COURT OF APPEALS
DECISION
DATED AND FILED

October 16, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 97-0891 and 97-0892

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

CITY OF MONROE,

PLAINTIFF-RESPONDENT,

v.

STEVEN L. FURGASON,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Green County: JAMES R. BEER, Judge. *Affirmed.*

ROGGENSACK, J.[1] Steven L. Furgason appeals his convictions in consolidated cases for operating a motor vehicle while under the influence (OMVWI) and with a prohibited alcohol concentration (PAC). Furgason contends the circuit court erred when it denied his motion to suppress evidence on the

[1] This opinion is decided by one judge pursuant to § 751.31(2)(c), STATS.

grounds that the muffler ordinance pursuant to which he was stopped was unconstitutionally vague, rendering the stop unlawful. However, because the ordinance at issue was sufficient to put Furgason on notice that his muffler was out of compliance, and because the arresting officer made the determination that a muffler violation had occurred based on objective standards suggested by the ordinance, no due process violation occurred. Accordingly, the judgments are affirmed.

BACKGROUND

On the evening of October 21, 1996, at approximately 9:10 p.m., City of Monroe Police Officer John Augsburger heard the load roar of a motorcycle when it was more than two blocks away. After investigating, Augsburger determined the source of the noise was Furgason's motorcycle, and he pulled him over to issue a citation for a muffler violation.

Augsburger immediately detected the odor of alcohol on Furgason's breath, and inquired whether he had been drinking. Furgason admitted to having had two drinks and agreed to perform field sobriety tests. Augsburger administered the horizontal gaze nystagmus, the walk-and-turn, the one-leg stand and the counting backwards tests. Furgason failed all of them. Meanwhile, Officer Sean Dunphy arrived at the scene of the stop and told Augsburger that he had observed Furgason traveling the wrong way on a one-way street. Augsburger then administered a preliminary breath test (PBT), which Furgason also failed. Thereafter, Augsburger arrested him for OMVWI. After a chemical alcohol test showed that Furgason had 0.189 grams of alcohol per 100 milliliters of blood, Furgason was cited, and eventually charged with both OMVWI and PAC violations, contrary to § 346.63(1)(a) and (b), STATS.

On appeal, Furgason does not challenge the sufficiency of the evidence gathered by Augsburger to support probable cause for the arrest. Rather, he claims that the muffler ordinance is unconstitutionally vague, thereby invalidating the stop. The ordinance in question is contained in Monroe City Code § 10-2-1, which is based on § 347.39(1), STATS. It provides:

> No person shall operate on a highway any motor vehicle subject to registration unless such motor vehicle is equipped with an adequate muffler in constant operation and properly maintained to prevent any excessive or unusual noise or annoying smoke. This subsection also applies to motor bicycles.

The circuit court rejected Furgason's constitutional challenge to the ordinance at the suppression hearing, after Augsburger and Dunphy each testified that they had heard Furgason's motorcycle from several blocks away. They also testified that any exhaust system which could be heard one block away violated the ordinance. The matter was then tried to the court on February 5, 1997, on stipulated facts, and the court adjudged Ferguson guilty of OMVWI and PAC, suspended his license for six months, imposed forfeitures and costs in the amount of $626.50 and ordered him to obtain an alcohol assessment.

DISCUSSION

Standard of Review.

The constitutionality of an ordinance is a question of law which this court reviews *de novo*. ***Wilke v. City of Appleton***, 197 Wis.2d 717, 726, 541 N.W.2d 198, 201 (Ct. App. 1995). The challenger of the ordinance must overcome a presumption that it is constitutional, and has the burden of showing beyond a reasonable doubt that the ordinance is unconstitutional. ***Id.***

Vagueness.

Furgason claims the Monroe ordinance is unconstitutionally vague. A law which is vague offends due process, as guaranteed by the United States and Wisconsin constitutions. ***State v. Courtney***, 74 Wis.2d 705, 709, 247 N.W.2d 714, 718 (1976). In order to survive a constitutional challenge for vagueness, a statute or ordinance must be "sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise judge and jury of standards for the determination of guilt." ***State v. Zwicker***, 41 Wis.2d 497, 507, 164 N.W.2d 512, 517 (1969). Thus, an ordinance will be held unconstitutionally vague if persons of ordinary intelligence must guess as to its meaning and differ as to its applicability. ***Id***. Reasonable notice does not require a particularized itemization of each act which would constitute a violation, however. ***City of Madison v. Baumann***, 162 Wis.2d 660, 677, 470 N.W.2d 296, 302 (1991) (***Baumann II***). Rather, a fair degree of definiteness is all that is required, especially in civil cases where the penalties are less severe than under the criminal code. ***City of Madison v. Baumann***, 155 Wis.2d 388, 407, 455 N.W.2d 647, 655 (Ct. App. 1990) (***Baumann I***) (Eich, C.J. dissenting) (cited with approval in ***Baumann II***). Moreover, when no First Amendment rights are involved:

> a defendant who challenges the enactment under which he was convicted on grounds of vagueness is limited to the conduct actually charged. Where that conduct is clearly within the prohibited zone, the defendant will not be heard to hypothesize other factual situations which might raise a question as to the applicability of the statute or regulation.

Courtney, 74 Wis.2d at 713, 247 N.W.2d at 719.

The United States Supreme Court has already determined that ordinances which prohibit loud noises on motor vehicles do not restrict the communication or discussion of ideas within the meaning of the First Amendment.

Kovacs v. Cooper, 336 U.S. 77, 87-88 (1949). Therefore, Furgason cannot raise a purely facial challenge to the muffler ordinance on vagueness grounds. ***Courtney***, 74 Wis.2d at 713, 247 N.W.2d at 719. Instead, this court will address in turn the dual concerns of the vagueness doctrine as applied to Furgason under the facts of this case. ***State v. Popanz***, 112 Wis.2d 166, 173, 332 N.W.2d 750, 754 (1983).

The first issue to consider is whether § 10-2-1 of the Monroe City Code was sufficiently definite to place Furgason on notice that operating his motorcycle with an exhaust system which could be heard two blocks away would subject him to civil penalties under the ordinance. Furgason maintains that the ordinance was not sufficiently definite because normally intelligent people could interpret the term "excessive or unusual noise" differently, depending upon the sensitivity of their hearing. However, the statute does not prohibit excessive noise in a vacuum. It prohibits the operation of vehicles with inadequate mufflers, using an excessive noise level as one indicator of a way in which a muffler might be inadequate. Thus, a noise would only be excessive or unusual compared to that produced by a properly working muffler, which presumably anyone who operates a motor vehicle on public roads has heard. *See* ***Wickstrom***, 118 Wis.2d at 352, 348 N.W.2d at 190 (noting that the meaning of common terms may be determined by common usage), and ***Baumann I***, 155 Wis.2d at 399-400, 455 N.W.2d at 651 (acknowledging that "[n]oise regulation poses special problems of draftsmanship and enforcement" making the use of "broadly stated definitions and prohibitions not only common but difficult to avoid"). Nor should it come as any surprise to the average citizen wishing to obey the law that traffic stops based on loud exhaust systems are to be expected. *See* ***State v. Pischke***, 198 Wis.2d 257, 262, 542 N.W.2d 202, 204 (Ct. App. 1995). Therefore, we conclude that a person of ordinary intelligence would be placed on notice by the ordinance to have an

adequate and properly maintained muffler so that his motorcycle could not be heard from two blocks away.

The second issue for consideration is whether the ordinance provided sufficient standards for law enforcement and judicial personnel to administer it against Furgason, keeping in mind that "[a] vague law impermissibly delegates policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." ***Grayned v. City of Rockford***, 408 U.S. 104, 108 (1972). In this case, two different police officers who had been patrolling independently of one another testified that Furgason's motorcycle could be heard from several blocks away. In fact, the arresting officer heard Furgason and took investigative action before he had even seen him. This, alone, makes the possibility that Furgason's traffic stop was arbitrary extremely remote. In addition, both officers testified that if exhaust noise is audible from more than one block away, it is a violation of the ordinance. Augsburger explained that he routinely pursues such violators. Thus, while determinations of what is "excessively loud" must necessarily be made within an officer's judgment on a case by case basis, *see* ***Baumann I***, 155 Wis.2d at 410, 455 N.W.2d at 656 (Eich, C.J., dissenting) (noting that law enforcement always requires the exercise of some degree of police judgment), standards for the enforcement of the ordinance do exist and were properly applied in this case.

In light of the decision that application of the muffler ordinance to Furgason did not violate his right to due process, this court need not address whether the arresting officer's good faith belief that the ordinance was constitutional would have been sufficient to sustain the legality of the traffic stop.

CONCLUSION

The Monroe ordinance which regulates the noise level of vehicles does not infringe on any First Amendment rights. Therefore, due process requires only that a reasonable motorist be on notice that his own exhaust noise would fall within the ordinance's gambit, and that appropriate standards were applied to make that determination. Furgason has not met his burden of proving beyond a reasonable doubt that the muffler ordinance was unconstitutionally vague as applied to him.

By the Court.—Judgments affirmed.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)4, STATS.