

**COURT OF APPEALS
DECISION
DATED AND FILED**

NOVEMBER 4, 1997

**Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin**

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-1742

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

TOWN OF GRAND CHUTE,

PLAINTIFF-RESPONDENT,

V.

MARK HARRY GABRIEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed.*

CANE, P.J. Mark H. Gabriel appeals the circuit court's judgment affirming his municipal court conviction for obstructing streets/sidewalks in violation of the TOWN OF GRAND CHUTE MUNICIPAL CODE § 7.05. He contends that when reviewing the municipal court proceedings, the circuit court erred by applying the clearly erroneous standard and by not concluding that his due process

rights were violated. Additionally, he argues that the ordinance is facially unconstitutional. This court rejects his arguments and affirms the judgment.

A police officer for the Town arrested Gabriel after employees of Planned Parenthood reported that he was standing at the clinic's driveway entrance, forcing vehicles to stop before entering the clinic and attempting to force pamphlets into the vehicles through open windows. The police had been called to the clinic twice that morning, the second time when Cynthia McFadden, a nurse employed at the clinic, filed a complaint. Gabriel informed the officers that he was protesting abortion. When asked for identification, Gabriel initially said that he had none and then gave a false name. Eventually, he gave his correct identification after the officers informed him that his truck was registered to a Mark H. Gabriel.

First, Gabriel contends the circuit court erred by applying the clearly erroneous standard of review. However, Gabriel appealed his municipal conviction to the circuit court without requesting a trial de novo. Thus, the circuit court's review, as well as this court's review, is limited under § 800.14(5), STATS., to an examination of the transcript of the hearing before the municipal court. *Village of Williams Bay v. Metzl*, 124 Wis.2d 356, 361, 369 N.W.2d 186, 189 (Ct. App. 1985). This review is analogous to appellate review of a trial to the court under § 805.17(2), STATS., and, therefore, findings of fact by the municipal court should not be set aside unless clearly erroneous and due regard should be given to the opportunity of the municipal court to judge the credibility of witnesses. *Id.* As an aside, a review of the transcript reveals sufficient evidence to support the conviction.

Next, Gabriel contends the circuit court erred by concluding that the Town had not violated his due process rights. He contends the municipal court denied him his right to call himself as a witness and frustrated his right to present his pro se defense. This contention is almost specious. The record shows that the municipal court correctly outlined the procedures for the trial and gave Gabriel every opportunity to testify, which Gabriel rejected and even indicated that if called to the stand, he would refuse to testify as his right under the Fifth Amendment. During closing arguments, Gabriel attempted to "testify" and the court properly reminded him that the closing arguments are to comment on the evidence, not to present new evidence. Even then, Gabriel did not attempt to reopen the trial for the admission of his testimony. Nor does the record reveal any acts by the prosecutor or the court to frustrate his presentation.

Finally, Gabriel challenges the constitutionality of the Town's ordinance, arguing that it is vague, overbroad and unreasonable. At the outset of the trial before the municipal court, however, Gabriel specifically indicated that he did not intend to challenge the constitutionality of the ordinance. In his appeal to the circuit court, he indicated that his appeal was limited to the evidence at the municipal court. He also stated, "Furthermore, I am purposely not challenging the Town of Grand Chute's ordinance under which I was arrested in this forum. This latter limitation is self-imposed due to my desire to reserve my rights under the Constitution of the United States for argument in a federal forum."

This court has repeatedly held that it will not consider an issue raised for the first time on appeal, especially a claim that a statute or ordinance is unconstitutional. See *Tomah-Mauston Broadcasting Co. v. Eklund*, 143 Wis.2d 648, 657-58, 422 N.W.2d 169, 173 (Ct. App. 1988). Although this court may exercise its own discretion to reach this issue, in view of Gabriel's repeated waiver

of this issue at the municipal and circuit court, this court declines to review the constitutionality of the ordinance. The conviction is therefore affirmed.

By the Court.—Judgment affirmed.

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

