable presumption could apply. The Orbis III, however, photographs the driver of a vehicle, so a presumption would be ineffective since the driver could use the photograph to overcome the presumption. The fifth amendment will prevent conviction for the substantive crime if the driver refuses to name the driver, and therefore, contempt of court may be the only alternative available.

D-1

August 21, 1990

Identifying Driver

TTI felt that identification of the driver could be obtained by examining trial, court of inquiry, or police investigation. We see difficulties here since examining trials are customarily conducted for felonies, and court of inquiries are limited to district courts. Districts courts do not have jurisdiction of violations of speed laws. An alternative would be the use of a pre-trial hearing.

Also note that Texas has a statutory husband-wife privilege whereby a person cannot be made to testify against a spouse. Tex. Code Crim. Proc. Ann. art. 38.11. This could be a problem when an owner lends a car to a spouse.

Evidence

Some statutory change is probably necessary to allow for the admission of the photograph into evidence. TTI did cite a 1970 AG opinion stating that admissibility of photographs does not require identification by an attendant or an eyewitness, and cited Vardilos v. Reed, 320 S.W.2d 419 (Tex. Civ. App.--Houston 1959, no writ), as its authority. Vardilos, however, only held that the identity of the photographer is not necessary for admittance into evidence. To admit a photograph into evidence, you do need a witness to testify that the photograph accurately reflects the scene depicted. (See e.g. McRoy v. Riverlake Country Club, Inc., 426 S.W.2d 299 (Tex. Civ. App.--Dallas 1968, writ ref'd n.r.e.)) We would recommend statutory language similar to that in House Bill 30, 70th Legislature, to provide for certification of the equipment and self-authentication of these photographs.

Summary

To accomplish your goal, TTI should consider the following:

- a statutory change should be sought to allow for admissibility of the photographs into evidence;
- contempt of court may be the only alternative for forcing the owner of the court to divulge the identity of the driver when the photograph itself proves that the owner was not the driver;
- the due process clause of the fifth amendment may preclude vicarious liability; and
- the availability of the husband-wife privilege may limit the effectiveness of the program.

Sincerely,


Robert E. Shaddock
General Counsel

BJ:cc