

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 20, 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. 2008AP373**

**Cir. Ct. No. 2007FO350**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**BARRY J. SMITH, SR.,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Ozaukee County:  
PAUL V. MALLOY, Judge. *Affirmed.*

¶1 NEUBAUER, J.<sup>1</sup> Barry J. Smith, Sr., appeals from a circuit court order imposing a civil forfeiture for fishing without a valid fishing license contrary

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

to WIS. STAT. § 29.024(1). Smith's citation was based on the fact that the annual license he purchased in July 2006 had expired in March 2007, the expiration date indicated on the face of the license. Smith requests this court to determine the meaning of "annual" to mean twelve months from the time of issue. Smith is essentially challenging the Department of Natural Resource's rule, promulgated under § 29.024, that all fishing licenses expire on March 31 regardless of the purchase date. Because Smith failed to follow the statutory method for review of the DNR's rule, we are without jurisdiction to review Smith's argument. Accordingly, we affirm the order.

¶2 The relevant facts are brief and undisputed. On May 27, 2007, Conservation Warden Benjamin Herzfeldt was working in the area of the Milwaukee River in the Village of Thiensville, Ozaukee County. Herzfeldt observed Smith fishing at that location. Herzfeldt approached Smith and inquired as to whether he had a valid fishing license. It was subsequently determined through the review of state records by Herzfeldt's dispatcher that Smith did not have a valid 2007 fishing license.

¶3 At trial, Smith, appearing pro se, apparently presented his 2006 fishing license to the circuit court.<sup>2</sup> Smith argued that he was entitled to an *annual* fishing license under WIS. STAT. § 29.193(3), which he interpreted as meaning twelve months from the time of issue, and that he had been ticketed ten months after having his license issued on July 4, 2006. Herzfeldt indicated that 2006

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<sup>2</sup> The transcript indicates the trial court was made aware of Smith's license, and Smith includes a copy of what purports to be his license in his appellate appendix. We acknowledge the State's observation that the license was not formally entered into the trial court record. While we cannot consider the added document on appeal, the fact relevant to the 2006 license—that it was issued on July 4, 2006—was testified to at trial.

annual licenses expired on March 31, 2007. The trial court informed Smith that the DNR could define the period of time for an annual license. The trial court also informed Smith that rules promulgated under WIS. STAT. ch. 29 are prima facie reasonable and lawful, only subject to review under statewide WIS. STAT. ch. 227 review, and the rules could only be challenged by an action under § 227.40.

¶4 Smith was found guilty and ordered to pay a fine of \$188.20. On appeal, Smith, again pro se, renews his argument that WIS. STAT. § 29.219(2), governing “annual fishing license[s],” should be read as entitling a qualifying resident of Wisconsin to a date-to-date twelve-month license. Smith requests reversal of the decision of the trial court and refund of any fine paid.

¶5 The State argues that because Smith has never sought a declaratory judgment on the validity of the rule under Chapter 227, as mandated by WIS. STAT. § 29.014(3), the trial court had no jurisdiction to determine the validity of the challenged DNR rule. For the same reason, the State asserts this court also has no jurisdiction to determine the validity of the rule on appeal.

#### DISCUSSION

¶6 Whether this court has jurisdiction is a question of law we review de novo. *Socha v. Socha*, 183 Wis. 2d 390, 393, 515 N.W.2d 337 (Ct. App. 1994). We lack appellate jurisdiction over a question if the trial court lacked subject matter jurisdiction. *Harris v. Reivitz*, 142 Wis. 2d 82, 93, 417 N.W.2d 50, 54 (Ct. App. 1987). Unlike most defects in briefing or procedure that may be waived at our discretion, an appellate court’s lack of subject matter jurisdiction cannot be waived. *Id.* at 91.

¶7 When a specific method of review is prescribed by statute, that method is exclusive. *Sewerage Comm'n of Milwaukee v. DNR*, 102 Wis. 2d 613, 630, 307 N.W.2d 189 (1981). Failure to strictly comply with the prescribed procedure deprives the court of subject matter jurisdiction to conduct the review. *See Harris*, 142 Wis. 2d at 92-93. We must thus examine whether a specific method of review of the DNR rule challenged by Smith is prescribed by statute.

¶8 The DNR rule mandating the expiration of Smith's annual fishing license on March 31 of the following year regardless of purchase date is promulgated under WIS. STAT. ch. 29. Relevant are WIS. STAT. §§ 29.014 (1)<sup>3</sup> and 29.569.<sup>4</sup> Section 29.014(1) is an initial mandate and grant of broad authority to develop rules and seasons for taking fish and game. Section 29.569 specifies that an approval (commonly known as a license) issued under ch. 29 is valid for the period or season specified on its face. In other words, a fishing license such as Smith's is valid until the March 31 expiration date stamped on it.

¶9 WISCONSIN STAT. § 29.014(2)(b) specifies that rules promulgated under WIS. STAT. ch. 29 are prima facie reasonable and lawful until found otherwise in a final determination by a court. Such judicial review is to be

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<sup>3</sup> WISCONSIN STAT. § 29.014 provides in part: "The department shall establish and maintain open and closed seasons for fish and game and any bag limits, size limits, rest days and conditions governing the taking of fish and game that will conserve the fish and game supply and ensure the citizens of this state continued opportunities for good fishing, hunting and trapping."

<sup>4</sup> WISCONSIN STAT. § 29.569 provides in relevant part: "Unless an approval issued under this chapter is suspended or revoked or unless another section of this chapter specifically provides otherwise, the approval is valid for the period or season specified on the face of the approval or on an attachment to the approval."

conducted in the manner prescribed in WIS. STAT. ch. 227 if the rule has statewide effect. Sec. 29.014(3). Absent a declaratory judgment in the prescribed fashion, no person may challenge the validity of a rule promulgated under ch. 29 in a prosecution for the violation of that rule. Sec. 29.014(4).

¶10 Barring exceptions enumerated in WIS. STAT. § 227.40(2), the exclusive means of judicial review of the validity of a rule shall be an action for declaratory judgment as to the validity of such rule, brought in the circuit court for Dane County in the prescribed manner. Sec. 227.40(1). Equally important, WIS. STAT. § 29.014(3)-(4) explicitly provide for this review in cases such as this one. Here, Smith argues that the expiration date on his license is invalid as contrary to WIS. STAT. § 29.219's requirement that the DNR shall issue an "annual license" and WIS. ADMIN. CODE § NR 25.02(18)'s definition of a "license year" as "that period from July 1 through June 30 of the succeeding year." In effect, Smith challenges the legitimacy of the DNR's choice of March 31 as the date of expiration of a fishing license. It has never been contended at any point in the proceedings that Smith commenced a declaratory judgment action under § 227.40.

¶11 Smith's claim is exactly the sort of statewide impact validity challenge addressed by WIS. STAT. § 29.014(3)-(4) and the trial court appropriately refused to consider it for lack of jurisdiction due to the challenge being outside the statutorily prescribed method of review. *Sewerage Comm'n of Milwaukee*, 102 Wis. 2d at 630. We similarly cannot consider such argument on appeal.<sup>5</sup> *Harris*, 142 Wis. 2d at 93.

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<sup>5</sup> Smith additionally argues he is not challenging the validity of the rule, the State is challenging the validity of WIS. STAT. § 29.219(2)(a) and WIS. ADMIN. CODE § NR. 25.02(18), and Smith is enforcing those same statutes. This argument is meritless.

(continued)

*By the Court.*—Order affirmed.

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

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Smith also advances a one-line statement at the end of his argument that the controversy at bar should have been resolved on a “notice of adjudicative facts” Smith filed with the court on the day of the trial. This argument is neither comprehensible nor adequately developed. We decline to develop issues for advocates, *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992), and will not consider such completely undeveloped argument, *see, e.g., State v. Shaffer*, 96 Wis. 2d 531, 545-546, 292 N.W.2d 370 (Ct. App. 1980).

