COURT OF APPEALS
DECISION
DATED AND FILED

November 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0374

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

DAVID PENDER,

PLAINTIFF-APPELLANT,

V.

CITY OF APPLETON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County: JAMES T. BAYORGEON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. David Pender, pro se, appeals an order denying his request for a permanent injunction restraining the City of Appleton from entering upon his premises. He claims that: (1) the trial court failed to suppress illegally obtained evidence; (2) the city attorney could not litigate the matter because of a

conflict of interest; (3) the ordinance prohibiting storing items in trailers is unconstitutionally vague; and (4) it is unconstitutional to obtain special inspection warrants without probable cause. We reject Pender's contentions. The claimed illegally obtained evidence was not subject to the exclusionary rule and was, in any event, harmless. The city attorney had no conflict. Pender may not challenge the ordinance on vagueness grounds because it clearly proscribes his use of the trailer for storage. Finally, because no special inspection warrant was issued, the question whether one may be issued absent probable cause is not before us. Accordingly we affirm the court's order.

¶2 The City cited Pender for noncompliance with Appleton municipal code provisions in connection with several vehicles on his property, including a trailer used for storage.[1] The citation alleged that the vehicles constituted a nuisance. Pender was later served with an order to abate nuisance. James Walsh signed the order as interim director of the Appleton Department of Inspection; Walsh was also a deputy city attorney. The order gave Pender ten days to abate the nuisance or the City would enter the premises and remove the offending vehicles. In response to the order, Pender filed a complaint seeking an injunction to prevent the City from "entering upon [his] premises … and removing [his] personal property without due process."

¶3 The matter was ultimately tried to the court. Pender filed a motion in limine to suppress any testimony regarding a search warrant executed against his property in connection with another matter. The court denied the motion

[1] The other vehicles cited were an unregistered bus and an inoperable Jaguar (because of a flat tire). The unregistered bus was registered prior to trial and thus was not at issue. Pender claimed to have repaired or replaced the Jaguar's flat tire. Pender's appeal therefore focuses on the trailer.

without a hearing. Pender also raised the question of a conflict of interest on the city attorney's part, claiming that he was not "an impartial litigator" because Walsh had signed the order for abatement. The court denied the motion and proceeded to trial.

¶4 The trial court determined that the procedure afforded Pender under the ordinance comported with due process and found that City provided due process by complying with its ordinance. Pender does not challenge that conclusion. The court also found that Pender's trailer was used for storage. As a result, the court denied Pender's request for an injunction.

¶5 Pender initially appears to claim that the trial court should have held a suppression hearing and suppressed unlawfully seized evidence in this civil case.[2] For authority, he cites ***City of Milwaukee v. Cohen***, 57 Wis.2d 38, 203 N.W.2d 633 (1973). In ***Cohen***, the court rejected the city's argument that the exclusionary rule does not apply to civil ordinance violations. *See* ***id***. at 45-46, 203 N.W.2d at 636-37. We will assume for purposes of this argument, without deciding the issue, that under certain circumstances the exclusionary rule may apply to an action to enjoin a municipality from enforcing an ordinance. We conclude, however, that the exclusionary rule does not apply here and that, even if it does, the admission of the evidence was harmless.

¶6 The search warrant in question was obtained and executed by a federal agency, the Bureau of Alcohol, Tobacco and Firearms. Local police officers merely assisted. The United States Supreme Court has declined to extend

[2] For purposes of this argument only, we will assume that the evidence obtained from the search warrant was illegally obtained.

the exclusionary rule to a civil proceeding when a different sovereign illegally obtained evidence.[3] *See* ***United States v. Janis***, 428 U.S. 433, 453-54 (1976). It determined that "exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion." ***Id***. at 454. Because the claimed illegally obtained evidence resulted from another sovereign's search, we follow the ***Janis*** analysis and conclude that the exclusionary rule does not apply here.

¶7 We also determine that the admission of any illegally obtained evidence constitutes harmless error. The evidence resulting from the allegedly illegal search demonstrated that Pender's trailer had computer equipment stored in it. Pender conceded in argument before the trial court that he was using the trailer for storage. He said: "And I would like to also note that the trailer is considered in transit currently because I do not have a building set up for the contents of the trailer, which was [sic] the items from a previous business which I owned. When I find such a building, I will move the trailer to that location." Because his argument concedes he was storing equipment in the trailer until he found a suitable building, any evidence from an illegal search is merely duplicative of his concession and therefore its admission was harmless.

[3] We limit our decision to an analysis of Pender's rights under the federal constitution because Wisconsin courts have consistently and routinely conformed the law of search and seizure under the Wisconsin Constitution to the law developed by the United States Supreme Court under the Fourth Amendment. *See* ***State v. Meyer***, 216 Wis.2d 729, 755, 576 N.W.2d 260, 271-72 (1998).

¶8 Pender next claims that the "trial court knowingly allowed a conflict of interest when it allowed the city attorney's office to be both complainant and litigant." (Capitalization omitted.) We reject this contention. When Walsh signed the nuisance abatement order, he acted in his capacity as an executive officer. Similarly, prosecution of the ordinance is an executive function. The case was tried to a separate judicial officer. There is no conflict of interest. Pender relies on ***Guthrie v. WERC***, 111 Wis.2d 447, 331 N.W.2d 331 (1983). His reliance is misplaced. The question in ***Guthrie*** was "whether an order of a quasi-judicial administrative tribunal conforms to the constitutional requirements of due process when one of the members of the adjudicative tribunal had, at an earlier stage of the same proceedings, served as counsel for one of the parties." ***Id***. at 448, 331 N.W.2d at 332. Here, neither the department of inspection nor city attorney acted as an adjudicative tribunal.

¶9 On appeal, Pender seems to suggest that he would have called Walsh as a witness had the court granted his motion. Pender did not make this argument before the trial court and there is no evidence he had subpoenaed Walsh, much less that Pender was going to call him as a witness.[4] As a general rule, we refuse to consider issues raised for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980). We see no reason to deviate from that rule here.

¶10 Pender next claims that the ordinance is unconstitutionally vague because it does not clearly define "storage." An ordinance may be invalidated for vagueness if there appears "some ambiguity or uncertainty in the gross outlines of

[4] Pender first raised this issue in a motion for reconsideration that he filed after filing his notice of appeal.

the duty imposed or conduct prohibited such that one bent on obedience may not discern when the region of proscribed conduct is neared, or such that the trier of fact in ascertaining guilt or innocence is relegated to creating and applying its own standards of culpability rather than applying standards prescribed …. " ***City of Milwaukee v. K.F.***, 145 Wis.2d 24, 33, 426 N.W.2d 329, 333 (1988) (quoted source omitted). Before analyzing the ordinance on vagueness grounds, this court must first determine whether Pender's conduct is clearly proscribed by the ordinance because "a plaintiff whose conduct is clearly proscribed by the statute in question cannot complain of the vagueness of a law as applied to others; the law must be impermissibly vague in all of its applications." ***Id***. at 33-34, 426 N.W.2d at 333.

¶11 As applied in this instance, we cannot say that the failure to define "storage" left Pender unable to discern when the region of proscribed conduct was neared. He conceded in effect that he was storing items in the trailer because he did not have a building in which to place them.[5] The statute is not vague as applied to him; his storage of items in the trailer as opposed to a building is clearly proscribed by the ordinance. Thus, Pender's vagueness challenge fails.

¶12 Pender also claims that the ordinance violates equal protection. Nowhere in his pleadings did he raise an equal protection challenge to the ordinance. Moreover, his appellate argument is bereft of citation to case authority or the applicable standard for our review. We decline to develop Pender's arguments for him, *see* ***State v. Gulrud***, 140 Wis.2d 721, 730, 412 N.W.2d 139,

[5] In addition to his concession at trial, Pender has not challenged the trial court's finding that the trailer was in fact used for storage.

142 (Ct. App. 1987), or to address issues inadequately briefed. *See* ***State v. Flynn***, 190 Wis.2d 31, 58, 527 N.W.2d 343, 354 (Ct. App. 1994).

¶13 Finally, Pender claims that it is unconstitutional for the City to use the special inspection warrant provisions of § 66.122, STATS., to search his property. The record does not reflect that a special inspection warrant was ever issued, nor does Pender claim such a warrant was actually issued or executed. His complaint seems to be that the provisions of § 66.122 permit inspection warrants to be issued based upon something less than probable cause. This court will not address issues based upon hypothetical or future facts. *See* ***State v. Armstead***, 220 Wis.2d 626, 631, 583 N.W.2d 444, 446 (Ct. App. 1998).

¶14 We determine that: (1) the evidence the court received was not subject to the exclusionary rule and was, in any event, harmless; (2) no conflict existed that would have prohibited the city attorney from prosecuting this case; (3) Pender's vagueness challenge to the ordinance fails because it clearly proscribes his storage of items in the trailer; and (4) no special inspection warrant was issued so the question whether one may be issued absent probable cause is not before us. Accordingly we affirm the court's order.

By the Court.—Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.