

Evidence--Record of Police Speedometer Test Held Admissable Under Civil Practice Act Section 374-a (People ex rel. Katz v. Jones (N.Y.C. Magis. Ct., N. Queens Dist. Feb 26, 1958))

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choosing, even in the light of the Governor's request for a change,²⁴ to retain the requirement that the apprehending police officer follow the speeder for a quarter mile in order to convict.²⁵



EVIDENCE—RECORD OF POLICE SPEEDOMETER TEST HELD ADMISSIBLE UNDER CIVIL PRACTICE ACT SECTION 374-a.—Based on patrolman-relator's speedometer reading while following the defendant's automobile, defendant was charged with speeding.¹ The defense claimed a deprivation of the rights to confrontation² and cross-examination³ due to the failure of the People to produce a witness who either tested or witnessed the testing of the radio patrol car's speedometer. The Court *held* that the Police Department's official records concerning the accuracy of the speedometer⁴ were admissible into evidence under Section 374-a of the Civil Practice Act.⁵ *People ex rel. Katz v. Jones* (N.Y.C. Magis. Ct., N. Queens Dist. Feb. 26, 1958) (opinion of Magis. Scopas).

Confrontation implies the right to the opportunity to cross-examine.⁶ However, unlike cross-examination, this constitutional

²⁴ Governor's Message, MCKINNEY'S SESSION LAWS OF NEW YORK, No. 1, A-73(3) (1958).

²⁵ See N.Y. VEHICLE & TRAFFIC LAW § 56(3), as interpreted by the instant case and the Governor's Message, note 24 *supra*.

¹ N.Y.C. TRAFFIC REGULATIONS § 60.

² N.Y. CONST. art. 1, § 6. ". . . [I]n any trial in any court whatever the party accused shall . . . be confronted with the witnesses against him." *Ibid*.

³ "Cross-examination . . . is a matter of right in every trial of disputed issue of fact." *Friedel v. Board of Regents*, 296 N.Y. 347, 352, 73 N.E.2d 545, 547 (1947).

⁴ The Rules and Regulations promulgated by the Police Commissioner (c. 24, § 25.1) read, "If the speedometer is found to be accurate the date and signature of the member of the force witnessing the test will be written immediately . . . on [a card] . . . [which] will be filed in the command to which the vehicle is assigned." *People ex rel. Katz v. Jones*, pp. 3-4 (N.Y.C. Magis. Ct., N. Queens Dist. Feb. 26, 1958) (opinion of Magis. Scopas). Furthermore, "by virtue of the Administrative Code of the City of New York, section 982-8.0, the court . . . is required to take judicial notice of all rules and regulations of New York City administrative . . . agencies." RICHARDSON, EVIDENCE § 25 (8th ed. 1955).

⁵ "Any writing or record . . . made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter." N.Y. CIV. PRAC. ACT § 374-a.

⁶ See *People v. Nisonoff*, 293 N.Y. 597, 601, 59 N.E.2d 420, 422 (1944). See also 5 WIGMORE, EVIDENCE § 1365 (3d ed. 1940). Confrontation also con-

guarantee is, in certain cases, dispensable.⁷ One such instance results from Section 374-a of the Civil Practice Act.⁸

Prior to this section's adoption, the hearsay evidence rule, the principal justification of which is the right of cross-examination,⁹ effected the abandonment of many valid claims because of the difficulty and expense of procuring, as witnesses, all the parties to a written entry made in the course of business.¹⁰ To satisfy this need for a ". . . rule of evidence which would 'give evidential credit to the books upon which the mercantile and industrial world relies in the conduct of business,'" Section 374-a was enacted.¹¹ It is this element of trustworthiness, serving in place of the traditional safeguards of confrontation and cross-examination, which justifies the admission of the writing despite the fact that it might be hearsay.¹²

However, while the primary purpose of this section was to relieve a difficulty in the business world, it does not appear that it was meant to be so restricted. Business is defined by the section to include ". . . business, profession, occupation and calling of every kind."¹³ Therefore, the courts have construed Section 374-a to encompass hospital records;¹⁴ the records of a doctor made in the course of his profession and the scientific deductions therefrom;¹⁵ a death certificate;¹⁶ and a toxicologist's report as to the quantity of alcohol found in a deceased's brain.¹⁷ However, whether the record of a speedometer accuracy test is within the scope of Section 374-a had not been determined prior to the instant case. Previously, it was the practice of the Police Department to produce either the actual tester of the summoning officer's speedometer or a witness thereto,¹⁸

sists in the opportunity to observe the demeanor of the witness on the stand, as a minor means of judging the value of his testimony. *Ibid.*

⁷ See *People v. Nisonoff*, *supra* note 6, at 601-03, 59 N.E.2d at 422-23 (1944); see also *Friedel v. Board of Regents*, note 3 *supra*.

⁸ See *Williams v. Alexander*, 309 N.Y. 283, 286-87, 129 N.E.2d 417, 419 (1955).

⁹ RICHARDSON, *EVIDENCE* § 207 (8th ed. 1955).

¹⁰ RICHARDSON, *op. cit. supra* note 9, § 228, at 204.

¹¹ *Johnson v. Lutz*, 253 N.Y. 124, 127, 170 N.E. 517, 518 (1930).

¹² See *Williams v. Alexander*, note 8 *supra*.

¹³ N.Y. CIV. PRAC. ACT § 374-a (emphasis added).

¹⁴ *Meiselman v. Crown Heights Hospital, Inc.*, 285 N.Y. 389, 34 N.E.2d 367 (1941). However, records of acts or occurrences leading to the patient's hospitalization are not admissible under § 374-a. *Williams v. Alexander*, 309 N.Y. 283, 129 N.E.2d 417 (1955).

¹⁵ *People v. Kohlmeyer*, 284 N.Y. 366, 31 N.E.2d 490 (1940). The electroencephalogram report of a doctor was held admissible in *Mayole v. B. Crystal & Son, Inc.*, 266 App. Div. 1008, 44 N.Y.S.2d 411 (2d Dep't 1943) (mem. opinion).

¹⁶ *Duffy v. 42nd Street M. & St. N. Ave. Ry. Co.*, 266 App. Div. 865, 42 N.Y.S.2d 534 (2d Dep't 1943) (mem. opinion).

¹⁷ *Iovino v. Green Bus Lines, Inc.*, 277 App. Div. 1002, 100 N.Y.S.2d 148 (2d Dep't 1950) (mem. opinion).

¹⁸ The Rules and Regulations promulgated by the Police Commissioner (c. 24, § 25.0) reads, "Speedometers of vehicles . . . shall be tested each 15-day

as well as the summoning officer himself, in order to prove the People's case.¹⁹ This was not done here. Instead, a card containing a record of the result of the speedometer test was introduced in evidence. Patrolman Katz, the relator, testified in his capacity of summoning officer, and, furthermore, stated: first, that the card was kept in the ordinary course of business pursuant to the Police Commissioner's rules and procedures; second, that his vehicle's speedometer had been tested both prior to and after the alleged violation,²⁰ and found accurate. It is to be noted that the officer was not present at these tests. The Court then ruled that the speedometer tests were made in "the regular course of business," and records of the tests were, therefore, admissible under Section 374-a.

They [the tests] are made pursuant to duty imposed by the Police Commissioner in conformity with duly constituted authority. . . . Their duties [the tester's and witnesses'], in turn, are subject to supervision by their superiors.²¹

As to the defendant's claim that he was deprived of his rights of confrontation and cross-examination, the Court stated that it has found that these rights are waived in most instances, and when exercised, have ". . . yet to result in an impairment of the witnesses' observation of the routine mechanical test."²²

Therefore, in view of the practical results of this decision, there seems to have been a valid and convincing justification for this ruling.²³ No longer will the public be inconvenienced due to the conflict in the scheduled appearances of police officers, throughout

period on the speedometer testing machine. . . . All speedometer tests shall be conducted in the presence of the operator of the vehicle and only by members of the force competent to perform such tests." *People ex rel. Katz v. Jones*, p. 3 (N.Y.C. Magis. Ct., N. Queens Dist. Feb. 26, 1958) (opinion of Magis. Scopas).

¹⁹ See *People v. Sachs*, 1 M.2d 148, 155-56, 147 N.Y.S.2d 801, 808 (N.Y.C. Magis. Ct. 1955). However, in *People v. Tyler*, 109 N.Y.S.2d 756 (N.Y.C. Ct. Spec. Sess. App. Part 1952), the summoning officer, who was himself a witness to the test, was allowed to testify concerning the test. This also appears to be true even if the test were performed by an outside agency. *People v. Marsellers*, 2 N.Y.2d 653, 143 N.E.2d 1 (1957).

²⁰ The radio patrol car's speedometer must be tested every fifteen days. See note 18 *supra*.

²¹ *People ex rel. Katz v. Jones*, p. 9 (N.Y.C. Magis. Ct., N. Queens Dist. Feb. 19, 1958) (opinion of Magis. Scopas).

²² *Id.* at 8. "The test . . . is as simple as comparing a clock to a wrist watch. . . . Proof of accuracy carried back to proof of the accuracy of the master speedometer . . . is not necessary in speed prosecutions." *People v. Tyler*, *supra* note 19, at 757.

²³ Nevertheless, it has been stated that the ". . . privilege . . . to operate a motor vehicle is important and precious. Its loss in many instances creates a greater hardship than would imprisonment for a limited period of time. For this reason the procedure for trial of traffic violations . . . which carry with them . . . loss of a license . . . should be surrounded with all of the safeguards which legal jurisprudence has given to the trial of criminal cases. . . ." *People v. Rice*, 206 Misc. 999, 1000, 136 N.Y.S.2d 134, 135 (County Ct. 1954).

the city, in order to bear witness to a speedometer test; no longer will such a number of policemen be removed from "active" duty to appear in court as witnesses. If a defendant desires, he may always subpoena the tester, or a witness to the tests, and question him about them.²⁴

Furthermore, it was feasible to hold that Section 374-a was meant, at least in spirit, to cover the present situation. It is the duty²⁵ of the police force to apprehend violators of traffic regulations. Speedometer testing appears to be inherent in this "business"²⁶ and is performed in the regular course thereof. However, some doubt as to the application of this section does arise when one considers that the requirement, that evidence be shown to prove that the speedometer was tested for its accuracy every fifteen days, necessarily demands that one of the two tests be *after* the alleged violation.²⁷ It is submitted that if this decision does not stand, it will be because the trustworthiness of the written entry is not sufficient to satisfy the requirements implied in Section 374-a.²⁸



NEGOTIABLE INSTRUMENTS—PAYEE AS HOLDER IN DUE COURSE — PAYEE, A BONA FIDE HOLDER FOR VALUE WITHOUT NOTICE, HELD TO BE A HOLDER IN DUE COURSE.—A building company contracted to build an animal hospital for defendant. The company assigned plaintiff its rights to first monies due on the contract as security for a loan. Defendant, who had notice of the assignment, forwarded a check, payable to plaintiff's order, to the building company to be marked "payment approved" and sent on to the plaintiff. Before plaintiff could cash the check, defendant stopped payment because the building company had abandoned its contract. In an action on the check the New York Supreme Court *held* that plaintiff, although payee, was a holder in due course and entitled to recover. *Squith*

²⁴ See N.Y. CIV. PRAC. ACT § 403.

²⁵ *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930) has declared that the person supplying the information to the entrant must be under a business duty to do so. Therefore, where an outside agency tested the patrol car's speedometer, admission of a written record of the test under § 374-a has been refused. *People v. Boehme*, 1 M.2d 629, 152 N.Y.S.2d 759 (County Ct. 1955); *People v. Greenhouse*, 4 M.2d 692, 136 N.Y.S.2d 675 (County Ct. 1955).

²⁶ In *People v. Heyser*, 2 N.Y.2d 390, 141 N.E.2d 553 (1957), the testimony of a patrolman, experienced in estimating the speed of motor vehicles, who had opportunity to observe the defendant's automobile, was sufficient to convict the defendant of speeding.

²⁷ See *People v. Sachs*, 1 M.2d 148, 155, 147 N.Y.S.2d 801, 808 (N.Y.C. Magis. Ct. 1955).

²⁸ See *Williams v. Alexander*, 309 N.Y. 283, 286, 129 N.E.2d 417, 418-19 (1955).