COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-1714

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

CITY OF APPLETON,

PLAINTIFF-APPELLANT,

V.

JENNIFER L. DREPHAL,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County: DENNIS C. LUEBKE, Judge. *Reversed and cause remanded.*

¶1 PETERSON, J. The City of Appleton appeals an order dismissing its prosecution against Jennifer Drephal for operating a motor vehicle while under the influence of an intoxicant.[1] A jury found Drephal guilty of the violation, but the circuit court dismissed the case because it decided that the City failed to

[1] APPLETON, WI, CODE § 19-1, adopting § 346.63(1)(a), STATS.

establish venue by offering any evidence that the offense occurred in Outagamie County. This court concludes that the City offered proof that the violation occurred in the City of Appleton and that was sufficient to establish venue. Therefore, the circuit court's decision is reversed.

¶2 Two City of Appleton police officers testified at Drephal's trial, lieutenant Michael Zimmerman, the first officer to observe Drephal's driving, and sergeant Michael Monroe, a second officer who later arrived to assist Zimmerman. Both officers testified that they were familiar with the area where Drephal had been driving. However, neither officer testified that the area was in Outagamie County. In fact, the City did not offer any evidence of the county in which Drephal's driving occurred.

¶3 Zimmerman testified that the night he confronted Drephal he was on duty and supervising "the central district." He began observing Drephal's erratic driving at the intersection of Memorial Drive and Prospect Avenue. As Drephal drove along Memorial, Zimmerman testified that she crossed a bridge. Zimmerman followed her and observed her swerve to avoid a median. Zimmerman continued to observe Drephal drive erratically until she turned onto Calumet Street and drove a block or a block and one-half before pulling into an apartment complex. During cross-examination, Drephal's attorney noted that Zimmerman knew the city well and asked him if he knew how many blocks were between the intersections of Prospect and Memorial and Calumet and Memorial. The officer answered that it was around ten or eleven blocks.

¶4 After the City rested, Drephal's attorney moved to dismiss based on the City's failure to establish venue. The City of Appleton is located in three counties. Drephal claimed that the City failed to offer proof that the violation

occurred in Outagamie County. The court took the motion under advisement and, after the jury returned a guilty verdict, set a sentencing hearing date where the court stated it would also decide Drephal's motion.

¶5 At the later hearing, the circuit court acknowledged that the area the officers described was "undisputedly within the City of Appleton in Outagamie County." Nevertheless, the court noted that reference was made in the testimony to the city but not the county. The court concluded that it would be speculating if it assumed the jurors knew the location of the county lines within the City of Appleton. The court determined that dismissal was required absent proof of the county in which Drephal's violations occurred.

¶6 Venue must be proved even though it is a matter of procedure and not an element of any offense. *See* ***Corey J.G.***, 215 Wis.2d 395, 408, 572 N.W.2d 845, 850 (1998).[2] Venue is not an element of an ordinance violation and becomes an issue only in the event that it is contested. *See* ***id***. at 408-09, 572 N.W.2d at 850-51. While venue is similar in criminal and municipal traffic regulation cases, there is an important exception for municipalities like Appleton that are located in more than one county. Section 345.31, STATS., provides that venue is the same as in criminal cases, "except that, in the case of a violation of an ordinance of a municipality which is located in more than one county, the action may be brought in any court sitting in that municipality even though in another county."

[2] In ***In re Corey J.G.***, 215 Wis.2d 394, 408, 572 N.W.2d 845, 850 (1998), the supreme court discussed venue in the context of criminal and juvenile delinquency proceedings. That analysis, however, is applicable to cases involving municipal ordinance violations. *See* ***City of Janesville v. Wiskia***, 97 Wis.2d 473, 481-82, 293 N.W.2d 522, 527 (1980) (municipal ordinance violations are quasi-criminal proceedings).

¶7 The interpretation of a statute, in this case the statute for venue in municipal traffic regulation cases, is a question of law this court reviews de novo. *See* ***State v. Setagord***, 211 Wis.2d 397, 406, 565 N.W.2d 506, 509 (1997). The purpose of statutory interpretation is to discern the intent of the legislature. *See* ***id***. In discerning the intent of the legislature, we first consider the language of the statute. If the language of the statute clearly and unambiguously sets forth the legislative intent, we do not look beyond the statutory language to ascertain its meaning. *See* ***id***.

¶8 Based on the plain language of § 345.31, STATS., this court concludes that, when a violation occurs in a municipality located in more than one county, the venue requirement is satisfied by proof the violation occurred in that municipality. In this case, the city satisfied its burden as to venue by proving that the violation occurred in the City of Appleton.

¶9 It is an appropriate function of the fact-finder to determine venue. *See* ***Corey J.G.***, 215 Wis.2d at 409 n.8, 572 N.W.2d at 850 n.8 (citing WIS JI—CRIMINAL 267 and comment). This court will not reverse a conviction based upon a city's failure to establish venue unless the evidence, viewed most favorably to the city, is so insufficient that there is no basis upon which a trier of fact could determine venue by clear, satisfactory and convincing evidence. *See* ***id***. at 407-08, 572 N.W.2d at 850; § 345.45, STATS. Here, Drephal does not dispute that her driving occurred in the City of Appleton.

¶10 Our supreme court has also stated that where no witness testifies directly to venue, it may be sufficiently "proved if there is reference in the evidence to the locality known or probably familiar to the jury …." ***City of Kenosha v. Dennis***, 42 Wis.2d 694, 698, 168 N.W.2d 216, 218 (1969). Here,

there was only one logical conclusion a jury could have made from the evidence: that Drephal's driving took place in the City of Appleton. Both officers testified that they were City of Appleton police officers and both testified in a detailed manner as to the area of the city where Drephal's erratic driving occurred. The trial court noted that the evidence established that Drephal's driving took place in Appleton. We conclude that the evidence formed a sufficient basis upon which the jury could determine venue by clear, satisfactory and convincing evidence. *See* ***Corey J.G.***, 215 Wis.2d at 408-09, 572 N.W.2d at 850. No testimony suggested otherwise. Accordingly, the judgment is reversed and the cause is remanded.[3]

By the Court.—Order reversed and cause remanded.

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

[3] Drephal only challenged lack of venue on the basis that the City failed to prove the county where her driving took place. Ordinarily, when venue is contested in a criminal case, the jury is instructed that venue must be proved. *See* ***Corey J.G.***, 215 Wis.2d at 409, 572 N.W.2d at 850. In ***Corey J.G.***, the court declined to address the State's argument that defendants waive their right to have a jury instruction and a verdict question regarding the venue requirement, when they fail to request an instruction. *See* ***id***. at 409 n.9, 572 N.W.2d at 850-51 n.9. This court concludes that Drephal waived her right to an instruction by failing to make a request at the trial court and by failing to raise the issue with this court. *See* § 805.13(3), STATS. (failure to object at jury instruction conference is waiver of issue).