COURT OF APPEALS
DECISION
DATED AND FILED

June 26, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2655-CR **Cir. Ct. No. 2006CM144**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS J. BRAVICK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Columbia County: DANIEL S. GEORGE, Judge. *Affirmed*.

¶1 VERGERONT, J.[1] Dennis Bravick appeals the circuit court's order revoking the deferred prosecution agreement and the resulting adjudication of guilt and sentence for misdemeanor bail jumping contrary to WIS. STAT. § 946.49(1)(a).

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

We conclude the circuit court did not err in revoking the deferred prosecution agreement and we therefore affirm.

BACKGROUND

¶2 The criminal complaint in this action charged that Bravick failed to comply with a condition of his bond in another case, in which he was charged with four counts of invasion of privacy. The invasion of privacy criminal complaint alleged that Bravick, a middle school physical education teacher, entered the girls' locker room while girls were changing clothes. The bond condition he was charged with violating in this case was not going on the premises of any Poynette School District property.

¶3 In this case, Bravick and the prosecutor entered into a plea agreement whereby Bravick pleaded no contest to misdemeanor bail jumping and entered into a deferred prosecution agreement. Under the terms of this agreement, the prosecution of the charge would be deferred for twenty-four months provided Bravick complied with the conditions of the agreement. If he breached any term of the agreement during that time, the prosecutor could move to set aside the agreement and, if the court vacated it, he could be sentenced on the charge; if he fully complied with the agreement during that time, this case would be dismissed with prejudice. At the same hearing at which the court accepted Bravick's plea in this case and approved the deferred prosecution agreement, the court, at the prosecutor's request and with the defense's concurrence, dismissed the invasion of privacy case.[2]

[2] At the sentencing in this case, the parties agreed that this dismissal would be with prejudice.

¶4 The prosecutor subsequently moved to revoke the deferred prosecution because of Bravick's breach of the following condition:[3]

> You agree that you will not initiate contact of any kind with any of the complaining witnesses or alleged victims in Columbia County Case No. 2005CM000227 including all those who were named on the State's Witness list filed on September 6, 2005 and those named in the matter of a dispute between the Poynette School District and the Poynette Education Association, WERC No. MA-13090, No. 65026 Case No. 16. A copy of the State's witness list, in 2005CM000227, is attached hereto and incorporated herein by reference. Your mere presence in a public place, other than Poynette School District property, where a complaining witness is present does not, in an [sic] of itself, constitute initiation of contact. This provision does not prohibit you from attending the church of your choice nor does it limit your attorney's ability to contact said witnesses unless such contact is directed by you solely for the purpose of harassing or intimidating the person contacted.

¶5 The prosecutor asserted that Bravick violated this condition when he responded to a letter to the editor, published in *The Poynette Press*, by the mother of one of the girls who had been in the shower room. After an evidentiary hearing, the court made the following findings of fact. The mother's name, Kris Anderson, was on the list of witnesses attached to the deferred prosecution agreement. Her letter defended the students who were involved as witnesses in the prosecution of the invasion of privacy charges. Bravick's letter to the editor was published in *The Poynette Press* one week later. His letter was a direct response to Anderson's letter and "focused directly to her attention," as demonstrated by the following portions of his letter:

[3] The prosecutor also moved to revoke on a different ground, but the court did not determine whether there was a violation of that other condition, and it is not relevant to this appeal.

> Mrs. Anderson, you were there and witnessed your daughter say "Well, I'd been in the water, and then you go out, and you kind of feel dizzy so I didn't know if I did or not."
>
> Countless times during the arbitration hearing your daughter claims she does not know what she saw.
>
> Mrs. Anderson, you daughter claims to have seen me past the shower area a clear 10 feet past the shower wall.
>
> The same thing your daughter claims to have heard when she looked. How did I walk 5-6 feet past these three students in the showers so your daughter could claim to see me with blurred vision because she was dizzy?
>
> Several of the students in your daughter's class knew their name was on this list that was destroyed by George Kintzer, the trained professional.
>
> If you are looking for bravery then ask your daughter to tell the truth.

¶6 The court found not credible Bravick's testimony that he intended to communicate with the general public and did not know Anderson would read his letter. The court reasoned that this testimony was inconsistent with the content of his letter and its timing—one week after her letter. The court determined that "the only logical conclusion is that his letter would be practically certain to be seen by Ms. Anderson" and that his letter "addresses Ms. Anderson personally and confronts her in a very direct manner." The court found that Bravick's conduct was a flagrant violation of both the specific terms and the "spirit of the … agreement." The court concluded there was "clear, satisfactory, and convincing evidence that [Bravick] has committed a material violation of the agreement by having prohibited contact with Ms. Anderson through the writing of [his] letter …," and it ordered the agreement revoked.

¶7 The court withheld sentence and placed Bravick on probation for one year.

DISCUSSION

¶8 On appeal, Bravick argues that the court erred in deciding he breached the deferred prosecution agreement because: (1) the court's finding that "it was practically certain that his letter would be seen by Anderson" is not sufficient to constitute contact, and (2) he did not initiate the contact.

¶9 The historic facts surrounding the alleged breach of a deferred prosecution agreement are found by the circuit court sitting as fact finder, and on review we accept them unless they are clearly erroneous. *See* ***State v. Naydihor***, 2004 WI 43, ¶11, 270 Wis. 2d 585, 678 N.W.2d 220. In making factual determinations, it is the circuit court's role as fact finder to decide whether to believe a witness's testimony, or parts thereof. *See* ***Nabbefeld v. State***, 83 Wis. 2d 515, 529, 266 N.W.2d 292 (1978) (addressing a jury's option to believe only part of a witness's testimony). When more than one reasonable inference may be drawn from the evidence, we accept the inference drawn by the fact finder. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. We also assume the circuit court implicitly made those findings that are necessary to its decision, even if they are not expressly stated, and we accept those implicit findings if they are supported by the evidence. ***Avon v. Town of Oliver***, 2002 WI App 97, ¶23, 253 Wis. 2d 647, 644 N.W.2d 260.

¶10 Whether the conduct as found by the circuit court constitutes a breach of the deferred prosecution agreement is a question of law, which we review de novo. *See* ***Naydihor***, 270 Wis. 2d 585 at ¶11.

¶11 Bravick asserts that the State must prove a "material and substantial breach" of the deferred prosecution agreement, citing ***Naydihor***, ***id.***, and that the State must do so by clear and convincing evidence, citing ***State v. Jorgensen***, 137

Wis. 2d 163, 167-68, 404 N.W.2d 66 (Ct. App. 1987). This is the standard the circuit court applied. Both ***Naydihor*** and ***Jorgensen*** concern an alleged breach of a plea agreement, not a deferred prosecution agreement. The State does not respond to Bravick's assertion that they provide the applicable standard for what the State must prove in this case. We therefore treat this as a concession that Bravick is correct. *See* ***Charolais Breeding Ranches v. FPC Securities***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶12 Bravick does not argue that "contact" may not be a written communication. Instead, he contrasts the court's finding that "it was practically certain that his letter would be seen by Ms. Anderson" with a hypothetical situation in which Bravick or someone at his direction delivered the letter to her, suggesting that this hypothetical situation *would* constitute contact. As we understand Bravick's argument, unless he or someone at his direction made *certain* she saw the letter, no contact occurred; and there is no evidence he or someone at his direction made certain she saw his letter in the paper.

¶13 It appears that Bravick is confusing the meaning of "contact" with the question whether contact was intended by Bravick. Because Bravick does not argue that a written communication is not a "contact" within the meaning of this deferred prosecution agreement, we assume without deciding that it may be; and there is no dispute that Anderson did read his letter in the newspaper. We agree with Bravick's implicit premise that Bravick must have intended contact with Anderson by written communication. The court found that he did. Therefore the pertinent inquiry is whether that finding is clearly erroneous. *See* ***Naydihor***, 270 Wis. 2d 585, ¶11. We conclude it is not.

¶14 The court's finding that Bravick's letter, though nominally addressed to the editor and published in the paper, is in content a direct and personal communication from Bravick to Anderson is supported by the content of Bravick's letter. This is one of the factual bases for the court's ultimate finding that Bravick intended to communicate with Anderson by means of the publication of his letter in the newspaper. Another basis is the court's finding that "it was practically certain that his letter would be seen by Ms. Anderson." This finding is supported by the evidence because it is reasonable to infer that Anderson read this newspaper and would be reading it soon after her letter was published in it. It is also reasonable to infer that Bravick knew this and thus knew that it was "practically certain" that she would read it. The content of his letter, together with the "practical certainty" that she would read it if it was published in the paper soon after hers was published, provide an adequate factual basis for the court's finding that Bravick intended to communicate with her by means of this letter.

¶15 Bravick also contends that he did not initiate the contact with Anderson because she wrote the first letter and he was only responding to "clarify the record with the facts." Bravick's argument on this point implicates the proper construction of the contract term that Bravick "not initiate contact." Whether his proposed construction is at least a reasonable one presents a question of law. *See* ***Kohler Co. v. Wixon***, 204 Wis. 2d 327, 335, 555 N.W.2d 640 (Ct. App. 1996) (whether contract term is reasonably susceptible to more than one construction is a question of law). We conclude his proposed construction is unreasonable as a matter of law. When the contact is in-person contact, there is an obvious unfairness to Bravick if he is considered to violate the no-contact provision simply because one of the persons identified in the attachment to the agreement approaches him in person. There is nothing he can do in that situation to avoid

contact. The insertion of the word "initiate" prevents that unfairness. However, when a person who is identified in the attachment to the agreement writes a letter concerning Bravick that is published in the newspaper, there is no need for him to respond as he did to Anderson's letter. Thus, he can easily avoid contact with that person. It is unreasonable to read the agreement as intending to permit Bravick to respond as he did to Anderson's letter simply because she wrote to the newspaper first.

¶16 Accepting the circuit court's assessment of Bravick's credibility, which finds support in the record, and accepting the court's other findings, we conclude there was clear and convincing evidence of a material and substantial breach of the deferred prosecution agreement. We do not agree with Bravick that this was a minimal breach, if any, that does not warrant revocation. Anderson was on the list of witnesses attached to the agreement. The evident purpose of the no-contact provision and the limitations on places Bravick could go was to prevent him from bothering the people whom he perceived to be against him or who were against him in the matters arising out of the shower incident. The letter he wrote was published in the paper and did, as the court found, "address[] Ms. Anderson personally and confront[] her in a very direct manner."

By the Court.—Order affirmed.

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