

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 7, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

**Appeal Nos. 04-0982
04-0983
STATE OF WISCONSIN**

**Cir. Ct. Nos. 97TR010988
97TR010989
97TR010990**

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRENTT O. KINISON,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Rock County:
JAMES WELKER, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.¹ Trentt O. Kinison appeals from a civil forfeiture judgment of conviction for operating a vehicle while intoxicated (OWI),

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

first offense, contrary to WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(a). Kinison's unfocused arguments insist that the trial court erred in allowing into evidence the breathalyzer and radar test results and that without this evidence, there was insufficient evidence to convict him. We conclude that Kinison's complaints go to the weight and credibility, not the admissibility, of the evidence and therefore we reject them. We affirm the judgment.

FACTS²

¶2 After a bench trial on April 1, 2004, Kinison was convicted of OWI, first offense, and speeding 35 miles per hour or more over the speed limit.³ Andrew Emmel, a trooper with the Wisconsin State Patrol for 10 years, was the only person to testify at trial.

¶3 Emmel testified that on September 13, 1997, at approximately 6:00 p.m., he received a report from dispatch that an orange Mustang car was traveling at a high rate of speed and in a reckless manner on westbound Interstate 90 near Shopiere Road in Rock County. Emmel then began clocking westbound I-90

² Kinison has not provided any citations to the record to corroborate the facts set out in his briefs but merely indicates his factual recitations are taken from the trial transcript, without reference to the trial transcript's location in the record. Such failure is a direct violation of WIS. STAT. RULE 809.19(1)(d) and (3) (1999-2000) of the rules of appellate procedure which requires parties to set out facts "relevant to the issues presented for review, *with appropriate references to the record.*" (Emphasis added.) An appellate court is improperly burdened where briefs fail to properly cite to the record. See *Meyer v. Fronimades*, 2 Wis.2d 89, 93-94, 86 N.W.2d 25 (1957). Kinison will therefore be held to the facts as we present them. In addition, Kinison failed to file a reply brief and supplied no explanation for said failure.

³ Kinison was also charged with operating a motor vehicle with a prohibited blood alcohol concentration; however, that PAC citation was dismissed after he was convicted of operating a motor vehicle while intoxicated.

traffic via a laser radar device. Emmel was trained and certified to operate the radar device.

¶4 Emmel observed an orange Mustang traveling at an estimated speed of over 100 miles per hour. Emmel used the radar device and determined that the Mustang was traveling approximately 132 miles per hour. Emmel subsequently stopped the Mustang and identified Kinison as the driver. Emmel detected a strong odor of intoxicants on Kinison's breath and Kinison indicated that he had consumed two 14-ounce beers, the last one of which he consumed approximately 30 minutes before he was stopped. Kinison was arrested for speeding and transported to the Rock county jail where he performed sobriety tests. After his performance on the sobriety tests, Kinison was arrested for OWI. Emmel administered an Intoxilizer test to Kinison which indicated .16% blood alcohol concentration.

¶5 During the trial, Kinison made several objections during Emmel's direct examination. Specifically, Kinison objected to Emmel's testimony concerning the use of the laser radar device and the Intoxilizer machine; the basis for these objections was lack of foundation. The objections were overruled and Kinison was convicted. Kinison appeals.

DISCUSSION

¶6 Kinison's arguments are, at best, disorganized and difficult to follow. Kinison appears to argue that the State did not meet its foundational requirements and thus the trial court erred in allowing into evidence the breathalyzer and radar test results. Kinison argues that without this evidence, there was insufficient evidence to convict him. We disagree with his contentions.

¶7 We rejected this precise argument over 20 years ago in *City of New Berlin v. Wertz*, 105 Wis. 2d 670, 671, 314 N.W.2d 911 (Ct. App. 1981), where we held that “[u]nder Wisconsin case law, breathalyzer tests carry a ‘prima facie presumption of accuracy,’ and the question of how accurately the test was performed goes to the weight to be given the test, not to its admissibility.” *Id.* at 674 (citation omitted).

[T]ests by recognized methods need not be proved for reliability in every case of violation. Examples, speedometer, breathalyzer, radar.... These methods of measurement carry a prima facie presumption of accuracy. Whether the test was properly conducted or the instruments used were in good working order is a matter of defense. The administration of law would be seriously frustrated if validity of basic and everyday accepted tests had to be a matter of evidence in every case in the first instance.

Id. Thus, it was not the State’s responsibility to affirmatively establish a foundation for admission of the breathalyzer and radar tests but instead it was Kinison’s responsibility to challenge the weight to be accorded the results of those tests. We therefore reject Kinison’s arguments to the contrary.

¶8 Kinison’s next argument is premised upon the success of the previous one; he argues that without the aforementioned test results, there was insufficient evidence to convict him. This argument implicitly concedes that with the test results there was sufficient evidence to convict him. Because we conclude the breathalyzer and radar results were properly admitted, we need not address this second argument and agree with the State that there was sufficient evidence to convict Kinison.

¶9 The tests challenged by Kinison carry a prima facie presumption of accuracy and whether the tests were properly conducted or the instruments used

were in good working order is a matter of defense and goes to the tests' weight, not their admissibility. We therefore affirm the judgment of conviction.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

