

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 19, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2008AP59
STATE OF WISCONSIN**

Cir. Ct. No. 2007TR14926

**IN COURT OF APPEALS
DISTRICT IV**

DANE COUNTY,

PLAINTIFF-RESPONDENT,

V.

LAVONNE R. O'MALLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
DANIEL R. MOESER, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, P.J.¹ Lavonne R. O'Malley appeals pro se a judgment against her for failure to stop at a stop sign as a bicyclist, contrary to WIS. STAT. § 346.46(1) (2005-06).² We affirm.

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

BACKGROUND

¶2 O'Malley received a citation for failure to stop at a stop sign while riding her bicycle at the intersection of River Road and Imperial Drive in Westport Township. O'Malley contested the citation, filing a "motion to suppress," which the circuit court construed as a motion to dismiss.

¶3 O'Malley argued to the circuit court that the citation was invalid because the stop sign was not a legal traffic control device. O'Malley provided documentation showing that the stop sign was installed in response to residents' complaints of heavy traffic and excessive speed on River Road. O'Malley noted that, before installing the sign, the Town of Westport had commissioned a traffic engineering report that recommended that "consideration ... be given to less restrictive traffic control measures prior to the application of a stop sign." The Town then directed the engineering firm to draft a supplemental report listing potential "traffic calming treatments." The supplemental report listed multiple options, including placement of a stop sign. O'Malley argued that the Town's placement of the sign in light of the recommendations of the traffic reports³ was contrary to federal regulations incorporated by the Wisconsin statutes.

¶4 The court denied O'Malley's motion to dismiss. O'Malley admitted to riding her bicycle through the stop sign and entered a plea of no contest to the

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

³ Although the supplemental report did list installation of a stop sign as an option, it expressed reservations about the safety of placing stop signs on River Road. (The report suggested that all-way stop signs on River Road would increase the probability of accidents because drivers do not expect to stop on a high-volume rural road.)

citation. The court entered judgment against her and imposed a minimum forfeiture of \$135.60. O'Malley appeals.

DISCUSSION

¶5 This case requires us to interpret statutes and regulations, a question of law that we review de novo. *E.S. v. Seitz*, 141 Wis. 2d 180, 184, 413 N.W.2d 670 (Ct. App. 1987).

¶6 Wisconsin law governing state trunk highways mandates that the Department of Transportation “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.” WIS. STAT. § 84.02(4)(e). These standards are set forth in the United States Department of Transportation’s Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD).

¶7 WISCONSIN STAT. § 349.065 requires that “the design, installation and operation or use of new traffic control devices placed and maintained by local authorities after the adoption of the uniform traffic control devices manual under s. 84.02(4)(e) shall conform to the manual.” Thus, WIS. STAT. §§ 84.02(4)(e) and 349.065 adopt the MUTCD as state law.⁴ See *Harmann v. Schulke*, 146 Wis. 2d 848, 854, 432 N.W.2d 671 (1988).

⁴ The Wisconsin Department of Transportation has adopted the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD), and includes a supplement to the federal rules to modify the standards for use in Wisconsin.

¶8 O’Malley argues that the stop sign was not legally installed because it did not conform to the standards found in the MUTCD, and that failure to stop at the sign did not violate WIS. STAT. § 346.46(1)⁵ because an illegal sign is not an “official sign” within the meaning of the statute.⁶ Specifically, she notes that §§ 1A.09 and 2B.07 of the MUTCD⁷ state that a decision to place a traffic control device at a particular location “should be made on the basis of either an engineering study or application of engineering judgment.” O’Malley argues that because Westport did not follow the engineering advice it received from the study

⁵ WISCONSIN STAT. § 346.46(1) provides, in relevant part:

Except when directed to proceed by a traffic officer or traffic control signal, every operator of a vehicle approaching an *official stop sign* at an intersection shall cause such vehicle to stop before entering the intersection and shall yield the right-of-way to other vehicles which have entered or are approaching the intersection upon a highway which is not controlled by an official stop sign or traffic signal. (Emphasis added.)

⁶ The County contends that O’Malley waived her right to assert this claim on appeal when she pleaded no contest. See *State v. Multaler*, 2002 WI 35, ¶54, 252 Wis.2d 54, 643 N.W.2d 437 (a guilty or no contest plea “generally waives all nonjurisdictional defects, including constitutional claims”). We do not address whether O’Malley waived her claim because, regardless, her claim fails on the merits.

⁷ MUTCD § 1A.09 provides, in relevant part:

The decision to use a particular device at a particular location *should* be made on the basis of either an engineering study or the application of engineering judgment....

Engineering judgment *should* be exercised in the selection and application of traffic control devices, as well as in the location and design of the roads and streets that the devices complement. (Emphasis added.)

MUTCD § 2B.07 provides, in relevant part:

The decision to install multiway stop controls *should* be based on an engineering study. (Emphasis added.)

report, and installed a stop sign rather than implementing “less restrictive control measures,” the stop sign was not a legal sign under the MUTCD and the Wisconsin statutes. We disagree.

¶9 The provision of the MUTCD upon which O’Malley relies is not mandatory. The MUTCD contains statements of law entitled “Standards,” which are mandatory, and comments upon those Standards entitled “Guidance,” which are “statement[s] of recommended, but not mandatory, practice in typical situations.” U.S. Dep’t of Transp., *MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES*, Introduction (2003); *see also Johnson v. Agency of Transp.*, 904 A.2d 1060, 1063-64 (Vt. 2006) (interpreting only the MUTCD’s “Standards” as binding on Vermont’s Agency of Transportation). The MUTCD language upon which O’Malley relies—that placement of traffic control devices “should be made on the basis of either an engineering study or application of engineering judgment”—is “Guidance,” and is therefore only a recommended practice, not a mandate upon government decision makers.⁸ We therefore conclude this provision of the MUTCD did not constrain Westport from installing the stop sign.

¶10 Moreover, this language of the MUTCD cannot supplant the legislative discretion of the Westport Town Board. *See Harmann*, 146 Wis. 2d at 854. The decision whether to place a stop sign on a county trunk highway is a legislative matter that “must be undertaken by the county board [or other legislative body] and not by the courts.” *Dusek v. Pierce County*, 42 Wis. 2d 498,

⁸ Moreover, the language of the provision itself, which states the basis upon which the decision to place a traffic control device *should* be made, is not mandatory. *See Qwest Corp. v. Federal Commc’ns Comm’n*, 258 F.3d 1191, 1200 (10th Cir. 2001) (“The term ‘should’ indicates a recommended course of action, but does not itself imply the obligations associated with ‘shall’”).

506, 167 N.W.2d 246 (1969); *see also Hjerstedt v. Schultz*, 114 Wis. 2d 281, 285, 338 N.W.2d 317 (Ct. App. 1983) (unless a statute or regulation requires sign placement, the decision whether to post a warning sign requires the exercise of judgment). We presume that the Town Board acted with the proper exercise of judgment and validly erected the stop signs on River Road. *See State ex rel. Newman v. Pagels*, 212 Wis. 475, 479, 250 N.W. 430 (1933) (when a municipal body enacts regulations pursuant to its expressly granted authority, all presumptions are in favor of its validity).

¶11 Finally, O'Malley contends that she was denied due process because the circuit court did not adequately address her arguments at the hearing. We disagree. The record shows that the circuit court afforded O'Malley due process by giving her a meaningful opportunity to present her case before the circuit court at the hearing. *See Mathews v. Eldridge*, 424 U.S. 319, 349 (1976).

By the Court. – Judgment affirmed.

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

