COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2989 **Cir. Ct. No. 01-TR-1927**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH R. MCGREW,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: PAUL B. HIGGINBOTHAM, Judge. *Affirmed.*

¶1 DYKMAN, J.[1] Kenneth McGrew appeals from a judgment of conviction for speeding. McGrew makes several arguments: (1) that the

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

prosecutor was obligated to respond to his discovery request and that WIS. STAT. § 345.421 is unconstitutional;[2] (2) that the State has a duty to preserve evidence in civil forfeiture cases and the destruction of a videotape from the citing officer's car was a violation of this duty; and (3) that he had a constitutional right to a twelve-person jury and therefore WIS. STAT. § 756.06(2)(c), which provides only a six-person jury, violates both WIS. CONST. art. I, § 5 and his equal protection rights. Because we reject each of his contentions, we affirm.

BACKGROUND

¶2 On January 21, 2001, a state highway patrol officer cited McGrew for speeding in excess of sixty-five miles per hour. In a January 31, 2001 letter to the Dane County district attorney's office, McGrew requested, in addition to "any other relevant materials in your possession or the possession of the police department or the Court," thirteen discovery materials related to the citation. McGrew wrote, "These items are essential to my ability to prepare a defense." When the district attorney's office did not respond to McGrew's letter, he filed a motion to compel discovery on March 18, 2001. On March 20, 2001, McGrew

[2] WISCONSIN STAT. § 345.421 provides:

> Neither party is entitled to pretrial discovery except that if the defendant moves within 10 days after the alleged violation and shows cause therefor, the court may order that the defendant be allowed to inspect and test under § 804.09 and under such conditions as the court prescribes, any devices used by the plaintiff to determine whether a violation has been committed, including without limitation, devices used to determine presence of alcohol in breath or body fluid or to measure speed, and may inspect under s. 804.09 the reports of experts relating to those devices.

demanded a jury trial under WIS. STAT. § 345.43. On April 27, 2001, McGrew filed a motion for a twelve-person jury and a motion to dismiss.

¶3 The circuit court denied each of McGrew's motions. On October 23, 2001, a six-person jury found McGrew guilty of speeding in excess of sixty-five miles per hour. McGrew appeals.

ANALYSIS

I. Requirements of WIS. STAT. § 345.421

¶4 "[WISCONSIN STAT. ch.] 345 establishes a uniform procedure for the great majority of state Motor Vehicle Code violations and for all ordinances enacted in conformity therewith." ***City of Lodi v. Hine***, 107 Wis. 2d 118, 120, 318 N.W.2d 383, 384 (1982). WISCONSIN STAT. § 345.421 was adopted along with the remainder of chapter 345 to provide a procedure for traffic violations where both ordinances and statutes might apply. ***Id.*** It provides that neither party is entitled to pretrial discovery in traffic forfeiture actions except that a defendant may ask the court to order the inspection and testing of certain items if the defendant moves the court for such an order within ten days of the alleged violation and shows cause for the order. Section 345.421.

¶5 McGrew contends that he made a timely request for discovery under WIS. STAT. § 345.421, which obligated the State to reply within thirty days in accordance with WIS. STAT. § 804.09. The State responds that McGrew failed to

meet the procedural requirements of § 345.421, so it was not obligated to reply to his request. We agree with the State. [3]

¶6 WISCONSIN STAT. § 345.421 provides that if the defendant "moves" within ten days of the alleged violation and "shows cause," the court may order limited discovery. The circuit court found that McGrew satisfied the procedural requirements of § 345.421.

¶7 Whether McGrew filed a motion within ten days of the alleged violation is a question of fact. Findings of fact by a circuit court shall not be set aside on appeal "unless clearly erroneous." WIS. STAT. § 805.17(2). An appellate court will search the record for evidence to support the trial court's findings of fact. ***Becker v. Zoschke***, 76 Wis. 2d 336, 347, 251 N.W.2d 431 (1977). In the present case, the record is devoid of evidence supporting the trial court's finding that McGrew complied with the requirements of WIS. STAT. § 345.421.

¶8 The record does not show that McGrew made a motion to the court requesting discovery. Rather, it shows only that he sent a discovery request letter to the district attorney's office. Because McGrew failed to comply with WIS.

[3] The circuit court ruled that the district attorney did not need to respond to McGrew's discovery request because McGrew obtained most of the information he requested via open records. We may affirm on different grounds than those relied on by the trial court. *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995).

STAT. § 345.421, the State was not required to comply with McGrew's discovery requests.[4]

¶9 McGrew contends that it is improper for the State to argue that his discovery request was untimely or improperly served because the State did not make such arguments to the circuit court. McGrew cites no authority to support this argument. ***State v. Holt***, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985), holds that a respondent may raise any defense to the appeal even if that defense is inconsistent with the stand taken at the trial level.

¶10 McGrew also contends that as a non-attorney, he was unclear as to how to obtain discovery. But ***Waushara County v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992), teaches that pro se litigants "are bound by the same rules that apply to attorneys on appeal."

¶11 Even if McGrew had made a timely motion, he also failed to "show cause" for why he was entitled to discovery. Whether McGrew made a proper showing of cause under WIS. STAT. § 345.421 is a question of law, which we review de novo. ***First Nat'l Leasing Corp. v. City of Madison***, 81 Wis. 2d 205, 208, 260 N.W.2d 251 (1977).

¶12 McGrew protests that he did show cause because in his January 31, 2001 discovery request letter, he stated, "These items are essential to my ability to

[4] In his reply brief, McGrew states that he did in fact send the January 31, 2001 discovery request letter to the court. In making our decision, we may rely only on facts in the trial court record. *See* ***Jenkins v. Sabourin***, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981). The circuit court record shows that the court did not receive the discovery request letter dated January 31, 2001, until March 18, 2001, when McGrew attached it to his motion to compel discovery.

prepare a defense." However, to show cause, one must do more than simply state, "because I need it." At the least, McGrew was required to explain why the evidence was relevant and how his ability to prepare a defense would be impaired without it.

¶13 Because McGrew failed to comply with the requirements of WIS. STAT. § 345.421, we need not consider his argument that the statute violates due process and equal protection.[5]

II. Duty to Preserve Evidence

¶14 McGrew next contends that regardless of whether he was entitled to conduct discovery, the State has an obligation to preserve evidence in civil forfeiture cases. Specifically, McGrew asks this court to conclude that the State had an obligation to preserve the videotape from the officer's squad car the day of his citation. He argues that because the state highway patrol routinely recorded over the videotape, we must impose the sanction of dismissal of his case.

¶15 "A trial court's decision whether to impose sanctions for the destruction or spoliation of evidence, and what sanction to impose, is committed to the trial court's discretion." ***Garfoot v. Fireman's Fund Ins. Co.***, 228 Wis. 2d 707, 717, 599 N.W.2d 411 (Ct. App. 1999). The circuit court did not impose sanctions against the State for the destruction of the videotape. Because we conclude that refusing to sanction that State was not an erroneous use of the circuit court's discretion, we affirm.

[5] We will not reach a constitutional issue if the resolution of other issues can dispose of an appeal. ***Grogan v. Public Serv. Comm'n of Wisconsin***, 109 Wis. 2d 75, 77, 325 N.W.2d 83 (Ct. App. 1982).

¶16 In ***Garfoot***, we reaffirmed our holding in ***Milwaukee Constructors II v. Milwaukee Metro. Sewerage Dist.***, 177 Wis. 2d 523, 502 N.W.2d 881 (Ct. App. 1993), that dismissal as a sanction for destruction of evidence requires a determination that there was a conscious attempt to affect the outcome of the litigation or a flagrant knowing disregard of the judicial process. ***Garfoot***, 228 Wis. 2d at 724.

¶17 The state highway patrol recorded over the videotape as a routine matter. McGrew's traffic stop involved nothing out of the ordinary to indicate a future desire or need for the videotape. Further, the relationship between the videotape and the issue in the present case is marginal at best. McGrew was charged with speeding. McGrew fails to persuasively explain how the videotape would have related to his guilt or innocence of speeding, which is the only relevant issue. Therefore, the record in the present case simply does not permit a reasonable conclusion that the state highway patrol destroyed the videotape in an attempt to affect the outcome of litigation or in a willful disregard for the judicial process.

¶18 McGrew next argues that even if the State was not required to preserve the videotape under WIS. STAT. § 345.421 or because of due process considerations, Wisconsin's open records statutes, WIS. STAT. §§ 19.21—19.39, create an additional legal requirement to preserve videotapes for a period of time as public records. McGrew cannot raise this issue in the instant appeal. McGrew may file a suit under the open records law if he believes the State violated that statute.

III. Right to Twelve-Person Jury

¶19 Finally, McGrew contends that he had a constitutional right to have his case tried before a twelve-person jury. He argues that WIS. STAT. § 756.06(2)(c), which provides a six-person jury in forfeiture cases, violates art. I, § 5 of the Wisconsin Constitution[6] and equal protection. Because McGrew had no constitutional right to a jury and he was not treated unequally, we disagree.

¶20 McGrew relies upon ***State v. Hansford***, 219 Wis. 2d 226, 580 N.W.2d 171 (1998), to support his argument. ***Hansford*** held that the constitutional right to a jury in a criminal trial under art. I, § 7[7] applies to misdemeanors. ***Id.*** at 241. Further, it concluded that where this right exists, the jury must consist of twelve, not six persons. ***Id.***

¶21 McGrew was charged with a civil forfeiture, not a misdemeanor, and he relies on art. I, § 5, not art. I, § 7. Therefore, ***Hansford*** does not apply. The issue, rather, is whether the art. I, § 5 right to a jury applies to forfeitures. The State cites a number of cases supporting its argument that even though McGrew was charged by the State, his case is nonetheless controlled by the general rule that the art. I, § 5 right to a jury does not apply to violations of municipal ordinances. *See* ***Oshkosh v. Lloyd***, 255 Wis. 601, 604, 39 N.W. 772 (1949); ***Ogden v. Madison***, 111 Wis. 413, 429, 87 N.W. 568 (1901); ***City of Kenosha v. Leese***, 228 Wis. 2d 806, 811, 598 N.W.2d 278, 281 (Ct. App. 1999); ***Village of Oregon v.***

[6] WISCONSIN CONST. art. I, § 5 provides in relevant part: "The right to trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law."

[7] WISCONSIN CONST. art. I, § 7 provides in relevant part: "In all criminal prosecutions the accused shall enjoy the right … to a speedy public trial by an impartial jury."

Waldofsky, 177 Wis. 2d 412, 420, 501 N.W.2d 912 (Ct. App. 1993); ***Village of Menomonee Falls v. Michelson***, 104 Wis. 2d 137, 146, 311 N.W.2d 658 (Ct. App. 1981). ***Waldofsky*** stated: "it is well recognized that persons charged with violating municipal ordinances do not have a constitutional right to a jury trial." 177 Wis. 2d at 420. To the extent that jury trials are granted to such persons, it is by statute only. ***Id.*** The State concedes that these cases involved municipal ordinance violations, rather than statutory forfeiture offenses, such as those McGrew was charged with. They argue, however, that there is no functional difference between the two.

¶22 Although the State, rather than a municipality, charged McGrew, he concedes that there is no difference between municipal ordinance violations and state civil forfeitures. McGrew writes: "It seems absurd to say that there is a constitutional right to a jury trial in forfeiture cases when charged by Wisconsin but not when charged by a municipality."

¶23 Because McGrew points to no authority that civil forfeitures are more akin to misdemeanors than to municipal ordinance violations, we conclude that ***Waldofsky*** controls and therefore McGrew did not have a constitutional right to a jury trial.[8] His right to a jury, therefore, was statutory only, providing him a six-person jury in accordance with WIS. STAT. § 756.06(2)(c). McGrew has not persuaded us that § 756.06(2)(c) violates art. I, § 5.

[8] McGrew argues that ***Waldofsky*** was decided incorrectly. Specifically, he argues that it is based on a misreading of ***Oshkosh v. Lloyd***, 225 Wis. 601, 39 N.W. 772 (1949) and ***Ogden v. Madison***, 111 Wis. 413, 87 N.W. 568 (1901). Because we do not find these cases to conflict with one another, we are bound by ***Waldofsky***. In any event, *see* ***Cook v. Cook***, 208 Wis. 2d 166, 171, 560 N.W.2d 246, 248 (1997) (holding the court of appeals does not have the power to overrule, modify or withdraw language from one of its published decisions).

¶24 McGrew argues that to find no constitutional right to a jury in his case contradicts earlier Wisconsin Supreme Court cases such as ***Norval v. Rice***, 2 Wis. 17 (1853) and ***State ex rel. Prentice v. County Court of Milwaukee County***, 70 Wis. 2d 230, 234 N.W.2d 283 (1975). But ***Norval*** does not hold that every citizen in every case has a constitutional right to a jury trial. It held that when a citizen has such a constitutional right, the jury must consist of twelve persons. ***Norval***, 2 Wis. at 30. Because we do not find such a right in McGrew's case, our holding does not conflict with ***Norval.***

¶25 McGrew argues that the Wisconsin Supreme Court in ***Prentice*** recognized a constitutional right to a jury trial in speed limit violation cases. However, the ***Prentice*** court did not reach the issue of whether Prentice had a constitutional right to a jury trial. The court concluded only that Prentice did not meet the statutory requirements to demand one. 70 Wis. 2d at 239-40. ***Prentice*** is inapplicable to McGrew's case.

¶26 Finally, McGrew alleges that WIS. STAT. § 756.06(2)(c) violated his equal protection rights by creating a situation where the State and McGrew were not equal under the law. But the State was no more entitled to a jury in this case than was McGrew. Rather, the only right to a jury either party had was a statutory right to a six-person jury. Because no unequal treatment occurred, § 756.06(2)(c) did not violate McGrew's equal protection rights.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.