COURT OF APPEALS
DECISION
DATED AND FILED

October 31, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP850 **Cir. Ct. No. 2007TR1162**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY M. MEILAHN,

DEFENDANT-APPELLANT.

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

¶1 SNYDER, J.[1] Jeffrey M. Meilahn appeals from an order adjudicating him guilty of driving thirty-six miles per hour over the posted speed limit. He contends the circuit court erred when it rejected his defense of necessity; specifically, he argues that the court improperly relied on an irrelevant fact in reaching its decision. Because the necessity defense is not available to Meilahn, we affirm the order of the circuit court.

¶2 The case stems from an incident that occurred on U.S. Hwy. 41 in Fond du Lac county on January 19, 2007. State Trooper Scott Hlinak observed a vehicle traveling at an excessive speed. Using his radar device, Hlinak clocked the vehicle at a speed of one hundred one miles per hour in a sixty-five mile per hour zone. Hlinak stopped the vehicle and approached from the passenger side. The driver, later identified as Meilahn, told Hlinak that his passenger was having an insulin reaction and was in some distress. Hlinak observed the passenger attempting to get out of the vehicle and described the passenger's "reduced abilities" as "consistent with someone having [an] insulin problem or insulin reaction." Hlinak offered to call an ambulance but Meilahn refused, stating that he did not want to have to pay for an ambulance.

¶3 Hlinak told Meilahn that he would follow them and to drive at normal speed to St. Agnes Hospital. When they arrived at the hospital, the passenger appeared to be better and stated that he did not want to be seen by a

[1] 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 indicated.

doctor. At that point, Hlinak issued Meilahn a citation for exceeding the posted speed limit.

¶4 At trial, Meilahn testified that he knew his passenger was diabetic and recognized the symptoms of an insulin reaction. He believed that without treatment, his passenger might die. The passenger testified that in the time between the traffic stop and his arrival at the hospital, he had eaten a bit of food and that had resolved the insulin reaction.

¶5 At the close of the evidence, Meilahn argued the defense of necessity, stating that he had to choose between two evils, either delay treatment for his friend or exceed the legal speed limit. He chose to speed. The court rejected the defense and summed up its ruling as follows:

> [M]y sense from [the passenger] is that he appreciated that he needed to do something and he ultimately did, which is he ate some pizza. He never expressed to the driver this is critical, I'm in trouble … I need to get to the hospital, I need medical attention. I never heard any of that testimony. Mr. Meilahn, as best I can tell, was concerned, and I think rightly so, but I'm not convinced that he needed to speed to get to the hospital to obviate the situation; and the food, as opposed to timing, is what solved this issue; and I think that negates the necessity defense.

¶6 Meilahn appeals, focusing primarily on the circuit court's reference to the fact that the food ultimately resolved the issue. He contends that the court should not have considered events that took place after the speeding offense occurred. This is an evidentiary ruling and, as such, is within the trial court's discretion. ***State v. Fishnick***, 127 Wis. 2d 247, 257, 378 N.W.2d 272 (1985). However, we look to see if a discretionary decision is based on a proper application of the law. ***State v. Halverson***, 130 Wis. 2d 300, 303, 387 N.W.2d 124 (Ct. App. 1986).

¶7 Meilahn directs us to ***State v. Brown***, 107 Wis. 2d 44, 55, 318 N.W.2d 370 (1982), where our supreme court recognized necessity, or "legal justification," as a defense to a speeding charge. The court held that the defense is available in certain civil forfeiture actions and explained that the basis for such a defense is that the "conduct is justified because it preserves or has a tendency to preserve some greater social value at the expense of a lesser one in a situation where both cannot be preserved." ***Id.*** at 53 (citation omitted). However, the ***Brown*** court limited its holding as follows: "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. The key distinction, which is fatal to Meilahn's analogy, is that Brown's speeding violation was "caused by the state itself through the actions of a law enforcement officer," and Meilahn's was not. *See* ***id.*** at 55-56.

¶8 Meilahn's argument would require us, as a matter of public policy, to extend the defense established in ***Brown*** to include causes other than law enforcement officers. In Wisconsin, the supreme court is the law-developing or policy-making court. ***State v. Schumacher***, 144 Wis. 2d 388, 407, 424 N.W.2d 672 (1988). The court of appeals is charged with error correcting in individual cases. ***Id.*** In ***Brown***, the concurrence reasoned that the defense of necessity should not be extended "beyond conduct provoked by law enforcement personnel." ***Brown***, 107 Wis. 2d at 57 (Callow, J., concurring). We conclude that

it would be incompatible with our error-correcting function to extend ***Brown*** in the face of an indication from the supreme court that it not be.[2]

¶9 We conclude that the defense of necessity has not been extended to civil forfeiture actions for speeding if the cause is someone or something other than a law enforcement officer. *See* ***Brown***, 107 Wis. 2d at 56. Accordingly, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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

[2] Even if the necessity defense was available to Meilahn, his evidence would fall short. There are four elements of the necessity defense: (1) The defendant acted under pressure from natural forces; (2) the defendant's act was necessary to prevent imminent public disaster, or death, or great bodily harm; (3) the defendant had no alternative means of preventing the harm; and (4) the defendant's beliefs were reasonable. *See* ***State v. Anthuber***, 201 Wis. 2d 512, 518, 549 N.W.2d 477 (Ct. App. 1996). Meilahn did have an alternative means of preventing harm to his passenger; specifically, he could have called an ambulance rather than speeding at over one hundred miles per hour on the highway.