

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 25, 2005**

Cornelia G. Clark  
Clerk of Court of Appeals

**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.*

**Appeal No. 2005AP74**

**Cir. Ct. No. 2004TR1091**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**COUNTY OF GREEN LAKE,**

**PLAINTIFF-RESPONDENT,**

**v.**

**PAUL J. MERTZ,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Green Lake County: WILLIAM M. MC MONIGAL, Judge. *Reversed.*

¶1 NETTESHEIM, J.<sup>1</sup> Paul J. Mertz appeals pro se from a forfeiture judgment after the trial court found him guilty of exceeding the fixed speed limit in violation of WIS. STAT. § 346.57(4)(g). Mertz's primary argument on appeal is that the posted speed limit sign failed to comply with the mandatory minimum size and height requirements established by the United States Department of Transportation's Manual on Uniform Traffic Control Devices for Streets and Highways<sup>2</sup> (the "MUTCD"), as adopted by the Wisconsin Department of Transportation in the Wisconsin Manual on Uniform Traffic Control Devices (the "WMUTCD"). *See* WISCONSIN MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES: SUPPLEMENT TO THE MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, at 2 (April 4, 2002).<sup>3</sup>

¶2 We conclude that compliance with the minimum size requirements in the WMUTCD is mandatory and that the unrefuted evidence demonstrates that the posted speed limit sign in this case failed to meet those requirements. We reverse the forfeiture judgment.

## **FACTS**

¶3 On June 22, 2004, Deputy Kevin Manning of the Green Lake County Sheriff's Department was monitoring traffic by radar on County Highway

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

<sup>2</sup> U.S. Dep't of Transp., MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES (2000).

<sup>3</sup> The 2005 version of the WMUTCD can be accessed at [www.dot.state.wi.us](http://www.dot.state.wi.us). The County has included the 2002 version of the WMUTCD, which was in effect at the time of Mertz's citation, in its appendix and Mertz does not dispute that it is the correct version. We therefore refer to the relevant portions of the 2002 WMUTCD included in the County's appendix.

F, also known as Ripon Road, in Green Lake County when he clocked a vehicle operated by Mertz at fifty-nine miles per hour in a posted thirty-five mile per hour speed zone. Manning issued Mertz a citation for traveling at fifty-four miles per hour in a thirty-five mile per hour zone. Mertz pled not guilty and the matter proceeded to a bench trial.

¶4 During the course of the trial, Mertz, appearing pro se, attempted to question Manning as to whether the posted speed limit sign was an “official sign” as required by statute. The County objected as to relevance and the trial court sustained the objection. In response, Mertz argued that the only sign posted on County Highway F was not the proper size pursuant to the WMUTCD. Later, the court allowed Mertz to ask Manning whether he had measured the sign and Manning answered that he had not since he was not responsible for “putting those signs in place.” In addition, Manning testified that he was not familiar with the Manual. During the presentation of his case, Mertz submitted digital photos demonstrating that the speed limit sign in question measured eighteen by twenty-four inches.

¶5 At the close of the testimony, the trial court asked the County “whether the sign in question being 18 by 24 is considered a compliant sign or if it has any knowledge of what the sign sizes are and whether they are mandatory or advisory.” The county prosecutor responded, “Because this was a surprise to me today, I have no idea. I haven’t had a chance to look.” With respect to the size of the sign, the court found the WMUTCD guidelines to be “advisory, not mandatory” and that there had been nothing cited that “indicates the size of 24 by 30 being mandatory in this situation.” The court found Mertz to be guilty of driving in excess of the posted speed limit. Mertz appeals.

## ***DISCUSSION***

¶6 We first set out that well-established law regarding speeding. WISCONSIN STAT. § 346.57(5), titled “ZONED AND POSTED LIMITS,” reads: “In addition to complying with the speed restrictions imposed by subs. (2) and (3), no person shall drive a vehicle in excess of any speed limit established pursuant to law by state or local authorities *and indicated by official signs.*” (Emphasis added.) The elements of the offense of speeding under this statute are: (1) that the defendant drove a vehicle on a highway, (2) that the defendant drove the vehicle at a speed which exceeded the speed limit established by law, and (3) *that the established speed limit was indicated by official signs.* WIS JI—CRIMINAL 2678.

¶7 Next, we set forth the law governing official traffic signs in Wisconsin. Mertz was cited for speeding pursuant to WIS. STAT. § 346.57(4)(g).<sup>4</sup> Section 346.57(6) governs “[C]ERTAIN STATUTORY LIMITS TO BE POSTED” and provides in part:

The speed limit specified in [§ 346.57] (4)(g) and (k) *is not effective on any highway unless official signs giving notice thereof have been erected* by the authority in charge of maintenance of the highway in question. The signs shall be erected at such points as the authority in charge of

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<sup>4</sup> The relevant portion of WIS. STAT. § 346.57 provides:

(4) FIXED LIMITS. In addition to complying with the speed restrictions imposed by subs. (2) and (3), no person shall drive a vehicle at a speed in excess of the following limits unless different limits are indicated by official traffic signs:

....

(g) Thirty-five miles per hour on any highway in a semiurban district outside the corporate limits of a city or village.

maintenance deems necessary to give adequate warning to users of the highway in question ....

(Emphasis added.)

¶8 An official sign or “traffic control device” is one placed by authority of a public body or official having jurisdiction for the purpose of regulating, warning or guiding traffic. *See* WIS. STAT. § 340.01(38). Wisconsin law requires that “[a]fter January 1, 1977, all traffic control devices placed and maintained by local authorities shall conform to the manual.” WIS. STAT. § 349.065. WISCONSIN STAT. § 84.02, which governs state trunk highways, provides at para. (4)(e): “The department shall adopt a manual establishing a uniform system of traffic control devices for use upon the highways of this state. The system shall be consistent with and, so far as practicable, conform to current nationally recognized standards for traffic control devices.” In keeping with this requirement, Wisconsin has for many years adopted the latest edition of the Federal Highway Administration’s manual and has added a supplement to make the standards applicable to Wisconsin. *See* WMUTCD, at 2. With this law in place, we turn to the instant case.

¶9 The crucial issue in this case is whether the guidelines set forth in the WMUTCD are mandatory.<sup>5</sup> This presents a question of statutory interpretation which we review *de novo*. *State v. Sveum*, 2002 WI App 105, ¶5, 254 Wis. 2d 868, 648 N.W.2d 496. Further, whether the eighteen by twenty-four inch speed limit sign in this case met the requirements of an “official sign” also presents a

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<sup>5</sup> The County argues that Mertz mistakenly relies on the MUTCD, instead of the WMUTCD, in support of his arguments. We agree with the County that the WMUTCD, which incorporates and supplements the MUTCD, governs the issue on appeal.

question of law which we review de novo. *See State v. Miller*, 2004 WI App 117, ¶20, 274 Wis. 2d 471, 683 N.W.2d 485 (the application of a legal standard to undisputed facts presents a question of law), *review denied*, 2004 WI 123, 275 Wis. 2d 296, 687 N.W.2d 523 (WI Aug. 2, 2004) (No. 2003AP1747-CR).

¶10 Turning first to the issue of whether the requirements in the WMUTCD are advisory or mandatory, we note that the County concedes on appeal that the trial court may have erred in its determination that the MUTCD is merely advisory. Based on the language of WIS. STAT. § 349.065, which provides that “all traffic control devices placed and maintained by local authorities *shall* conform to the manual” (emphasis added), we conclude that the MUTCD requirements are mandatory. *See C.A.K. v. State*, 154 Wis. 2d 612, 621, 453 N.W.2d 897 (1990) (The word “shall” in a statute is “presumed to be mandatory when it appears in a statute, unless a different construction is necessary to carry out the legislature’s clear intent.”).

¶11 According to the WMUTCD, and the adopted MUTCD, in effect at the time of Mertz’s citation, the minimum size for a speed limit sign on a conventional road is twenty-four by thirty inches. U.S. Dep’t of Transp., MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, Table 2B-1 (2000); WMUTCD, at 8. Mertz’s evidence showing that the sign in question measured eighteen by twenty-four inches stands unrefuted. However, the County contends that the sign nonetheless conforms to the requirements of the Wisconsin supplement to the MUTCD which gives the option of using an eighteen by twenty-four inch sign in areas that have a speed limit of thirty-five miles per hour or less. We disagree with the County’s interpretation of the WMUTCD supplement. The option in the WMUTCD supplement provides in its entirety:

Unless otherwise provided in the description of a specific sign or sign type, the FHWA minimum size (Department size code 1) [18x24] warning and regulatory signs may be used on streets and highways *which are neither State Trunk Highways*, nor connecting highways and which have no more than one lane for traffic in each direction, and which have a speed limit of 35 mph or less.

WMUTCD, at 8 (emphasis added). The “Standard” following the option provides: **“Standard size, conventional roads (size code 2) signs are the smallest, which shall be used on State Trunk Highways or Connecting Highways.”** *Id.* It is undisputed that County Highway F is a state trunk highway. The Wisconsin Department of Transportation standard sign table reflects that a “size code 2” sign will be twenty-four by thirty inches. We therefore conclude that the eighteen by twenty-four inch sign did not comply with the requirements of an official sign and, as such, the evidence does not support the “official sign” element of the speeding charge.

¶12 Because we hold that the evidence was not sufficient as to an element of the offense, we need not address Mertz’s further arguments relating to the sufficiency of the citation and whether the height of the sign complied with the WMUTCD. The parties also debate whether the County had the burden of proof to show that the size of the sign complied with the WMUTCD or whether Mertz had this burden as an affirmative defense. However, we also need not answer this question because, even if the County had the burden, Mertz gratuitously assumed the burden by affirmatively demonstrating that the size of the sign did not comply with the WMUTCD.<sup>6</sup>

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<sup>6</sup> In arguing against assigning the burden of proof to the prosecution, the County argues it would be unreasonable to require evidence as to the actual measurements of a sign in every case where an “official sign” is an element of the offense. As noted, we leave this question to another day in another case in which we are required to squarely address the issue.

## ***CONCLUSION***

¶13 We conclude that WIS. STAT. § 349.065 mandates that all official traffic signs conform with the WMUTCD. We further conclude that the WMUTCD requires the minimum size of a speed limit sign on a county trunk highway to be twenty-four by thirty inches. Because the speed limit sign in question did not conform to this requirement, the evidence was insufficient to support the “official sign” element of the speeding charge against Mertz. We therefore reverse the judgment.

*By the Court.*—Judgment reversed.

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

