STATE OF NEW MEXICO
COUNTY OF DONA ANA
THIRD JUDICIAL DISTRICT COURT

CITY OF LAS CRUCES,

Plaintiff-Appellee,

v

CRISTOBAL RODRIQUEZ,

Defendant-Appellant, pro se.

No.CV-2010-0202
Judge Arrieta

DECISION

THIS MATTER having come before the Court on the Notice of Appeal filed by the Appellant Rodriquez on January 20, 2011, pursuant to NMRA Rule 1-074, from an adverse decision from the hearing officer under the Safe Traffic Operations Program (STOP), the Court having certified the matter to the Court of Appeals who has dismissed and remanded the matter, and the argument having been fully briefed, the Court makes the following decision:

BACKGROUND

Appellant Cristobal Rodriquez ("Appellant") received notice of a STOP (Safe Traffic Operations Program) fine violation for a speeding vehicle of which he was the registered owner from the City of Las Cruces ("City"). At the time of the violation, Appellant was not driving the vehicle. While his wife was authorized to use the vehicle, other family relatives were visiting on the day in which the violation was issued. Appellant claims that he does not know the identity of driver for the day in question.

ISSUES

Issue 1: Whether the STOP program is unconstitutional based on the general claims of the

Appellant under the Fourteenth and Fifth Amendments to the US Constitution?

Issue 2: Whether under Ordinance No. 2495, the Appellant can be held strictly and vicariously liable as the registered vehicle owner when he was not the driver for purposes of an alleged violation for speeding as detected by cameras or electronic equipment under the City's STOP program?

ISSUE 3: Whether the evidence relied on by hearing officer constitutes substantial evidence sufficient to meet the constitutional requirements of Due Process?

THE RECORD BELOW

A review of the record (audio disc of the hearing) in this matter revealed the following testimony and evidence:

An assigned and certified officer from the City police department with 5 years experience testified that the City and "Redflex Traffic Systems" (presumably a private third party corporation), had entered into an agreement to process traffic violations which result from traffic photo enforcement. Redflex is responsible for capturing speed and red light violations. Redflex "is the custodian of the records" and provided the officer with the records and data to review and determine if reasonable grounds existed to issue a citation. The data included Exhibit 1, "documents showing how the technology worked"; Exhibit 2, "speed verification" forms showing that a Lidar technician had tested each system monthly (for August 31, 2009) ; Exhibit 3, being a second set of speed verification forms (for September 11, 2009); Exhibit 4, the citation and three Redflex camera photos of the subject vehicle; and Exhibit 5, video footage from the Redflex camera. The officer testified that she reviewed the exhibits and based on her review, found a violation of speeding by a preponderance of the evidence. The hearing officer

then admitted the exhibits into evidence without considering any objection on admissibility. Immediately after their admission and without further testimony, the City rested its case. The entire proceeding took 15 minutes.

The exhibits were entered pursuant to Section 27-7.5(f) of the Ordinance No. 2495 which states that the City has the burden of proof by a preponderance of the evidence. The Section also mandates that a "... photograph, videotape or other electronic evidence of a violation is authentic, is not hearsay, and shall be admitted into evidence" by the hearing officer. (Administrative transcript on appeal (Admin.Tr), page 0030). The hearing officer advised the Appellant that while the evidence is admitted without evidentiary objections or challenges to foundation, Appellant could challenge the weight or accuracy of the evidence.

At the hearing, the pro se Appellant in a less than articulate argument, stated that while there was no question as to technology or the speed of the vehicle, he raised constitutional issues under the Fifth and Fourteenth Amendment, claimed a denial of his "right of confrontation", equal protection, and conflicts in law. Appellant also argued that, "...not providing evidence on who the driver is, is unconstitutional...", and questioned, "[w]here is the evidence?". At that point, the hearing officer commenced to explained to Appellant the speed verification undertaken by the third party and explained the ordinance as applying to the registered owner, regardless of the identity of the driver. In his initial statement of the issues, Appellant argued that a violation of the procedural due process rights under the 14th Amendment occurred "in the insufficiency of evidence". (Statement of Issues filed July 22, 2010, paragraph 8).

The Appellant's argument is essentially, that the evidence of a violation is hearsay, its admission denies his constitutional right to procedural Due Process, and it further denies him a

reasonable opportunity to confront, or cross-examine the evidence. Appellant argues that by allowing the admission of the supporting documents and video into evidence as not being hearsay and establishing its authenticity without an objection, the Ordinance language inherently serves an adjudicatory function. Appellant also seems to argue that this is a denial of his right to equal protection under the laws.

ANALYSIS

ISSUE 1: Whether the Stop Program Is Unconstitutional Based on the General Claims of Appellant Under the Fourteenth and Fifth Amendments to the US Constitution?

Fourteenth Amendment Challenge:

Appellant contends that STOP violates the Fourteenth Amendment in that it abridges the privileges or immunities of citizens depriving them of life, liberty or property without due process of law or equal protection. (Appellant's Supplemental Briefing, filed December 9, 2011). In Titus v. City of Albuquerque, 149 N.M. 556, 252 P.3d 780 (App. 2011) *cert granted*, Titus v. City of Albuq, 150 N.M. 667, 265 P.3d 718 (May 03, 2011), the Court of Appeals addressed the constitutionality of the STOP program for Albuquerque under the New Mexico constitution. The challenge in this case however, is under the US constitution. Regardless, the Appellant has failed to specify how his rights under Equal Protection have been denied. There is no basis in the record from which to glean such an argument. Other than Due Process which is addressed below, there is no basis within the record to determine how Appellant has been denied of life or liberty.

The Court will not review unclear arguments, or guess at what a party's argument might be and neither will it review arguments that are inadequately developed. Titus, *supra*. The

Appellant's general constitutional claims (except for Due Process) under the Fourteenth Amendment are dismissed.

Fifth Amendment Challenge.

Simply stated, Appellant contends that the Fifth Amendment does not allow for private property to be taken for public use or that he be compelled to be a witness against himself.

The Fifth Amendment to the Constitution of the United States provides (among other things) that no one shall "be compelled in any criminal case to be a witness against himself." The Fifth Amendment is applied to each state through the Fourteenth Amendment. Schmerber v. California, 384 U.S. 757, (1966). Since this matter is a civil proceeding, the Fifth Amendment does not apply. The record does not reflect that any property of the Appellant was seized as a criminal matter or in a forfeiture. Appellant's general Fifth Amendment claims are dismissed.

ISSUE 2: Whether under STOP Ordinance, the Appellant Can Be Held Strictly and Vicariously Liable as the Registered Vehicle Owner When He Is Not the Driver for Purposes of an Alleged Violation for Speeding as Detected by Cameras or Electronic Equipment under the City's Stop Program?

With respect to the argument that the Ordinance imposes strict or vicarious liability upon a registered owner in violation of the constitution, Titus, has already addressed that issue in its analysis of the nuisance challenge. While the Titus did not address the issue as a US constitutional issue, it did acknowledge the legislative grant to municipalities to adopt STOP ordinances and allow the matter to be treated as a civil nuisance not preempted by state law. Without any further analysis under the constitution on strict or vicarious liability, this Court will adopt the Titus opinion in that this Ordinance (on strict liability) is a valid adoption of a nuisance ordinance under the specific facts of this case as presented by Appellant.

ISSUE 3: Whether the Evidence Relied on by Hearing Officer Constitutes Substantial Evidence Sufficient to Meet the Constitutional Requirements of Due Process?

Appellant argued that a violation of the procedural due process rights under the Fourteenth Amendment occurred "in the insufficiency of evidence". Appellant questions the evidence underlying his conviction of a STOP violation as a matter of Due Process. Appellant raises a denial of his Fifth Amendment "right of confrontation" which this Court will interpret as a failure by the City to provide evidence which is subject to cross-examination or simply examination in a civil proceeding context.

As stated, the pro se Appellant has been somewhat inarticulate in his argument. While the argument below focused on a claim that the City failed to prove the identity of the driver, and that the technology and speed were not at issue, Appellant clearly made the argument that in the absence of the admitted data, there was an insufficiency of evidence to support the traffic violation. This argument was further refined; it is the insufficiency of the evidence which led to a violation of his Due Process rights. In other words, Appellant has clearly challenged the sufficiency of the evidence underlying the traffic violation regardless of whether the issue is phrased in terms of identity or speeding; without the admitted evidence, the City could prove neither and therefore no violation could issue. Before we analyze the applicable law, we must consider the standard of review of a district court from an administrative appeal.

STANDARD OF REVIEW

Although the City has relied on Rule of Civil Procedure 1-074 (statutory review of administrative decisions) as the basis for the appeal, it appears that Rule 1-075 (constitutional review by district courts of administrative appeals) is the applicable rule. NMSA 1978, Section

3-18-17 (2011 Supp.) granted legislative authority to municipalities to enact ordinances dealing with red light and speeding offences as a nuisance, however the Section did not specifically include nor describe STOP programs (traffic photo enforcement systems). This Court will assume that such programs are implicitly authorized within the statutory authority. However, Section 3-18-17 does specifically provide for a district court review of the administrative decisions (see subsection 3-18-17(A)(3)(e)). Therefore, this Court will look to Rule 1-075(R) as the basis for the administrative appeal and for the standard of review in addition to applicable precedent.

Constitutional questions are questions of law and are reviewed de novo in an administrative appeal. See Martinez v. Public Employees Retirement Ass'n of New Mexico 286 P.3d 613 (App. 2012). To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial on the same grounds argued in the appellate court. Woolwine v. Furr's, Inc., 106 N.M. 492, 745 P.2d 717 (App. 1987). Preservation of the issues is also required on appeal from decisions in administrative proceedings. See Selmeczki v. N.M. Dep't of Corr., 139 N.M. 122, 129 P.3d 158 (App. 2006). Although preservation of an issue is a prerequisite to its review on appeal, "the preservation requirement should be applied with its purposes in mind, and not in an unduly technical manner." Gracia v. Bittner, 120 N.M. 191, 195, 900 P.2d 351, 355 (App. 1995).

Rule 1-075 provides for a constitutional review by the district courts when there is no statutory right to appeal. The district court under Subsection R applies the following standards of review: 1) whether the administrative agency acted fraudulently, arbitrarily or capriciously; 2) whether based on a whole record review, the decision of the agency is not supported by

substantial evidence; 3) whether the decision of the agency was outside of the scope of authority of the agency; and 4) whether the action of the agency was otherwise, not in accordance with the law.

WHAT PROCESS WAS DUE TO APPELLANT?

As indicated earlier, the Titus case dealt with Due Process under the New Mexico Constitution. Under that analysis, the Court of Appeals considered a general and broad constitutional challenge to the Albuquerque STOP program concerning the strict and vicarious liability of the registered owner (among other issues). While that issue was also raised in this case and disposed of in accordance with Titus, the Appellant here challenges the adequacy of the evidence as a denial of his Due Process under the US constitution.

In Titus, the Court of Appeals noted that if the vehicle owner chose to challenge the violation, the owner was entitled to following process: notice of the violation and detailed information about basis for charge; notice that the owner was entitled to a hearing before an impartial hearing officer at no cost; the burden to prove the violation was on city department; the owner was entitled to hear and challenge evidence; the hearing officer was required to render a decision in writing; and the owner could appeal to district court and recover costs if the appeal was successful. The Titus court did not however, examine the constitutionality of how the evidence underlying the citation, was admitted.

The essence of procedural due process is that the parties be given notice and an opportunity for a hearing. Jones v. Nuclear Pharmacy, Inc., 741 F.2d 322 (10th Cir.1984) Beyond that, a procedural due process analysis involves consideration of three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation

of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews v. Eldridge, 424 U.S. 319 (1976). Imposition of a monetary fine is a sufficient property interest to support a procedural due process claim. Titus, supra.

In this case, Appellant has a monetary interest that will be affected by official action that bears the risk of an erroneous deprivation through the procedures used. With respect to additional or substitute procedural safeguards, Appellant is not advocating for additional safeguards but is complaining that the current process lacks the basic safeguards of Due Process. The lack of procedural Due Process rights under the Fourteenth Amendment occurred, "in the insufficiency of evidence". The safeguards to be provided here are the basic right to confront or cross-examine witnesses, i.e., the electronic evidence through the adherence to a constitutionally sound process.

The importance of the administrative body's interest is the need to provide a fair and procedurally sound process to its citizenry while at the same time, maintaining a streamlined yet cost efficient process to administratively deal with these citations. The City also has additional monetary interests in maintaining the STOP program: Each month the City retains the gross amounts from the fines, fees and costs assessed that are collected that month, less the "setup, maintenance, support and processing service fees" charged by the vendor (Redflex) that month, then the City pays one half of the net amount to the State treasury, retaining the other half for itself. NMSA 1978, Section 3-18-17A(3)(a) and (b).

Appellant has alleged a sufficient private interest (a fine affecting his property interests)

that will be affected by the City's official action. This private interest bears the risk of an erroneous deprivation if appropriate and basic Due Process safeguards are not afforded to Plaintiff. While the City's monetary interest might be affected through increased administrative burdens, the basic Due Process rights of its citizenry vastly outweigh the costs of additional fiscal burdens necessary to provide those basic rights.

DID THE EVIDENCE AND PROCESS PROVIDED AT THE STOP HEARING MEET CONSTITUTIONAL SCRUTINY?

1). The Evidence Relied on By the Hearing Officer Was Not Legislatively Authorized to be Admitted as, "Without Foundation, as Authentic and Not Hearsay"; The City Acted Outside of its Scope of Authority.

The record below establishes the following facts:

First, the only evidence upon which the violation is based on, are the four Exhibits constituting the data received from Redflex (Admin. Tr. and disc);

Second, the data was admitted pursuant to Ordinance section 27-7.5(f) allowing a, "... photograph, videotape or other electronic evidence of a violation is authentic, is not hearsay, and shall be admitted into evidence" by the hearing officer (Admin. Tr., page 30);

Third, the data was admitted through an Ordinance enacted pursuant to the authorizing legislation of NMSA 1978, Section 3-18-17 (Admin. Tr., page 20); and

Fourth, the designated police officer's testimony was predicated solely on the evidence admitted under section 27-7.5(f).

The district courts are required to show great deference to the decisions of municipal authorities in passing ordinances. The judiciary merely determines whether the municipality has complied with the plain meaning of legislation (i.e., whether administrative body was within

scope of its authority.) and whether legislation is itself unconstitutional. Daugherty v. City of Carlsbad 120 N.M. 716, 905 P.2d 1120 (App.1995).

Pursuant to NMSA 1978, Section 3–17–1 (1993), municipalities may enact ordinances to provide for the health and safety of their inhabitants so long as the ordinances do not conflict with the laws of the State of New Mexico. An ordinance which exceeds the authority delegated by the State and which imposes a different standard of proof than what is authorized, is an ordinance which the entity had no authority to pass. See for example, Lopez v. Municipal Council, *unreported opinion*, 2012 WL 870716 (N.M.App., February 06, 2012). In Lopez, the City of Artesia passed an ordinance allowing its city council to determine by resolution that a property was a menace to the public and then allowing its condemnation. The plaintiff was cited and challenged the ordinance as exceeding the authority granted to municipalities by state statute NMSA 1978, Section 3–18–5 because the ordinance imposed a higher standard of proof on his appeal to the district court than the standard of appeal under Section 3–18–5. The ordinance (§ 5–5–4) departed from the language of Section 3–18–5(E) by adding a final sentence purporting to impose a "clearly erroneous" standard of review on the district court as opposed to hearing the matter de novo with findings. The Court of Appeals held that the City of Artesia had lacked the authority to pass the ordinance. See also, Chapman v. City of Albuquerque, 65 N.M. 228, 335 P.2d 558 (1959) (City, which enacted a stand-by ordinance making assessments against unconnected property by which sewer pipes ran, had no authority to create by ordinance distinctions applicable to unplatted or unsubdivided lands and not applicable to platted or subdivided lands; no authority existed by statute to create such distinctions).

In this case, the legislature was clear when it provided for a hearing process in Section 3-

18-17 (A)(3)(e):

> " ... a hearing provided for a contested nuisance ordinance offense or violation shall be held by a hearing officer appointed by the presiding judge of the civil division of the district court with jurisdiction over the municipality, and **the hearing itself shall be conducted following the rules of evidence** and civil procedure for the district courts." (Emphasis added).

The City Ordinance section 27-7-7.5(A)(3)(e), provides that a, "... photograph, videotape or other electronic evidence of a violation is authentic, is not hearsay, and shall be admitted into evidence" by the hearing officer (Admin. Tr., page 30). In enacting section 27-7-7.5(A)(3)(e), the City excluded the use of the following Rules of Evidence: Rule 11-801, hearsay definitions, Rule 11-802, hearsay, Rule 11-803 and 1-804, exceptions, Rule 11-901, authentication and identification, and quite possibly, all of the Rule 11-701 series requiring expert testimony for technical or specialized knowledge. (By automatically allowing the electronic related evidence in by ordinance, the City eliminated the need for expert/technical testimony to carry its burden of proving a violation by a preponderance of the evidence.) The legislature mandated that the City conduct a hearing, "following the rules of evidence". The legislature made no exception to exclude these critical evidentiary rules in providing the citizenry of the State with Due Process.

Interestingly, sometime after the City enacted its original Ordinance, it was brought to the attention of the City that its hearing process in the Ordinance did not follow the process set out by the legislature in Section 3-18-17 (A)(3)(e). On June 15, 2009, the City passed Ordinance No. 2527 (Admin. Tr., page 0020), amending Ordinance No. 2495 and noting that amendments to the State statute 3-18-17, "...include a provision that the District Court appoints the Hearing Officer ... ***and that hearings shall be conducted following the rules of evidence*** and civil procedure for the district courts." (Emphasis added) Id. The amending Ordinance was then

passed so that Ordinance No. 2495 could be "enacted to read as shown on **Exhibit "A"** attached" (Admin. Tr., pages 0020-0031). Exhibit A being the amended Ordinance 2495 reflects a change that the hearing office was to be appointed by the district court and not the City Manager. Section (f) Hearings, of the Ordinance however, was left unchanged with the same language allowing for automatic admission of the electronic evidence without hearsay or authenticity objection. (Admin. Tr., page 0030). As of December 21, 2009, six months after the amendment and as of the date of Appellant's hearing, the City was still allowing for the automatic admission of Redflex evidence without hearsay and authenticity objection.

The City acted outside its scope of its legislative authority when it excluded the Rules of Evidence on hearsay and authenticity from the hearing.

2). Independently, the City had no Authority to Alter or to Enact the Rules of Evidence for its Administrative Hearings.

The City had no authority to prescribe the Rules of Evidence and procedures for the district court to follow upon a whole record review and to confer jurisdiction upon its hearing officer to enforce the City ordinance 27-7-7.5(A)(3)(f); the enactment of this ordinance was beyond the scope of authority delegated to the City. See Lopez v. Municipal Council, *supra.*; City of Spokane v. J-R Distributors, Inc. 90 Wash.2d 722, 585 P.2d 784 (Wash. 1978).

The separation of powers doctrine precludes the legislature from stepping into the judiciary's exclusive domain of prescribing the rules of judicial practice and procedure. In re Daniel H., 133 N.M. 630, 68 P.3d 176 (2003). Although the judiciary has shared procedural rule making with the legislature, any conflict between court rules and statutes that relate to procedure are resolved in favor of the court rules. Const. Art. 3, § 1; Southwest Community Health Services

v. Smith, 107 N.M. 196, 755 P.2d 40 (1988).

In Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976), appealed on other grounds after remand, 91 N.M. 250, 572 P.2d 1258 (App.), cert. denied, 91 N.M. 249, 572 P.2d 1257 (1977), cert. denied, 436 U.S. 906 (1978), the appellate court held that legislation creating a testimonial privilege in a judicial proceeding was unconstitutional. The statute at issue constituted an evidentiary rule. Evidence rules are traditionally considered to be "adjective law" or "procedural law," the promulgation of which is a power vested in the New Mexico Supreme Court by virtue of its superintending control over all inferior courts under Article VI, Section 3, of the New Mexico Constitution. Article III, Section 1. Under the Constitution, the legislature lacks the power to prescribe by statute rules of evidence and procedure, and the statutes purporting to regulate practice and procedure in the courts cannot be binding.

In this case, the legislature mandated the use of the rules of evidence. It was the City in enacting the subject ordinance that altered or prohibited the use of critical evidence rules. Pleading, practice and procedure are of the essence of judicial power. Functions of the judiciary which are essential to its constitutional powers cannot be exercised by another branch of the government in conflict with the judicial branch. While, historically, the judiciary has shared procedural rule-making with the legislature, any conflict between court rules and statutes that relate to procedure are today resolved by this Court in favor of the rules. State v. Garcia 101 N.M. 232, 680 P.2d 613 (App. 1984); Maestas v. Allen, 97 N.M. 230, 231, 638 P.2d 1075, 1076 (1982); Salazar v. St. Vincent Hosp., 96 N.M. 409, 412, 631 P.2d 315, 318 (App.), aff'd in part, rev'd in part, 95 N.M. 147, 619 P.2d 823 (1980). The power to pass an ordinance

establishing a rule of evidence binding on the courts is not granted to cities expressly by statute and is not fairly implicit from or incident to powers expressly given to cities nor essential to accomplishment of objects and purposes of such powers. See for example, Nasfell v. Ogden City, 122 Utah 344, 249 P.2d 507 Utah 1952. (Ogden assumed that because cities have been given the power to regulate streets and the parking of vehicles for a fee, together with the general power to enforce such powers, that they necessarily had the implied power to pass an ordinance establishing a rule of evidence binding on the courts. The appellate court could find no such authority for the city to enact rules of evidence).

The City's attempt to regulate the practice or procedure in the administrative court to allow the admission of critical evidence over a hearsay and authenticity objection, is a violation of the power reserved to judiciary under the Constitution.

3) Even Under a Lax Standard of Admission of Evidence in Administrative Hearings, the Evidence that was Admitted Violated Appellant's Due Process.

While such procedural matters as the rules of evidence or hearsay need not be adhered to by administrative agencies to the same degree as in a court of law, the right to a fair hearing is held to the higher standard. Los Chavez Community Ass'n v. Valencia County, 277 P.3d 475 (App. 2012) (requiring an impartial tribunal in an administrative setting). Our Supreme Court has determined it to be "imperative" that when governmental agencies adjudicate the legal rights of individuals, that they "use the procedures which have traditionally been associated with the judicial process." Reid v. N.M. Bd. of Exam'rs in Optometry, 92 N.M. 414, 416, 589 P.2d 198, 200 (1979).

In administrative proceedings, both hearsay and non-hearsay evidence may be considered;

however, the "legal residuum" rule requires that the administrative action be supported by some evidence that would be admissible in trial. New Mexico follows the "legal residuum" rule in administrative proceedings in which a person faces the loss of his or her livelihood or a property right. See Anaya v. State Personnel Bd., 107 N.M. 622, 762 P.2d 909 (App.1988) (The revocation of a driver's license is an administrative adjudication that affects a substantial matter. Therefore, we require a residuum of competent evidence which would support a verdict in a court of law.); Trujillo v. Employment Sec. Comm'n, 94 N.M. 343, 610 P.2d 747 (1980) (A license revocation cannot be based solely upon the observation of the police officer; it depends upon the blood alcohol test result.); City of Portales v. Shiplett, 67 N.M. 308, 355 P.2d 126 (1960) (Test results are critical evidence; without it there can be no legal residuum to support the license revocation); Bransford v. State Taxation and Revenue , 125 N.M. 285, 960 P.2d 827 (App. 1998); Anaya v. New Mexico State Personnel Bd., 107 N.M. 622, 762 P.2d 909 (App.1988); and Young v. Board of Pharmacy, 81 N.M. 5, 462 P.2d 139 (1969). Under the rule, "any action depriving [the person] of that property must be based upon such substantial evidence as would support a verdict in a court of law." Young, 81 N.M. at 9. The Court of Appeals has already stated that the imposition of a monetary fine is a sufficient property interest to support a procedural due process claim. Titus, supra

The legal residuum rule requires that agency's decision be supported by some evidence that would be admissible under the rules, otherwise the agency's decision is not considered to be supported by substantial evidence. The exceptions to the hearsay rule are based on guarantees of reliability and trustworthiness of particular circumstances which the rules of evidence accept as substitutes for declarant's testimony at trial. The purpose of the hearsay rule is to limit the danger

that evidence at trial is unreliable. Chavez v. City of Albuquerque, 124 N.M. 239, 947 P.2d 1059 (App. 1997). See also Matter of Termination of Boespflug, 114 N.M. 771, 845 P.2d 865 (App. 1992).

In the instant case, there is no dispute that the five exhibits entered into evidence were hearsay and that they were the whole of the evidence supporting the violation and citation. With respect to Exhibit 4 (the citation and three Redflex camera photos of the subject vehicle) and Exhibit 5 (video footage from the Redflex camera), they might have been admissible under current law. See Idris v. City of Chicago, Ill. 552 F.3d 564 C.A.7 (Ill.),2009 (federal challenge to Chicago's STOP program under federal constitutional law: "... photographs are at least as reliable as live testimony, that the due process clause allows administrative decisions to be made on paper (or photographic) records without regard to the hearsay rule.") Id at page 568. The problem is that the videos and the photographs alone, do not implicate Appellant in any violation; at most they demonstrate that it is Appellant's vehicle in the picture due to the license plate information. (See Admin. Tr., pages 0005-0009). Without Exhibits, 1, 2 and 3, or the hearsay information imprinted at the top of Exhibit 4, there is no way to determine what speed the vehicle was traveling.

Incidently, in Idris, the Seventh Circuit did not address the plaintiff's constitutional claims of due process under the procedure granted during STOP administrative hearing: "Objections to procedures used at a hearing must be made there (and then on review in state court), where they can be evaluated in context." Id at page 568.

Exhibit 1 consists of "documents showing how the technology worked". Exhibit 2 are the "speed verification" forms showing that a Lidar technician had tested each system monthly

(for August 31, 2009) in addition to Exhibit 3, being a second set of the speed verification forms (for September 11, 2009).

With respect to Exhibit 1 (Amin. Tr., pages 0010-0013), it consists of 4 pages titled, "Statement of Technology, REDFLEXred Rear Only Camera System with Video". This written information from the City's vendor attempts to explain how the technology works in detecting speeds using cameras and videos connected to a traffic signal controller and inroad sensors within "the detection zone". The traffic signal controller is the City's traffic signal device with green, red and amber phases. The "Speed Detection System" within the detection zone consists of an inductive loop with electro magnets placed in the surface of the roadway at certain intervals along with sequenced "piezo strips" which are pressure sensitive strips. The inductive loop detects metal passing over it while the piezo strip detects a "tire strike" when the vehicle's tire impacts the strips. As a vehicle passes through these detection devices which are "in the roadway at known distances from each other", it causes eight distinct signals which are apparently transmitted to, and calculated through some type of computer software, somewhere. The speed is calculated by the formula Speed = Time/Distance, (S=T/D), "...and since the computer in the system knows the distances between each detector and the time it took for the vehicle to move that distance, it is a simple mathematical calculation to determine the speed of that vehicle." (Admin. Tr., page 0011). As a check for accuracy of the system, the time measured by the system clock and the speed it registers allows for a calculation of the distance traveled. The accuracy of the calculation is checked when "the known wheel base of the offending vehicle" strikes the first piezo strip with the front tire and then is struck by the rear tire. (Admin. Tr., page 0012). That speed is then checked with established computer calculations for

approaching speeds "covering the 6' between piezos". Id.

While the information provided in Exhibit 1 may be worthy of a class review for an engineering or a math class, in a court of law, the question is how can this data used in a specialized area (to determine speed) be used to interpret the facts to reach an ultimate conclusion, i.e., that the vehicle was speeding? Determining the speed of a vehicle by measuring various coefficients is not normally within the common experience of a lay person and requires a foundational predicate laid by an expert witness. Tobeck v. United Nuclear-Homestake Partners, 85 N.M. 431, 512 P.2d 1267 (App. 1973).

While Exhibit 1 might be helpful in explaining how the speed detection system works in general, it raises more questions than it answers. To insure that Exhibit 1 is, "based on guarantees of reliability and trustworthiness of particular circumstances", the fact finder must determine whether there is any calibration of the system (see discussion on Exhibits 2 & 3 below), not only for overall accuracy but, as to each separate component. How is the "system clock" calibrated and maintained? If the "four devices are imbedded *in about 10 feet* of road surface", just how accurate are the results? (Emphasis added). How does, age, temperature, weather and the current physical road conditions affect the components and calculation? How are the components (electro magnets, piezo strips, Lidar radar, etc) maintained and how often are they replaced? How does a computer account for a "known wheel base" given the different sizes and types of vehicles on the road? If these questions and others cannot be answered, then the hearing office can only assume guarantees of reliability and trustworthiness.

Exhibit 4 and 5 are the speed verifications forms for testing done in August and September of 2009 for four different locations done within the City. (Admin. Tr., pages 0014-

0017). The exhibits are preprinted forms with "fill in the blanks" spaces for the "tech" to fill in and to sign at the bottom of each page. The blanks lines are filled in and are separated by intersection and lane with the "Software" indicating a certain mph speed. Adjacent to this is a "LIDAR" mph speed. Apart from an illegible signature, the tech's initials are placed at the top along with the date of the speed verification. This appears to be the City's evidence that the equipment was tested randomly against five different vehicles, thus ensuring guarantees of reliability and trustworthiness.

There is no information on the tech's education, training or skills. There is no indication of what vehicles or type of vehicles were tested against the system. Each page (Admin. Tr., pages 0014-0017) has a statement at the bottom above the signature that reads:

> "_____ certify that the speed detection system at the intersection of
> _____ was verified for speed accuracy and tested on
> _____ in accordance with the most current documentation at the time of testing."

This supposed certification has no indication of who (I, me, we, etc) is doing the certification and no indication of what intersection was certified or the date...all of the spaces to the left were left blank in each page. The certification was not done under oath to be admissible at trial under penalty of perjury. There is no indication of how the speed verification was done; we cannot tell if the tech was sitting in some back room at the corporate headquarters back East viewing software generated results, or whether the tech was actually on the ground at each of the intersections in Las Cruces. What was "the most current documentation at the time of testing" upon which the verification and testing was based? We do not even know the qualifications or experience if any, the tech had in generating speed verifications.

While there is precedent that declares that a court's deference to an agency is more

substantial when the challenged decision involves technical or scientific matters within the agency's area of expertise, this assumes that the deciding agency already had that expertise. WildEarth Guardians v. National Park Service, 703 F.3d 1178 C.A.10 (Colo.). There is no indication that the testifying officer or the City, had any type of expertise in speed detection equipment. Here, there was complete reliance on hearsay evidence entered pursuant to an ordinance that was enacted to allow the entry of technical evidence without hearsay exception or foundational requirements.

By nature of legal residuum rule, inadmissible hearsay is not made admissible in administrative proceedings because it is corroborated by other inadmissible hearsay. Chavez v. City of Albuquerque, *supra*. The City admitted hearsay evidence (a software calculation of speed) and corroborated the violation of speeding with speed verifications forms for the accuracy of the system. The "legal residuum" rule requires that the administrative decision be supported by some evidence that would be admissible in trial, otherwise the agency's decision is not considered to be supported by substantial evidence. Chavez v. City of Albuquerque, supra. Appellant was denied Due Process when the evidence used to determine a violation did not meet the legal residuum rule. There is no substantial evidence to support the hearing officer's finding of a violation.

4) The Technical Evidence was Not Admitted Pursuant to Legislative Authority Establishing the Foundational Guarantees of Reliability and Trustworthiness.

In the context of a trial, the proponent of technical evidence must set a foundation to establish the guarantees of reliability and trustworthiness, unless such guarantees are established through the enacting statutes. See for example, State v. Martinez, 141 N.M. 713, 160 P.3d 894

(2007). (Before a breath alcohol test card is admitted into evidence in a prosecution for driving while under the influence of alcohol, the State must make a threshold showing that the machine has been certified, and, before the result of a breath test is admissible, the State must also make a threshold showing that certification by the Scientific Laboratory Division of the Department of Health was current at the time the test was taken. NMSA 1978, § 66–8–102.) It is the court that must decide any preliminary questions about whether a witness is qualified, a privilege exists, or evidence is admissible. Id.

See also, Bransford v. State Taxation and Revenue Dept., Motor Vehicle Div., supra. In Bransford, the appellate court held that the calibration of a breath testing machine is not a judicially cognizable fact of which a hearing officer can take administrative notice. In license revocation proceedings, when the reliability or validity of breath test result is at issue, evidence of proper calibration may be set forth by affidavit or certification by an appropriate, qualified witness, indicating that the breath testing machine was properly calibrated or that machine was in proper working order on day in question; live testimony is not required.)

In the instant case, the City cannot point to any legislative authority which allows for the admission of technical speed detection data and equipment calibration, nor can it point to any qualified witness as recognized by legislative authority.

5) By Admitting the Speed Detection Data without a Foundation, the Appellant's Right to Cross-Examination Was Denied Resulting in a Due Process Violation.

As stated, Appellant's pro se argument focuses on a denial of his right to confrontation as a Due Process violation. The Court will interpret this argument as a claim of denial to his right to cross-examine a key witness in a civil case. See Dennison v. Marlowe, 108 N.M. 524, 775

P.2d 726 (1989) ("Marlowes did not cite this standard of review, but we interpret their argument to be when an unambiguous provision in a contract calls for attorney fees, failure to enforce this provision is an abuse of discretion.") and Griffin v. Thomas, 122 N.M. 826, 932 P.2d 516 (App.1997) ("When the plaintiff is pro se, the pleadings must tell a story from which the essential elements prerequisite to the granting of the relief sought can be found or reasonably inferred....In light of the general lenity with which complaints are read, we hold that Plaintiff's complaint adequately raised a due process property claim."). See also Parham v. Department of Labor, Licensing & Registration., 985 A.2d 147 (Md.App. 2009) (Appellant's pro se hand-written appeal of the hearing examiner's decision, though not written in terms of "unreliable hearsay" and "the denial of due process," clearly indicated that the factual dispute sufficient to raise the issue and coupled with her testimony, preserved the issue for appeal.)

To deny a litigant the right to cross-examine a witness who has testified against him is a denial of due process of law. TW Telecom of New Mexico, LLC v. New Mexico Public Regulation, 150 N.M. 12, 256 P.3d 24 (2011) (The parties were denied the opportunity to substantively address the impact of an administrative order at a proceeding through the presentation of evidence or the examination and cross-examination of witnesses resulting in a denial of due process); In the Matter of a Commission Investigation into the 1997 Earnings of U S West Communications, Inc., 127 N.M. 254, 980 P.2d 37 (1999) (State Corporation Commission did not violate the due process rights of the telephone company at hearing on interim rate reduction as long as the witness was subject to company's cross-examination); and In the Matter of Pamela A.G., 139 N.M. 459, 134 P.3d 746 (2006) (In evaluating whether the procedure used by a trial judge for admissibility of a child's hearsay statements in abuse and

neglect proceeding created an erroneous deprivation of the parents' relationship with their child, and thus resulted in denial of due process, the Supreme Court looked to the purpose of confrontation and cross-examination, which is to ensure the integrity of the fact-finding process by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact). See also, Director of Patuxent Institution v. Daniels, 221 A.2d 397 (Md. 1966) ("We believe that even in a civil proceeding the Fourteenth Amendment's guarantee of due process requires a test of whether lack of confrontation (or receiving hearsay evidence) may result in the denial of such basic rights as to offend the Constitution.").

Where there is no competent evidence which corroborates the improper hearsay testimony, and the credibility of those statements are outcome determinative, the admission of that testimony is a denial of due process where it involves a constitutionally protected interest. See Colquitt v. Rich Township H.S. Dist. No. 227, 699 N.E.2d 1109 (Il. App. 1998); and Kaske v. City of Rockford, 96 Ill.2d 298, 309, 450 N.E.2d 314 (1983) ("...while the rules of evidence are not so rigidly applied at an administrative hearing, such relaxation of rules 'cannot abrogate the right to a just, fair and impartial hearing.").

From the record, it can be reasonably inferred that the Appellant claimed a denial of Due Process from the lack of admissible evidence. The evidence that was admitted without regard to hearsay or authenticity, denied Appellant's Due Process rights as he was denied his right to cross-examine the key evidence against him.

6) **Exhibits 1, 2 and 3, were Admitted Beyond the Scope of What was Permissible Under the Subject Ordinance.**

Ordinance 27-7-7.5(A)(3)(e), provides that a, "... photograph, videotape or other electronic evidence of a violation is authentic, is not hearsay, and shall be admitted into evidence" by the hearing officer (Admin. Tr., page 30). The words "electronic evidence" is not defined by the ordinance. Exhibits 1, 2 and 3 were not "electronic evidence". While the RedFlex documents explaining the system (Exhibit 1) and the two sets of speed verification forms (Exhibits 2 and 3) purporting to certify the accuracy of the system were related to the actual "electronic" data being the video and photos, the former simply attempted to verify what the latter purported to prove. This documentation can not be said to be, "other electronic evidence of a violation".

The City could have easily defined what was meant by "electronic evidence" or could have included the words, "electronic related evidence" within the definition. At this point, the Court can only interpret the ordinance giving its words their plain meaning. Exhibits 1, 2 and 3 should not have been admitted as "electronic evidence".

7) **The Evidence Could not have Been Admitted as Business Records Exception to Hearsay.**

At the beginning of the hearing the police officer summarily stated that the Redflex records were "business records" kept within the regular course of the business of the City.

In administrative proceedings, both hearsay and non-hearsay evidence may be considered. See In re Termination of Boespflug, 114 N.M. 771, 774, 845 P.2d 865, 868 (Ct.App.1992) (an administrative body is not required to follow the formal rules of evidence). However, the legal residuum rule requires that an administrative action be supported by some evidence that would

be admissible in a trial. Tallman v. ABF (Arkansas Best Freight), 108 N.M. 124, 767 P.2d 363 (App.1988) (if the only support found is inadmissible hearsay, then the reviewing court may set aside the agency's finding or decision); Anaya v. State Personnel Bd., 107 N.M. 622, 762 P.2d 909 (App.1988) (Courts require a residuum of competent evidence which would support a verdict in a court of law.). See also discussion (3) above.

Under the public records exception to hearsay, Rule 11-803(6), allows a record of an event to be an exception to hearsay if: 1) the record is made at or near the time of the event by someone with knowledge; 2) the record was kept in the course of regularly conducted activity of an organization; 3) the making of the record was a regular practice of that activity; and 4) all of the conditions are shown by the testimony of the custodian or other qualified witness or with certification that complies with Rule 11-902(11). Rule 11-902 provides that certain evidence is self-authenticating requiring no extrinsic evidence of authenticity; Subsection 11 to this Rule allows certified domestic records of a regularly conducted activity provided that the requirements of Rule 11-803(6) (a) to (c) are shown by the certification of custodian or another qualified person.

Whether a foundation to the business records is laid by a custodian of the records or by certification, the basic foundational elements of Rule 11-803(6) (a) to (c) must still be shown. See for example, Levy v. Disharoon, 106 N.M. 699, 749 P.2d 84 (1988). A custodian of the records or other qualified witness must appear in court to identify the records and testify as to the mode of their preparation and their safekeeping.

In the instant case, the testifying officer admitted that the records custodian was the company Redflex. The officer did not testify as to whether the records were made at or near the

time of the event by someone with knowledge, although this could be implied by the nature of the evidence. The officer stated that the records were kept in the course of regularly conducted activity of the police department however, it was clear that the department was only the recipient of the records and such records were generated by a third party. It must also be shown that, "the making of the record was a regular practice of that activity". Presumably the "activity" means the activity of documenting violations through the use of speed detection devices. There is no evidence that the City police department generated any of the admitted documentation of the violation on its own (other than the citation), or for that matter, that it operated any of the speed detection devices on its own.

In Cadle Co. v. Phillips, 120 N.M. 748, 906 P.2d 739 (App. 1995), the plaintiff was a successor in interest to a bank that had failed and whose assets were then taken over by the FDIC. The FDIC sold the defendants' loan to the plaintiff who subsequently sought to collect. At trial the plaintiff offered the predecessor's bank file which had a partial payment history, a computer printout showing the alleged balance, and a second printout from another bank which had temporarily operated that bank after its failure. The plaintiff offered the records as a business records exception to hearsay and the trial court excluded the evidence because plaintiff failed to lay a proper foundation under the business records exception to the hearsay rule. Plaintiff attempted to introduce the evidence through one of its account officers who was the custodian of the file that contained the disputed records. The officer maintained the file in the regular course of plaintiff's business. She had received the records from the FDIC, which had received them from the original bank. The officer testified that the records were the business records of the bank however, she also testified that she did not have personal knowledge of the procedures used

by the bank in creating and maintaining its records. The trial court excluded the bank records and its decision was affirmed by the Court of Appeals.

As in Cadle Co., in the present case there was no testimony at all about the origin of the records except that they came from the custodian for Redflex. No testimony was presented as to how they were generated or how Redflex maintained its records. There was no testimony as to whether the admitted records were all of the records that the City received from Redflex or that the records provided were accurate. The certifications on the documentation was also wholly deficient. (See discussion 3 above).

There was an insufficient foundation of evidence to support the testifying officer's knowledge of Redflex's record-keeping system for the purpose of admitting the records under SCRA 11-803(6). The records were not self-authenticating.

8) This Case Presents Jurisdictional Issues that Must be Addressed.

A jurisdictional issue determines a court's authority to address the merits of the case and may therefore be raised at any time, even *sua sponte*. It is incumbent upon the appellate court to raise jurisdictional questions *sua sponte* when the court notices them. Smith v. City of Santa Fe, 142 N.M. 786, 171 P.3d 300 (2007) (Holding that the district court had jurisdiction to hear the plaintiffs' declaratory judgment action but that it lacked jurisdiction to consider the plaintiffs' claim for relief under the declaratory judgment action).

What constitutes a jurisdictional issue that can be raised at any time includes the question of whether an entity has the authority to take action on the specific matter at issue. See for example, Pineda v. Grande Drilling Corp., 111 N.M. 536, 807 P.2d 234 (App. 1991) (The Worker's Compensation Division could not have applied a rule granting attorneys' fees in the

case because the rule became effective while the case was pending; it was an error that went to "the heart of the WCD's authority" and was considered a jurisdictional defect that could be raised for the first time on appeal); State v. Clark, 56 N.M. 123, 241 P.2d 328 (1952) (Initiating a contempt proceeding without a required affidavit was jurisdictional). See also Van Sickle v. Industrial Comm'n, 121 Ariz. 115, 588 P.2d 857 (1978) (The power of a three-member board to act when two of the positions on the board are vacant is also a jurisdictional matter that can be raised for the first time on appeal); Railroad Yardmasters of Am. v. Harris, 721 F.2d 1332 (D.C.Cir.1983) (So is the question of whether the Civil Aeronautics Board has power to issue rules that apply to banks); First Am. Bank of Va. v. Dole, 763 F.2d 644 (4th Cir.1985) (A district court has no jurisdiction to enter a conviction and sentence under an inapplicable statute); and Harmon v. Brucker, 355 U.S. 579 (1958) (A district court had not only the jurisdiction to determine its jurisdiction but also power to construe statutes involved to determine whether Secretary of Army did exceed his powers).

Whether the City had the authority to take action on the specific matter at issue (i.e., to admit the speed detection data without hearsay or authenticity objection), is a jurisdictional matter. In this case, the City had no authority to: 1) to go beyond the scope of State statute Section 3-18-17 (A)(3)(e), and enact an ordinance excluding the use of hearsay and authenticity objections contrary to the legislative mandate to use of the Rules of Evidence without exception; 2) to prescribe the Rules of Evidence and procedures for the district court to follow upon a whole record review, or for that matter, to create or alter the applicable Rules of Evidence through its ordinances; and 3) allow its hearing officer to admit the documentary Exhibits 1, 2 and 3, as "electronic evidence" which were beyond the scope of what was permissible under the subject

ordinance.

9) As a Result of the Effect of Multiple Errors, Appellant was Denied Due Process.

The Supreme Court has recognized the potential for multiple errors to impinge upon the fundamental fairness of a trial and result in a deprivation of due process under the Fourteenth Amendment. Darks v. Mullin, 327 F.3d 1001 (10th Cir.2003). The combined effect of multiple errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal. Donnelly v. DeChristoforo, 416 U.S. 637 (1974); and Pickering v. Board of Ed. of Tp. High School Dist. 205, Will County, Illinois 391 U.S. 563 (1968) ("However, appellant makes this contention for the first time in this Court, not having raised it at any point in the state proceedings. Because of this, we decline to treat appellant's claim as an independent ground for our decision in this case. On the other hand, we do not propose to blind ourselves to the obvious defects in the fact-finding process occasioned by the board's multiple functioning vis-a -vis appellant." Pickering at page 580, Footnote 2.).

In this case, due to the multiple errors and lack of authority, Appellant is deemed to have been denied the fundamental fairness of a hearing resulting in the deprivation of Due Process under the Fourteenth Amendment.

FOR THE FOREGOING REASONS,

IT IS HEREBY DECREED that the City lacked authority to admit Exhibits 1-5 constituting all of the evidence against Appellant and acted outside the scope of its authority to enact an ordinance allowing for its admission;

IT IS FURTHER DECREED that the evidence used to determine a violation did not

meet the legal residuum rule and therefore based on a whole record review, there is no substantial evidence to support the hearing officer's finding of a violation;

IT IS FURTHER DECREED that the hearing officer acted outside of his authority under the subject ordinance to admit Exhibits 1, 2 and 3; and

IT IS HEREBY ORDERED that the action of the City was otherwise, not in accordance with law and therefore the decision of the hearing officer in finding a violation is REVERSED.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed via first-class to all counsel and parties of record on this 2nd day of May 2013.

Nancy A. Heavner
Trial Court Administrative Assistant