

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 29, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2169

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HENRY STOTHARD,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Ozaukee County:
THOMAS R. WOLFGRAM, Judge. *Affirmed.*

SNYDER, P.J. Henry Stothard appeals his conviction for speeding, contrary to § 346.57(4)(h), STATS., 1993-94. The single issue he presents on appeal is whether the State proved by clear and convincing evidence that he was traveling 82 miles per hour. We conclude that it did and consequently affirm.

State Trooper Michael Dyer was working in traffic enforcement when he observed the Stothard vehicle pass his location. Because he believed

the speed of the vehicle was in excess of the posted limit, he activated his VASCAR unit. The VASCAR unit has been used by law enforcement for more than twenty years. See *State v. Frankenthal*, 113 Wis.2d 269, 271-72, 335 N.W.2d 890, 891 (Ct. App. 1983). The principle underlying VASCAR is the use of the formula: speed equals distance divided by time. See *id.* at 271, 335 N.W.2d at 891. When a vehicle enters the target area, the VASCAR operator switches on the device. When the vehicle covers the measured distance, the operator switches off the timer. The unit then functions as a calculator and divides the time into the distance traveled to arrive at the speed at which the clocked vehicle was traveling. See *id.*

Because it was dark, the two benchmarks Dyer used were two overhead viaducts. He activated the unit when he saw the headlights of the Stothard vehicle “flash” as the car passed under the first overpass.¹ By this same method Dyer determined when to shut the unit off, and he testified that he did so when he observed the vehicle reach the second viaduct. Based on the VASCAR calculation, the Stothard vehicle was traveling at 82 miles per hour.

In addition to the above testimony, Dyer also testified that he had been trained in the use of the VASCAR unit, and at the beginning and end of the shift in question, he conducted two checks of whether his particular unit was operating properly.

¹ The “flash” refers to the fact that as a vehicle approaches an overpass at night, the underside of the viaduct will be lit up by the headlights of the vehicle. As the car passes directly under the viaduct, an observer will see a change from light to dark just as if a light switch is being turned off.

Stothard also testified. He stated that he estimated his speed was approximately 70 miles per hour at the time the VASCAR reading was taken. He also admitted that he had been checking his speedometer “[f]rom time to time” and that the last time he looked at it, it read 70 miles per hour.

The trial court weighed the testimony it had before it and found Dyer's testimony to be more reliable. The trial court found by clear, satisfactory and convincing evidence that Stothard was traveling 82 miles per hour when he was stopped. This appeal followed.

The trial court's determination in this case rested on the credibility of Dyer and the reliability of the VASCAR computation when placed in opposition to the testimony of Stothard. A trial court's findings of fact will not be set aside unless clearly erroneous, and a reviewing court shall give due regard to the trial court's opportunity to judge the credibility of the witnesses. Section 805.17(2), STATS.

Under *Frankenthal*, 113 Wis.2d at 272, 335 N.W.2d at 891, a prima facie presumption of accuracy arises when the State offers VASCAR evidence of speeding. The State is not required to affirmatively prove the accuracy of the device. See *id.* Any contentions that are raised by Stothard go to the weight of the evidence when it is considered by the trier of fact. See *id.* at 272-73, 335 N.W.2d at 891.

The trial court heard the testimony of Dyer that he had been employed by the Wisconsin State Patrol for approximately ten years. Dyer

testified that he had been “fully trained” in the use of the VASCAR unit and had been operating VASCAR units for approximately nine years. He also stated that he had specifically received training in the use of “flashes” to track a vehicle when operating the unit at night and that he served as a VASCAR instructor. He explained that unlike radar, the VASCAR unit cannot be affected by outside interference. He stated that his check of the unit showed that “[e]verything was within acceptable parameters.”

In contrast to Dyer's testimony, Stothard testified that he had been watching his speedometer “[f]rom time to time” and that he estimated he was going 70 miles per hour.² He also testified that the last time he looked at his speedometer, it read “70.” He admitted to having had two drinks earlier in the evening, but testified that his perceptions as to what was going on around him were not impaired.

On appeal, we examine the record for facts to support the findings of the trial court. See *Odegard v. Birkeland*, 85 Wis.2d 126, 134, 270 N.W.2d 386, 391 (1978). The credibility of the witnesses and the weight to be given their testimony are matters for the trier of fact. See *id.* at 135, 270 N.W.2d at 391.

Dyer testified at length as to his credentials as a VASCAR operator and as to his operation of the unit on the date in question. Stothard offered no testimony to refute this, but rather relied on testifying that he had been

² Dyer had testified that when he approached the Stothard vehicle after the stop and told him how fast he had been going, Stothard responded that he was not going that fast, but admitted that he might have been traveling at 75 miles per hour.

watching his speedometer, and therefore could not have been going as fast as the VASCAR unit reported. The trial court found Dyer's testimony more credible than Stothard's and we conclude that this finding is supported by the facts of record.

By the Court. – Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.