

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 31, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 98-3400-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROCKY A. KNOBLE,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Grant County:
GEORGE S. CURRY, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Vergeront, JJ.

¶1 PER CURIAM. Rocky Knoble appeals from a judgment and an amended judgment convicting him of attempting to elude a traffic officer. He claims the trial court erred by excluding a traffic citation from evidence and by modifying his sentence from straight jail time to jail time as a condition of

probation. We conclude that the evidentiary decision was within the trial court's range of discretion and that Knoble waived any objection to the modified sentence. Accordingly, we affirm.

BACKGROUND

¶2 Deputy Bruce Visser testified that he was traveling westbound on Highway 133 near Wightman Road (Point A), when he passed Knoble going the other direction. Visser said he used moving radar to clock Knoble traveling 68 m.p.h. in a 55 m.p.h. zone at Point A. Visser then made a Y-turn and caught up to Knoble around Pine Road (Point B) where he paced him at 85 m.p.h., using the speedometer in his squad car. Visser said it was his customary practice to switch his radar from moving to stationary status to check the accuracy of his speedometer.

¶3 Visser testified that he turned on his sirens and lights at Point B, but that, rather than pulling over, Knoble increased speed, and Visser had to travel in excess of 100 m.p.h. in order to keep up. Visser said he called in the pursuit over the radio and asked for assistance. Visser continued following Knoble through the Village of Muscoda, and eventually stopped him on the other side of town at Azim Street (Point C), approximately four miles beyond Point B and six miles beyond Point A.

¶4 Sergeant Daniel Dobbs testified that he heard a radio transmission indicating Visser had observed a vehicle traveling eastbound on Highway 133 at 68 m.p.h. and was engaged in a high-speed pursuit in the vicinity of Point B. However, in his police report, Dobbs wrote that Visser said over the radio he had clocked a car doing 85 m.p.h. and had turned around at Point B to pursue the car. The report mentioned nothing about Visser having clocked Knoble at 68 m.p.h.

¶5 Dobbs also testified he was asked to set up stop strips to deflate Knoble's tires, but did not have time to do so before the vehicles passed his position. Dobbs observed Visser following about 150 feet behind Knoble as they came through a 40 m.p.h. zone just outside Muscoda. He estimated Knoble's speed at approximately 100 m.p.h. as he passed by.¹

¶6 The defense theory was that Knoble was traveling at 85 m.p.h. all along, and that he did not see Visser's sirens and lights until he had passed through Muscoda. In support of his theory, Knoble sought to introduce a traffic citation which Visser had issued to Knoble for traveling 85 m.p.h. in a 55 m.p.h. zone at Point B. The citation had a notation stating, "Car Clock stationary." Knoble contends the citation tended to show that Dobb's written report was more accurate than the testimony given by the officers at trial. Knoble further argues that, if he was already at Point B when Visser clocked him at 85 m.p.h. and turned around to follow him, it makes sense that the officer would not have caught up to him until somewhere around Point C.

¶7 The trial court initially sentenced Knoble to serve seventy-five days in the Grant County Jail, with Huber privileges to be allowed after the first thirty days. The location was subsequently amended to Sauk County, where Knoble lived. However, when Knoble informed the court that Sauk County would not allow him Huber privileges to work in Dane County and asked to be resentenced to thirty days' time already served, the trial court instead placed Knoble on two years' probation with an additional forty-five days in jail on weekends and 100 hours community service as conditions of probation. Knoble claims the second

¹ As a requirement of Dobb's radar certification, he had learned to estimate the speed of vehicles to within two miles per hour.

sentence was harsher than the original sentence, and says he did not agree to probation.

ANALYSIS

The Traffic Citation

¶8 We review evidentiary decisions under the erroneous exercise of discretion standard. *See State v. Sullivan*, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. *See Burkes v. Hales*, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). Thus, we will not overturn a discretionary determination merely because we would have reached a different result. Rather, “[b]ecause the exercise of discretion is so essential to the trial court’s functioning, we generally look for reasons to sustain discretionary decisions.” *Id.* at 591.

¶9 Any evidence which tends to make the existence of a fact of consequence to the determination of the action more or less probable is relevant. *See* WIS. STAT. § 904.01 (1997-98).² Relevant evidence is generally admissible, unless its probative value is substantially outweighed by the danger of unfair prejudice or confusion of issues. *See* WIS. STAT. §§ 904.02 and 904.03; *Sullivan*, 216 Wis. 2d at 772-73.

¶10 The State admits that evidence that Visser had used stationary radar to clock Knoble at 85 m.p.h. at point B would be relevant to the eluding charge. It

² All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

further concedes that the “Car Clock stationary” notation could arguably be construed to mean that Visser had clocked Knoble’s speed by the use of stationary radar. However, it contends that the probative value of the citation was low because the more reasonable interpretation of the notation was that Visser had used his stationary radar to verify his speedometer reading when clocking Knoble by pacing the squad car behind Knoble’s vehicle. We agree that the ambiguity of the notation limits its probative value.

¶11 Furthermore, we agree with the trial court’s assessment that admission of the citation could have been confusing. Prior to trial, Knoble and the State had stipulated that the citation should be changed to show 68 m.p.h. in a 55 m.p.h. zone. This stipulation would have been inconsistent with Knoble’s argument that he was never clocked doing 68 m.p.h. at Point A, but was first clocked doing 85 m.p.h. near Point B. Thus, we conclude that that trial court’s decision to exclude the evidence as substantially more confusing than probative constituted a rational application of the proper legal standard to the facts of record.

Modified Sentence

¶12 Knoble opposed probation at the initial sentencing. However, he never objected to the modified sentence in the trial court. He has therefore waived any double jeopardy issue which the sentence might have posed.³ See *State v. Franklin*, 228 Wis. 2d 408, 418, 596 N.W.2d 855 (Ct. App. 1999), *review denied*,

³ Knoble correctly points out that a defendant has the right to reject probation as an alternative to sentencing. See *State v. McCready*, 2000 WI App 68, ¶6, 234 Wis. 2d 110, 608 N.W.2d 762, *review denied*, 2000 WI 36, 234 Wis. 2d 175, 612 N.W.2d 734 (Wis. Apr. 26) (Nos. 99-1822-CR, 99-1823-CR). He did not do so, however. Nonetheless, we note that there is nothing in the opinion which would prohibit Knoble from subsequently moving to revoke his probation. See *id.* (holding “the right to reject probation lasts throughout the probationary period”).

228 Wis. 2d 175, 602 N.W.2d 761 (Wis. Jul. 23, 1999) (Nos. 98-2420-CR, 98-2421-CR).

By the Court.—Judgments affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

