

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 18, 2010

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2009AP1608

Cir. Ct. No. 2008FO414

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

GARY W. BLINKWOLT,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Washburn County:
EUGENE D. HARRINGTON, Judge. *Affirmed.*

¶1 BRUNNER, J.¹ The State of Wisconsin appeals from a judgment finding Gary Blinkwolt not guilty of hunting over illegal deer bait contrary to WIS. ADMIN. CODE § NR 10.07(2) (Oct. 2009). The State contends Blinkwolt failed to

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.

sufficiently prove he was engaged in a normal agricultural practice and therefore exempt from § NR 10.07(2)'s prohibition. Based on the evidence presented, we conclude a reasonable trier of fact could find Blinkwolt was engaged in the normal agricultural practice of composting. Consequently, we affirm.

BACKGROUND

¶2 Evidence adduced at trial and accepted by the circuit court establishes that Blinkwolt has grown and sold pumpkins on his farm since 2004. Blinkwolt primarily grew the pumpkins in a patch near his farmhouse, but also established a small field near his tree stand in which he grew pumpkin, squash and corn. Blinkwolt returned unsold crop to the small field to decompose.

¶3 On November 19, 2008, Department of Natural Resources Warden Susan Miller investigated suspected baiting observed by air. She discovered Blinkwolt in his tree stand, bow hunting over piles of corn, squash, and shattered pumpkins. Blinkwolt explained his composting practice and that he harvested seeds from large pumpkins for the next year's crop. In addition, Blinkwolt stated his tractor was broken and he could not till the compost because the ground was frozen by the time the tractor was repaired. Miller cited Blinkwolt for hunting deer over more than two gallons of bait in violation of WIS. ADMIN. CODE § NR 10.07(2).

¶4 Blinkwolt contested the citation, arguing he was engaged in a normal agricultural practice as allowed under WIS. ADMIN. CODE § NR 10.07(2)(b)5. (Oct. 2009). The circuit court agreed, finding Blinkwolt "was growing pumpkins there. He's clearly in the business of selling pumpkins When you harvest pumpkins, you have to deal with them, and returning them to the soil where they were grown is a reasonable agricultural practice."

DISCUSSION

¶5 WISCONSIN ADMIN. CODE § NR 10.07(2) generally prohibits placing, using, or hunting over bait or feed materials for the purpose of hunting wild animals.² Section 10.07(2) contains numerous exceptions, among them WIS. ADMIN. CODE § NR 10.07(2)(b)5., which allows hunting “[w]ith the aid of material deposited by natural vegetation or material found solely as a result of normal agricultural or gardening practices.” The State contends Blinkwolt failed to produce sufficient evidence he was engaged in a normal agricultural practice under § NR 10.07(2)(b)5.

¶6 The State’s argument presents a mixed question of law and fact.³ We will uphold the trial court’s findings of historical fact unless clearly erroneous.

² WISCONSIN STAT. § 29.336(4) permits deer feeding for hunting purposes in certain counties (including Washburn) if:

- (a) Not more than two gallons of material are at the feeding site.
- (b) No feeding site is closer than 100 yards of another feeding site.
- (c) The person does not place more than two gallons of material in any area comprising forty acres or less.
- (d) The material used to feed deer does not contain any animal part or animal byproduct.

See also WIS. ADMIN. CODE § NR 10.07(2m) (Oct. 2009). Blinkwolt concedes the crop beneath his tree stand exceeded two gallons. WISCONSIN STAT. § 29.336 therefore does not apply.

³ Citing *Michels Pipeline Construction, Inc. v. LIRC*, 197 Wis.2d 927, 931, 541 N.W.2d 241 (Ct. App. 1995), the State suggests, and Blinkwolt agrees, that we should accept any findings of fact “so long as the findings are supported by credible and substantial evidence.” The parties misapprehend the applicable standard of review. Unlike this case, *Michels Pipeline* involved an appeal from an administrative agency decision. Although both standards are highly deferential, we think it best to correct the parties and conduct our analysis under the proper standard.

State v. Lala, 2009 WI App 137, ¶8, 321 Wis. 2d 292, 773 N.W.2d 218. Application of these factual findings to the legal standard under WIS. ADMIN. CODE § NR 10.07(2)(b)5. presents a question of law this court reviews de novo. *Id.* In addition, interpretation of an administrative code provision is a question of law subject to independent appellate review. *Orion Flight Servs., Inc. v. Basler Flight Servs.*, 2006 WI 51, ¶18, 290 Wis. 2d 421, 714 N.W.2d 130.

¶7 The trial court determined Blinkwolt deposited unsold pumpkin, corn and squash at the location they were grown to revitalize the soil. WISCONSIN ADMIN. CODE § NR 10.07 does not define “normal agricultural or gardening practices,” but in our view composting unused crop in this manner falls within the meaning of the exception. Generally, composting refers to “an aerobic decomposition process by which microorganisms or soil invertebrates reduce materials into component compounds, producing carbon dioxide and water as primary by-products.” WIS. ADMIN. CODE § NR 500.03(45) (Jan. 2006). The DNR encourages the practice, which annually prevents over 300,000 tons of yard materials from entering landfills or incinerators in Wisconsin.⁴ Indeed, the DNR exempts composting of crop residue generated at the farm site from most solid waste regulations. *See* WIS. ADMIN. CODE §§ NR 502.12(4), 518.04(1)(b) (Jan. 2006). The asserted abnormality of Blinkwolt’s practice is belied by the fact that the DNR promotes it.

¶8 Having determined that composting is a normal agricultural practice, the sole remaining question is whether Blinkwolt presented sufficient credible

⁴ WISCONSIN DEPARTMENT OF NATURAL RESOURCES, PUB WA-182, HOME COMPOSTING: THE COMPLETE COMPOSTER 2 (2005), <http://www.dnr.state.wi.us/org/aw/wm/publications/newpub/WA182.pdf>.

evidence of that activity. Blinkwolt testified he brought some unsold crop back to the field near the tree stand to compost. He explained he smashed large pumpkins to remove seeds for future use and left the remnants to decompose. Blinkwolt elucidated his failure to till the decaying crop, noting his tractor was broken and, by the time it was repaired, the ground was frozen. The trial court accepted Blinkwolt's testimony, and we will not reverse a credibility determination unless the testimony is incredible as a matter of law. *See State v. Garcia*, 195 Wis. 2d 68, 75, 535 N.W.2d 124 (Ct. App. 1995). A reasonable trier of fact could believe Blinkwolt's testimony that he was composting the fruit. We therefore affirm.

By the Court.—Judgment affirmed.

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

