

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 5, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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 No. 2006AP2342

Cir. Ct. No. 2004TR23870

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DANE COUNTY,

PLAINTIFF-RESPONDENT,

V.

NANCY A. BAXTER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: JAMES L. MARTIN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 DYKMAN, J.¹ Nancy Baxter appeals from an order denying her motion to dismiss, adjudicating her guilty of speeding, and imposing a forfeiture

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

of \$156.20. Baxter contends that the circuit court erroneously admitted a police officer's visual estimation of her speed, and that even if the visual estimation was admissible, that evidence alone was insufficient to support a guilty verdict. She further contends that even if the police officer's testimony was sufficient evidence to prove she was speeding, it was insufficient to prove that she was speeding by more than ten miles per hour. Because we conclude that there was sufficient, admissible evidence to find that Baxter exceeded the speed limit but insufficient evidence to find that she exceeded it by more than ten miles per hour, we affirm in part and reverse in part, and remand for proceedings consistent with this opinion.

Background

¶2 The following facts are taken from trial testimony and the circuit court's findings. Additional facts will be set out as necessary in the discussion section. On September 22, 2004, Deputy David Kratochwill, of the Dane County Sheriff's Office, issued Nancy Baxter a citation for driving sixty miles per hour in a forty-five-mile-per-hour speed zone. Baxter pled not guilty to speeding, and filed a motion to suppress evidence of Kratochwill's reading on a laser speed detection device and to dismiss the citation. After a bench trial, the court denied Baxter's motion to dismiss and granted her motion to suppress the laser evidence. The court found Baxter guilty of speeding based on Kratochwill's visual estimation of Baxter's speed as fifty-five miles per hour. Baxter appeals.

Discussion

¶3 Baxter argues that Kratochwill's testimony that he visually estimated Baxter's speed as fifty-five miles per hour should not have been admitted into evidence because Kratochwill's testimony established his estimation was so unreliable that it was not worthy of consideration. We disagree.

¶4 Baxter cites *City of Milwaukee v. Berry*, 44 Wis. 2d 321, 324, 171 N.W.2d 305 (1969), in support of her argument that Kratochwill’s testimony was inadmissible. There, the supreme court addressed the admissibility and sufficiency of an officer’s visual estimation of speed to establish a speeding violation. *Id.* at 322. As Baxter does here, Berry contended that the testifying officer’s visual estimation of his speed was either inadmissible because it lacked probative value or insufficient to meet the City’s burden of proof. *Id.* The court explained that “when a witness is in no position to judge speed or the time of observation is too short upon which to base a probative estimation of speed, the testimony is inadmissible.” *Id.* at 324. The court also explained, however, that “if there is a reasonable basis upon which speed can be judged, the weight or probative value of the opinion will depend upon the factors of position, length of observation, existence of reference points, the experience of the witness in judging speed and other relevant facts.” *Id.* Thus, the court concluded that “the officer, who had four years’ experience in traffic work, was in a position to estimate Berry’s rate of speed because he had a clear view for one city block and had sufficient time to observe and calculate the speed.” *Id.* at 323. The court also noted that the officer used the guardrails of the overpass and the intersection of streets as reference points to aid his estimation of Berry’s speed. *Id.* Thus, the officer’s testimony was probative and properly considered by the court. *Id.* at 325.

¶5 *Berry* explained that, unlike the officer’s testimony in that case, in certain instances an estimation of speed will be so unreliable it will not be admissible:

In *Culver v. Webb* (1944), 244 Wis. 478, 485, 12 N.W.2d 731, a witness was held not qualified to estimate speed of an automobile when he saw it in operation only 15 feet. This distance was too short. In *Bellrichard v. Chicago & N.W. Ry.* (1945), 247 Wis. 569, 576, 20 N.W.2d 710, where a witness saw a train a few seconds before it hit her,

we said the time was too short to enable the witness to judge the speed of the train. In *Fessler v. Northwestern National Casualty Co.* (1953), 265 Wis. 14, 18, 60 N.W.2d 387, a witness who was traveling in the opposite direction and had admitted he was in no position to judge speed was not permitted to testify; and in *Carstensen v. Faber* (1962), 17 Wis. 2d 242, 247, 116 N.W.2d 161, we held a witness could not give his opinion of speed which was based entirely upon sound.

Berry, 44 Wis. 2d at 324-25. The court distinguished the officer's estimation of Berry's speed because the officer was in a position to make an estimation based on his physical ability to view Berry and his experience traffic work. *Id.* at 323.

¶6 We do not agree that the facts here place Kratochwill's testimony in the category of cases listed by the *Berry* court as inadmissible. We review admissibility of evidence for an erroneous exercise of discretion; that is, whether the court relied on the facts in the record and applied the proper legal standard to reach a reasonable determination. *City of West Bend v. Wilkens*, 2005 WI App 36, ¶13, 278 Wis. 2d 643, 693 N.W.2d 324. Kratochwill testified that he has been performing traffic enforcement for the Dane County Sheriff's Office for fourteen years. His training involved visual speed estimation. In that training, Kratochwill was required to have an eighty percent accuracy rate, with a plus or minus five miles per hour margin of error. He testified that he visually estimated Baxter's speed during daylight, when the traffic was light and the weather was clear and dry. He was parked "somewhat perpendicular" to Highway P, and looking out his driver side window to view oncoming traffic. He viewed Baxter's car as it approached, visually estimated its speed as fifty-five miles per hour, and then conducted a laser reading of its speed.² Kratochwill waited for Baxter to pass him,

² Neither party has appealed from the circuit court's suppression of the laser evidence. We therefore do not consider the laser evidence in this appeal.

and then stopped her. Baxter's vehicle remained in his sight the entire time. Thus, Kratochwill testified as to his experience visually estimating speed and his basis for doing so in this case. His testimony is therefore distinguishable from the testimonies denounced in *Berry*, which were all unsupported by facts establishing a basis to judge speed.

¶7 Baxter contends, however, that the facts in this case are so different from *Berry* as to render Kratochwill's testimony inadmissible. Baxter argues that *Berry* is distinguishable on three grounds: (1) in *Berry*, the facts established that the officer viewed Berry from a distance of about half a city block, while here the distance was much greater; (2) in *Berry*, the officer used reference points to estimate Berry's speed, while here there is no indication that Kratochwill used reference points to estimate Baxter's speed; and (3) in *Berry*, the officer observed Berry traveling across his line of vision, while Kratochwill observed Baxter oncoming. Thus, Baxter argues, the officer's testimony in *Berry* was far more probative than Kratochwill's testimony here, which Baxter contends renders Kratochwill's testimony inadmissible. We disagree. Contrary to Baxter's implication, *Berry* does not purport to establish a minimum threshold for the admissibility of visual speed estimation testimony. Thus, although we are convinced that the facts in *Berry* were more favorable to the City of Milwaukee, we are not convinced that it follows that Kratochwill's testimony is inadmissible.

¶8 Baxter's first argument distinguishing *Berry* focuses on the distance from which Kratochwill conducted his visual estimation. The *Berry* court did not specify the distance between the officer and Berry, but the facts indicate that the distance was as close as half a city block. The court specifically relied on the fact that the officer viewed Berry unobstructed for a full city block, and concluded that that was sufficient to estimate his speed. Here, the distance from which

Kratochwill made his speed estimation is disputed.³ Regardless, the testimony establishes that Kratochwill viewed Baxter's vehicle from some distance, estimated her speed, and continued to monitor her car until she passed him. The entire time, Kratochwill had a clear view of Baxter's car. Even conceding the distance was far greater than the half a city block in *Berry*, we are not convinced that there was no basis for Kratochwill to estimate Baxter's speed.⁴

¶9 Next, we are unconvinced that the lack of reference points in this case renders Kratochwill's testimony useless. While we agree that the *Berry* court relied on the use of reference points as helpful, it did not say that reference points were required in every case. Here, other factors compensate for the lack of reference points: Kratochwill's years of experience estimating speed, his tested accuracy in visual speed estimations, and the clear view he had of Baxter's car during daylight hours all supported his testimony.

¶10 Similarly, we are unconvinced by Baxter's argument that Kratochwill's viewing Baxter oncoming rendered his visual estimation unreliable. While *Berry* indicated that it is difficult to estimate speed in an oncoming vehicle, it is possible to estimate the speed of an oncoming car and such testimony has

³ The court made a finding as to the distance between Baxter and Kratochwill when he made his visual estimation of speed, and Baxter provides several arguments as to what she believes that distance was. However, the only evidence in the record supporting any finding of distance is the distance reading on the laser device, evidence of which the circuit court suppressed. We therefore are unable to make a determination of the distance from which Kratochwill estimated Baxter's speed. We conclude we need not do so.

⁴ Baxter argues that it was physically impossible for Kratochwill to make a visual estimation of Baxter's speed from such a great distance. We disagree. First, the record does not establish the actual distance from which Kratochwill estimated speed. We know only that Kratochwill is experienced in estimating speed, that he had a clear view of Baxter's car from some distance, and that he testified that he was able to visually estimate her speed from that distance. The circuit court believed that testimony, and we defer to the circuit court's credibility determinations.

been admitted into evidence.⁵ *Berry*, 44 Wis. 2d at 323-24 (citing *Pagel v. Kees*, 23 Wis. 2d 462, 468, 127 N.W.2d 816 (1964)).

¶11 Thus, *Berry* explained that if there is a reasonable basis for the visual estimation, the testimony is admissible. For the reasons explained above, we conclude that there was a reasonable basis for Kratochwill's visual estimation.

¶12 We turn, then, to Baxter's next argument: that Kratochwill's visual estimation of Baxter's speed, even if admissible, was insufficient to meet the County's burden of proof. We review the circuit court's decision to determine

whether a reasonable trier of fact could be convinced of the defendant's guilt to the required degree of certitude by the evidence which it had a right to believe and accept as true. It is not a question of whether this court is so convinced. Our task as a reviewing court is limited to determining whether the evidence presented could have convinced a trier of fact, acting reasonably, that the appropriate burden of proof has been met.

City of Milwaukee v. Wilson, 96 Wis. 2d 11, 21, 291 N.W.2d 452 (1980) (footnote omitted). The burden of proof in this case was on the County to prove a speeding violation by clear, satisfactory, and convincing evidence. See *Madison v. Geier*, 27 Wis. 2d 687, 691-93, 135 N.W.2d 761 (1965).

¶13 Baxter concedes that an officer's testimony of visual speed estimation may satisfy the clear, satisfactory, and convincing standard, as in *Berry*. Baxter argues, however, that Kratochwill's testimony was far less reliable than the officer's testimony in *Berry*, and thus the evidence here is insufficient to meet that standard. The problem with Baxter's argument is that *Berry* explained

⁵ We are also not persuaded by Baxter's argument that the case *Berry* relies on required a different standard of proof. The *Berry* court did not rule out estimations of speed of oncoming vehicles, as Baxter implies.

that when “the testimony of the police officer on speed [is] probative, we will not quarrel with the weight given it by the trier of the fact.” *Berry*, 44 Wis. 2d at 325. “[I]t is not our function to review questions as to weight of testimony and credibility of witnesses. These are matters to be determined by the trier of fact and their determination will not be disturbed where more than one reasonable inference can be drawn from credible evidence.” *Estate of Dejmal v. Merta*, 95 Wis. 2d 141, 151, 289 N.W.2d 813 (1980).

¶14 The evidence the court relied on for its finding of guilt was the visual estimation by Kratochwill, which it deemed credible. We disagree with Baxter’s contention that the circuit court could not find Kratochwill’s testimony credible because he testified that he had an accuracy rate of plus or minus five miles per hour,⁶ eighty percent of the time. The court was entitled to weigh Kratochwill’s testimony, his professional experience, and his training⁷ and accuracy rate in determining the weight to give the visual estimation of speed. We cannot say that Kratochwill’s testimony was “so insufficient in probative value and force that ... no trier of fact, acting reasonably, could have found guilt” by clear, satisfactory, and convincing evidence. See *State v. Schwebke*, 2002 WI 55, ¶40, 253 Wis. 2d 1, 644 N.W.2d 666. We therefore affirm the circuit court’s finding that Baxter violated the speeding ordinance.

⁶ Taking into account the five-mile-per-hour margin of error, Kratochwill provided a range of Baxter’s speed from fifty to sixty miles per hour, establishing Baxter exceeded the forty-five-miles-per-hour speed limit.

⁷ Baxter also argues that Kratochwill did not testify that he was trained to make visual estimations of speed from the distance he did in this case. We do not agree that Officer Kratochwill was required to do so. Again, Baxter’s argument goes to the credibility of the testimony, which was for the circuit court to determine.

¶15 We agree with Baxter, however, that Kratochwill's testimony did not establish that Baxter was speeding by more than ten miles per hour by the clear, satisfactory, and convincing evidence standard. Baxter was charged with speeding under WIS. STAT. § 346.57(5), which prohibits driving in excess of the posted speed limit. However, the actual speed at which Baxter was driving is significant under WIS. STAT. § 343.32(2)(b), which assigns different demerit points for different levels of speeding. Under § 343.32(2)(b), a defendant receives three demerit points for speeding by zero to ten miles per hour, and four demerit points for speeding by more than ten but less than twenty miles per hour. In this case, Baxter received four demerit points.⁸

¶16 The only evidence admitted during trial to establish Baxter's speeding was Kratochwill's testimony that he visually estimated Baxter's speed as fifty-five miles per hour. Baxter was charged with speeding sixty miles per hour based on the laser reading Kratochwill performed; however, the laser evidence was suppressed. The court did not specify what speed it found Baxter was driving, other than to say that it was finding Kratochwill's testimony credible. Thus, the only evidence in the record of Baxter's speeding indicates that she was driving fifty-five miles per hour, with a plus or minus five-miles-per-hour margin of error, for a range of fifty to sixty miles per hour. Because the speed limit was forty-five miles per hour, if Baxter was driving anywhere from fifty to fifty-five miles per hour, she was within the zero to ten (or three demerit point) range; if she was driving fifty-six to sixty, she was in the more than ten, less than twenty (or four

⁸ This information is not in the record, but Baxter has submitted her driving abstract as an appendix to her brief, which reflects that she was convicted of speeding by fifteen miles per hour. In any event, the court's order does not reflect that the court made a finding as to the actual amount Baxter was speeding. We agree with Baxter that the court must do so based on WIS. STAT. § 343.32.

demerit point) range. If Kratochwill's visual estimation was correct, or if her actual speed fell within the lower range of the five mile per hour margin of error, Baxter was only speeding by up to ten miles per hour. If her actual speed fell within the higher end of the range (which, as Baxter points out, is less likely statistically, since the higher end of the range is smaller) then she was traveling more than ten miles per hour over the speed limit. Based on that evidence, we agree that Kratochwill's testimony of his visual estimation of Baxter's speed did not provide clear, satisfactory, and convincing evidence that Baxter was speeding by more than ten miles per hour. We therefore remand to the circuit court to find Baxter guilty of speeding by no more than ten miles per hour.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

