COURT OF APPEALS
DECISION
DATED AND FILED

June 18, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP39 **Cir. Ct. No. 2012TR4123**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

CITY OF SUPERIOR,

PLAINTIFF-RESPONDENT,

V.

JUSTIN E. BACHINSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Douglas County: KELLY J. THIMM, Judge. *Reversed and cause remanded with directions.*

¶1 STARK, J.[1] Justin Bachinski appeals a judgment imposing a forfeiture for speeding. Bachinski argues he could not be found guilty because the speed limit sign was obstructed by a tree branch. We agree and reverse and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

remand with directions to vacate the forfeiture judgment and enter a judgment of acquittal.

BACKGROUND

¶2 Bachinski was issued a citation for traveling thirty-four miles per hour in a twenty-five mile-per-hour zone on State Trunk Highway 35/Tower Avenue in the City of Superior. Bachinski contested the citation and demanded a trial.

¶3 The day before trial, Bachinski filed a brief, arguing he could not be found guilty of speeding because the City's "posting of a 25 mph sign was ineffective because the sign was obscured by tree foliage so that it was not legible to any person proceeding on … State Highway 35[.]" In support of this argument, Bachinski emphasized that, pursuant to WIS. STAT. §§ 346.57(6)(a) and 349.065, the City was required to post the speed limit sign and to keep the sign in compliance with the Manual on Uniform Traffic Control Devices (MUTCD). He argued the MUTCD required that signs not be obscured by shrubbery, and, because the sign in this case was covered by a tree branch, it was therefore not in compliance with the MUTCD, and he could not be guilty. At trial, three photographs of the speed limit sign and tree foliage were admitted into evidence.

¶4 The circuit court delayed rendering judgment on the speeding citation so the City could respond to Bachinski's brief. The City subsequently filed a brief, arguing the speed limit sign complied with the MUTCD. It explained that the MUTCD provision that municipalities ensure posted signs were not obstructed by shrubbery was a recommended provision. The provision was not mandatory. Accordingly, the City argued its speed limit sign complied with the MUTCD and Bachinski should be found guilty of speeding.

¶5 In reply, Bachinski argued "[t]he purpose of traffic signs is to inform the motoring public of the speed limits." He asserted that, based on this purpose, it "makes no sense" for the MUTCD provision to be only a recommendation. He then argued, "[t]o hold that regardless of whether [the] speed control sign can be seen or not, that the traveling public is required to conform to speed limits that they could not possibly be aware of would fly in the face of common sense and justice."

¶6 In its oral decision, the circuit court concluded:

> I'm convinced by reviewing the case cited by the City … and reading the statute and the accompanying provisions of the MUTCD, that [the provisions on maintenance and shrubbery removal are] not mandatory. They're discretionary or they're guidance I guess is the more official term. Whether somebody should be able to see the sign or not apparently is guidance.
>
> I'm not saying it was wise not to make sure the sign didn't have the shrubbery in front of it which I agree with [Bachinski]. It clearly did[,] but on the other hand, that's not what the statute [requires].
>
> ....
>
> So under the circumstances, I am led to the conclusion that the defendant is guilty of the speeding violation ....

DISCUSSION

¶7 Bachinski renews his assertion that he cannot be guilty of speeding because the posted speed limit sign was obscured by a tree branch. However, he no longer relies on the MUTCD in support of that argument. Instead, Bachinski relies for the first time on WIS. STAT. § 346.02(7). That statute provides a traffic code provision may not be enforced against an alleged violator if a sign is required by statute to be posted, and, at the time of the alleged violation, the sign is "not in

proper position and sufficiently legible to be seen by an ordinarily observant person." *See* ***id.*** Bachinski argues that because the City was required to post the twenty-five-mile-per-hour speed limit sign, *see* WIS. STAT. § 346.57(6), and because the circuit court found the sign was obstructed by a tree branch, he cannot be found guilty of speeding because of § 346.02(7).

¶8 The City responds Bachinski is precluded from making this argument because it is being raised for the first time on appeal. The City points out that, although "Bachinski complained generally of an obstructed traffic sign[,]" he never specifically relied on WIS. STAT. § 346.02(7) in the circuit court.

¶9 Bachinski, however, insists he is not improperly raising a new issue on appeal. He emphasizes he repeatedly argued in the circuit court that he could not be guilty of speeding because the speed limit sign was obstructed by a tree branch. He asserts his new reliance on WIS. STAT. § 346.02(7) is simply a variation of the argument he made in the circuit court.

¶10 Generally, we do not consider issues raised for the first time on appeal. ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838. We apply this rule when the circuit court has not had the opportunity to "pass" on the issue. ***Hopper v. City of Madison***, 79 Wis. 2d 120, 137, 256 N.W.2d 139 (1977). However, new arguments are permitted on an issue that was properly raised in the circuit court. *See* ***State v. Holland Plastics Co.***, 111 Wis. 2d 497, 505, 331 N.W.2d 320 (1983) (holding that an additional argument on issues already raised in the circuit court does not violate the general rule against raising issues for the first time on appeal).

¶11 Further, the general rule against issues being considered for the first time on appeal is merely one of judicial administration. *See* ***Segall v. Hurwitz***,

114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983). Thus, we may choose to address an issue raised for the first time on appeal in the exercise of our discretion, depending on the facts and circumstances of each case, particularly where "compelling circumstances" exist or where there is a reason to do so. ***Hopper***, 79 Wis. 2d at 137; *see* ***Sears v. State***, 94 Wis. 2d 128, 140, 287 N.W.2d 785 (1980) (compelling circumstances); ***Segall***, 114 Wis. 2d at 489-90 (a reason to do so). One such circumstance is when the issue is solely a question of law that is not dependent on further fact finding to resolve the issue and the parties overlooked applicable law in the circuit court. *See* ***Helgeland v. Wisconsin Muns.***, 2006 WI App 216, ¶9 n.9, 296 Wis. 2d 880, 724 N.W.2d 208; ***Estate of Hegarty ex rel. Hegarty v. Beauchaine***, 2001 WI App 300, ¶12, 249 Wis. 2d 142, 638 N.W.2d 355.

¶12 We conclude Bachinski's reliance on WIS. STAT. § 346.02(7) to support his argument that he could not be guilty of speeding because the sign was covered by a tree branch is nothing more than a variation of the argument he made in the circuit court. *See, e.g.*, ***State v. Weber***, 164 Wis. 2d 788, 789-91, 476 N.W.2d 867 (1991) (even though parties argued automobile exception in circuit court, the legal issue on appeal was constitutionality of the search; therefore, court could rely on inventory search). Although Bachinski's argument to the circuit court focused on whether the City was obligated under the MUTCD to maintain the sign, he also argued that, irrespective of the MUTCD, it would be unfair to hold motorists responsible if they could not see the sign. Consequently, we will consider the merits of Bachinski's § 346.02(7) argument.

¶13 Moreover, the factual record is complete and the application of WIS. STAT. § 346.02(7) is simply a matter of law. *See* ***Helgeland***, 296 Wis. 2d 880, ¶9 n.9. The record reflects the circuit court agreed with Bachinski that the sign

was obstructed by tree foliage and also acknowledged, "I see where [Bachinski is] coming from, that it's not fair." Accordingly, even if Bachinski's argument was raised for the first time on appeal, we exercise our discretion to apply § 346.02(7) to the facts of this case.

¶14 WISCONSIN STAT. § 346.02(7) provides:

> No provision of this chapter for which signs are required shall be enforced against an alleged violator if at the time and place of the alleged violation an official sign is not in proper position and sufficiently legible to be seen by an ordinarily observant person. Whenever a particular section does not state that signs are required, such section is effective even though no signs are erected or in place.

¶15 Because WIS. STAT. § 346.02(7) precludes enforcement only if a sign is required to be posted, we first consider whether the speed limit sign in this case was required to be posted.[2] The circuit court found Bachinski was traveling in excess of the twenty-five-mile-per-hour speed limit on State Trunk Highway 35 in the City of Superior, contrary to City of Superior Ordinance § 112-1.1.(a). That ordinance adopts by reference the provisions of WIS. STAT. § 346.57. *See* SUPERIOR, WIS. ORDINANCES §112.1.1.(a). WISCONSIN. STAT. § 346.57(4)(e),[3] in

[2] Not all speed limits are required to be posted. *See, e.g.*, WIS. STAT. § 346.57(4)(h).

[3] WISCONSIN STAT. § 346.57(4)(e) provides:

> [N]o person shall drive a vehicle at a speed in excess of the following limits unless different limits are indicated by official traffic signs:
>
> ….
>
> (e) Twenty-five miles per hour on any highway within the corporate limits of a city or village, other than on highways in outlying districts in such city or village.

turn, generally sets the speed limit on a highway within a city's corporate limits at twenty-five miles per hour. Then, § 346.57(6)(a) provides the speed limit specified in § 346.57(4)(e) "is not effective unless official signs giving notice thereof have been erected by the authority in charge of maintenance of the highway in question." Consequently, based on §§ 346.57(4)(e) and (6)(a), we conclude the City was required to post the twenty-five-mile-per-hour speed limit sign on State Trunk Highway 35.

¶16 We next consider whether the speed limit sign was "in proper position and sufficiently legible to be seen by an ordinarily observant person." *See* WIS. STAT. § 346.02(7). Before the circuit court, Bachinski argued the City's "posting of a 25 mph sign was ineffective because the sign was obscured by tree foliage so that it was not legible to any person proceeding on … State Highway 35[.]" In rendering its oral decision, the circuit court "agree[d]" with Bachinski that the sign had shrubbery in front of it, finding, "It clearly did[.]" This finding is reasonably supported by the three photograph exhibits admitted into evidence at trial. In Exhibit 1, the speed limit sign is completely obstructed by a tree branch and not visible at all. In Exhibits 5 and 6, only small portions of the speed limit sign are visible through the tree branch. Based on the circuit court's agreement with Bachinski that the sign was obstructed by shrubbery, we conclude the speed limit sign was not "in proper position and sufficiently legible to be seen by an ordinarily observant person." *See* ***id.***

¶17 Because the speed limit sign was required to be posted, and because the sign was obstructed by a tree branch so that it was not sufficiently legible, we conclude WIS. STAT. § 346.02(7) precludes the City from enforcing the speeding violation against Bachinski. We therefore reverse the forfeiture judgment and remand with directions to vacate and enter a judgment of acquittal.

By the Court.—Judgment reversed and cause remanded with directions.

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