

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 26, 2012**

Diane M. Fremgen  
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 No. 2011AP2853**

**Cir. Ct. No. 2011TR3517**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**BRET W. LIEDERBACH,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Jefferson County:  
RANDY R. KOSCHNICK, Judge. *Affirmed.*

¶1 VERGERONT, J.<sup>1</sup> Bret Liederbach appeals from a conviction of speeding in violation of WIS. STAT. § 346.57(4)(gm), which provides, in part, that

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) and (3) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

“no person shall drive a vehicle at a speed in excess of .... [s]ixty-five miles per hour on any freeway or expressway.” After a trial to the court, the circuit court found that Liederbach drove his motorcycle at a speed of 100 miles per hour on the interstate highway in a 65-mile-per-hour zone.

¶2 On appeal Liederbach does not contest the sufficiency of the evidence to establish a violation of § 346.57(4)(gm). Specifically, he does not argue that the evidence was insufficient to show he exceeded a speed of 65 miles per hour. However, Liederbach contends that the circuit court’s finding that he was speeding at a rate of 100 miles per hour is not supported by credible evidence. Thus, Liederbach contests the applicability of WIS. STAT. § 343.30(1n), which provides that “[a] court shall suspend the operating privilege of a person for a period of 15 days upon the person’s conviction by the court of exceeding the applicable speed limit as established by s. 346.57(4)(gm) ... *by 25 or more miles per hour.*” (Emphasis added.) He also contests the applicability of § 343.32(2)(b), which provides that for each speeding conviction, the driver shall be assigned “6 demerit points for exceeding the lawful speed limit *by 20 or more miles per hour.*” (Emphasis added.) We disagree that the court’s finding that he was traveling 100 miles per hour is not supported by credible evidence, and therefore we affirm.

## BACKGROUND

¶3 The facts are undisputed. At trial, Trooper Craig Morehouse testified that on June 29, 2011, shortly before 1:33 a.m., Trooper Morehouse was stopped in a closed construction zone area monitoring traffic when he observed a line of three cars followed by a motorcycle move past his location at a speed of approximately 55 miles per hour, the speed limit at that location in the

construction zone. Trooper Morehouse testified that he noticed that the motorcycle was following closely behind the cars, which drew his attention to the motorcycle. Trooper Morehouse pulled out of the construction zone and began following the vehicles.

¶4 Trooper Morehouse testified that, once following the vehicles, he observed the first and third cars in the line ahead of the motorcycle move into the right lane. He observed and heard the motorcycle accelerate, observed it pass the first car in the left lane, move into the right lane to pass the second car, and then move back into the left lane to pass the third car. The motorcycle then switched into the right lane. The officer testified that he followed the motorcycle through traffic in order to estimate the speed of the motorcycle. He also testified that, after he passed the cars and as he was following the motorcycle, he looked down at his speedometer and noticed that he was “already doing 100 miles an hour and the motorcycle was still accelerating away from [him].” At this point, Trooper Morehouse testified, he turned on his lights and siren and stopped attempting to estimate Liederbach’s exact speed. After following Liederbach “about a mile, maybe a mile and a half,” Trooper Morehouse initiated a traffic stop and identified Liederbach as the driver of the motorcycle by his driver’s license.

¶5 Trooper Morehouse also testified to the accuracy of his speedometer. During his direct examination, Trooper Morehouse testified that his speedometer had been certified in September 2009, roughly two years before he stopped Liederbach. The 2009 certification indicated that when “[Trooper Morehouse’s] speedometer says 100 miles an hour, [he’s] doing 100 miles an hour.” Trooper Morehouse also testified that his speedometer was certified again on July 29, 2011, shortly after he stopped Liederbach. On cross-examination, Trooper Morehouse testified that the 2011 certification indicated that his speedometer

overestimated speed by approximately two miles: when Trooper Morehouse's vehicle was traveling 98 miles per hour, the speedometer would indicate that he was traveling at 100 miles per hour.

¶6 The circuit court held that the State had proved by clear and convincing evidence that Liederbach was traveling at a rate of 100 miles per hour. The circuit court acknowledged that, in a period of time between September 2009 and July 2011, the speedometer had lost accuracy to the extent of two miles per hour when the squad car was traveling near 100 miles per hour. Nevertheless, the court accepted Trooper Morehouse's testimony that he estimated Liederbach's speed to be 100 miles per hour as credible, in light of Trooper Morehouse's training, experience, information on his speedometer, and immediate observations at that time. Liederbach now appeals.

## DISCUSSION

¶7 Liederbach contends the circuit court's finding concerning his speed is not supported by the evidence. He concedes that, while credible evidence supported the circuit court's finding that he was traveling above the 65-mile-per-hour speed limit, it did not support the finding that he was specifically traveling at 100 miles per hour. According to Liederbach, the appropriate remedy is to reverse the conviction with instructions to the circuit court to enter a conviction for the "base violation" only; and therefore not to impose a 15-day license suspension

pursuant to § 343.30(1n) and not to assign Liederbach six demerit points pursuant to § 343.32(2)(b).<sup>2</sup>

¶8 On appeal we will not set aside a circuit court’s factual findings unless they are clearly erroneous. WIS. STAT. § 805.17(2). It is for the circuit court, not this court, to determine the credibility of witnesses. *Global Steel Prods. Corp. v. Ecklund Carriers, Inc.*, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269. We search the record for evidence to support findings the circuit court made, not for findings the circuit court could have made but did not. *Id.*

¶9 Here, the facts in the record support the circuit court’s conclusion that Liederbach was traveling at a speed of 100 miles per hour.

¶10 Trooper Morehouse testified that he estimated Liederbach’s speed to be *over* 100 miles per hour. He testified that this estimate was based on the fact that Trooper Morehouse’s speedometer indicated that he was traveling 100 miles per hour while he was following Liederbach, and that Trooper Morehouse “could visually see the motorcycle still pulling away from [him] going *considerably* faster than [he] was.” (Emphasis added.) The circuit court considered this testimony and concluded that “if the defendant was traveling at about 55 miles an hour when he was first observed by the Trooper and then greater than 100 miles an hour several moments later, that at some point in that continuum of time the defendant would have, in fact, been traveling 100 miles an hour as charged.”

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<sup>2</sup> Because we conclude that the circuit court’s finding that Liederbach was traveling 100 miles per hour is not clearly erroneous, we do not reach Liederbach’s waiver argument, in which he contends that the State is precluded from arguing that the evidence was sufficient to establish Liederbach’s speed exceeded 90 miles per hour, which would therefore be sufficient to subject him to six demerit points under § 343.32(2)(b), as well as a 15-day mandatory suspension under § 343.30(1n).

¶11 As we noted, when a circuit court sits as a fact finder, it is the circuit court's role to assess the credibility of witnesses, *Fidelity & Deposit Co. v. First National Bank of Kenosha*, 98 Wis. 2d 474, 484-85, 297 N.W.2d 46 (Ct. App. 1980), and the weight to be given to each witness's testimony, *Milbauer v. Transport Employee's Mutual Benefit Society*, 56 Wis. 2d 860, 865, 203 N.W.2d 135 (1973). The circuit court concluded that Trooper Morehouse's testimony was credible in light of his training and experience, which included "an initial forty hour block of training both in radar and just in speed estimation" as well as annual tests on estimating the speed of vehicles. The circuit court also noted that the length of observation here was not in any way deficient or insufficient.

¶12 Liederbach asserts that, because the speedometer certification performed shortly after Liederbach was stopped demonstrated that the speedometer overestimated speed by two miles, this means Liederbach's speed "may have briefly exceeded 98 miles per hour, not 100 miles per hour." However, the circuit court considered the testimony regarding the accuracy of Trooper Morehouse's speedometer and nevertheless concluded that Trooper Morehouse's estimation that Liederbach was traveling at least 100 miles per hour was credible. Trooper Morehouse testified that Liederbach was "pulling away" from him, even when his speedometer read 100 miles per hour. Taking into account the speedometer certification indicating the speedometer overestimated speed by about two miles per hour, the circuit court's finding is still not clearly erroneous in light of Trooper Morehouse's testimony that Liederbach was traveling "considerably faster" than Trooper Morehouse, and Trooper Morehouse's estimation that Liederbach was traveling at a speed *over* 100 miles per hour.

## CONCLUSION

¶13 We conclude the circuit court's finding that Liederbach traveled at a speed of 100 miles per hour in a 65-mile-per-hour zone is not clearly erroneous. Accordingly, we 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.

