COURT OF APPEALS
DECISION
DATED AND FILED

April 29, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1386 **Cir. Ct. No. 2013CV2717**

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

CITY OF WAUKESHA,

PLAINTIFF-RESPONDENT,

V.

ROBERT J. BOEHNEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] This case requires us to decide whether the City of Waukesha acted within the bounds of the law when it instituted a policy of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2013-14). All references to Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

charging only bar owners when their bartenders serve underage drinkers. The impetus for the case was a sting operation that the City conducted in a bar Robert Boehnen owns. The governing law makes it illegal for a person who holds a liquor license or one of his or her employees to serve alcohol to anyone not of legal age. *See* WAUKESHA, WIS., MUN. CODE § 9.16(2) (2000). Boehnen argues that he did not violate the law because he lacked the scienter of serving an underage drinker. He also argues that the City's policy of only charging bar owners is discriminatory and, therefore, unconstitutional. We see no merit in either of these arguments. This is a strict liability crime that does not require scienter. Furthermore, Boehnen has clearly failed to show that bar owners are being singled out for prosecution among similarly situated individuals. Affirmed.

Background

¶2 Robert Boehnen owns Fox Run Lanes and holds a license to sell alcohol in that establishment. One of the bartenders he employs sold a beer to an underage volunteer participating in a sting operation conducted by the Waukesha police. Boehnen was not present at the time of this sale. However, the police cited Boehnen, and not the bartender, for serving the underage person under WAUKESHA, WIS., MUN. CODE § 9.16(2). The City has a policy of always citing the business owner, as opposed to his or her employees, when enforcing this law.

¶3 Boehnen challenged his citation in municipal court. After those proceedings, the circuit court conducted a de novo trial. The circuit court found Boehnen guilty and ordered him to pay a fine. Boehnen appeals.

Analysis

¶4 As we have stated, Boehnen advances two arguments on his appeal. First, he claims that his due process rights were violated because the City did not prove scienter, which he argues is an element of the violation, and the circuit court wrongly found vicarious liability as a result. Second, he claims an equal protection violation arising from the City's policy of selectively prosecuting bar owners in all instances like this one. We will address each argument in turn.

¶5 His first issue, claiming that scienter must be an element of the ordinance as a matter of due process, is a constitutional question that we review de novo. ***Northwest Props. v. Outagamie Cnty.***, 223 Wis. 2d 483, 487, 589 N.W.2d 683 (Ct. App. 1952). We presume that ordinances are constitutional. ***Id.*** The party challenging the ordinance must prove it unconstitutional beyond a reasonable doubt. ***Id.***

¶6 Boehnen relies primarily on ***Morissette v. United States***, 342 U.S. 246 (1956), to make his argument. In ***Morissette***, the appellant was convicted under a federal statute of "knowingly" stealing and converting government property, but the trial court did not require the prosecutor to prove intent as an element of the crime. ***Id.*** at 248-50. The United States Supreme Court reversed, holding that even if a statute contains no explicit mention of intent it may still be an element of the crime. *See* ***id.*** at 263. Because the statute at issue in ***Morissette*** outlawed "knowingly" stealing and converting government property, the Court held that the legislature required the prosecutor to prove intent. ***Id.*** at 270-71. However, the Court also held that if the word "knowingly" had not been present, the defendant could have been found guilty of the crime regardless of his mental state. ***Id.*** Boehnen argues that the ordinance at issue here unconstitutionally

imputes vicarious liability by not requiring the prosecutor to prove his intent to break the law. But he misunderstands the holding in ***Morissette***. First, ***Morissette*** discusses a federal statute. Therefore, the principles in that case are not necessarily transferable to the ordinance at issue here. Also, ***Morissette*** does not require that prosecutors prove intent for every offense, all of the time. Strict liability offenses do still exist and are appropriate in certain instances. *See* ***State v. Hermann***, 164 Wis. 2d 269, 276, 280-81, 474 N.W.2d 906 (Ct. App. 1991) (citation omitted) (prosecutor did not need to show that the defendant knew he was near a school when violating a statute prohibiting drug sales within a 1000-foot radius). Whether a law imposes strict liability depends on legislative intent, meaning we must evaluate the statute's language, purpose, and practical requirements for effective law enforcement. *See* ***id.*** at 276-77.

¶7 The law is quite clear on this matter. In ***State v. Beaudry***, 123 Wis. 2d 40, 365 N.W.2d 593 (1985), our supreme court deliberated whether a bar owner could be held vicariously liable for the illegal actions of an employee. ***Id.*** at 47-48. The court acknowledged a long history of strict liability offenses for persons that violate a statute regarding the illegal sale of alcohol which contains no language about scienter. ***Id.*** at 49. The legislature imposes strict liability in such instances because "protection of the public interest warrants the imposition of liability unhindered by examination of the subjective intent of each accused." ***Id.*** The theory of vicarious liability does not require that the charged person commit an illegal act, but rather it transfers liability from an employee to his or her employer. ***Id.*** at 50. We must look at the language of the statute itself to determine whether it imposes vicarious liability. ***Id.*** Because the ordinance at issue adopts a state statute verbatim, the principles we have discussed form a basis for our analysis.

¶8 The City charged Boehnen under WAUKESHA, WIS., MUN. CODE § 9.16(2), which states: "No licensee or permittee may sell, vend, deal or traffic in alcoholic beverages to or with any underage person not accompanied by his or her parent, guardian or spouse who has attained the legal drinking age." The ordinance is clearly different from the statute in ***Morissette***. Here, the ordinance contains no language even hinting about scienter, and it clearly imposes strict liability on any offender, regardless of mental state. Therefore, Boehnen's scienter, or lack thereof, is irrelevant, as a specific mental state is not required for the court to find him guilty. Furthermore, the law contemplates liability for either the person holding the liquor license or one of his or her employees. This language indicates that the ordinance considers both bar owners and their employees as potential violators. While the ordinance does not explicitly say bar owners are liable for the actions of their employees, we see nothing to indicate that an employer should be insulated from the illegal conduct of his or her staff in situations like this one. Therefore, we hold that the circuit court properly imputed vicarious liability to Boehnen for the actions of his bartender.

¶9 We now turn to Boehnen's second argument—that the City acted unconstitutionally by selectively singling out bar owners, and only bar owners, for prosecution even if it was an employee who served the minor. Boehnen has the initial burden of establishing a prima facie case of selective prosecution. ***State v. Kramer***, 2001 WI 132, ¶15, 248 Wis. 2d 1009, 637 N.W.2d 35. We review the circuit court's decision with regard to whether Boehnen established a prima facie case for clear error. ***Id.***, ¶17. According to our supreme court,

> To establish a prima facie showing on a selective prosecution claim, a defendant must show that the prosecution had a discriminatory effect and that it was motivated by a discriminatory purpose. That is, a defendant must show that he or she has been singled out for

> prosecution while others similarly situated have not (discriminatory effect) and that the prosecutor's discriminatory selection was based on an impermissible consideration such as race, religion or another arbitrary classification (discriminatory purpose).

Id., ¶18 (citation omitted). Boehnen clearly has failed to show us why he and other bar owners are singled out for prosecution while others similarly situated are not. The bartenders are not similarly situated. They work for the bar owners. The ultimate responsibility to make sure that the law is being followed must rest with the owners—they make the rules, hire and fire, and set bar policy. Boehnen has not established a prima facie case of selective prosecution. We affirm.

By the Court.—Judgment affirmed.

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