COURT OF APPEALS
DECISION
DATED AND FILED

June 24, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP226 **Cir. Ct. No. 2014CV719**

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

TOWN OF BLOOMFIELD,

PLAINTIFF-RESPONDENT,

V.

PETKO ZVETKOV BARASHKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Reversed and cause remanded with directions*.

¶1 REILLY, J.[1] In this unusual case we exercise our discretionary power of reversal under WIS. STAT. § 752.35 as: the court erred in its admission

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

of an insufficient municipal court transcript at a de novo trial; the Town of Bloomfield did not establish grounds that its only witness was "unavailable" for purposes of admitting hearsay testimony under WIS. STAT. § 908.04(1)(e); and critical questions exist regarding the credibility of the Town's "unavailable" witness.

¶2 Town of Bloomfield police officer Aaron Henson stopped Petko Barashki's vehicle on the evening of September 1, 2013, and cited Barashki with operating a vehicle while intoxicated and operating a vehicle without registration lamps, and accused him of improperly refusing to provide a sample of his blood. Barashki, pro se, challenged the stop and the citations before the municipal court on July 10, 2014. The municipal court found that the stop was legal and prevented Barashki from questioning Henson about cash that was in Barashki's car. After Barashki was found guilty of all charges, he appealed to the circuit court for a trial de novo.

¶3 The trial de novo occurred on December 1, 2014. Barashki again appeared pro se. The Town submitted the transcript from the July 10, 2014 municipal court trial, claiming that Henson was "unavailable." The circuit court allowed the transcript to serve as Henson's testimony and, upon consideration of the transcript and Barashki's testimony, found the stop was supported by reasonable suspicion and that Barashki was guilty of all charges.

¶4 Barashki appeals to this court. The Town appropriately argues that as Barashki did not supply us with a transcript of the circuit court trial we should assume that all facts supporting the convictions were presented at trial. *See* ***T.W.S., Inc. v. Nelson***, 150 Wis. 2d 251, 254-55, 440 N.W.2d 833 (Ct. App. 1989). While the failure to provide a transcript often dooms an appellant's

arguments, in this case we were left with the question as to why Henson was "unavailable." The record supplies the answer. The record reflects that on April 29, 2014, prior to Barashki's municipal court trial, Henson was charged with felony misconduct in office—he was stealing money. *See* court record in Walworth county case No. 2014CF177.[2] On July 2, 2014, Henson was arraigned, and on October 13, 2014, Henson pled guilty and was sentenced to jail by the same circuit court judge who presided at Barashki's trial.

DISCUSSION

Inadequate Transcript

¶5 Barashki appeals his conviction on the basis that the evidence does not show that Henson had reasonable suspicion to stop his vehicle for nonworking registration lamps. We agree.

¶6 In its request to the circuit court to use the transcript from the municipal court trial, the Town claimed that Henson was not cooperating nor agreeing to testify. The circuit court allowed the transcript in lieu of Henson's personal appearance, but therefore had to rely on Henson's testimony found in the municipal court transcript to evaluate "those facts known to the officer at the time of the stop" in its reasonable suspicion analysis. *See* ***State v. Washington***, 2005 WI App 123, ¶16, 284 Wis. 2d 456, 700 N.W.2d 305 ("When determining if the standard of reasonable suspicion was met, those facts known to the officer at the time of the stop must be taken together with any rational inferences, and

[2] We take judicial notice of Consolidated Court Automation Program (CCAP) records relating the details of Henson's criminal case. WIS. STAT. § 902.01.

considered under the totality of the circumstances."). Our review of the transcript does not reveal evidence from which the court could determine that Henson saw Barashki operating a vehicle with nonworking registration lamps prior to the stop. On this point, the transcript provides:

> [Municipal attorney]: Ok. What if anything unusual occurred on September one of thirteen at about eleven forty one p.m.?
>
> [Henson]: I was traveling (inaudible).
>
> [Municipal attorney]: How do you know they weren't flashing at you?
>
> [Henson]: (inaudible).
>
> [Municipal attorney]: Ok. Continue.
>
> [Henson]: Um, (inaudible) which is an indicator (inaudible).
>
> [Municipal attorney]: You could tell that the subject vehicle changed its headlight settings even though you were behind the subject vehicle?
>
> [Henson]: Yes.
>
> [Municipal attorney]: Ok. Explain what you noticed.
>
> [Henson]: I (inaudible) speedometer (inaudible).
>
> [Municipal attorney]: And how much after this other vehicle flashed its brights?
>
> [Henson]: Um, (inaudible).
>
> [Municipal attorney]: Ok. All right so ah, did you activate any squad car lights?
>
> [Henson]: I did.
>
> [Municipal attorney]: Did you initiate a stop of the subject vehicle?
>
> [Henson]: I did.
>
> ….

[Municipal attorney]: Ok. You issued two citations in this case. The first one was Operating While Under the Influence and the next one was Operating Without Registration Lamps. During your entire time on this traffic stop did the registration lamps start functioning properly?

[Henson]: No.

[Municipal attorney]: All right. They always just didn't work?

[Henson]: Correct.

….

[Municipal attorney]: Oh and just to clarify, as to the tail lamp violation, I'm just looking at the statute, Mr. Barashki was operating on a highway. Is that correct?

[Henson]: (inaudible).

[Municipal attorney]: Was it during the hours of darkness?

[Henson]: Yes.

[Municipal attorney]: And was the car a motor vehicle?

[Henson]: Yes.

[Municipal attorney]: And was it a type of motor vehicle where a registration plate is required?

[Henson]: Yes.

[Municipal attorney]: Now this is a little curious. The statute says that the vehicle must be equipped with a lamp so constructed and placed as to illuminate with a white light, the rear registration plate and render it clearly legible from a distance of 50 feet to the rear. Was Mr. Barashki's rear license plate legible from a distance of 50 feet to the rear?

[Henson]: (Inaudible).

[Municipal attorney]: Ok. And that was the only reason you were even able to see the license plate?

[Henson]: That's correct.

….

> [Barashki]: When you stopped me, did you say that you stopped me, what did you say you were stopping me?
>
> [Henson]: Ah, (inaudible).
>
> [Barashki]: Did you look around, when you stopped me did you look around my car to see that the registration light are not (inaudible).
>
> [Henson]: No. (Inaudible).

The transcript reflects that Henson stopped Barashki after observing him flash his high-beam lights. The transcript does not include any testimony regarding Henson's observations of Barashki's registration lamps before the stop. Nor, we note, does the transcript contain any testimony regarding Henson's training and experience against which his observations can be evaluated.[3] The transcript also reflects that Henson was never sworn in as a witness at Barashki's trial (the municipal court felt it sufficient that he had been sworn in on other cases) and that Henson's "expertise" as an officer and in field sobriety tests was accepted without any testimony as the municipal court had heard Henson testify in other cases on those issues.[4] We also observe that as Henson did not appear, Barashki could not

[3] The following exchange established the officer's training and experience at Barashki's municipal court trial:

> [Municipal attorney]: … Judge, I've never asked this question. Perhaps we can speed things up. Will the Court take judicial notice of [Henson's] training and experience?
>
> [Court]: Yes.

[4] The municipal court transcript reflects the following foundation for Henson's testimony as to his observations on field sobriety tests given to Barashki:

> [Henson]: Um, I was going to ask him to perform Field Sobriety Tests.
>
> [Municipal attorney]: The same Field Sobriety Tests you talked about in Mr. Bellack's case for which you hold certification?

(continued)

question Henson's credibility, including the fact that Henson was no longer an officer and had been convicted of theft. Barashki was also prevented at the municipal trial from questioning Henson about the alleged discrepancy in the amount of cash reported to be in his car the night of the arrest.

¶7 Despite these glaring omissions in the transcript and questions that should have been raised about the credibility and motives of Henson, the circuit court found that the Town had provided sufficient evidence to support the stop of Barashki's vehicle as well as each of the elements necessary for his conviction on the charges. The transcript does not support the circuit court's finding that "[t]he Bloomfield officer stopped Defendant for driving while his registration lamps were not working." As the transcript would be the only source for such a finding, this finding was clearly erroneous and cannot support a decision that there was reasonable suspicion for the stop.[5] Absent reasonable suspicion, evidence related to Henson's observations of Barashki's intoxication, the blood test, and Barashki's refusal to voluntarily consent to the blood test should have been suppressed at trial.

> [Henson]: Yes.
>
> ….
>
> [Municipal attorney]: I would ask the court to take judicial notice of the testimony Officer Henson provided previously about how the HGN test is performed, what Nystagmus is and what he's looking for.
>
> [Court]: Will do.

[5] The transcript also does not provide sufficient evidence to support the stop on the ground that Barashki violated WIS. STAT. § 347.12 (requiring the driver of a vehicle with multiple-beam headlamps to dim lights within five hundred feet of an approaching vehicle).

¶8 The transcript bears similar flaws as it relates to the evidence of Barashki's refusal to take a blood test. Under WIS. STAT. § 343.305, a driver who is found to have improperly refused to take a blood test shall have his or her driving privileges revoked. However, if law enforcement does not follow the statutory procedures, including substantially complying with the duty to inform the driver of his or her rights under the law per § 343.305(4), then the State forfeits its opportunity for revocation based on an unreasonable refusal. *See* ***State v. Piddington***, 2001 WI 24, ¶33, 241 Wis. 2d 754, 623 N.W.2d 528; ***State v. Zielke***, 137 Wis. 2d 39, 49, 403 N.W.2d 427 (1987). A law enforcement officer's compliance with § 343.305(4) "is based upon the objective conduct of that officer, rather than upon the comprehension of the accused driver." ***Piddington***, 241 Wis. 2d 754, ¶21.

¶9 Relevant to the refusal allegation, the municipal court transcript provided the following exchanges:

> [Municipal attorney]: Ok. Did you read him something called Informing the Accused?
>
> [Henson]: (Inaudible).
>
> Everyone stepped away from the microphones.
>
> [Court]: Any objections?
>
> [Barashki]: I'm sorry I don't understand you.
>
> [Court]: He's asking that that be put into evidence. Do you have any objections to that?
>
> [Municipal attorney]: (Inaudible).
>
> [Barashki]: Ok, I don't agree.
>
> [Court]: All right, well I'll receive it.
>
> [Barashki]: Ok.

[Municipal attorney]: Did you also complete a form (inaudible).

Everyone speaking away from microphones.

[Municipal attorney]: Just a moment. Is it a true and accurate copy of the Notice (inaudible).

[Henson]: Yes.

[Municipal attorney]: (Inaudible).

[Henson]: Read them the Informing the Accused. We don't read the form over (inaudible).

[Municipal attorney]: (Inaudible).

[Court]: Proceed.

[Municipal attorney]: I want to go back a little bit and expand on something. You indicated that you asked Mr. Barashki to provide a sample of his blood. Is that correct? What words did he use when he answered that question? Did he just say no, as the form indicates or something else.

[Henson]: (inaudible).

….

[Barashki]: And ah, about the Informing the Accused.

[Municipal attorney]: Mr. Barashki do you have a copy of that form in your records?

[Barashki]: Yes. If you ask me will you submit to a evidentiary chemical, I mean did you read this to me or did you ask me, you may not want to submit?

[Henson]: (Inaudible).

….

[Municipal attorney]: … I just want to clarify your testimony. You did read that form, the Informing the Accused, verbatim to Mr. Barashki?

[Henson]: (Inaudible).

[Municipal attorney]: Did he have any questions about the form as you were reading it to him?

> [Henson]: I know he wanted (inaudible).
>
> [Municipal attorney]: And there was a question from Mr. Barashki, I wanted to clarify this, did you ever tell Mr. Barashki he may not want to give a sample of his blood?
>
> [Henson]: No (inaudible).

Apparently based on these exchanges, the circuit court found: "The officer complied with [WIS. STAT. §] 343.305(4), by reading the Informing the Accused form to Defendant." This finding is not supported by the transcript as all of Henson's answers to the question of whether he read the Informing the Accused form were deemed to be inaudible.[6]

Admissibility of Municipal Court Transcript

¶10 We also conclude the circuit court erred in admitting the municipal court transcript at Barashki's trial. Barashki requested a de novo trial without a jury before the circuit court, not a transcript review. *See* WIS. STAT. § 800.14(4), (5). The Town convinced the court to accept the municipal court transcript in lieu of Henson's live testimony on the basis that Henson was unavailable under WIS. STAT. § 908.04(1)(e). The evidence of Henson's unavailability presented by the Town consisted of an email from Henson's attorney that stated: "Aaron Henson will not voluntarily appear for any court appearances. He does not authorize me to accept service on his behalf. He has not authorized me to disclose his residence." This was insufficient to establish

[6] Barashki's failure to provide a transcript of the trial causes us pause on this issue as we could assume a transcript would reflect that Barashki admitted that Henson read him the form. Nonetheless, we exercise our discretionary power, and we also observe that the municipal transcript reflects that Barashki objected to the admission of the form.

Henson's unavailability for purposes of introducing his testimony via the municipal court transcript.

¶11 WISCONSIN STAT. § 908.04(1)(e) provides that a witness is unavailable for purposes of WIS. STAT. § 908.045(1) if the proponent of the witness's prior testimony has been unable to procure the witness's attendance for the hearing "by process or other reasonable means." The proponent of the hearsay testimony must specify the facts showing that he or she made a good-faith effort and exerted due diligence in attempting to procure the absent witness's attendance. ***State v. Williams***, 2002 WI 58, ¶¶62-63, 253 Wis. 2d 99, 644 N.W.2d 919. Lack of cooperation is not enough, the proponent must establish that some effort was made to compel the witness's attendance through the formal legal process. *See* ***State v. Zellmer***, 100 Wis. 2d 136, 149-50, 301 N.W.2d 209 (1981); ***State v. King***, 2005 WI App 224, ¶16, 287 Wis. 2d 756, 706 N.W.2d 181.

¶12 Whether a witness is unavailable is a mixed question of law and fact in which the court must determine what happened and whether those facts fulfill a particular legal standard. ***State v. Buelow***, 122 Wis. 2d 465, 474-75, 363 N.W.2d 255 (Ct. App. 1984). The determination of whether the facts support a finding of unavailability is one of law, which this court reviews de novo. ***Id.*** at 475. Based on this record, we cannot say that Town counsel showed that he did enough to procure Henson's attendance at the de novo trial, and therefore, the Town did not establish Henson's unavailability for purposes of introducing his prior testimony.

¶13 Town counsel indicated that Henson had moved and that counsel did not know his new address. Counsel did not present evidence that he had undertaken any other means, outside of email correspondence with Henson and his attorney, to track down Henson or secure his presence. Given that Henson had

recently been convicted in Walworth county circuit court, a recent address for Henson was likely on file or could be quickly obtained. Counsel did nothing more than establish that Henson had ceased cooperating, falling short of the required due diligence necessary before hearsay evidence may be introduced.

¶14 Moreover, given the gaping holes in the transcript that was introduced by the Town, we question the court's discretionary decision to admit and rely upon the transcript as evidence. ***State v. Burns***, 112 Wis. 2d 131, 139, 332 N.W.2d 757 (1983) (admissibility of former testimony is a matter of discretion and will not be overturned absent an erroneous exercise of discretion). WISCONSIN STAT. § 908.045(1) permits the introduction of the prior testimony of an unavailable witness if that testimony is from "another hearing of the same or a different proceeding … at the instance of or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, with motive and interest similar to those of the party against whom now offered."

¶15 Although Barashki had an opportunity to cross-examine Henson at the municipal court trial, the transcript is so incomplete that it does not show the development of this testimony. Many of Henson's responses on both direct and cross-examination are missing, rendering this prior opportunity essentially meaningless. "A judge does not have the discretion to allow the admission of testimony when the right of cross-examination is limited by the circumstances." ***Town of Geneva v. Tills***, 129 Wis. 2d 167, 179, 384 N.W.2d 701 (1986). The missing testimony diminishes the reliability of the hearsay statements and undermines the purpose of the prior testimony exception, which is to ensure the trier of fact has a satisfactory basis for evaluating the truthfulness of the evidence.

See ***State v. Tomlinson***, 2002 WI 91, ¶40, 254 Wis. 2d 502, 648 N.W.2d 367. The court erred when it admitted and relied upon the municipal court transcript.[7]

Henson's Credibility

¶16 In finding whether the stop was supported by reasonable suspicion, the court had testimony from only two people—Henson and Barashki. The court's credibility decisions about that testimony were critical. We commonly defer to a circuit court's credibility decisions in bench trials because that court "has the opportunity to observe the witnesses and their demeanor on the witness stand." ***Pindel v. Czerniejewski***, 185 Wis. 2d 892, 898-99, 519 N.W.2d 702 (Ct. App. 1994). "[T]he opportunity of the trier of fact to observe the demeanor of the witness gives depth and meaning to the testimony." ***Liles v. Employers Mut. Ins. of Wausau***, 126 Wis. 2d 492, 503 n.3, 377 N.W.2d 214 (Ct. App. 1985). In making its credibility and other assessments here, however, the circuit court was missing key evidence: either Henson's presence on the witness stand or a complete and comprehensible transcript.

¶17 Between Barashki's arrest on September 2, 2013, and his municipal court trial, Henson was criminally charged with misconduct in office and theft of movable property (less than or equal to $2500). Henson testified at the municipal court trial during the pendency of his criminal case. After serving a jail sentence resulting from his guilty pleas to obstructing an officer and theft, Henson ceased cooperating with the Town as a witness. By relying on the transcript from the

[7] The Town might have been able to fill in the holes from the transcript by providing an audio recording of the municipal trial (as would have been required for a transcript review per WIS. STAT. § 800.14(5)), but did not do so.

municipal court proceeding, the circuit court did not have before it evidence of Henson's recent convictions for crimes of dishonesty for the purpose of evaluating Henson's credibility. *See* WIS. STAT. § 906.09. The court's reliance on the transcript also prevented Barashki from showing an alternative motive for Henson's stop of Barashki's vehicle.[8]

CONCLUSION

¶18 We exercise our discretionary reversal power as the record/transcript does not show reasonable suspicion to stop Barashki's vehicle and the real controversy was not fully tried. *See* WIS. STAT. § 752.35.

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.

[8] The transcript from the municipal court trial indicates that at one point, Barashki asked Henson, "And when you searched my car, how much currency was in the car." After the Town objected, Barashki explained that Henson had misrepresented in his police report the amount of money that was in Barashki's car. The court sustained the Town's objection on the ground of relevancy. If Barashki was pursuing this line of questioning to argue that Henson might have had another motive for stopping his vehicle—i.e., to steal money—this information would be relevant.