

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

August 7, 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.

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

No. 96-3204

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CITY OF BLACK RIVER FALLS,

PLAINTIFF-RESPONDENT,

v.

DOUGLAS W. SPENCER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jackson County:
ROBERT W. RADCLIFFE, Judge. *Affirmed and cause remanded with directions.*

DYKMAN, P.J.¹ Douglas W. Spencer appeals from a judgment convicting him of speeding in violation of § 346.57(4)(gm), STATS. Spencer argues that his conviction was not supported by credible evidence. We disagree and therefore affirm. The City of Black River Falls requests attorney fees because

¹ This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

this appeal is frivolous.² We agree that Spencer should have known that this appeal was without any reasonable basis in law or equity and cannot be supported by a good faith argument for an extension, modification or reversal of existing law. We therefore remand the matter to the trial court for a determination as to the costs and fees associated with this appeal.

On June 18, 1996, Spencer was cited for speeding for driving eighty-five miles per hour in a sixty-five mile per hour zone on I-94 in the City of Black River Falls. Spencer pleaded not guilty. At trial, Officer Michael Johnson testified that on June 18, 1996 at approximately 12:40 a.m., he was running stationary radar on I-94. Johnson was initially watching westbound traffic, but noticed Spencer's vehicle traveling eastbound at what he estimated to be a fast rate of speed. Johnson turned the radar head toward Spencer's vehicle, which was the only one approaching, and clocked his speed at eighty-five miles per hour. The court found Spencer guilty of driving nineteen miles per hour over the speed limit. Spencer appeals.

Spencer argues that his conviction was not supported by credible evidence. But Officer Johnson testified that he clocked Spencer's vehicle at eighty-five miles per hour with his stationary radar. A prima facie presumption of accuracy applies to stationary radar. *City of Wauwatosa v. Collett*, 99 Wis.2d 522, 523-24, 299 N.W.2d 620, 621 (Ct. App. 1980). “[W]hether a stationary radar

² The City also requests that we summarily affirm the trial court's judgment because Spencer's brief does not conform to the requirements of RULE 809.19, STATS. RULE 809.83(2), STATS., allows us to dismiss an appeal for the appellant's failure to comply with a requirement of the rules of appellate procedure. Dismissal is only one of the sanctions available under RULE 809.83(2), however, and we believe that dismissal is too harsh under the circumstances. The City does not request any other sanction for Spencer's failure to conform to the statutory briefing requirements.

device was inaccurate or unreliable is a matter of defense. The state is not required to affirmatively prove accuracy and reliability.” *Id.* at 524, 299 N.W.2d at 621. Therefore, Johnson’s radar reading is entitled to a prima facie presumption of accuracy.

Spencer argues that the radar reading is not entitled to a prima facie presumption of accuracy under *State v. Hanson*, 85 Wis.2d 233, 270 N.W.2d 212 (1978). But *Hanson* set forth five criteria the State needs to satisfy to establish a prima facie presumption of accuracy for a *moving radar*.³ The criteria set forth in

³ *Hanson* provides:

[I]n Wisconsin a prima facie presumption of accuracy sufficient to support a speeding conviction will be accorded to moving radar upon testimony by a competent, operating police officer that:

1. The officer operating the device has adequate training and experience in its operation.
2. That the radar device was in proper working condition at the time of the arrest. This will be established by proof that suggested methods of testing the proper functioning of the device were followed.
3. That the device was used in an area where road conditions are such that there is a minimum possibility of distortion.
4. That the input speed of the patrol car must be verified, this being especially important where there is a reasonable dispute that road conditions may have distorted the accuracy of the reading (*i.e.*, presence of large trucks, congested traffic and the roadside being heavily covered with trees and signs).
5. That the speed meter should be expertly tested within a reasonable proximity following the arrest and that such testing be done by means which do not rely on the radar device’s own internal calibrations.

State v. Hanson, 85 Wis.2d 233, 245, 270 N.W.2d 212, 218-19 (1978).

Hanson do not apply to stationary radar. See *Collett*, 99 Wis.2d at 523, 299 N.W.2d at 621. Therefore, *Hanson* is inapplicable.

Spencer argues that the radar reading was not reliable for several reasons. First, he argues that Johnson testified that he does not use his radar to clock vehicles over 1000 feet away, while the citation states that Spencer's vehicle was 0.4 mile from Johnson when he was clocked. Spencer misreads the citation. It reads that Spencer committed his offense 0.4 mile west of State Highway 12 on I-94 eastbound, not that Spencer was 0.4 mile away from Johnson when he took his radar reading.

Spencer also argues that Johnson did not have any documented proof that the radar equipment was properly calibrated or tested at regular intervals. But the radar reading is entitled to a prima facie presumption of accuracy. Johnson did not need to have such information.

Finally, Spencer argues that Johnson did not know or remember certain key information, such as the weather conditions at the time of the incident, the time that he re-tested his radar equipment after citing Spencer, the range of his equipment or the width of the radar beam. Spencer's arguments concerning the reliability of Johnson and his equipment only go to the weight of the evidence, as a matter of defense. *State v. Frankenthal*, 113 Wis.2d 269, 272-73, 335 N.W.2d 890, 891 (Ct. App. 1983). The trier of fact, in this case the trial court, determines the weight given to evidence. See *State v. Wyss*, 124 Wis.2d 681, 694, 370 N.W.2d 745, 751 (1985). Therefore, we uphold Spencer's conviction.

Furthermore, the State did not rely solely on the radar's presumption of accuracy. Johnson testified that had been trained to operate that radar unit and that he had used it during every shift for almost one year. Johnson tested the unit

when he came on his shift at 7:00 p.m. by performing an internal circuitry test and by performing an external test by the use of two tuning forks. Johnson also tested the radar unit by these same methods after the completion of the citation process. Johnson also testified that there were not any other vehicles or other stimuli in the area that could have distorted the radar reading. Finally, Johnson never lost sight of Spencer's vehicle.

The State argues that Spencer's appeal is frivolous under RULE 809.25(3), STATS., and moves for its attorney fees and costs associated with this appeal. An appeal is frivolous when "[t]he party ... knew, or should have known, that the appeal ... was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." RULE 809.25(3)(c)2. Here, the only authority cited by Spencer in support of his argument was *State v. Hanson*, 85 Wis.2d 233, 270 N.W.2d 212 (1978). But under *City of Wauwatosa v. Collett*, 99 Wis.2d 522, 523, 299 N.W.2d 620, 621 (Ct. App. 1980), the *Hanson* criteria do not apply to stationary radar, which was involved in this case. Because Spencer's argument did not have a reasonable basis in law or equity, we conclude that his appeal is frivolous. On remand, the trial court is instructed to determine the reasonable attorney fees and costs generated by this appeal.

By the Court.—Judgment affirmed and cause remanded with directions.

Not recommended for publication in the official reports. See RULE 809.23(1)(b)4, STATS.

