

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

DECEMBER 27, 1996

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

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No. 96-2706-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CITY OF CEDARBURG,

Plaintiff-Respondent,

v.

PAUL WUCHERER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Ozaukee County:
JOSEPH D. MC CORMACK, Judge. *Affirmed.*

ANDERSON, P.J. In this appeal from a conviction for speeding, Paul Wucherer insists that the City of Cedarburg failed to prove by clear, satisfactory and convincing evidence that he was the operator of the car. Because we conclude that Wucherer's claim is utterly without merit, we affirm.

At the trial, Officer Glenn Lindberg, the issuing officer, stated that he observed the Wucherer vehicle traveling southbound on Sheyboygan Road in excess of the speed limit. Lindberg “stopped [his] squad car and placed the radar in stationary mode and locked the vehicle at 47 miles an hour” in a twenty-five miles per hour (mph) zone. After locking the vehicle on radar, Lindberg pulled behind the vehicle and pulled it over. Lindberg testified that the driver identified himself as Wucherer.¹ At trial, Lindberg refreshed his recollection of the driver’s full name by viewing the citation that he had issued during the stop.

After the City rested, Wucherer moved to dismiss contending that Lindberg’s testimony was “not enough to establish the identity of – the element of identity in this offense” The trial court noted that the witness was asked to identify the defendant. Lindberg refreshed his recollection by looking at the citation that had been issued in this case. The trial court concluded that “that’s enough for me to believe circumstantially that he has identified Paul Wucherer, 8606 W. Freistadt, date of birth 2/7 of ’80” and dismissed the motion. The trial court further found Wucherer guilty of speeding, in violation of § 346.57(5), STATS. Wucherer appeals.

On appeal, Wucherer argues that the City failed to show by clear, satisfactory and convincing evidence that Wucherer was the driver of the vehicle. This court must affirm the trial court’s findings of fact unless they are

¹ Lindberg also testified that Wucherer indicated that “he thought the speed limit was 30 miles an hour and that he was going approximately 35 miles an hour.”

clearly erroneous. Section 805.17(2), STATS. The trial court is the arbiter of the credibility of witnesses and of the weight of the testimony, and if more than one reasonable inference can be drawn from the evidence, this court must accept the inference drawn by the trial court. See *Cogswell v. Robertshaw Controls Co.*, 87 Wis.2d 243, 250, 274 N.W.2d 647, 650 (1979). In order to reverse, we would have to hold that as a matter of law no trial court could be so convinced by the credible evidence presented. See *State v. Zick*, 44 Wis.2d 546, 553, 171 N.W.2d 430, 434 (1969). In this case, we cannot so hold and we therefore affirm Wucherer's conviction.

The basis of Wucherer's argument is that the arresting officer could not remember his full name until he had refreshed his recollection on the stand and then the officer mispronounced his last name.² He claims that the City failed to produce any evidence establishing his identity either by a photo driver's license, by an in-court identification or through fingerprint evidence.

We disagree. The trial court found that: (1) the circumstantial evidence established that Wucherer was the driver of the vehicle; (2) Wucherer's speed was 47 mph; and (3) the posted speed limit was 25 mph. These findings are not clearly erroneous. Lindberg testified that Wucherer was

² In support of this argument, Wucherer's counsel attaches an affidavit to his principal brief that states that the officer failed to pronounce Wucherer's name "correctly or even phonetically which is not reflected in the transcript." We have no reason to doubt counsel's allegations, but we are bound by the record and that is not to be enlarged by supplemental affidavits. See *State v. Pettit*, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). We note that counsel failed to alert the trial court that Wucherer's name had been pronounced incorrectly and to argue that the mispronunciation contaminated the officer's identification of Wucherer.

the driver of the vehicle.³ Lindberg further testified that he locked Wucherer with his radar gun at 47 mph in a 25 mph zone. In addition, Lindberg testified that Wucherer admitted that he thought the speed limit was 30 mph and that he was going approximately 35 mph. This testimony provides sufficient support for the trial court's findings.

Moreover, the trial court could accept the testimony of Lindberg and find that Wucherer was the driver of the vehicle and was guilty of driving in excess of the speed limit. The credibility of the witnesses and the weight of their testimony were determinations for the trial court. The evidence supports the trial court's finding that Wucherer was the driver of the vehicle and that he was driving 22 mph above the posted speed limit. This finding supports the legal conclusion that the City established that Wucherer violated § 346.57(5), STATS., by clear, satisfactory and convincing evidence.

By the Court. – Judgment affirmed.

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

³ In his principal brief, Wucherer concedes that he does not expect fingerprint evidence to be the standard by which traffic cases have to be proven. However, we also note that Wucherer never appeared in court, so an in-court identification was not possible and Lindberg was never asked how he identified Wucherer, by photo identification or other means. This does not make his testimony incredible as a matter of law.