COURT OF APPEALS
DECISION
DATED AND FILED

January 10, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP3100 **Cir. Ct. No. 2010TR2876**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICIA LEE HEUPHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oneida County: PATRICK F. O'MELIA, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Patricia Heupher, pro se, appeals a judgment of conviction for speeding. She asserts the circuit court erred by failing to take

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

judicial notice of her legal justification defense and by refusing to grant her motion to amend her citation to a warning. She also asks us to determine that ***State v. Brown***, 107 Wis. 2d 44, 318 N.W.2d 370 (1982), renders WIS. STAT. ch. 345 unconstitutional. We affirm.

BACKGROUND

¶2 On July 25, 2010, Heupher was issued a speeding citation after officer Kristen Kempen clocked her traveling sixty-nine miles per hour in a fifty-five-miles-per-hour zone. Heupher pled not guilty and a court trial was scheduled. On the week of trial, Heupher filed a motion to amend the citation to a warning, arguing she "momentarily accelerated to restore the safe distance between" her vehicle and the vehicle behind her. She also contended the "patrol-car radar actually registered the definitely higher speed of the larger vehicle rapidly closing in on my car."

¶3 Prior to trial, the State objected to her motion, arguing it was in essence a motion for summary judgment and summary judgment motions are not permitted in traffic forfeiture cases. The State also contended Heupher's factual assertions were trial issues. The court agreed and the case proceeded to a court trial.

¶4 At trial, Kempen testified that, while traveling southbound on Highway 51, she was running moving radar on the northbound lane of traffic. She clocked Heupher's vehicle traveling sixty-nine miles per hour in a fifty-five-miles-per-hour zone, and made a traffic stop.

¶5 Additionally, Kempen explained that her radar "sees" for 2,500 feet and that Heupher's vehicle was the only vehicle within the radar's range. Kempen

testified that "there definitely wasn't [a vehicle] in front" of Heupher and any vehicle behind Heupher would have been "way behind her."

¶6 Heupher testified traffic was heavy and was "not exactly bumper to bumper, but we were very close." She testified that as Kempen's squad car approached, "all the cars suddenly dropped speed." The vehicle behind her was not slowing down so Heupher accelerated to prevent a rear-end collision.

¶7 The court found Heupher guilty of speeding. In reaching its determination, the court reasoned, in part, that it did not believe "there was an emergency that's been described here that would cause you to increase your speed."

DISCUSSION

¶8 On appeal, Heupher asserts the court erred by failing to accept her defense to the speeding allegation and by failing to grant her motion to amend. She also contends ***Brown***, 107 Wis. 2d 44, renders WIS. STAT. ch. 345 unconstitutional.[2]

¶9 Heupher first argues "the court did err in failing to take judicial notice of [her] legal justification defense plea." In support of this argument, she seems to contend the court was required to take judicial notice of her defense because, similar to ***Brown***, 107 Wis. 2d 44, the State caused her to speed. She also asserts the State's evidence was insufficient to overcome her defense.

[2] As a whole, Heupher's arguments are inconsistent, difficult to follow, and undeveloped. Any argument that we do not specifically address is denied because it is inadequately briefed and lacks any discernable merit. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (We need not consider inadequately developed arguments.).

¶10 Heupher, however, cites no legal authority for the proposition that the circuit court was required to take judicial notice of her legal justification defense. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (We need not consider undeveloped arguments.). Nevertheless, even on the merits, we observe that a judicially noticed fact "must be one not subject to reasonable dispute" and must be either "[a] fact generally known within the territorial jurisdiction of the trial court" or "[a] fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." WIS. STAT. § 902.01(2). Heupher's allegation that she was almost in an accident was disputed by Kempen's testimony that no other cars were near her. It cannot be a judicially noticed fact.

¶11 There is also no evidence of police misconduct so as to invoke the "legal justification defense" as outlined in ***Brown***. In ***Brown***, 107 Wis. 2d at 47, a motorist was cited for speeding. At trial, the motorist claimed the officer caused him to speed. ***Id.*** at 46. Specifically, the motorist alleged the officer passed in front of him and slowed down to twenty-five to thirty miles under the speed limit. ***Id.*** at 46. When the motorist moved to the other lane to pass the officer, the officer alternatively sped up and slowed down several times, refusing to let the motorist back into the lane of traffic until the motorist was speeding. ***Id.*** at 46-47. Our supreme court held that, although speeding was a strict liability offense, a motorist "may claim the defense of legal justification if the conduct of a law enforcement officer causes the actor reasonably to believe that violating the law is the only means of preventing bodily harm to the actor or another and causes the actor to violate the law." ***Id.*** at 52, 55-56. Here, this defense is not available to Heupher because there is absolutely no evidence that Kempen, traveling in the southbound lane, somehow caused Heupher to speed in the northbound lane.

¶12 We also conclude the evidence sufficiently supports Heupher's speeding conviction. Kempen testified she clocked Heupher's vehicle traveling sixty-nine miles per hour in a posted fifty-five-miles-per-hour zone. Although Heupher testified she was speeding to prevent an accident, the court rejected this testimony. Factual findings and credibility determinations are for the circuit court. *See* WIS. STAT. § 805.17(2).

¶13 Heupher next argues "the court did err in granting [the State's] motion to quash and/or set aside defendant's motion to dismiss pretrial to be 'considered and determined relative to the outcome of the trial.'" From what we can discern, it appears she is asserting that the circuit court erred by failing to grant her motion to amend the citation to a warning and this ruling somehow precluded her from presenting her defense.

¶14 The court did not err by failing to grant her motion to amend the citation. First, her motion contained no legal authority in support of her argument. It only included factual allegations explaining why she believed she deserved a warning. Factual disputes need to be resolved at trial. *See* ***State v. Owen***, 202 Wis. 2d 620, 630, 551 N.W.2d 50 (Ct. App. 1996). Moreover, as the State argued at trial, her motion was essentially a motion for summary judgment, which procedurally is unavailable in traffic forfeiture cases. *See* ***State v. Schneck***, 2002 WI App 239, ¶16, 257 Wis. 2d 704, 652 N.W.2d 434 (Summary judgment procedure is inconsistent with, and unworkable in, traffic forfeiture proceeding.). Furthermore, the court did not prohibit her from presenting any defense. Heupher testified she was speeding to avoid an accident.

¶15 Finally, Heupher contends the "subjective test procedure under ***State v. Brown*** renders [WIS. STAT.] chapter 345 procedure for processing traffic cases

affirmatively defended for police misconduct unconstitutional." Her argument in support of this assertion is confusing and undeveloped. She does not explain why ***Brown*** renders ch. 345 unconstitutional. *See* ***Pettit***, 171 Wis. 2d at 646-47. Rather, she asks us to "overrule" ***Brown*** because, from what we can discern, she objects to the limitation the ***Brown*** court placed on the legal justification defense.[3] We cannot overrule the supreme court. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

¶16 Also within this argument, she asks us to forego the "subjective test" and adopt the "objective test." The court's decision in ***Brown***, however, was based on public policy—not a subjective or objective test. *See* ***Brown***, 107 Wis. 2d at 54-56. It is unclear to which subjective test Heupher refers. Based on her discussion of the entrapment defense, we believe she objects to our supreme court's adoption, in an unrelated case, of the subjective "origin of intent" doctrine rather than the objective test for the entrapment defense. *See* ***State v. Saternus***, 127 Wis. 2d 460, 469-70, 381 N.W.2d 290 (1986). Entrapment, however, has never been an issue in this case and we will not address it. *See* ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶10, 261 Wis. 2d 769, 661 N.W.2d 476 (We need not consider arguments raised for the first time on appeal.). We will also not overrule the supreme court. *See* ***Cook***, 208 Wis. 2d at 189-90.

[3] The court in ***State v. Brown***, 107 Wis. 2d 44, 56, 318 N.W.2d 370 (1982), emphasized that it decided "only that a defendant in a civil forfeiture action for speeding may claim that his violation of the law should be excused if it was *caused by the state itself* through the actions of a law enforcement officer." (Emphasis added.)

By the Court.—Judgment affirmed.

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