COURT OF APPEALS
DECISION
DATED AND FILED

April 20, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP2369 **Cir. Ct. No. 2009CV1148**

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

TOWN OF GRAND CHUTE,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. KETTNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed in part; reversed in part; and cause remanded; counsel sanctioned.*

¶1 HOOVER, P.J.[1] Michael Kettner, pro se, appeals a municipal forfeiture judgment for violations of Town of Grand Chute, Wisconsin ordinances

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

prohibiting the possession of marijuana and drug paraphernalia. Kettner argues he could legally possess marijuana pursuant to a medical authorization signed by a California medical doctor. We affirm the judgment as to the paraphernalia violation, but reverse the judgment for possession of marijuana and direct the circuit court to vacate that portion of the judgment. Further, we sanction the Town's counsel.

BACKGROUND

¶2 A Grand Chute police officer arrested Kettner for possessing two grams of marijuana and two pipes containing marijuana residue discovered in Kettner's car. Kettner was cited for one violation each of TOWN OF GRAND CHUTE, WIS. ORDINANCES 7.02(A.), Possession of Drug Paraphernalia, and 7.23, Possession of Marijuana (Mar. 2005). Kettner disputed the citations in municipal court, and then in the circuit court.

¶3 At the trial to the circuit court, Kettner stipulated he possessed the marijuana and pipes. However, he presented a typewritten medical authorization to possess marijuana, signed by a licensed California medical doctor. The circuit court received the authorization as a marked exhibit and accepted it "as a genuine document issued by Dr. Ironside." Kettner argued he legally possessed the marijuana pursuant to WIS. STAT. §§ 961.41(3g) and 59.54(25).

¶4 The Town argued Kettner's interpretation of the Wisconsin statutes was incorrect. The court, however, did not decide that issue. Instead, the court reviewed California's medical marijuana laws and concluded Kettner was not entitled to the benefit of the California laws because he was not a California

resident when he received his medical authorization.[2] Kettner appeals, renewing his argument that he was entitled to possess marijuana under Wisconsin law.

DISCUSSION

¶5 Kettner argues he legally possessed marijuana pursuant to WIS. STAT. §§ 961.41(3g) and 59.54(25) because he was issued a doctor's order authorizing the use of marijuana. Subsection 961.41(3g), the statute that criminalizes marijuana possession, provides:

> No person may possess or attempt to possess a controlled substance ... unless the person obtains the substance ... directly from, or pursuant to a valid prescription or order of, a practitioner who is acting in the course of his or her professional practice, or unless the person is otherwise authorized by this chapter to possess the substance or the analog. Any person who violates this subsection is subject to the following penalties: ....

The statute then lists several categories of drugs, setting forth various penalties.[3] Subsection 59.54(25) grants county boards the authority to enforce ordinances prohibiting marijuana possession, "subject to the exceptions in [§] 961.41(3g)(intro.)."[4]

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[2] The circuit court based its conclusion on introductory language stating the legislation's purpose was to ensure "Californians" had the right to obtain marijuana for medical purposes, and more recent legislation that created a voluntary identification card system.

[3] Marijuana (THC) is listed at WIS. STAT. § 961.41(3g)(e).

[4] The Town argues WIS. STAT. § 59.54(25) only applies to counties. That statute's specific applicability is irrelevant to our inquiry. Any significance to Kettner's argument comes from the legislature's use of the term exceptions. Regardless, we note WIS. STAT. § 66.0107(1)(bm), which applies to towns, villages, and cities, contains the same language.

¶6 Kettner does not provide a separate argument challenging the paraphernalia forfeiture. However, the paraphernalia ordinance adopts the language of WIS. STAT. § 961.572, which prohibits the possession of paraphernalia with intent to inhale a controlled substance in violation of WIS. STAT. ch. 961. Thus, if Kettner prevails on his WIS. STAT. § 961.41(3g) argument regarding the marijuana, he prevails as to the paraphernalia.

¶7 The Town argues the prescription exception in WIS. STAT. § 961.41(3g) cannot apply because marijuana is a schedule I drug, and asserts Wisconsin physicians can never legally prescribe schedule I drugs. The Town's argument is flawed. First and foremost, the argument fails to address out-of-state physicians. Second, the Town cites no law that states practitioners cannot prescribe schedule I drugs. It instead relies on the WIS. STAT. § 961.13(1m) description of schedule I drugs, which indicates drugs are placed in that category by a state board if they have no accepted medical use. This ignores the fact that drugs may instead be placed in the category based on federal mandates.[5] *See* WIS. STAT. §§ 961.11(4), 961.13(2m). Moreover, the Town's argument only addresses physicians providing prescriptions; it fails to address prescription users.

¶8 WISCONSIN STAT. § 961.38, titled "Prescriptions," which one might expect to address the subject, includes no provision banning schedule I drug prescriptions. Indeed, subsec. (5) suggests such prescriptions may be written, stating: "No practitioner shall prescribe ... or take without a prescription a controlled substance included in schedule I, II, III or IV for the practitioner's own

[5] A federal mandate can, but need not, also be based on a finding of no accepted medical use. *See* 21 U.S.C. § 812(b). However, the Town emphasizes the fact of a State of Wisconsin board making the determination.

personal use." Additionally, WIS. STAT. § 961.34 expressly provides that under certain circumstances, "pharmacies can distribute ... marijuana to patients upon written prescription ... [and] practitioners can write prescriptions for the marijuana." We therefore reject the Town's argument.

¶9 As we observed supra, the circuit court avoided consideration of WIS. STAT. § 961.41(3g) by interpreting and applying California law. The Town not merely concedes, but affirmatively asserts, the court erred in its application of California law. We agree and accept the concession. Nonetheless, we, in part, affirm the circuit court on other grounds. *See* ***State v. Holt***, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985), *superseded by statute on other grounds by* Wis. Stat. § 940.225(7), as recognized in ***State v. Grunke***, 2007 WI App 198, 305 Wis. 2d 312, 738 N.W.2d 137.

¶10 Kettner relies on the exception in WIS. STAT. § 961.41(3g) permitting possession of a controlled substance "pursuant to a valid prescription or order of, a practitioner who is acting in the course of his or her professional practice." He argues the subsection does "not say that it could only be a practitioner licensed in Wisconsin." For Kettner, however, the devil is in the details. Practitioner has a specific definition for purposes of WIS. STAT. ch. 961. "'Practitioner' means ... [a] physician ... licensed, registered, certified or otherwise permitted to ... dispense ... a controlled substance in the course of professional practice ... *in this state*."[6] WIS. STAT. § 961.01(19)(a) (emphasis added). Having

[6] In contrast, WIS. STAT. § 450.01, providing definitions specific to WIS. STAT. ch. 450, regulating pharmacists, defines practitioner as "a person licensed in this state to prescribe and administer drugs or licensed in another state and recognized by this state as a person authorized to prescribe and administer drugs." WIS. STAT. § 450.01(17).

failed to allege or demonstrate his California physician met that definition, Kettner likewise failed to show he met the § 961.41(3g) exception for possession pursuant to a valid prescription or order.[7] Because his marijuana possession would violate the statute, his paraphernalia possession violated the Grand Chute ordinance adopting WIS. STAT. § 961.572. We therefore affirm the judgment as to the possession of drug paraphernalia forfeiture.

¶11 However, we reverse the judgment as to the marijuana possession forfeiture because Kettner was charged under neither WIS. STAT. § 961.41(3g), nor an ordinance adopting that section. At the conclusion of the bench trial, the circuit court found Kettner guilty, as follows:

> THE COURT: I'm going to find Mr. Kettner guilty of possessing marijuana in the State of Wisconsin – or the Town of Grand Chute in violation of the Grand Chute ordinance which incorporates the state statute; correct, Mr. Rossmeissl?
>
> MR. ROSSMEISSL [(the Town's attorney)]: That's correct.

However, that was not correct. Rather, the Town drafted its own marijuana possession ordinance. TOWN OF GRAND CHUTE, WIS. ORDINANCE 7.23 (Mar. 2005), which Kettner was cited for violating, provides:

> No person shall possess any amount of marijuana ... unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a license[d] physician ... for a valid medical purpose. Their marijuana in possession should be consistent with the amount needed for personal use only, and not in an amount that is intended for distribution.

[7] Kettner has not argued he met the other WIS. STAT. § 961.41(3g) exception as a "person [who] is otherwise authorized by this chapter to possess the substance."

¶12 Thus, not only did counsel incorrectly advise the court as to the language of the ordinance, but the ordinance contained a medical use exception that would be central to the case.[8] Indeed, Kettner presented a signed order from a licensed medical doctor authorizing the use of marijuana, and the circuit court accepted it as a "genuine document issued by Dr. Ironside." Further, Kettner was charged with possessing only two grams, or approximately seven-hundredths of an ounce, of marijuana. We doubt the Town could prove that was an amount suggesting an intent to distribute. Because Kettner was not afforded a proper trial based on the marijuana possession ordinance's actual language, we reverse the judgment as to that forfeiture. The real controversy was not tried. *See* WIS. STAT. § 752.35.

¶13 Additionally, the Town significantly misrepresents the record to this court. The Town includes in the appendix to its brief a handwritten document containing much of the information from Kettner's medical marijuana authorization.[9] The Town then misrepresents to this court that the document was Kettner's proffered medical authorization, and attacks its validity. The record on appeal, however, contains the typewritten, form medical authorization that was actually considered at trial. Kettner explains in his reply brief that he provided the handwritten document—which included the medical clinic's contact information—to the Town so it could independently confirm Kettner had obtained

[8] We assume counsel was unaware of the language of the ordinance he was enforcing at trial, and thus did not intentionally mislead the circuit court.

[9] We avoid the use of the term prescription because Kettner asserts his medical authorization is an "order" rather than a "prescription," and because the authorization is dissimilar to a typical prescription in that it does not specify an amount of drug to be dispensed. *See* WIS. ADMIN. CODE § Phar 8.05(1) (Oct. 2006) (requiring that a prescription set forth the "strength, dosage form, quantity prescribed, [and] directions for use").

a medical marijuana authorization. The Town's brief contains the following argument and misrepresentations:

> Kettner alleged ... that he maintained a valid *handwritten* prescription and/or order .... (emphasis added).
>
> Kettner failed to prove that the written document he alleges is a "prescription" is actually a **valid** prescription. The document is nothing more than a piece of paper with handwriting on it. The document that spells a name, which apparently is to represent the name of the doctor, has no signature line where the doctor signed off on the alleged "prescription" for marijuana. Interestingly, the document even misspells the word [as] "perscription" .... Such misspelling seems odd.
>
> The ... [c]ircuit [c]ourt held that Kettner did not have a valid prescription.
>
> Ultimately, the Court found that the document Kettner alleged was a valid prescription was hearsay and that Kettner could not prove that it was valid.

¶14 We are astonished by the Town's brazen misrepresentations, which are not supported by record citations, excepting citation to the misrepresented "prescription" in the brief's appendix. While the Town objected to the typewritten medical authorization on hearsay grounds, the circuit court overruled that objection and admitted the document. Further, the same law firm represented the Town at trial and on appeal, with the trial attorney's name appearing on the appellate brief. Thus, the misrepresentations of the hearsay ruling and, more importantly, the substituted document, were knowing.[10]

[10] The Town also seeks to reverse the forfeiture amount ordered by the circuit court, arguing it was too low. We cannot act on that request because the Town failed to file a cross-appeal. *See* WIS. STAT. RULE 809.10(2)(b). Further, the Town's argument relies entirely upon a forfeiture schedule improperly placed in its appendix. That document is not part of the record.

¶15 This appeal presented an additional burden due to the pro se appellant's failure to fully comply with the rules of appellate procedure. In these circumstances we often rely on the represented governmental party to assist the court in understanding the procedural history and legal issues presented. Instead, here the Town exacerbated the problem, grossly misrepresenting the record, omitting record citations, and citing a document not made part of the record. Kettner's rule violations pale in comparison to the Town's. *See* WIS. STAT. RULES 809.19(1)(d), (1)(e), (2)(a). We therefore sanction the Town's counsel. *See* WIS. STAT. RULE 809.83(2). Counsel shall pay a $200 penalty to the clerk of this court within thirty days of this decision.[11] Kettner shall be entitled to his appellate costs. *See* WIS. STAT. RULES 809.25(1)(a)5., (1)(b).

By the Court.—Judgment affirmed in part; reversed in part; and cause remanded; counsel sanctioned. Costs awarded.

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

[11] Attorney Andrew Rossmeissl appeared on behalf of the Town in the circuit court. His name and bar number are also present on the cover of the Town's appellate brief, but only attorney Michael Menghini signed the brief and its various certifications. The penalty shall therefore be assessed against the attorneys' firm. It can apportion the responsibility.