COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1451 **Cir. Ct. No. 2012TR1737**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

TAMMY S. CAMDEN,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Grant County: CRAIG R. DAY, Judge. *Reversed.*

¶1 SHERMAN, J.[1] The State appeals a judgment of the circuit court finding Tammy Camden not guilty of driving thirty-seven miles over the posted speed limit. The State contends the circuit court erred when it accepted her

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

defense of necessity. Because I conclude that the necessity defense is not available to Camden, I reverse the judgment of the circuit court.

BACKGROUND

¶2 On March 13, 2012, at approximately 2:13 p.m., Wisconsin State Trooper Daniel Breeser, who was on patrol on Highway 18 in the Township of Patch Grove, observed a motor vehicle traveling at an excessive speed. Trooper Breeser clocked the vehicle at a speed of ninety-two miles per hour in a fifty-five mile per hour speed zone. Trooper Breeser stopped the vehicle which was driven by Camden. Trooper Breeser testified that Camden admitted that she had been speeding, but that she informed him that she had been "attempting to get away from a vehicle." Trooper Breeser testified that Camden was unable to provide him with a description or any details of the vehicle. Trooper Breeser issued Camden a citation for exceeding the posted speed limit.

¶3 At trial, Camden admitted that she was driving at approximately ninety miles per hour when she encountered Trooper Breeser. However, she testified that she was doing so because of another vehicle, which was traveling closely behind her. Camden testified that after leaving Prairie du Chien, she observed a vehicle traveling behind her, in close proximity to her vehicle. She testified that she put her turn signal on and started to pull over and the vehicle behind her did the same. Camden testified that she continued driving and turned on her turn signal at the next possible turn. She testified that she observed that the vehicle behind her "looked like [it was] going to turn also." Camden testified that when she sped up, the vehicle behind her sped up as well, and that she felt that she "need[ed] to get away" from the vehicle behind her.

¶4 The circuit court determined that Camden's speeding was legally justified under the circumstances and dismissed the traffic citation. The State appeals.

DISCUSSION

¶5 The State contends that the circuit court erred in applying the legal justification defense in this case. Whether undisputed facts give rise to a legal defense is a question of law that this court reviews de novo. *See* ***Bantz v. Montgomery Estates, Inc.***, 163 Wis. 2d 973, 978, 473 N.W.2d 506 (Ct. App. 1991) (whether facts fulfill a particular legal standard is a question of law).

¶6 In ***State v. Brown***, 107 Wis. 2d 44, 55, 318 N.W.2d 370 (1982), the supreme court recognized, as a matter of public policy, necessity, or "legal justification," as an available defense to a speeding charge when the violation of the speeding law was caused by the actions of a law enforcement officer. The court explained that the defense was available in that situation because the defendant's conduct, although illegal, was "justified because it preserve[d] or ha[d] a tendency to preserve some greater social value at the expense of a lesser one in a situation where both [could not] be preserved." ***Id.*** at 53. The court stated, however: "We need not and we do not decide whether a defense of legal justification is available to the defendant in a civil forfeiture action for speeding if the causative force is someone or something other than a law enforcement officer." ***Id.*** at 56.

¶7 In Wisconsin, the supreme court is the law-developing, or policy making court. *See* ***State v. Schumacher***, 144 Wis. 2d 388, 405-07, 424 N.W.2d 672 (1988). The court of appeals, in contrast, is mainly an error correcting court. ***Id.*** Although this court has a role in developing the law as it exists, it cannot

declare new law. ***Id.*** Instead, "[W]e are duty-bound to apply the law as it presently exists." ***Thomas ex rel. Gramling v. Mallett***, 2004 WI App 131, ¶20, 275 Wis. 2d 377, 685 N.W.2d 791, *aff'd in part and rev'd in part on other grounds*, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523.

¶8 Extending the "legal justification" defense established in ***Brown*** to include causes other than law enforcement officers would be incompatible with the error-correcting function of this court. Accordingly, because the supreme court has not extended the defense of necessity to apply to civil forfeiture actions for speeding if the cause is someone or something other than a law enforcement officer, I conclude that the circuit court erred in determining that it applied in this case. The judgment of the circuit court is therefore reversed.[2]

By the Court.—Judgment reversed.

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

[2] Camden argues that the State has forfeited its argument that the legal justification defense is not available in this case because it failed to argue before the circuit court that the defense was not available. However, she acknowledges that the State argued that the facts of this case do not support the legal justification defense. A party's failure to properly or timely raise issues in the circuit court may result in the forfeiture of the opportunity to argue those issues on appeal. However, this court may, at its discretion, consider arguments raised for the first time when the issue is solely a question of law and is not dependent upon further fact-finding to resolve the issue. *See* ***Helgeland v. Wisconsin Municipalities***, 2006 WI App 216, ¶9 n.9, 296 Wis. 2d 880, 724 N.W.2d 208; ***Estate of Hegarty ex rel. Hegarty v. Beauchaine***, 2001 WI App 300, ¶¶11-12, 249 Wis. 2d 142, 638 N.W.2d 355.