223 Va 335

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
OCT 30 1981
RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 810616

JOHN HUBERT LEETH, III

Appellant

v.

COMMONWEALTH OF VIRGINIA

Appellee

JOINT APPENDIX

John F. Rick
Farino & Rick
7 E. Franklin Street
Richmond, Virginia 23219

Counsel for Appellant

William C. Plott
Foresman & Plott
6 E. Washington Street
Lexington, Virginia 24450

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VIRGINIA UNIFORM TRAFFIC SUMMONS D 425161

DEPARTMENT OF STATE POLICE D 425161

FILE NO	TRIAL DATE	CONT. DATES
T80-12587	10-23-80	

NAME (LAST, FIRST, MIDDLE): LEETH, JOHN HUBERT III

ADDRESS: 401 SIMRE Rd

CITY/TOWN: WAYNESBORO, STATE: VA, ZIP: 22980

YOU ARE SUMMONED TO APPEAR IN THE ROCKINGHAM (COUNTY/CITY)

[X] GENERAL [ ] JUVENILE & DOMESTIC RELATIONS

DISTRICT COURT AT HARRISONBURG, VIRGINIA

ON THE 23rd DAY OF OCTOBER, 19 80 AT 1:00 A.M. (PM)

TO ANSWER THE VIOLATION OF [X] STATE [ ] COUNTY [ ] CITY [ ] TOWN LAW.

SECTION NO. 46.1-196 DESCRIBE CHARGE: ~~[illegible]~~ A RADAR DETECTION device

DEVICE S/NO 16593

I PROMISE TO APPEAR AT THE TIME AND PLACE SPECIFIED ABOVE

SIGNATURE X [signature] DATE 10/1/80

SIGNING THIS SUMMONS IS NOT AN ADMISSION OF GUILT.

OFFICER PR. W. L. JONES JR BADGE NO. 1522

X 705-434-4455 EXT 50

RACE	SEX	WGT.	HT FT.	HT IN.	EYES	HAIR	DATE OF BIRTH MO.	DAY	YR.
W	M	215	6	1	BR	BR	7	7	46

O.L./C.L. NO. 228-66-3423 STATE VA

V E H	YEAR	MAKE	TYPE	VEH. LIC. NO	YEAR	STATE
	80	AUDI	2DR	WD4ASE	81	VA

OWNERS NAME: —

OWNERS ADDRESS: —

OFFENSE LOCATION: EXIT 61 — OFFENSE JURISDICTION: C82

OFFENSE DATE	DAY WK.	A.M. / PM	WEA	ROUTE NO./STREET
10/1/80	WED	1:00 PM	C1	81

DIRECTION	NO. LANES	ACCIDENT YES	ACCIDENT NO	DATE ARREST	ARREST LOCATION
S	4D		X	"	C82

NAME OF COURT	COUNTY-CITY-TOWN	CONV. DATE
GEN DIST	ROCKINGHAM	10-23-80

OFFICER PR. W. L. JONES JR — CODE BADGE NO. 2410

CONVICTED OF: Same

PLEA	SENTENCE	FINE	COSTS	§ 46.1-423.3
G NG NC TA		[illegible]	18.00	YES NO

PERIOD LICENSE SUSPENDED — SURRENDERED YES NO — D.M.V. ASSIGN TO DR. IMP. CLINIC? YES NO

I CERTIFY THIS AS A TRUE ABSTRACT OF THE RECORDS OF THE COURT AS IT RELATES TO THE CHARGE, JUDGEMENT AND PENALTY.

DATE 10-23-80 — SIGNATURE OF JUDGE OR CLERK [signature]

61-64	* CONV. CODE	* CONV. CODE	65-69	CT SUSP	70-71	* COURT	72-75	* JURIS	70-72	FOR RESID

VIRGINIA UNIFORM TRAFFIC SUMMONS D 425161

DEPARTMENT OF STATE POLICE D 425161

FILE NO.	TRIAL DATE	CONT. DATES
T80-12587	10-23-80	

NAME (LAST, FIRST, MIDDLE): LEETH, JOHN HUBERT III

ADDRESS: 401 SHORE Rd

CITY/TOWN: WAYNESBORO, STATE: VA, ZIP: 22980

YOU ARE SUMMONED TO APPEAR IN THE ROCKINGHAM COUNTY/CITY

☒ GENERAL ☐ JUVENILE & DOMESTIC RELATIONS

DISTRICT COURT AT HARRISONBURG VIRGINIA

ON THE 25th DAY OF OCTOBER, 1980 AT 1:00 A.M. P.M.

TO ANSWER THE VIOLATION OF ☒ STATE ☐ COUNTY ☐ CITY ☐ TOWN LAW.

SECTION NO. 46.1-161 DESCRIBE CHARGE [redacted] operating a motor vehicle with A RADAR DETECTION DEVICE S/NO 16593

I PROMISE TO APPEAR AT THE TIME AND PLACE SPECIFIED ABOVE.

SIGNATURE [signature] DATE 10/1/80

SIGNING THIS SUMMONS IS NOT AN ADMISSION OF GUILT.

OFFICER PR W L JONES JR BADGE NO. 1572

☐ YOU MUST APPEAR FOR TRIAL AT THE TIME AND PLACE SHOWN. FAILURE TO APPEAR CONSTITUTES A SEPARATE OFFENSE

☒ TRIAL MAY BE WAIVED ONLY IF THIS BOX IS CHECKED.

CALL 703-434-4455 FOR DETAILS.

EXT-300

RACE	SEX	WGT.	HT. FT.	HT. IN.	EYES	HAIR	DATE OF BIRTH MO.	DAY	YR.
W	M	215	6	1	BR	BR	7	4	46

O.L./C.L. NO. 228-66-3423 STATE VA

VEH YEAR	MAKE	TYPE	VEH. LIC. NO.	YEAR	STATE
80	AUDI	2dR	WD4ASE	81	VA

OWNERS NAME —

OWNERS ADDRESS —

OFFENSE LOCATION: EXIT 61 — OFFENSE JURISDICTION: 082

OFFENSE DATE	DAY WK.	A.M. / P.M.	WEA.	ROUTE NO./STREET
10/1/80	WED	1025 P.M.	CI	81

DIRECTION	NO. LANES	ACCIDENT YES / NO	DATE ARREST	ARREST LOCATION
S	4D	☒ NO	11	082

NAME OF COURT: GEN DIST — COUNTY-CITY-TOWN: ROCKINGHAM — CONV. DATE

OFFICER: PR W L JONES JR — CODE-BADGE NO. 2412

PLEA: G (NG) NC TA — ATTORNEY

CONVICTED OF —

SENTENCE: FINE

O.L./C.L. SUSP. ____ DAYS/MOS SURRENDERED ☐ YES ☐ NO

JAIL: ____ DAYS/MOS. SUSP. ON CONDITION

☐ DISMISSED ☐ NOLLE PROSEQUI. ☐ C.W.L. DATE

JUDGE

I HEREBY NOTE AN APPEAL TO THE CIRCUIT COURT OF THIS COUNTY/CITY, TO BE CALLED ON ____, 19__

DEFENDANT'S SIGNATURE

APPEAL WITHDRAWN

DEFENDANT'S SIGNATURE

DATE

COURT COPY

STATE FINE	100.00
LOCAL FINE	
TRIAL FEE	
MAG. BAIL FEE	
FILING FEE	15.00
SUMMONS FEE	
DMV FEE	
BLOOD TEST FEE	
ASAP	
CICF	
CT APPT ATTY STATE	
CT APPT ATTY LOCAL	
WEIGHING FEE	
LIQ. DAMAGES	
TOTAL RECEIVED	115.00

§ 46.1-423.3 ___ YES ✓ NO

RECEIPT NO.

ESCOT

DEPARTMENT OF STATE POLICE
D 425161

MOTION TO DISMISS
and
MOTION TO SUPPRESS EVIDENCE

TO: THE HONORABLE JOSHUA ROBINSON, JUDGE OF THE CIRCUIT COURT OF ROCKINGHAM COUNTY.

This day comes the Defendant, acting by counsel, and represents unto your Honorable Court the following facts and circumstances as the basis for his Motions to Dismiss and Suppress Evidence in the above captioned case:

1. On the 23rd day of October, 1980, the Defendant was found guilty on a Virginia Traffic Summons of possession of a radar detection device and fined $100 in the General District Court of Rockingham County.

2. The uncontroverted evidence submitted by the Trooper (Trooper W. C. Jones, Jr.) was that at about 10:30 at night, on the 1st day of October, 1980, the Trooper observed the Defendant's automobile apply his brakes and slow down on Interstate Highway 81 close to Harrisonburg when the said automobile came within the beam of the Trooper's radar. Based solely on this testimony, the Trooper fell in behind the Defendant, stopped the Defendant's automobile, and conducted a search thereof. The search ended with the finding of a radar detector under the passenger's seat to the right of the driver. This radar detector was not connected to any power source, nor was any power source tested in the Defendant's

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Rockingham County, Va.
DEC 18 0
003 Donna Funkhouser Deputy Clerk 3

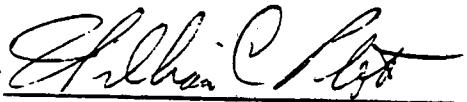
automobile and found to be operative.

3. Subsequent to the illegal search by the Trooper, which was protested vigorously by the Defendant (with the Trooper telling the Defendant that a radar detector stood in the same category as contraband such as marijuana or drugs, thus giving him a right to search the automobile), the radar detector in question was confiscated to be used as evidence at the trial for possession of a radar detection device, with which Defendant was charged.

WHEREFORE, your Defendant moves your Honorable Court that this case be dismissed for the reason that possession of a radar detection device is not a crime within the meaning of Section 46.1-198.1, Code of Virginia, 1950, as amended, and further, that all evidence of the finding of a radar detection device within the Defendant's automobile be suppressed, since there was no probable cause to stop Defendant's automobile and search the same. It is patently clear that the mere fact that a person applies his brakes on an interstate highway cannot possibly support a search and seizure such as has been occasioned here. The very most that an application of brakes under the above described conditions could cause would be a slight suspicion, and certainly not enough to constitute probable cause to stop and search. Additionally, it was night, the Defendant's automobile was approaching the Trooper's position, and the only evidence the Trooper could have observed would have been reflections from brake lights, as he was not even in a position to see the brake lights actually come on.

Based on the above, the Defendant respectfully requests your Honorable Court to dismiss this case and place it among the ended causes.

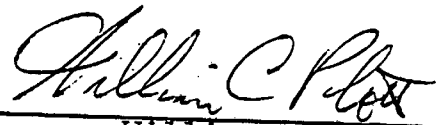
JOHN H. LEETH

By 
Counsel

William C. Plott, Esq.
Foresman & Plott
6 E. Washington Street
Lexington, Virginia 24450
Counsel for the Defendant

CERTIFICATE

I hereby certify that a copy of the foregoing Motion was mailed unto David I. Walsh, Commonwealth's Attorney for Rockingham County, Court House, Harrisonburg, Virginia 22801, this 16th day of December, 1980.


William C. Plott

VIRGINIA: IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY, December 19, 1980

COMMONWEALTH

V

JOHN HUBERT LEETH, III

On an appeal from a judgment of the Rockingham District Court - a summons charging the illegal possession of a radar detector (docket #7182)

This day came the Assistant Commonwealth's Attorney, and John Hubert Leeth, III, the defendant herein, came pursuant to his recognizance, and by his retained counsel, William C. Plott. Thereupon, the defendant tendered a plea of not guilty to the charge. The accused, with the consent of the Court and the Attorney for the Commonwealth, thereupon waived trial by jury and agreed to submit all matters of law and fact to the Court for hearing and determination. Having heard the evidence of the Commonwealth, the accused, by counsel, moved the Court to strike said evidence, and the Court having considered said motion overruled said motion, to which action of the Court the accused, by counsel, excepted. Having heard the evidence of the defendant it is the judgment of the Court that John Hubert Leeth, III is guilty of the illegal possession of a radar detector as charged in the summons and that the Commonwealth recover of the said John Hubert Leeth, III a fine in the amount of $75.00 and the costs of this proceeding. It is further ordered that upon payment of the fine and costs the device shall be returned to the defendant.

A TRUE COPY

ATTESTE: _____, Deputy Clerk

Commonwealth of Virginia

JUDGES

ROBERT K. WOLTZ
COUNTY COURTHOUSE
WINCHESTER, VIRGINIA 22601
(703) 667-1580

JOSHUA L. ROBINSON
P. O. BOX 46
LURAY, VIRGINIA 22835
(703) 743-6596

DUNCAN C. GIBB
P. O. BOX 1597
FRONT ROYAL, VIRGINIA 22630
(703) 635-3550

TWENTY-SIXTH JUDICIAL CIRCUIT

CIRCUIT COURTS OF

COUNTY OF PAGE
COUNTY OF CLARKE
COUNTY OF WARREN
CITY OF WINCHESTER
COUNTY OF FREDERICK
COUNTY OF ROCKINGHAM
COUNTY OF SHENANDOAH

February 18, 1981

OCT 7 1981

A.L.L.

William C. Plott
Foresman & Plott
6 E. Washington Street
Lexington, Virginia 24450

Re: Commonwealth v. Leeth

Dear Mr. Plott:

Mr. Heilberg hand delivered your letter of February 10, 1981 to me on February 17. There was no Court Reporter present and I recognize the difficulty in constructing a record pursuant to Rule 5:9 based on the recollection of counsel.

Rule 5:9(c) requires a written statement of "facts testimony or other incidents of the case". The part to which you refer is not part of the testimony, but I assume that counsel consider it appropriate to be included in the record under Rule 5:8 as a memorandum decision rendered by the judge.

I am quite sure that I did not rule that "the arrest was not legal. . . " (Page 5, second paragraph). If I recall correctly, I ruled that the officer had probable cause to make an investigatory stop and search, the arrest not having been made until the contraband was discovered. The quotation in your letter of February 10, 1981 from Mr. Heilberg's statement, therefore, appears to be correct.

I will review the Court file and see if any of my trial notes are there, and if they should indicate any correction to the foregoing I will notify you promptly.

Yours very truly,

Joshua L. Robinson, Judge
Twenty-Sixth Judicial Circuit

JLR/zjm
cc: David Heilberg, Esquire

STATEMENT OF FACTS,
TESTIMONY OR OTHER INCIDENTS
OF THE CASE
AND OPINION RENDERED BY THE JUDGE

On October 1, 1980, at approximately 10:25 p.m., Trooper William J. Jones, Jr., Virginia State Police, was working stationary radar on the on ramp to Interstate 81 at the Mt. Crawford exit in Rockingham County. He stopped a vehicle driven by Dr. John Hubert Leeth, III, at that location and issued a summons for "possession of a radar detector device." He testified to the facts of that night later in court.

On the 23rd of October, 1980, in the Rockingham County General District Court, Judge John A. Paul found Dr. Leeth guilty on an amended warrant of "operation of a motor vehicle equipped with a radar detection device," and the Defendant appealed the conviction to the Circuit Court of Rockingham County.

On December 19, 1980, the case came before the Rockingham County Circuit Court, the Honorable Judge Joshua L. Robinson presiding. Trooper Jones was called to take the stand by Assistant Commonwealth's Attorney David L. Heilberg. Mr. Heilberg asked Trooper Jones to explain what caused him to stop a vehicle (on the 1st of October, 1980, at approximately 10:30 p.m.). While working stationary radar on the on ramp facing south to Interstate 81 at the Mt. Crawford exit in Rockingham County, he saw a vehicle traveling southbound at what he observed to be a faster rate than the posted 55 miles per hour. When the vehicle appeared to be in range, he activated the Kustom KR-11

radar set and, at the instant he activated the radar, the brake lights came on. This vehicle braked suddenly, almost to the point of skidding. Trooper Jones immediately put the set back into a hold mode suspecting that there was a radar detector in the vehicle. Trooper Jones added that this was a common tactic for operating radar, used at night by the State Police, to thwart the use of radar detectors. Prior to stopping the vehicle, he observed with his headlights, a small cord hanging down from the interior rear view mirror. He also observed the driver fumbling over the sunvisor on the driver's side of the vehicle. It was his opinion at this point that there was a radar detector in the vehicle and the driver was attempting to conceal it. He stopped the vehicle and approached the driver, who he found to be Dr. Leeth, asked him for his driver's license and registration card. After he produced these two items, Trooper Jones advised him that he had reason to believe that he had a radar detection device in the vehicle and requested to see it. Dr. Leeth stated that he did not have such a device in his vehicle. Trooper Jones then asked Dr. Leeth to exit his vehicle so that Trooper Jones could search the area immediately accessible to Dr. Leeth for a radar detector. While still standing beside the open door, Dr. Leeth rolled the window of the driver's door up, depressed the locking mechanism and began to close the door. At this point, Trooper Jones grasped the top of the driver's door in such a manner as to keep Dr. Leeth from closing the locked door. Trooper Jones advised Dr. Leeth that if he closed the door and locked it, he would be charged with obstructing justice.

Dr. Leeth at this point did not close the door but stated that Trooper Jones would be searching the vehicle against his will. Trooper Jones then entered the vehicle on the driver's side where he found a power cord running from the dash up and over the rear view mirror and in behind the sunvisor on the driver's side. He then went around to the other side of the vehicle, entered on the passenger's side and found an ESCORT model radar warning device, serial number 16593, on the floorboard under the seat. The testimony of both the Trooper, and later that of Dr. Leeth, was to the effect that the device could be seen by shining a flashlight through the windshield on the passenger's side. Trooper Jones then advised Dr. Leeth that he would be seizing the device and its power cord as evidence. The device was taken back to the Trooper's vehicle and while Dr. Leeth was sitting in its front passenger seat, the device was plugged into the cigarette lighter and found to be in working order. Throughout the entire time that Dr. Leeth was in Trooper Jones's vehicle, he kept stating, "I am not admitting that that is a radar detection device." The device that Trooper Jones seized was introduced into evidence by Mr. Heilberg in the Circuit Court. Trooper Jones testified that the item seized was a radar detection device, based on its physical appearance. He knew this because of his training and experience as a State Trooper. Mr. Heilberg requested that Trooper Jones hold the power cord up in the fashion that the trooper had found it.

Before Mr. Plott began his cross-examination, he made a motion to dismiss on the ground that possession of a radar detection device was not illegal. Judge Robinson then looked at

the arrest warrant and stated that the charge was "operating a motor vehicle equipped with a radar detection device" and not a "possession of a radar detection device." At this point, Trooper Jones advised Judge Robinson that the warrant had been amended in the General District Court. Judge Robinson suggested continuing the case if Mr. Plott claimed surprise, but this offer was declined.

Mr. Plott's cross-examination disclosed that when Trooper Jones observed Dr. Leeth's brake lights, he was sitting at the top of the ramp and Dr. Leeth's vehicle was at the point where the ramp joins the southbound lane of the Interstate. Mr. Plott then asked what was the range on the beam of Trooper Jones's radar set. He answered that he did not know. Mr. Plott also asked what the width of the beam was. Trooper Jones again answered that he did not know. Mr. Plott asked Trooper Jones how the antenna was mounted, and the Trooper replied that it was on the bracket outside the left rear door, and was generally aligned with the automobile. After Trooper Jones left the stand, but before making a motion, Mr. Plott asked the Judge if Trooper Jones could be asked a further question. The Judge allowed the question without requiring Trooper Jones to return to the stand. Mr. Plott asked Trooper Jones if he had gotten a speed reading on the KR-11 at any time on the Leeth vehicle. The Trooper stated that he did not.

Mr. Plott made a motion to dismiss due to the fact that Trooper Jones did not have probable cause to stop the vehicle because he did not know the width and the length of the radar beam and could not establish the direction of the beam

since the antenna was pointed generally down the ramp and the fact that Trooper Jones had not gotten any reading on the radar. This motion was overruled. Judge Robinson then asked Trooper Jones a few questions, the gist of the response being that Trooper Jones was working the Interstate highway alone on that night.

After Trooper Jones finished testifying, Dr. Leeth took the stand and told the Court that he felt Trooper Jones acted improperly in stopping and searching his vehicle and that it was over his strong objection that such search and seizure took place. Dr. Leeth further explained that his radar detection device was not in plain sight, was under the front passenger seat of his vehicle, with the cord disconnected and wrapped around it, and was not connected at the time when the Trooper stopped his vehicle. Further, Dr. Leeth stated that the Trooper could observe a short cord which hung down from his sunvisor only at the time that he stopped Dr. Leeth and shined the light on the interior of the vehicle. Mr. Leeth admitted, on cross-examination, that he could not know what the Trooper saw with his headlights. He stated that the Trooper did not see the radar detection device until Dr. Leeth exited and the Trooper entered the vehicle and shined his light under the seat. He further admitted that the item seized was a radar detector which he used when in Alabama where these devices are legal. At the end of Dr. Leeth's testimony, counsel for Dr. Leeth again moved to strike the evidence of the Commonwealth and dismiss the charge. This motion was overruled.

-:- OPINION RENDERED BY JUDGE JOSHUA L. ROBINSON -:-
(Per Rule 5:8(e))

At the conclusion of all the evidence, Judge Robinson ruled that due to the Trooper's observation, while he was behind the vehicle, the brake lights, the rapid decrease in speed and the power cord hanging down, and the fumbling over the driver sunvisor, that Trooper Jones had reason to stop the vehicle and continue his investigation. He further ruled to the fact that Trooper Jones was working by himself and therefore would have not been able to detain Dr. Leeth or to secure his vehicle while he went for a search warrant, and due the exiqencies of this situation, that the warrantless search was legal. In a letter to the Counsel for the Defendant (a copy attached) the Judge stated that his ruling was that there was no arrest until the contraband was discovered. He next found that the item introduced into evidence was plainly a radar detector device that, in view of circumstantial evidence, was operable and, indeed, had been in use. He therefore found the defendant guilty as charged and reduced the fine to $75.00 plus costs after remarking that the appeal had been brought in good faith.

-:- C E R T I F I C A T E -:-

The undersigned counsel for the Defendant doth hereby certify that a copy of the foregoing and annexed Statement of Facts, Testimony or Other Incidents of the Case and Opinion Rendered by the Judge heretofore pending in the Circuit Court of the County of Rockingham under the caption and style of "Commonwealth of Virginia v. John Hubert Leeth, III" (Case No.

7182) was mailed unto Honorable David I. Walsh, Esq. Commonwealth's Attorney for the County of Rockingham, Harrisonburg, Virginia 22801, this 28th day of February, 1981.

William C. Plott

-:- N O T I C E -:-

TO: THE HONORABLE DAVID I. WALSH, COMMONWEALTH'S ATTORNEY FOR THE COUNTY OF ROCKINGHAM, VIRGINIA:

Notice is hereby given that the foregoing and annexed written Statement of Facts, Testimony or Other Incidents of the Case and Opinion of the Judge heretofore pending in the Circuit Court of Rockingham County under the caption and style of "Commonwealth of Virginia v. John Hubert Leeth, III" (Case No. 7182) will be presented unto the Honorable Joshua Robinson, Judge of the Circuit Court of Rockingham County, no earlier that 10 days or later than 15 days subsequent to the date hereof.

Given under my hand this 28th day of February, 1981.

William C. Plott
Counsel for the Defendant

The foregoing and annexed Statement of Facts, Testimony or Other Incidents of the Case and Opinion of the Judge of the foregoing case has been accepted as true and correct in all respects, and signed this 6th day of March, 1981, by the Commonwealth's Attorney for Rockingham County and counsel of record for the Defendant pursuant to Rule 5:9, as amended, of the Supreme Court of Virginia.

David L. Heilberg
Assistant Commonwealth's Attorney
for Rockingham County

William C. Plott
Counsel for John Hubert Leeth, III

Signed and thereafter delivered unto the Clerk of the Circuit Court of Rockingham County for filing in the office of such Clerk pursuant to Rule 5:9, as amended, of the Supreme Court of Virginia, this 6 day of March, 1981.

Judge

ASSIGNMENTS OF ERROR

The defendant respectfully submits that the trial court erred in failing to sustain the motion of the defendant to strike the evidence of the Commonwealth and dismiss the charge that he had violated the provisions of §46.1-198.1, Code of Virginia, 1950, as amended, and will rely in the proceedings before this Court upon the following assignments of error:

I. That the trial court erred in failing to sustain the motion to strike the evidence of the Commonwealth and dismiss the charge against the defendant on the grounds that it was never proved that the radar detection device in question had an available and operative power source.

II. That the trial court erred in failing to sustain the motion of the defendant to strike the evidence of the Commonwealth on the grounds that the stopping of the defendant's vehicle violated his rights under the Fourth and Fourteenth Amendments of the Constitution of the United States.

III. That the trial court erred in failing to sustain the motion of the defendant to strike the evidence of the Commonwealth and dismiss the charges against the defendant upon the grounds that the radar detection device in question was discovered by an illegal search and seizure in violation of the defendant's rights under the Fourth and Fourteenth Amendments of the Constitution of the United States.