COURT OF APPEALS
DECISION
DATED AND FILED

March 14, 2000

Cornelia G. Clark
Acting 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* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2067-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RALPH OVADAL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Barron County: JAMES C. EATON, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Pastor Ralph Ovadal appeals his conviction for erecting an unauthorized sign within highway limits, contrary to WIS. STAT. § 86.19(3).[2] Ovadal argues that (1) the trial court erred by finding a violation

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] WISCONSIN STAT. § 86.19(3) provides:

(continued)

because § 86.19 regulates permanently fixed roadside signs and he was holding an unattached sign; (2) the statute impermissibly limits his first amendment right of expression; (3) the statute is not content neutral, serves no compelling state interest and is not narrowly drawn; (4) the statute is an overbroad regulation of protected communicative conduct; (5) the statute provides selective access to traditional public fora—highways—and thus violates equal protection; and (6) the statute is impermissibly vague. This court concludes that the evidence supports Ovadal's conviction under the broadly defined term "erecting" and that Ovadal's constitutional challenges are without merit. The judgment of conviction is therefore affirmed.

¶2 The material facts are undisputed. A group of people were stationed with large signs along both sides of U.S. Highway 8 in Barron County in the vicinity of the Turtle Lake casino. The signs were approximately six feet tall and two and one-half to three feet wide and depicted aborted fetuses. Ovadal was identified as "being in charge" of what both parties referred to as the "picketers." It was undisputed, as the trial court found, that "Ovadal, an antiabortion picketer, … was found standing within a State highway right-of-way holding a two and a half foot by six foot sign." Exhibit 5 shows a large sign set on the ground with Ovadal holding it upright, in place. The court heard unrefuted testimony from a

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> Any person who shall erect any sign on any public highway, or elsewhere in violation of any of the provisions of this section or the regulations of the department, or without the written consent of the department if the sign is to be erected on a state trunk highway, the county highway committee in the case of a county trunk highway, or the city council, village or town board in case of a street or highway maintained by a city, village or town, shall be fined not less than $10 nor more than $100, and for a second or subsequent violation shall be fined not less than $10 nor more than $500.

Department of Transportation employee that Odaval was not issued a permit to place a sign within the highway's limits. The first police officer to arrive at the scene, Alan Gabe, testified that the signs, Ovadal's included, created a hazard by blocking motorists' view. Another officer similarly testified that Ovadal's sign created a hazard because "[I]t obstructed the view for vehicles making the turn." Gabe discussed with Ovadal his concern that the picketers move back from the exits or entrances along Hwy. 8, and particularly those accessing the casino. Exhibit 5 shows Ovadal and his sign positioned between highway traffic and a casino entrance sign. According to Gabe, Ovadal and the sign were situated four to five feet from the highway curb. The exhibit also discloses that Ovadal and the sign were very near the casino entrance sign so as to obscure part, if not all, of the sign. Ovadal initially refused to comply with the officer's request that he move away from the entrance. Eventually, Ovadal moved between fifteen to twenty feet from the entrance after officers first requested that he move 100 and, later, fifty feet.

¶3 A criminal complaint charged Ovadal with erecting a sign within the limits of a highway in violation of WIS. STAT. § 86.19.[3] The first issue is whether the facts satisfy the definition of "erect." Ovadal notes that two subsections that precede subsec. (3) refer to signs that are "placed."[4] Ovadal contends that "place"

[3] The criminal complaint charged Ovadal with erecting a sign within the limits of a highway in violation of WIS. STAT. § 86.19(1) "contrary to Section(s) 86.19(3) of the Wisconsin Statutes." The judgment of conviction indicates that Ovadal was convicted of violating § 86.19(3).

[4] WISCONSIN STAT. § 86.19(1) provides:

> Except as provided in sub. (1m), no sign shall be placed within the limits of any street or highway except such as are necessary for the guidance or warning of traffic or as provided by ss. 60.23(17m) and 66.046. The authorities

(continued)

refers, at least with regard to subsec. (1m), to the fashion in which signs are set. He then asserts that, viewed "against the backdrop of the 'be placed' prohibitions of the preceding paragraphs … Statute 86.19 is nothing more than a regulation of permanently fixed roadside signs." Ovadal concludes that, because there is no evidence that he permanently fixed his sign within highway limits, the statute was improperly applied to convict him.

¶4 The trial court held that "the placement by the defendant of his signs, as well as the others depicted in the evidentiary pictures, satisfy the terms 'place' or 'erect' as contained in the statute."[5] It based this conclusion on the grounds that the signs in this case serve the same purpose as those that are fastened to objects within the highway's limits, they are motionless and "they serve the same obstruction and obscuring roles as permanently fixed signs." This court agrees that, under the undisputed facts, Ovadal's conduct constitutes erecting a sign within the meaning of WIS. STAT. § 86.19(3).

¶5 Ovadal obviously takes exception to the court's construction of "erect," but this court does not appreciate how the observations Ovadal offers as argument call into question the court's interpretation, or in any way inform on the

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> charged with the maintenance of streets or highways shall cause the removal therefrom and the disposal of all other signs.

WISCONSIN STAT. § 89.19(1m) requires the DOT to "place" 100 signs that promote Wisconsin agricultural products "near highways and in waysides."

[5] The trial court made several findings regarding the hazards the picketers' sign placement posed and, it appears to this court, may have implicitly imputed their placement to Ovadal. While he was identified by one of the picketers as "being in charge," Ovadal was not charged under WIS. STAT. § 939.05 as a party to the crime. This decision rests upon only the unrefuted evidence concerning Ovadal's sign placement.

matter. He offers no explanation or analysis why WIS. STAT. § 86.19(3) applies only to signs that are fixed in place. This court, however, must concede that, although more a proposition than a syllogism, Ovadal's position nonetheless has some intuitive appeal. This court will therefore undertake a de novo review of the trial court's statutory interpretation. *See* ***Katzman v. State Ethics Bd***., 228 Wis. 2d 282, 290-91, 596 N.W.2d 861 (Ct. App. 1999) (interpretation and application of a statute to undisputed facts is a question of law that is reviewed de novo).

¶6 WISCONSIN STAT. § 86.19(2) authorizes the DOT to promulgate regulations concerning highway sign erection.[6] WISCONSIN ADMIN. CODE § TRANS 200.015(2)(g) defines "erect":

> "Erect" means to construct, manufacture, fabricate, build, raise, assemble, place, affix, attach, create, paint, draw, or in any other way bring into being or establish a sign or sign structure ….

While the definition is broad, it generally implies a sense of relative permanency, with a possible exception for the inclusion of the verb "place." Webster's defines the verb "to place" as to "ARRANGE, DISPOSE, STATION : to put into … a particular position : cause to rest or lie : set, fix. WEBSTER'S THIRD NEW INT'L DICTIONARY

[6] WISCONSIN STAT. § 86.19(2) provides:

> The department shall prescribe regulations with respect to the erection of signs on public highways. Such regulations shall have the full force of law. No advertising sign shall use prominently any words, or combination of words, commonly used for the guidance or warning of travel, nor shall any advertising sign be erected or be permitted to remain in any place or manner so as to endanger travel on the highways, either by reason of causing an obstruction to the view or otherwise.

(unabr. 1993).[7] The dictionary definition of "place" is similarly broad, so that some synonyms do not connote the sense of permanency otherwise suggested by the definition of "erect" in WIS. ADMIN. CODE § TRANS 200.015(2)(g). The facts of this case encompass those synonyms: Ovadal's sign was "set" or "stationed" along the highway.

¶7 WISCONSIN STAT. § 86.19(2), by prohibiting sign placement that endangers travel on the highways by obstructing motorists' view or otherwise, demonstrates that § 86.19 is a safety statute. *See* 74 Op. Att'y Gen. 219 (1985). As the trial court observed, broadly construing the statute to prohibit holding an eighteen-square-foot sign in place near the traveled portion of the highway effectuates the public safety concerns that § 86.19 was intended to address. Thus, in view of the broad definition the term "place" supports and § 86.19's public safety character, this court is satisfied that Ovadal violated § 86.19(3) when he obstructed motorists' view of peripheral traffic by setting or stationing his large sign on the ground and holding it in place.

¶8 Ovadal raises multiple constitutional challenges to WIS. STAT. § 86.19.[8] The trial court's thoughtful and thorough opinion appropriately disposes

[7] Neither party points to a legal definition of "place" as used in the present context. For purposes of statutory interpretation or construction, the common and approved usage of words may be established by consulting dictionary definitions. *See* WIS. STAT. § 990.01(1); *see also* ***Swatek v. County of Dane***, 192 Wis. 2d 47, 61, 531 N.W.2d 45 (1995).

[8] The State argues that this appeal should be dismissed because the attorney general was not served pursuant to WIS. STAT. § 806.04(11), which it claims "is a jurisdictional prerequisite for a challenge to [the] constitutionality of a statute …." Ovadal contends that the service requirement does not apply to this case. This court need not consider whether service on the attorney general was required in this instance because Ovadal has invited the attorney general to submit its position to this court. *See* Reply Appendix. In ***Estate of Fessler v. William B. Tanner Co.***, 100 Wis. 2d 437, 444, 302 N.W.2d 414 (1981), the Wisconsin Supreme Court held that failure to notify the attorney general of a constitutional challenge in a pending probate proceeding was a defect that was cured when the attorney general was subsequently invited to participate in the court of appeals proceedings.

of most of these issues. Accordingly, the trial court's opinion is adopted and incorporated by reference as expressing this court's rationale and holding, except as discussed below.

¶9 Ovadal contends, and the trial court concurred, that WIS. STAT. § 86.19 "functions as an 'anti-picketing statute.'"[9] This court does not agree.[10] Section 86.19 does not prohibit carrying signs in a public area to protest or otherwise disseminate ideas. Under the facts of this case, however, Ovadal was not merely indulging his right to express a viewpoint in a public place. Rather, he communicated his message by using a sign of a size and in a placement calculated to inevitably distract the motoring public. By doing so, he obstructed motorists' view of peripheral traffic and thereby jeopardized public safety. Placing a sign so as to obstruct motorists' view of the highway in such a way as to compromise public safety is all that § 86.19 proscribes.

¶10 Ovadal contends that ***Boos v. Barry***, 485 U.S. 312 (1988), is directly on point and mandates that WIS. STAT. § 86.19 be declared unconstitutional. Ovadal's reliance upon that portion of ***Boos*** that found a District of Columbia code provision unconstitutional is both underdeveloped and confusing. More to the point, it is utterly misplaced.

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[9] Although certainly not dispositive, the law enforcement officers at the scene did not apply WIS. STAT. § 86.19 as an anti-picketing statute. All of the State's witnesses acknowledged that Ovadal was told that he could picket in an area within the highway's limits.

[10] This court also entertains some doubt concerning the circuit court's conclusion that "picketing can be conducted beyond the [highway] right-of-way safely and lawfully." This determination would be correct only if the adjoining property was public, rather than privately owned. *See* ***Jacobs v. Major***, 139 Wis. 2d 492, 504, 407 N.W.2d 832 (1987) (free speech provisions of the United States and state Constitutions prohibit only state interference with individual rights of expression).

¶11 District of Columbia Code § 22-1115 prohibited, in pertinent part, displaying within 500 feet of a foreign embassy any sign that tends to bring the foreign government into public odium or public disrepute. *See* ***id.*** at 315. Among the issues the Supreme Court addressed in ***Boos*** is whether § 22-1115 violated the First Amendment on its face. The Court held that it did because it was a content-based restriction on political speech in a public forum that was not narrowly tailored to serve a compelling state interest. A majority of justices agreed with Justice O'Connor that the code provision was content-based because whether picketing in front of a particular embassy was prohibited was entirely dependent upon whether the signs were critical of the foreign government. *See* ***id.*** at 319. It is true, as Ovadal recites, that the Court noted the "'profound national commitment' … that 'debate on public issues should be uninhibited, robust, and wide-open.'" ***Id.*** at 318. It goes too far, however, to imply as Ovadal does, that this observation transforms into an unequivocal constitutional rule that placing signs of such a size and in such a manner as to endanger the public is beyond the government's reach. There is no merit to Ovadal's contention that the "operative terms of 89.19 … drop seamlessly into [the] U.S. Supreme Court's hallmark ***Boos*** decision."

¶12 Ovadal contends that WIS. STAT. § 86.19 is content-based because it permits certain signs to be erected within highway limits.[11] The trial court considered only WIS. STAT. § 86.19(1m) and held that the statute is content neutral because this subsection has a de minimis effect. Ovadal asserts, however, exempting some signs from § 86.19(3) favors some content and not others, and

[11] For example, WIS. STAT. §86.19(1m) requires the DOT to place 100 signs near highways and in waysides that promote Wisconsin agricultural products. Subsection (2) permits erection of advertising signs under certain conditions. Subsection (4) exempts approved historical markers.

thereby "raises the specter of content and viewpoint censorship," quoting ***City of Lakewood v. Plain Dealer Publishing Co.***, 486 U.S. 750, 753 (1988). He also relies on ***Turner Broad. Sys. v. FCC***, 512 U.S. 622 (1994), and, in particular, on ***Foti v. Menlo Park***, 146 F.3d 629 (9th Cir. 1998), to support this contention. He asserts that regulation of content-based speech communicated in a public forum is subject to strict scrutiny and is presumptively unconstitutional. This court concludes that whether the statute is content based or neutral, it passes the strict scrutiny test.

¶13 In ***Foti***, anti-abortion picketers challenged the constitutionality of a city ordinance that regulated picketing and displaying signs on public property. The ordinance exempted certain signs, including signs placed by the government, safety, traffic and public informational signs. *See* ***id.*** at 634. The ordinance also restricted the size of picketers' signs. The ***Foti*** court, citing another ninth circuit decision, observed that when exceptions to noncommercial speech restriction are based on content, the restriction itself is based on content. *See* ***id.*** at 636. Thus, the court concluded, exemptions for such signs as those relating to safety or traffic are content-based. *See* ***id.*** "To enforce the ordinance, a law enforcement officer must examine the content of … signs to determine whether the exemption applies." ***Id.***

¶14 Ovadal argues, and both the trial court and this court agree, that regulating speech in a traditional public forum such as thoroughfares is subject to the highest scrutiny. ***Frisby v. Schultz***, 487 U.S. 474, 480-81 (1988) (street is traditional public forum); ***International Soc. for Krishna Consciousness v. Lee***, 505 U.S. 672, 678 (1992) (highest scrutiny). More precisely, "[t]he appropriate level of scrutiny is tied to whether the statute distinguishes between prohibited and permitted speech on the basis of content." ***Foti***, 146 F.3d at 635, citing ***Frisby***,

487 U.S. at 481. Content-based regulations are presumptively unconstitutional. *See* ***R.A.V. v. City of St. Paul***, 505 U.S. 377, 382 (1992). To regulate content-based speech in a public forum, the State must show that such regulation serves a compelling state interest, is narrowly drawn and uses the least restrictive means to further the articulated interest. *See* ***Perry Educ. Ass'n v. Perry Local Educators' Ass'n***, 460 U.S. 37, 44 (1983) (compelling interest and narrowly drawn); ***Sable Communs. v. FCC***, 492 U.S. 115, 126 (1989) (least restrictive means). Finally, however, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." ***Ward v. Rock Against Racism***, 491 U.S. 781, 794 (1989).

¶15 The trial court, again, considering only WIS. STAT. § 86.19(1m), held that the statute is content-neutral because the subsection requiring the DOT to post 100 promotional signs has de minimis effect. It further concluded, relying on ***Ward***, that the regulation was content-neutral because the State's purposes and justification, public safety and aesthetics, are content-neutral. In ***Ward***, the Supreme Court held:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech.

Id. at 791.

¶16 The trial court's reliance upon ***Ward***, a case involving a "time, place and manner" regulation concerning use of a public amphitheater, may be misplaced. In ***Ward***, the Supreme Court found a "crucial difference" between the case before it and ***Boos***. ***Ward***, 491 U.S. at 798 n.6:

> The regulation we invalidated in ***Boos*** was a content-based ban on displaying signs critical of foreign governments; such content-based restrictions on political speech must be subjected to the most exacting scrutiny. While time, place, or manner regulations must also be narrowly tailored in order to survive First Amendment challenge, we have never applied strict scrutiny in this context.

Id. at 800.

This court need not, however, determine which test correctly analyzes whether WIS. STAT. § 86.19 is content-based or neutral. Subjecting the statute to strict scrutiny, this court is satisfied that it serves a compelling state interest and is narrowly written, using the least restrictive means to further the articulated interest.

¶17 The ***Foti*** court acknowledged that aesthetic and traffic safety interests are substantial. It went on to say that "[o]f course, it is difficult to imagine that the City would not have a compelling interest in traffic signs …." ***Id.*** at 637. In ***City of Ladue v. Gilleo***, 512 U.S. 43, 48 (1994), the Supreme Court observed:

> While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs ….

In ***Metromedia, Inc. v. San Diego***, 453 U.S. 490, 507-08 (1981), the Court stated:

> Nor can there be substantial doubt that the twin goals that the ordinance seeks to further--traffic safety and the appearance of the city--are substantial governmental goals. It is far too late to contend otherwise with respect to either traffic safety, ***Railway Express Agency, Inc. v. New York***, 336 U.S. 106 … (1949), or esthetics, *see* ***Penn Central Transportation Co. v. New York City***, 438 U.S. 104 … (1978); ***Village of Belle Terre v. Boraas***, 416 U.S. 1 … (1974); ***Berman v. Parker***, 348 U.S. 26, 33 … (1954). Similarly, we reject appellants' claim that the ordinance is broader than necessary and, therefore, fails the fourth part of the ***Central Hudson*** test. If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. The city has gone no further than necessary in seeking to meet its ends. Indeed, it has stopped short of fully accomplishing its ends: It has not prohibited all billboards, but allows onsite advertising and some other specifically exempted signs.[12]

¶18 WISCONSIN STAT. § 86.19, on its face, demonstrates the State's determination that erected signs are a traffic hazard. While the DOT may permit signs to be erected on public highways, such signs may not be "permitted to *remain in any place or manner* so as to endanger travel on the highways, either by reason of causing an obstruction to the view or otherwise." WIS. STAT. § 86.19(2) (emphasis added). This court concludes that traffic safety is not only a substantial, but a compelling state interest. Moreover, as in ***Metromedia***, the State has not gone beyond the point necessary to achieve its public safety goal. As indicated,

[12] *See also* ***Members of City Council v. Taxpayers for Vincent***, 466 U.S. 789, 806-07 (1984), upholding an ordinance that prohibited posting signs on public property on the grounds that the city's interest in avoiding visual clutter was sufficient to justify the prohibition. The Court rejected the argument that the validity of the city's aesthetic interest had been compromised by failing to extend the ban to private property, reasoning that the "private citizen's interest in controlling the use of his own property justifies the disparate treatment …." ***Id***. at 811.

§ 86.19 does not prohibit expression of noncommercial speech, but rather, prohibits erecting signs, which includes placing signs if done in a manner that endangers public safety. To construe the statute otherwise, or more to the point to take Ovadal's essential proposition to its logical extreme, ignores the foregoing precedent, renders the presumption of unconstitutionality irrebuttable, and leads to potentially nonsensical results. In the latter respect, Ovadal's tacit contention, that government cannot regulate in any manner noncommercial, religiously "sincere," expression in a traditional public forum, fails to provide a reasonable stopping point. For example, what size sign does the First Amendment protect? Does Ovadal enjoy a First Amendment privilege to place his sign in the middle of a traffic lane? Rhetorical questions supply their own answers.

¶19 Ovadal raises an equal protection argument for the first time on appeal. This court declines to consider this issue. *See* ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974). While an appellate court may, in a proper case, consider new issues for the first time on appeal, *see* ***State ex rel. General Motors Corp. v. Oak Creek***, 49 Wis. 2d 299, 319, 182 N.W.2d 481 (1971), generally, "[t]he province of this court is to correct errors of the trial court …." ***Chrome Plating Co. v. WEPCO.***, 241 Wis. 554, 562, 6 N.W.2d 692 (1942). Another reason for deciding only those issues considered by the trial court is that this court would otherwise be deprived of the informed thinking of the trial judge on the matter. *See* ***Terpstra***, 63 Wis. at 593. This court's adoption by reference of the trial court's holding on several of the constitutional issues Ovadal raises demonstrates that this factor is particularly significant.

¶20 In any event, Ovadal merely recasts his "strict scrutiny—no compelling interest" argument as an equal protection challenge. The foregoing

discussion concluding that the State has a compelling interest in regulating signs erected within highway limits dispenses with Ovadal's equal protection argument.

¶21 Finally, while adopting without reiterating the trial court's rationale concerning Ovadal's vagueness challenge, this court would add that a person who intends to picket within a highway's right-of-way would not reasonably be concerned that by carrying a sign, he or she has thereby "placed" that sign under any conventional, commonly understood connotation of the word.

¶22 As indicated above, this court adopts as its own the trial court's analysis and conclusions with regard to Ovadal's remaining constitutional contentions. This is a one-judge decision and will not be published. *See* WIS. STAT. RULE § 809.23(1)(b)4. Therefore, no meaningful purpose would be served by reiterating the trial court's decision in the guise of separate analysis. Upon the foregoing, the judgment of conviction is affirmed.

By the Court.—Judgment affirmed.

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