COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

Nos. 00-3487
00-3488

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

CITY OF BELOIT,

PLAINTIFF-RESPONDENT,

V.

MIEKE VENEMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: DANIEL T. DILLON, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] Mieke Veneman appeals two judgments of conviction for placing signs in a public way in violation of BELOIT, WIS., ORDINANCES § 30.16. The City of Beloit issued the two citations after Veneman placed yellow ribbons on poles on terraces in support of the American troops in the Kosovo conflict.[2] After the municipal court found her guilty of violating the ordinance, Veneman requested a jury trial in circuit court.[3] The circuit court granted the City's motion for summary judgment, concluding there were no disputed issues of fact, the ribbons were an "animated sign" as defined in BELOIT, WIS., ORDINANCES § 30.03(1), and she had not presented evidence of either selective enforcement or viewpoint discrimination that would entitle her to a trial.

¶2 On appeal Veneman asserts that the yellow ribbons were not signs within the meaning of the ordinance and summary judgement was not appropriate

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] BELOIT, WIS., ORDINANCES § 30.16 provides:

> Signs in the Public Way. No sign, except as provided in §§ 30.04(1)(b) and 30.14(1) and (2) above, shall be placed so that any part of the sign is upon, above or extends into, any public way, public sidewalk or publicly owned land. The provisions of this section shall not be construed to prohibit the placing of traffic signs, sandwich boards or subdivision entrance features in the public way if such placement is approved by the City Council.

Terrace is used in this record to mean the area between the edge of the street and the sidewalks, and there is no dispute between the parties that this area is in "the public way" or on "publicly owned land" within the meaning of § 30.16.

[3] Proceedings on the two citations were consolidated in the circuit court and in this court.

because the facts on the record presented were sufficient to entitle her to a trial on the issues of selective enforcement and viewpoint discrimination.

¶3 We conclude that, based on the undisputed facts, the yellow ribbons were signs within the meaning of the ordinance, although our analysis differs from that of the circuit court. Because Veneman does not challenge the propriety of using the summary judgment procedure when a trial de novo to a jury has been requested on an alleged ordinance violation, we assume without deciding that the procedure was available to the City. We agree with the circuit court that the materials submitted by Veneman did not show a disputed issue of fact with respect to either selective enforcement or viewpoint discrimination. We therefore affirm.

BACKGROUND

¶4 The parties stipulated that the record of the testimony at the trial before the municipal court could be considered by the circuit court for purposes of the City's motion for summary judgment. According to her testimony, Veneman placed approximately five hundred yellow ribbons on utility poles or other types of poles on terraces throughout the City. Each item consisted of approximately eight feet of yellow plastic ribbon. At least some of the ribbon arrangements consisted of a bow with two streamers coming down.[4] The ribbon was blank,

[4] The transcript of Veneman's testimony on this point reads:

> Q. Was there any other purpose to the style in which you fashioned the yellow ribbons?
> A. No.
> Q. Did each one of them typically consist of a bow with two streamers coming down?
> A. Some were different.
> Q. The majority of them consist of a bow with two streamers coming down?
> A. To (inaudible).

(continued)

containing no letters, logos, or symbols. Veneman intended that the ribbons would remind people of the men and women overseas in the Kosovo conflict and remind people to pray for those men and women. She elaborated on that purpose in this way:

> For people to be reminded to pray. There's a feeling that I had that I should do, as I did in Desert Storm, not to forget our men and women who fight for this country and who put their life on the line for our freedom, and we should never forget.

She acknowledged that she intended people on the streets of Beloit to see these ribbons "[a]s a reminder."[5]

¶5 John Raisbeck, the City of Beloit Director of Housing Services, testified concerning the City's interest in regulating signs for both safety and aesthetics. He noted the concern over the threat that signs posed to traffic safety by causing drivers to divert their attention from their driving. He testified that he advised Veneman in early April, prior to any citation being issued, to remove the yellow ribbons from the public right-of-way and he did not observe any effort on her part to remove the ribbons.

> Q. Why was it necessary to go to that level of effort for purposes of attaching if that was the only reason you arranged them in that fashion?
> A. Try to look a little bit nicer, attractive.

The exact manner in which the ribbons were tied does not affect our analysis or conclusion.

[5] Following this testimony, Veneman answered no when asked by the assistant city attorney if she regarded the ribbons as a form of political speech, and "not really" when asked if she regarded them as a form of speech of any kind. We view these questions as asking her to apply legal concepts and conclusions to her motives; therefore, her answers are not relevant to a factual determination of her intent and they are not binding on the circuit court's or this court's conclusions of law.

DISCUSSION

¶6 Summary judgment is appropriate when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08. In reviewing motions granting or denying summary judgment, we apply the same method as the trial court, and our review is de novo. ***Envirologix Corp. v. City of Waukesha***, 192 Wis. 2d 277, 287, 531 N.W.2d 357 (Ct. App. 1995).

¶7 We first consider Veneman's argument that the yellow ribbons are not signs within the meaning of the ordinance. The circuit court concluded that the yellow ribbons constituted "animated signs" under the BELOIT, WIS., ORDINANCES § 30.03(1), which defines animated signs as:

> Animated Sign. Any sign, all or part of which moves, whether such movement is wind driven or motor driven, or which simulates movement. Animated signs include, but are not limited to, steamers [sic], pennants, propellers and search lights. Animated signs do not include banners or other temporary signs which are not designated or erected to be blown by the wind or flashing signs.[6]

The circuit court reasoned that a yellow ribbon "can be described as a streamer or pennant which moves or can be stimulated to movement by the wind."

¶8 Veneman contends the record does not permit the circuit court to find as a matter of law that the yellow ribbons were "animated signs." We will assume for purposes of argument that is true. However, even if the yellow ribbons are not animated signs, if they come within the general definition of "sign" they

[6] Under BELOIT, WIS., ORDINANCES § 30.09(1) animated signs are prohibited city-wide, unless they are a permitted nonconforming sign under BELOIT, WIS. ORDINANCES § 30.10(1).

are not permitted on the terrace, with certain exceptions that Veneman does not argue are applicable. The definition of "sign" in the ordinance is "Any sign, billboard, statuary or search light which is used, capable of being used or intended to be used to attract attention to a specific subject matter for the purpose of identification, information, or advertising." BELOIT, WIS., ORDINANCES § 30.03(42).

¶9 Veneman does not identify any factual disputes that exist with respect to whether the yellow ribbons are "signs" under this definition of the ordinance, and she expressly states in her conclusion that the issue of "what constitutes a 'sign' under the ordinance may be a question of law…." We can see no factual disputes relevant to whether the yellow ribbons are "signs" within the meaning of the ordinance, and we turn to that issue.

¶10 The application of an ordinance to a set of undisputed facts is a question of law, which we review de novo. ***County of Adams v. Romeo***, 191 Wis. 2d 379, 383, 528 N.W.2d 418 (1995). When we interpret an ordinance, we apply the same rules of construction we apply to statutes. ***Schroeder v. Dane County Bd. of Adjustment***, 228 Wis. 2d 324, 333, 596 N.W.2d 472 (Ct. App. 1999). We begin with the language of the ordinance and, if it is plain on its face, we apply that language to the facts at hand and do not look beyond the language to ascertain the meaning of the ordinance. ***Id.*** An ordinance is ambiguous if it can be reasonably interpreted in more than one manner, and the question of whether an ordinance is ambiguous is a question of law. ***Id.*** When an ordinance is ambiguous we may consider the scope, history, context, subject matter, and purpose of the ordinance to arrive at the intended meaning. ***Id.*** We do not interpret sections of ordinances in a vacuum, but consider the entire ordinance in

order to best determine the meaning. ***J.L.W. v. Waukesha County***, 143 Wis. 2d 126, 130, 420 N.W.2d 398 (Ct. App. 1988).

¶11 Veneman acknowledges the yellow ribbons are a symbol, but she contends that is not the same as a "sign" because the ribbons have no "sign face." A "sign face" is defined as:

> That portion of the sign upon which the message or subject matter of the sign is displayed by graphics, symbols, insignias, logos, pictures or other means. Sign face also includes the frame around the portion of the sign upon which the message or subject matter is displayed. Sign face does not include the sign structure, except where such parts are used to display a message."

BELOIT, WIS., ORDINANCES § 30.03(45). However Veneman does not point to any provision that requires a "sign" to have a "sign face." The definition of "sign face" is used in determining the fee for permits for certain signs, because the fee for certain signs is determined by the "sign area," which is defined as the "surface area of a sign face." BELOIT, WIS., ORDINANCES §§ 30.03(43) and 30.05(1). But fees for permits for "painted, non-solid, and irregularly shaped signs" have a different permit fee structure which does not depend on having a "sign face." BELOIT, WIS., ORDINANCES § 30.05(2)(b).[7] We see no indication in the ordinance that an object is not a sign unless it has a "sign face."

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[7] BELOIT, WIS., ORDINANCES § 30.05(2)(b) provides:

> (b) Painted, Non-solid, and Irregularly Shaped Signs. Whenever a sign is irregularly shaped, painted on a wall, fence or other non-sign structure or whenever letters, numbers, pictures or other objects are hung from or attached to a wall, fence or other structure, the sign area shall constitute the area within the square or rectangle, the dimensions of which shall be measured from the following points:

(continued)

¶12 Veneman's second argument is that a sign is something "which is readily understandable as to its singular, *specific* meaning," and the yellow ribbons are subject to multiple interpretations. However, the plain language of the definition of "sign" does not require that the viewers have any particular understanding of the subject matter of the sign; rather, it is sufficient if it "is used, capable of being used or intended to be used to attract attention to a specific subject matter for the purpose of identification, information or advertising." BELOIT, WIS., ORDINANCES § 30.03(42)

¶13 Although we reject Veneman's proffered definitions of "sign" we conclude that the definition is ambiguous. That is, the definition does not specifically define a "sign" that is not a "billboard, statuary or search light," besides specifying that it "is used, capable of being used or intended to be used to attract attention to a specific subject matter for the purpose of identification, information or advertising," and there are a number of reasonable ways that "sign" could be interpreted in this context. We conclude that the most reasonable interpretation is a broad one that includes an object that is itself "used, capable of being used or intended to be used to attract attention to a specific subject matter for the purpose of identification, information or advertising." Since the purpose of the ordinance includes concerns with public safety, substantial annoyance to others, the proliferation of signs, and the need to communicate messages, a broad

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1. The top of the highest painted area, letter, number or other symbol in the sign; and

2. The bottom of the lowest painted area, letter, number or other symbol in the sign; and

3. The outer edge of the painted area, letters, numbers or other symbols furthest to the right and left in the sign.

definition of "sign" will best fulfill those purposes.[8] In addition, the inclusion of "statuary or search light" in the definition suggests a broad definition, as does the fee structure in BELOIT, WIS., ORDINANCES § 30.05(2)(b), which we have already referred to.

¶14 There is no dispute that Ms. Veneman placed the yellow ribbons with the intent of reminding passersby to remember and pray for the men and women in the Kosovo conflict because they are risking their lives for our freedom. The yellow ribbons were therefore objects that were intended to be used to attract attention to the Kosovo conflict for the purpose of informing people of the need to pray for and honor the men and women fighting there. We conclude the yellow ribbons are "signs" within the meaning of BELOIT, WIS., ORDINANCES § 30.03(42).

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[8] BELOIT, WIS., ORDINANCES § 30.01 provides:

> Intent and Purpose. The purpose of this chapter is to regulate the erection and maintenance of outdoor signs; to provide for the removal of unsafe or unlawful signs and to limit the proliferation of billboards and other off-premises signs. It is also intended that each occupant of a property having a need for the communication offered by signs be permitted to fulfill that need, provided that it is done within the confines of his/her own property and in accordance with the regulations imposed by this ordinance and without endangering public safety and without substantial annoyance to others. Finally, given the extensive investment made by the public and private sectors in revitalizing the Riverfront Conservation District and the Downtown Beloit Business Improvement District banning the further erection of billboards and other off-premises signs in those districts is deemed to be in the public interest.

BELOIT, WIS., ORDINANCES § 30.02 provides:

> Scope. The provisions of this chapter shall regulate the location, size, lighting, number, height, manner of support, construction, alteration, repair, maintenance and erection of all signs, their appurtenant and auxiliary devices within the City.

¶15 We next consider Veneman's contention that she was entitled to a trial on her defense that she was the subject of selective enforcement.[9] She contends the City's interrogatory response that "no one other than this defendant has been cited between 1992 and the present for illegally posting signs" is sufficient to create a triable issue of fact. We agree with the circuit court that it is not.

¶16 The equal protection clause prohibits administering an ordinance so as to treat similarly situated people differently. ***Village of Menomonee Falls v. Michelson***, 104 Wis. 2d 137, 145, 311 N.W.2d 658 (Ct. App. 1981). However, "evidence that a municipality has enforced an ordinance in one instance and not in others would not in itself establish a violation of the equal protection clause." ***Id.*** There must be a showing of intentional, systematic, and arbitrary discrimination. ***Id.*** Since Veneman is asserting the defense of selective prosecution, she has the burden on summary judgment of making a showing sufficient to establish the elements essential to her defense. ***Transportation Ins. Co. v. Huntzinger Constr. Co.***, 179 Wis. 2d 281, 290, 507 N.W.2d 136 (Ct. App. 1993).

¶17 If evidence presented by a party on summary judgment gives rise to more than one reasonable inference, we draw the inference in favor of the person opposing summary judgment. ***Grams v. Boss*** 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980). Whether an inference is reasonable and whether it is the only reasonable inference are questions of law that an appellate court decides de novo.

[9] Veneman asserts she is entitled to a jury trial on this defense as well as on the defense of viewpoint discrimination. However, as the trial court correctly noted, the issue of unconstitutional discriminatory enforcement is decided by the court, not by a jury. Therefore, if there were disputed issues of fact on either of these defenses, she would be entitled to a court trial, not a jury trial. *See* ***Village of Menomonee Falls v. Michelson***, 104 Wis. 2d 137, 153-54, 311 N.W.2d 658 (Ct. app. 1981).

Groom v. The Professionals Ins. Co., 179 Wis. 2d 241, 249, 507 N.W.2d 121 (Ct. App. 1993).

¶18 Veneman has presented no evidence creating a reasonable inference that others have violated the ordinance by similar conduct and have not been prosecuted, let alone presented evidence creating a reasonable inference of the intentional systematic and arbitrary evidence required for the defense of selective prosecution.

¶19 For the same reason, we reject Veneman's argument that the circuit court erred in concluding she was not entitled to a trial on her defense that she was the subject of viewpoint discrimination. On this issue she contends the absence of other prosecutions creates a "suspicion" that she is being prosecuted for her views. In addition, she points to a memo which she claims is evidence that City personnel "are contemplating new ways to suppress [her] activism."

¶20 The First Amendment and the equal protection clause prohibit the government from discriminating among viewpoints on issues falling within the realm of protected speech. ***Niemotko v. Maryland***, 340 U.S. 268, 272 (1951). Veneman claims the City is discriminating against her viewpoint of patriotic concern for our armed forces.

¶21 The evidence of lack of other prosecution since 1992, without evidence that persons with other viewpoints who violated the ordinance were not charged, does not create a reasonable inference that Veneman was charged with a violation because the City disapproved of her patriotic concerns for the armed forces. The memo Veneman refers to does not, either. In that memo a city employee is addressing an argument that Veneman made in the circuit court—that

persons who put rummage sale signs in the terraces were not given citations.[10] The memo analyzes under what definition in the ordinance rummage sale signs might fit, notes that even persons wishing to post temporary signs such as rummage sale signs and signs like Veneman's "pray ribbons" must request a permit, and asks whether such a permit is necessary in those situations and whether an exemption might be appropriate. The memo also conveys a concern with First Amendment rights in relation to a proposal that abutting landowners must approve of a sign permit application. No reasonable reading of this memo suggests that the City charged Veneman with a violation of the ordinance because of her viewpoint.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

[10] There was no evidence of the rummage sale signs presented to the circuit court. Veneman asked the court to take judicial notice and the court declined.