COURT OF APPEALS
DECISION
DATED AND FILED

August 28, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP575-CR **Cir. Ct. No. 2004CT10846**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESSE M. DELGADILLO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN F. FOLEY, Judge. *Reversed and cause remanded for a hearing.*

¶1 CURLEY, P.J.[1] Jesse M. Delgadillo appeals from the judgment of conviction entered after the trial court found him guilty of operating while under the influence of an intoxicant, third offense, in violation of WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06).

§ 346.63(1)(a) (2001-02).[2] Delgadillo contends that the trial court erred in dismissing his motion to suppress based on lack of timeliness. We agree and hold that, contrary to the trial court's interpretation, WIS. STAT. § 971.31(5)(a) grants the trial court discretion to permit motions to be filed after the ten-day timeframe. We further hold that the error was not harmless and, therefore, remand this case to the trial court for a hearing on Delgadillo's motion to suppress.

I. BACKGROUND.

¶2 On October 24, 2004, Delgadillo was driving his car when a police officer stopped him because, as she testified, he was "driving on the shoulder of the roadway" and swerving in the lane of traffic. After administering field sobriety tests, the officer placed Delgadillo under arrest. He was later administered a breath-test, which showed .14 grams of alcohol in 210 liters of his breath.

¶3 A criminal complaint was filed charging Delgadillo with operating a motor vehicle while under the influence of an intoxicant, as well as operating a motor vehicle with a prohibited alcohol concentration of 0.08% or more.

¶4 Delgadillo's initial appearance in court was on November 19, 2004. A pretrial conference was then held on December 7, 2004, where Delgadillo requested time to file a motion challenging both the initial detention and the arrest. The trial court initially gave Delgadillo until December 13, 2004, to file the motion, and a hearing was scheduled for February 16, 2005. However, the clerk

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

then indicated to Delgadillo, in open court and on the record, that he could bring the motion either by the end of the week of December 7, 2004, or he could wait until "right after the 1st of the year." Delgadillo's counsel responded, "it will be this week."

¶5 At the motion hearing scheduled on February 16, 2005, a different judge from the one who conducted the pretrial conference presided. The trial court determined that Delgadillo's motion, which purportedly was mailed to the court and opposing counsel, was never received by the court or the State. Delgadillo's counsel stated, and the court nevertheless accepted, that he had mailed the motion to both the court and the State on December 14, 2004. Additionally, the arresting officer who appeared at the hearing to testify brought a videotape of the arrest that Delgadillo had not yet viewed. Delgadillo's counsel asked to view the videotape, and the court agreed that he should have an opportunity to do so. The court then implicitly allowed Delgadillo to refile the motion to suppress when it rescheduled the motion hearing for April 28, 2005, and Delgadillo's counsel refiled the motion with the clerk on February 22, 2005.

¶6 Over the course of the next eight months, a series of hearings were rescheduled because Delgadillo and the arresting officer had various health issues arise. Finally, on November 2, 2005, the hearing on Delgadillo's motion to suppress evidence took place, with yet another presiding judge. At the hearing, the State called the arresting officer as a witness and conducted its direct examination. After the State's direct examination, but before Delgadillo's cross-examination, the trial court, *sua sponte*, raised the issue of the timeliness of Delgadillo's filing of the motion to suppress evidence. In response, the State moved to exclude any evidentiary motions of the defense, claiming the motions were untimely filed. The State further noted that it never received Delgadillo's

motion and that it was relying on the motion in the court file. Delgadillo objected to the trial court raising the timeliness issue *sua sponte* and stated that this was an issue that the prosecution had waived by not objecting at any of the previous court appearances by the parties. Furthermore, Delgadillo's counsel indicated that he was not prepared to argue the issue at that point, and that he had mailed the motion to the State at the same time as he mailed it to the court.

¶7 After these initial arguments by the State and Delgadillo, the court took a recess to look at WIS. STAT. § 971.31(5)(a). Upon resuming, the trial court stated that "after reading the headnotes and the statute, it does not appear that the court has the authority to [] change the time limits. This motion must be dismissed at this time. Accordingly, it is dismissed."

¶8 Following a two-day trial, Delgadillo was convicted of operating while under the influence, third offense, contrary to WIS. STAT. § 346.63(1)(a). Delgadillo now appeals the trial court's *sua sponte* decision to deny the motion to suppress evidence.

II. ANALYSIS.

¶9 Delgadillo argues that WIS. STAT. § 971.31(5)(a) gives the trial court discretion to extend the time when pretrial motions shall be served and filed. This issue requires statutory interpretation, which "is a question of law that we review de novo." ***State v. Stenklyft***, 2005 WI 71, ¶7, 281 Wis. 2d 484, 697 N.W.2d 769. "[O]ur goal in interpreting statutory provisions is to give effect to the intent of the legislature, which we assume is expressed in the text of the statute." ***Id.*** Extrinsic aids are not used to interpret statutes unless the statute is ambiguous, i.e., if it is susceptible to more than one reasonable understanding. ***State ex rel. Kalal v. Circuit Court***, 2004 WI 58, ¶¶45-47, 271 Wis. 2d 633, 681 N.W.2d 110.

"[I]nstead [we] apply the plain meaning of the words of a statute in light of its textually manifest scope, context, and purpose." ***Stenklyft***, 281 Wis. 2d 484, ¶7.

¶10 WISCONSIN STAT. § 971.31(5)(a) states that "[m]otions before trial shall be served and filed within 10 days after the initial appearance of the defendant in a misdemeanor action ... *unless the court otherwise permits*." (Emphasis added.) By the plain meaning of the statute, the trial court has the discretion to permit pretrial motions to be filed after the ten-day window. As the State accurately conceded, "WIS. STAT. § 971.31(5)(a) unambiguously invests the trial court with the power to permit or not to permit the filing of suppression motions outside of the 10-day timeframe. Therefore, the statute contemplates an exercise of discretion."[3] Nevertheless, when the hearing for the motion to suppress occurred almost one year after Delagadillo's initial appearance, the trial court denied the motion because it determined that "it does not appear that the court has the authority to [] change the time limits [for filing motions under § 971.31(5)(a)]." Since § 971.31(5)(a) allows the trial court to "otherwise

[3] The State contends that Delgadillo's motion to suppress was untimely filed, and thus subject to denial, because WIS. STAT. § 972.11(1) causes WIS. STAT. § 801.15(2)(a) to control the trial court's general discretion to permit the filing of motions outside the ten-day window. If § 801.15(2)(a) applied, it would have required Delgadillo to file a motion to enlarge after the ten days had passed and further required the court to make a finding of "excusable neglect." However, § 972.11(1) states: "[T]he rules of evidence and practice in civil actions shall be applicable in all criminal proceedings *unless the context of a section or rule manifestly requires a different construction*." (Emphasis added.) As stated above, WIS. STAT. § 971.31(5)(a) specifically states that pretrial motions must be filed within ten days of the initial appearance "unless the court otherwise permits." Thus, since § 971.31(5)(a) provides the trial court discretion to permit or prohibit pretrial motions after the ten-day window, the context of the section manifestly requires a different construction, and § 801.15(2)(a) does not apply. This situation can be contrasted with ***State v. Elliot***, 203 Wis. 2d 95, 106, 551 N.W.2d 850 (Ct. App. 1996), where we held that § 801.15(2)(a) governed extensions of time for a particular criminal statute because no other procedure was prescribed in the statute at issue.

permit[]" motions filed after the ten-day window, the trial court erred when it held that it lacked authority to extend the time limit.

¶11 The State then argues that the trial court's error in statutory interpretation was harmless for two separate reasons: (1) because the motion was properly subject to dismissal as untimely filed; and (2) because the evidence adduced at trial demonstrates that the suppression motion was not viable on its merits. To uphold a conviction despite an error during the trial, we must find that the error was clearly harmless beyond a reasonable doubt. ***State v. Shomberg***, 2006 WI 9, ¶18, 288 Wis. 2d 1, 709 N.W.2d 370, *reconsideration denied*, 2006 WI 108, 292 Wis. 2d 416, 718 N.W.2d 728. In ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985), we set out a definition of harmless error. "[I]n respect to harmless versus prejudicial error, … the test should be whether there is a reasonable possibility that the error contributed to the conviction. If it did, reversal and a new trial must result." ***Id.*** In this instance, we cannot hold that the trial court's denial of the motion to suppress was harmless beyond a reasonable doubt.

¶12 Turning to the first argument, we cannot hold that the statutory interpretation error was harmless. The trial court could have dismissed the motion as untimely filed, but only through a proper exercise of its discretion. Therefore, we must look to see if the court properly exercised its discretion when it dismissed the motion. In determining whether a trial court abused its discretion, we will look for reasons in the record to sustain a trial court's discretionary decision. ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968). However, "there must be evidence that discretion was in fact exercised…. [Discretion] contemplates a process of reasoning. This process must depend on facts … and a conclusion based on a logical rationale founded upon proper legal

standards." ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971) (emphasis added). The facts show that the trial court dismissed the motion because the court thought, incorrectly, that it was required to do so by statute. As the decision was founded upon improper legal standards, it was not a proper act of discretion on the part of the trial court.

¶13 Furthermore, we find no facts in the record to support the State's contention that the trial court would have dismissed the motion to suppress for being untimely if it had not erroneously interpreted the statute. The record shows that earlier in the pre-trial proceedings, the trial court twice "otherwise permit[ted]" Delgadillo to file the motion to suppress after the ten-day timeframe. First, at the December 7, 2004, pretrial conference, the court, by way of its clerk, explicitly granted Delgadillo until "right after the 1st of the year." Then, at the February 16, 2005 motion hearing, the court implicitly extended the time to file when it rescheduled the motion hearing. Given the prior extensions, and the fact that there were no indications that the trial court would have denied the motion as untimely without the erroneous belief of a statutory requirement to do so, it is not clear beyond a reasonable doubt that had the court's erroneous statutory interpretation was harmless.

¶14 Regarding the State's second "harmless error" argument, we will not exercise the trial court's discretion for it by determining whether the motion was viable on its merits. "The inquiry into a circuit court's exercise of 'discretion in making an evidentiary ruling is highly deferential.'" ***Shomberg***, 288 Wis. 2d 1, ¶11 (citation omitted). Consequently, we decline to pass judgment on the motion to suppress evidence before the trial court has done so. *See* ***Barrera v. State***, 99 Wis. 2d 269, 282, 298 N.W.2d 820 (1980) (supreme court cautioning court of appeals against usurping the role of the trial court).

¶15 While there is trial testimony concerning the officer's observations that led to Delgadillo's stop and arrest, the trial court never ruled whether there was reasonable suspicion to stop Delgadillo, and the trial court never expressed a belief whether there was probable cause to arrest. We cannot determine how the trial court would have ruled had it properly interpreted WIS. STAT. § 971.31(5)(a) and held the hearing for the motion to suppress. Accordingly, we remand this case to the trial court for a hearing on Delgadillo's motion to suppress. If the trial court concludes that Delgadillo's motion lacks merit, it shall reinstate the judgment of conviction. However, if the trial court concludes that Delgadillo's motion should be granted, it shall conduct further proceedings as appropriate.

By the Court.—Judgment reversed and cause remanded for a hearing.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4 (2005-06).