

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 24, 1995

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. 95-1008-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICHAEL G. EHLERS,

Defendant-Respondent.

APPEAL from an order of the circuit court for Dodge County:
ANDREW P. BISSONNETTE, Judge. *Affirmed.*

GARTZKE, P.J. The State appeals from an order suppressing evidence obtained by the State as a result of a traffic stop leading to the arrest of Michael Ehlers for operating a motor vehicle while under the influence, § 346.63(1)(a), STATS., and operating a motor vehicle with a prohibited blood alcohol concentration, § 346.63(1)(b). Each charge alleges that it is Ehlers' third

offense. He is therefore charged with two misdemeanors. Section 346.65(2)(c), STATS.¹

We deem the issue to be whether the trial court erred when it suppressed the evidence on grounds that because the testimony of the witnesses was equally credible, the State had not met its burden of proof by the preponderance of the evidence.

The arresting officer testified that he followed two vehicles traveling the same direction. He saw several traffic violations by the vehicle directly in front of him. He saw no violations by the lead vehicle. He stopped the vehicle immediately ahead of him. At the suppression hearing, Keith Resop testified that he, rather than Ehlers, drove the vehicle immediately ahead of the officer, and that the officer did not stop Resop's vehicle but pulled over the lead vehicle which Ehlers was driving. Thus, the officer's testimony and Resop's testimony is in direct conflict.

The trial court found Resop's and the officer's testimony equally credible. The court said that in assessing credibility it could consider motive to fabricate or falsify testimony, but there appeared to be no such motive on the part of the officer. Resop had some reason to give a false statement because of his apparent friendship with Ehlers but Resop testified against his own penal interest. The court declared itself unable to find who drove the rear and lead vehicles. In light of that circumstance, the court concluded that the State had not met its burden of proof to a preponderance of the evidence and granted Ehlers' motion to suppress.

On appeal, the State asserts on the basis of *State v. Wille*, 185 Wis.2d 673, 518 N.W.2d 325 (Ct. App. 1994), that the court was required to determine the credibility of the officer and the other witnesses, and to make a factual finding regarding the identity of the driver who committed the alleged traffic violation. The State argues that it is impossible that the testimony of the officer and Resop is equally credible. As the State puts it, the court cannot claim an inability to make a necessary factual determination and then penalize the

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

State by granting the relief sought by Ehlers. The State asks that we remand for a finding as to the identity of the driver who committed the alleged traffic violations.

The State cites *State v. Prober*, 98 Wis.2d 345, 358-59, 297 N.W.2d 1, 8 (1980), for authority that an appellate court may remand for findings a judge should have made but failed to do so. *Prober* is not on point. The *Prober* trial court judge chose not to make a finding when sufficient evidence existed to make it. Here the evidence was insufficient to make a finding.

In *Prober*, the trial court denied a motion to suppress evidence an officer obtained from a purse found in an inventory search of an automobile. The court believed it unnecessary to find whether the officer opened the purse to determine its contents or whether its contents spilled out. *Id.* at 349, 357-59, 297 N.W.2d at 4, 8-9. The court believed a search of the purse's contents was permissible in either event. During the *Prober* appeal, *Arkansas v. Sanders*, 442 U.S. 753 (1979), held that police require a warrant to open luggage found in an automobile. The *Prober* court therefore remanded to the trial court for the factual determination the trial court had believed was unnecessary. On remand the trial court made the finding on the already existing record. *Id.*

In *State v. Wille*, 185 Wis.2d at 682, 518 N.W.2d at 328-29, we said, "The trial court takes evidence in support of suppression and against it, and chooses between conflicting versions of the facts. It necessarily determines the credibility of the officers and other witnesses." We did not say that the court must choose between equally credible witnesses. At times the court cannot decide that one witness is more credible than another. Compelling a choice between those witnesses would be tantamount to flipping a coin. The burden of proof rescues a trial court from that dilemma.

A similar circumstance arose in *United States v. Starr*, 434 F.Supp. 214 (1977). In that case the suppression court found that the defendant and an officer were equally credible witnesses even though they each had a different version of the events. The court relied on the burden of proof to resolve the dilemma. It granted the motion to suppress. *Starr*, 434 F.Supp. at 216.

By the Court.--Order affirmed.

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