COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1069 **Cir. Ct. No. 2013FO2163**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

WILLIAM M. GRUBER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Reversed and cause remanded*.

¶1 LUNDSTEN, J.[1] This is a State Capitol protester case with a twist. Unlike many protesters at the Capitol who in 2012 and 2013 were cited under an

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

administrative code provision prohibiting "events" without a permit, William Gruber was cited under a code provision prohibiting disorderly conduct. It appears that this distinction was missed by Judge Sumi here. The upshot is that, when Judge Sumi dismissed the charges against Gruber relying on the reasoning of Judge John Markson in a different case, that reliance was misplaced. Because I discern no other basis on which to affirm dismissal of the charges against Gruber, I reverse.

Background

¶2 In a civil forfeiture complaint filed August 1, 2013, Gruber was charged with five counts of disorderly conduct in violation of WIS. ADMIN. CODE § Adm 2.14(2)(k). The five counts relate to five different dates in the second half of 2012.

¶3 As to each count, the factual allegation was essentially the same. Gruber was in the Wisconsin State Capitol around the noon hour and shouted at "the top of his lungs" or "the top of his voice." The complaint alleged that, in some instances, this shouting could be heard inside offices far away from the common area of the Capitol. The Wisconsin Administrative Code provision under which Gruber was charged is a disorderly conduct prohibition. The provision prohibited engaging "in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances where the conduct tends to cause or provoke a disturbance in public places or private areas in [state] buildings and facilities managed or leased by the [Department of Administration], or on state properties surrounding those buildings." WIS. ADMIN. CODE § Adm 2.14(2)(k).

¶4 On March 27, 2014, the circuit court, acting sua sponte, issued an order dismissing the charges against Gruber. The reason given for dismissal by the circuit court was:

> For the reasons well stated in State of Wisconsin v. Michael W. Crute, Dane County Circuit Court, Branch 1, "Decision and Order of Dismissal," the administrative rule sought to be enforced in this forfeiture action violates the First Amendment to the United States Constitution. Because an unconstitutional law is void and unenforceable, this action must be dismissed.

The reference is to Judge John Markson's decision dated February 5, 2014, in which Judge Markson determined that a different administrative code provision was unconstitutional. Judge Markson concluded that WIS. ADMIN. CODE § Adm 2.14(2)(vm)5., a provision requiring persons engaged in specified activities to obtain a permit, was facially unconstitutional because it was not, under controlling First Amendment principles, narrowly tailored to serve a substantial governmental interest.

¶5 The only other notable thing about the record here is that it contains a transcript of a November 1, 2013 pretrial conference involving several apparent Capitol protesters. This transcript provides some support for the proposition that Judge Sumi did not realize that Gruber had been charged differently from other protesters whose cases were at that moment before her. At that hearing, Judge Sumi explained that several of the defendants present had issues in common. In particular, she noted that several defendants had filed motions to dismiss based on the proposition that the administrative code provision under which they were charged was an invalid restraint on First Amendment activity, a description that also fits other defendants such as Michael Crute. Judge Sumi indicated that a

decision on the merits of that topic would logically apply to other defendants before her.[2]

Discussion

¶6 Based on the scant record before me, it appears that Judge Sumi erroneously believed that Gruber had been charged under the same administrative code provision as Michael Crute, the defendant before Judge Markson. Instead, Crute was charged under a provision requiring a permit for "events," including performances, presentations, meetings, rallies, and "like" events held in public areas of state facilities. *See* ***State v. Crute***, No. 2014AP659, slip op. ¶5 (WI App Jan. 29, 2014) (recommended for publication).[3] The Markson decision and, now, the court of appeals decision in ***Crute*** take the position that the rule at issue in that case was flawed because it applied to all events no matter how small, even if such events involved such a small number of people that it was not reasonable to believe that those events would interfere with the normal uses of state facilities. *See* ***id.***, ¶28. The fact that the permitting rule covered very small groups meant that it was not "narrowly tailored" to promote "a substantial government interest." *See* ***id.***, ¶¶29-33.

¶7 In contrast, the administrative code provision at issue in this case is a disorderly conduct law that is substantially similar to the state statute prohibiting

[2] I note that it is not clear that Gruber was present during this hearing. In the caption of that transcript, Gruber's circuit court case number is handwritten below typed case numbers relating to other defendants. However, when Judge Sumi made a record of the defendants who appeared at the hearing, there is no reference to Gruber.

[3] The timing of this decision and the ***Crute*** decision is largely coincidental. After allowing Gruber time to file a responsive brief and Gruber's failure to do so, this case was submitted for decision and assigned to me on January 8, 2015.

disorderly conduct. *See* WIS. STAT. § 947.01(1). Thus, declaring the disorderly conduct provision at issue here facially unconstitutional is akin to declaring the state disorderly conduct statute facially unconstitutional. I doubt Judge Sumi had this in mind when she dismissed the charges against Gruber.

¶8 Rather, Judge Sumi's reliance on Judge Markson's decision in ***Crute*** suggests that Judge Sumi mistakenly believed that Gruber was charged under the same provision as Michael Crute. Only then would Judge Markson's reasoning provide support for Judge Sumi's assertion that the reasoning demonstrates that "the administrative rule sought to be enforced in this forfeiture action violates the First Amendment to the United States Constitution."

¶9 Nothing in Judge Markson's decision in ***Crute*** casts doubt on the constitutionality of the disorderly conduct provision under which Gruber has been charged. It follows that nothing in the reasoning adopted by Judge Sumi justifies declaring the disorderly conduct provision at issue here unconstitutional. Because I can discern no other basis for dismissing the charges against Gruber, I reverse.

¶10 In closing, I note that it appears to me that the State could have achieved reinstatement of the disorderly conduct charges against Gruber without an appeal. Judge Sumi's order was expressly based on the reasoning found in ***Crute***, an obvious mismatch with the disorderly conduct charges at issue here. Under normal circumstances, a mismatch like this should alert the State that the judge simply failed to realize that a different law was at stake. The appropriate response to such a dismissal is a motion for reconsideration. Here, if Judge Sumi's attention had been drawn to the fact that the reasoning in ***Crute*** had no implications for the facial constitutionality of a disorderly conduct provision, it is apparent that she would have, in some fashion, promptly corrected her mistake.

Looking at this from a different angle, perhaps Judge Sumi's apparent oversight and the State's failure to move for reconsideration resulted from the same underlying cause, the high volume of Capitol protester cases and the consequent failure to notice that Gruber's case was different from the large numbers of other protester cases dismissed following Judge Markson's decision in ***Crute***.

Conclusion

¶11 For the reasons stated, I reverse the order dismissing the charges against Gruber.

By the Court.—Order reversed and cause remanded.

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