COURT OF APPEALS
DECISION
DATED AND FILED

December 18, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1455 **Cir. Ct. No. 01-TR-6848**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL T. RAYMOND,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed*.

¶1 NETTESHEIM, P.J.[1] Daniel T. Raymond appeals pro se from a forfeiture judgment of conviction for operating a motor vehicle at an unreasonable

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

and imprudent speed pursuant to WIS. STAT. § 346.57(2). Raymond argues that the trial court denied his right to a speedy trial. Alternatively, Raymond argues that the evidence was insufficient to support the trial court's finding of guilt. We reject both arguments and affirm the judgment.

FACTS

¶2 On November 11, 2001, at approximately 8:13 p.m., Wisconsin State Trooper Mike Smith was speaking to a motorist he had stopped on State Highway 12 in Walworth county. At this point, Highway 12 is a four-lane divided highway with two lanes in each direction and governed by a 65 mile per hour speed limit. Smith was standing on the shoulder of the roadway, approximately 1½ to 2 feet off the travel portion of the road. At this time, Smith was nearly struck by a vehicle that was traveling very close to the white line that marked the right side of the travel lane of the road. Later investigation revealed that Raymond was the operator of the vehicle. Smith immediately terminated the conversation with the motorist he had stopped, ran to his police cruiser, and took up pursuit of the vehicle. Smith estimated that it took him only two seconds to commence pursuit because the motor of his cruiser was already running.

¶3 During the initial 1½-mile phase of the pursuit, Smith estimated that he was approximately 1500 feet behind Raymond's vehicle. Despite the fact that he reached a speed of 115 miles per hour, Smith did not close the gap between himself and Raymond's vehicle. Smith estimated Raymond's speed at over 100 miles per hour during the pursuit. Because of the substantial distance between the vehicles, Smith was not able to perform a formal "pace" of Raymond's vehicle. Instead, he described his pursuit of Raymond as a "rough pace." During this chase, Raymond passed four vehicles. Eventually, Raymond had to slow his

vehicle in an area where Highway 12 makes a sharp turn and reduces to a single lane. This allowed Smith to catch up to Raymond and to stop him.

¶4 Smith issued Raymond a uniform traffic citation. Raymond entered a written plea of not guilty. On January 16, 2002, the trial court conducted a pretrial conference and scheduled a bench trial for March 6, 2002. However, on January 24, 2002, the State wrote to the trial court asking that the trial date be rescheduled because Smith was unavailable. Raymond objected and asked for a speedy trial pursuant to WIS. STAT. § 971.10. The court granted the State's request and rescheduled the trial for March 20, 2002.

¶5 On the scheduled trial date, Raymond moved for dismissal, arguing that he had not been granted a speedy trial. The trial court denied this motion, and again rescheduled the trial because another case was going to trial at that time. The rescheduled trial occurred on April 24, 2002. The court found Raymond guilty. Raymond appeals.

SPEEDY TRIAL

¶6 Raymond premises his speedy trial argument on WIS. STAT. § 971.10(1). He acknowledges that this statute speaks only of misdemeanors and felonies. However, he reasons that since the statute requires that a felony trial must commence within 90 days of a speedy trial demand, and a misdemeanor trial must commence within 60 days of such demand, the trial in this forfeiture case should, at a minimum, have commenced within 60 days of his demand.

¶7 In response, the State correctly notes that WIS. STAT. § 971.10 governs criminal actions, whereas the prosecution in this case was a forfeiture action. WISCONSIN STAT. § 939.12 states, "A crime is conduct which is prohibited

by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime." As a civil action, a forfeiture procedure is one in which the rules of civil, not criminal, procedure apply. ***Village of Bayside v. Bruner***, 33 Wis. 2d 533, 535, 148 N.W.2d 5 (1967).

¶8 WISCONSIN STAT. § 345.20(1)(b) provides that "'traffic regulation' means a provision of chs. 194 or 341 to 349 for which the penalty for violation is a forfeiture." Thus, WIS. STAT. § 346.57(2) prohibiting unreasonable and imprudent speed is a "traffic regulation." In addition, § 345.20(2)(a) provides, "[T]he apprehension of alleged violators of traffic regulations and the trial of forfeiture actions for the violation of traffic regulations shall be governed by ss. 345.21 to 345.33." These provisions do not confer the right of a speedy trial in forfeiture actions.

¶9 Our supreme court has said, "[w]hile certain procedures of criminal law have been adopted by the legislature in the prosecution of forfeitures, criminal pleading, practice and procedure should be used *only to the extent that the legislature has so directed.*" ***State v. Peterson***, 104 Wis. 2d 616, 624, 312 N.W.2d 784 (1981) (emphasis added). Bearing this admonition in mind, we are not at liberty to graft the speedy trial provisions of WIS. STAT. § 971.l0 onto a traffic regulation forfeiture prosecution.

¶10 Our holding does not mean that a forfeiture prosecution can pend interminably. The rules of civil procedure provide that an action can be dismissed with prejudice for a failure to prosecute. WIS. STAT. § 805.03. And, the case law has approved such dismissals. *See* ***Marshall-Wis. Co. v. Juneau Square Corp.***, 139 Wis. 2d 112, 128-42, 406 N.W.2d 764 (1987); ***Prahl v. Brosamle***, 142 Wis. 2d 658, 666-71, 420 N.W.2d 372 (Ct. App. 1987). However, Raymond

makes no argument for dismissal under § 805.03. Even if he did, the history of this case does not even remotely suggest that the State failed to diligently prosecute. The State sought the first adjournment because Smith was unavailable for the trial date, a move that signaled a desire to pursue, rather than abandon, the prosecution. Finally, we note that the second adjournment was at the behest of the court, not the State.

¶11 In conclusion, Raymond was not entitled to a speedy trial pursuant to WIS. STAT. § 971.10, and the State diligently pursued the prosecution.

SUFFICIENCY OF THE EVIDENCE

¶12 Alternatively, Raymond argues that the evidence does not support the trial court's finding that he operated his vehicle in an unreasonable and imprudent manner. We disagree.

¶13 The factual findings of the trial court will not be upset on appeal unless those findings are clearly erroneous. WIS. STAT. § 805.17(2). The court of appeals elaborated on this standard of review in ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983):

> The evidence supporting the findings of the trial court need not in itself constitute the great weight or clear preponderance of the evidence; nor is reversal required if there is evidence to support a contrary finding. Rather, to command a reversal, such evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence. In addition, when the trial judge acts as the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses. When more than one reasonable inference can be drawn from the credible

> evidence, the reviewing court must accept the inference drawn by the trier of fact.

Id. at 643-44.[2]

¶14 Here, the only evidence is the testimony of Smith.[3] This evidence reveals that Raymond nearly struck Smith while Smith was standing on the shoulder of the highway speaking to another motorist. Smith immediately took up pursuit, reaching speeds of 115 miles per hour, but he could not close the estimated 1500-foot distance between the two vehicles. Smith estimated Raymond's speed at 100 miles per hour or more. In ***City of Milwaukee v. Berry***, 44 Wis. 2d 321, 171 N.W.2d 305 (1969), a police officer estimated the defendant's speed at "conservatively in excess of 50 miles per hour." ***Id***. at 324. The supreme court upheld the admissibility of such testimony, saying:

> [W]hen a witness is in no position to judge speed or the time of observation is too short upon which to base a probative estimation of speed, the testimony is inadmissible. But if there is a reasonable basis upon which speed can be judged, the weight or probative value of the opinion will depend upon the factors of position, length of observation, existence of reference points, the experience of the witness in judging speed and other relevant facts.

Id.

¶15 Here, Smith was in a position to judge or estimate Raymond's speed. He had Raymond in his sights during the pursuit, he was in a position to determine that he was not gaining on Raymond during the pursuit and he observed his

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[2] Although the terms are synonymous, we now use the phrase "clearly erroneous" instead of "great weight and clear preponderance" as our standard of review for a trial court's factual findings. ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983).

[3] Raymond did not testify.

speedometer to register 115 miles per hour during this pursuit. Under ***Berry***, this testimony was admissible, and it was for the trial court to assess Smith's credibility and the weight to be accorded his testimony.

¶16 Having opted for Smith's testimony regarding Raymond's speed, it logically follows that Raymond was operating his vehicle in an imprudent and unreasonable manner under the circumstances then prevailing. No plausible argument can be made that operating a motor vehicle at, or in excess of, 100 miles per hour in a 65 mile per hour speed zone while passing other vehicles on the roadway does not constitute unreasonable and imprudent speed.

CONCLUSION

¶17 We hold that the speedy trial provisions of WIS. STAT. § 971.10 do not apply to traffic forfeiture prosecutions. We further hold that the evidence supports the trial court's finding that Raymond operated his vehicle at an unreasonable and imprudent speed contrary to WIS. STAT. § 346.57(2).

By the Court.—Judgment affirmed.

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