

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 15, 2003

Cornelia G. Clark
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. 02-0885

Cir. Ct. No. 00-CV-251

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

TOWN OF ELDORADO,

PLAINTIFF-RESPONDENT,

v.

HARRY SCHMITZ, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Harry Schmitz, Jr. appeals from the judgment entered against him and in favor of the Town of Eldorado. The issues on appeal are whether the Town had a rational basis for enacting a \$100 fee for signs and billboards, whether the Town assessed the fee in a discriminatory manner, whether the Town violated a stipulation it entered into with Schmitz, and whether the

forfeiture imposed by the trial court was excessive. Because we conclude that the historical facts as found by the trial court supported its conclusions, we affirm.

¶2 Schmitz owns two billboards in the Town of Eldorado. As a result of an earlier dispute with the Town over the billboards, Schmitz and the Town previously entered into a stipulation in which the Town agreed not to do anything to interfere with Schmitz's use of the existing signs. In 1995, the Town adopted a billboard and sign ordinance which requires a permit and assesses a fee of \$100 per year for every sign or billboard erected in the Town. The ordinance also establishes a fine of at least \$50 per day for violating or refusing to comply with the ordinance. From 1998 to 2001, Schmitz violated the ordinance by not paying the required fee and not filing the permit application. The Town eventually brought a civil action against Schmitz seeking an injunction prohibiting him from using the signs and the assessment of a \$50 per day fine.

¶3 After a bench trial, the court found that Schmitz violated the terms of the ordinance from 1998 through 2001. The court further found that there were signs and billboards in the Town which were subject to the ordinance but whose owners had not filed an application or paid a fee. The court concluded that this was not a case of some of the Town purposefully denying Schmitz his constitutional rights, but rather was just the Town's poor enforcement of the ordinance. The court further found that the \$100 fee was acceptable and was not a penalty or a tax, and that at the time the ordinance was enacted, the \$100 fee was a reasonable amount to cover the costs of enforcement including mailings and inspections. The court further found that the Town had not breached the stipulation between the parties because the Town had not done anything to interfere with Schmitz's use of the signs. The court then determined that the \$50

per day fine would be imposed from the time the complaint had been filed, and assessed \$22,850 in fines against Schmitz.¹

¶4 Schmitz argues on appeal that the Town did not have a rational basis for imposing the \$100 fee. He argues that our review of this issue is *de novo* because it involves an issue of constitutional law. His description of our standard of review is too narrow. He is correct that we review constitutional questions independently of a circuit court's determination. *See State v. Bangert*, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986). However, we will not upset a circuit court's findings of evidentiary or historical fact unless the findings are clearly erroneous. *Id.* at 283-84. Here, Schmitz is disputing the court's findings of historical facts. We are not convinced that the trial court's findings were incorrect.

¶5 Schmitz is correct in arguing that the court applies a rational basis test. *See Szarzynski v. YMCA, Camp Minikani*, 184 Wis. 2d 875, 886, 517 N.W.2d 135 (1994). "Under the 'rational basis test,' we must uphold a legislative classification if there exists any reasonable basis to justify that classification. To decide if there is any reasonable basis, the court is obligated to find or construct, if possible, a rationale that might have influenced the legislature and that reasonably upholds legislative determinations." *City of Milwaukee v. Hampton*, 204 Wis. 2d 49, 59, 553 N.W.2d 855 (Ct. App. 1996) (citation omitted).

¶6 In this case, the trial court found that at the time the Town enacted the ordinance, it had a rational basis for assessing the \$100 fee. The basis for this

¹ Schmitz argues that the court imposed a forfeiture of over \$28,000. The record indicates, however, that the court imposed a forfeiture of \$22,850 (\$50 per day for 457 days).

fee, the court found, was the cost of mailings and inspections. The court noted that while the actual cost of enforcing the ordinance was much greater as a result of this litigation, the Town did not know that this would be true at the time it enacted the ordinance. While Schmitz disputes these facts, these were the historical facts found by the trial court and they are not clearly erroneous.

¶7 The trial court also found as a matter of historical fact that the “unequal” enforcement of the ordinance was the result of poor management by the Town and not an attempt by the Town to deny Schmitz his constitutional rights. Again, we are not convinced that the court’s finding was clearly erroneous and consequently agree that Schmitz has not established that his constitutional rights were violated.

¶8 We also agree with the trial court’s conclusion that the Town did not violate the stipulation which it had previously entered into. The ordinance did not interfere with Schmitz’s right to use the signs.

¶9 Schmitz also argues that the Town did not comply with certain procedural requirements for the violation of a municipal ordinance. *See* WIS. STAT. § 800.02 (1999-2000). As the Town argues, however, Schmitz did not raise this before the trial court and we will not consider it. *See Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).

¶10 Finally, Schmitz argues that the forfeiture imposed by the trial court was excessive. When a legislative body establishes a minimum and maximum forfeiture, a court does not have discretion to impose less than the minimum. *Village of Sister Bay v. Hockers*, 106 Wis. 2d 474, 479, 317 N.W.2d 505 (Ct. App. 1982). The forfeiture imposed by the trial court was the minimum allowed

by the ordinance and was not excessive. For the reasons stated, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

