COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP462 **Cir. Ct. No. 2009TR4875**

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

VILLAGE OF MARATHON CITY,

PLAINTIFF-RESPONDENT,

V.

JENNY L. NOWAK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Affirmed*.

¶1 VERGERONT, P.J.[1] Jenny L. Nowak appeals the judgment of conviction, after a jury trial, for violating WIS. STAT. § 346.57(4)(e) by operating a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) and (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

motor vehicle at thirty-nine miles per hour in a twenty-five mile per hour zone. Nowak alleges three errors by the circuit court: (1) the court improperly denied her motion to dismiss, which asserted a failure to comply with MARATHON COUNTY CIRCUIT COURT RULE 3.12 (Nov. 2000);[2] (2) the court erred in admitting evidence obtained by a radar speed detection device without requiring the Village of Marathon City to prove that it had first obtained a license from the Federal Communications Commission (FCC); and (3) the court used an incorrect standard for determining whether a sign is official and therefore erred in declining to instruct the jury with her proposed instructions. For the following reasons, we conclude that Nowak's contentions lack merit. Accordingly, we affirm the judgment of conviction.

BACKGROUND

¶2 In May 2009 Nowak received a citation for driving thirty-five miles per hour in a twenty-five mile per hour zone. According to the citation, her speed was detected by radar while she was driving on Fourth Street in the Village of Marathon City. Nowak pled not guilty and filed a motion to dismiss on the grounds that the Village failed to file the citation within seventy-two hours, as required by MARATHON COUNTY CIRCUIT COURT RULE 3.12; failed to obtain a license to operate a radar speed detection device, as required by the FCC; and could not prove that the sign stating a twenty-five mile per hour speed limit met the requirements of an official traffic sign. Nowak also filed a motion to suppress the radar evidence.

[2] All references to the Marathon County Circuit Court Rules are to the November 2000 version unless otherwise noted.

¶3 The circuit court denied Nowak's motions. With respect to circuit court rule 3.12, the court determined, based on the testimony of the clerk of civil court, that the rule was adopted approximately twenty years ago when the judges traveled to different villages to make sure the court knew ahead of time how many citations needed to be heard. The court stated the rule had apparently never been enforced. The court viewed the rule as imposing an unreasonably short time period and a harsh remedy. The court concluded that enforcing the rule for apparently the first time could raise equal protection issues. With respect to compliance with FCC licensing requirements, the court determined this to be irrelevant to the admissibility of the radar evidence. The court ruled that the radar evidence could be admitted if the radar device was in proper working order and operated by a trained and qualified operator.

¶4 Finally, the circuit court determined that the Village needed to prove only that the sign was in a proper position and "sufficiently legible to be seen by an ordinarily observant person." *See* WIS. STAT. § 346.02(7).[3] For this reason, the court declined to give Nowak's proposed jury instructions, which included requirements from the Wisconsin Manual on Uniform Traffic Control Devices (the manual).

[3] WISCONSIN STAT. § 346.02(7) provides:

> APPLICABILITY OF PROVISIONS REQUIRING SIGNPOSTING. No provision of this chapter for which signs are required shall be enforced against an alleged violator if at the time and place of the alleged violation an official sign is not in proper position and sufficiently legible to be seen by an ordinarily observant person. Whenever a particular section does not state that signs are required, such section is effective even though no signs are erected or in place.

¶5 Nowak filed a motion to reconsider, which was denied. She was found guilty by a jury of operating a motor vehicle in excess of the village speed limit of twenty-five miles per hour.

DISCUSSION

¶6 Nowak first contends that the circuit court erred when it denied her motion to dismiss the citation for failure to comply with MARATHON COUNTY CIRCUIT COURT RULE 3.12. This issue involves the interpretation and application of statutes and local circuit court rules, which are questions of law we review de novo. ***Hefty v. Strickhouser***, 2008 WI 96, ¶27, 312 Wis. 2d 530, 752 N.W.2d 820. We affirm the circuit court's decision, but on different grounds.

¶7 MARATHON COUNTY CIRCUIT COURT RULE 3.12 provides in relevant part:

> (1) When Filed: … [A]ll Marathon County law enforcement agencies shall file all citations with the Marathon County Clerk of Court within 72 hours of issuance.
>
> ….
>
> (3) Failure to File: Citations not filed within the time provided herein shall not be accepted by the clerk and shall be considered dismissed with prejudice by the court.

Nowak argues that, because her citation was not filed within the seventy-two hour period, it must be "considered dismissed with prejudice by the court."

¶8 Pursuant to WIS. STAT. § 753.35(1), a circuit court may adopt rules governing court practice in that court, as long as the rules are "consistent with … statutes relating to pleading, practice, and procedure." Thus, circuit court rules

may supplement, but not supersede, state statutes and rules. ***Hefty***, 312 Wis. 2d 530, ¶59.

¶9 Nowak contends that, because there is no statute of limitations specifically for violations of speed restrictions under WIS. STAT. § 346.57, there is no statute that conflicts with circuit court rule 3.12. The Village responds that the relevant statute of limitations in such situations is determined by § 893.93(1)(a), which provides that "[a]n action upon a liability created by statute when a different limitation is not prescribed by law" shall be "commenced within 6 years.…" We do not resolve this dispute as framed by the parties because we conclude circuit court rule 3.12 is not a statute of limitations in that it does not create a right in the defendant to dismissal of the citation. *See* ***C. Coakley Relocation Sys., Inc. v. City of Milwaukee***, 2008 WI 68, ¶22, 310 Wis. 2d 456, 750 N.W.2d 900 ("When the limitation period ends, it extinguishes the cause of action of the potential plaintiff, but it also creates a right for the would-be defendant to insist on that statutory bar.") (citation omitted). A statute of limitations does not prevent the filing of an action and, if no motion for dismissal is brought, the action proceeds. *See* ***Robinson v. Mount Sinai Med. Ctr.***, 137 Wis. 2d 1, 16-17, 402 N.W.2d 711 (1987). In contrast, circuit court rule 3.12 mandates that the clerk reject a citation if it is not filed within seventy-two hours of issuance. It is undisputed that the clerk in this case accepted Nowak's citation. The rule does not address what happens if the clerk does accept a citation filed after seventy-two hours and the court, as here, approves of this late acceptance. Nothing in the language of the rule suggests that the defendant has the right to a dismissal in these circumstances.

¶10 Nowak next contends that the circuit court erred by admitting radar evidence without first requiring the Village to prove it held a public safety radio

license, as required by the FCC. We review a circuit court's ruling on the admissibility of evidence for an erroneous exercise of discretion. ***State v. Ross***, 2003 WI App 27, ¶35, 260 Wis. 2d 291, 659 N.W.2d 122 (citation omitted). We uphold a circuit court's decision on an evidentiary ruling as long as the circuit court examined the relevant facts, applied a proper standard of law, and demonstrated a rational process in reaching a reasonable conclusion. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998).

¶11 The five-factor ***Hanson/Kramer*** test is used to determine the accuracy of moving radar.[4] *See* ***Washington Cnty. v. Luedtke***, 135 Wis. 2d 131, 133 n.2, 399 N.W.2d 906 (1987). "If there is compliance with the

[4] The five factors are:

> 1. The officer operating the device has adequate training and experience in its operation.
>
> 2. That the radar device was in proper working condition at the time of the arrest. This will be established by proof that suggested methods of testing the proper functioning of the device were followed.
>
> 3. That the device was used in an area where road conditions are such that there is a minimum possibility of distortion.
>
> 4. That the input speed of the patrol car must be verified, this being especially important where there is a reasonable dispute that road conditions may have distorted the accuracy of the reading (*i.e.*, presence of large trucks, congested traffic and the roadside being heavily covered with trees and signs).
>
> 5. That the speed meter should be expertly tested within a reasonable proximity following the arrest and that such testing be done by means which do not rely on the radar device's own internal calibrations.

State v. Kramer, 99 Wis. 2d 700, 703, 299 N.W.2d 882 (1981) (quoting ***State v. Hanson***, 85 Wis. 2d 233, 245, 270 N.W.2d 212 (1978)).

Hanson/Kramer criteria, the [radar device] readout is presumptively correct and is to be admitted into evidence." ***Id.*** at 137.

¶12 Nowak does not contest the accuracy of the radar. She also does not point to any evidence, or even assert, that the Village failed to satisfy the ***Hanson/Kramer*** test, nor does she provide support for her contention that a radar device must be licensed by the FCC as a condition precedent to the admissibility of radar evidence. Accordingly, she has not established that the circuit court erroneously exercised its discretion in admitting the radar evidence.

¶13 Nowak's final contention is that the circuit court erred when it determined that compliance with the requirements of the manual is not required for a sign to be an "official sign" under WIS. STAT. §§ 346.02(7)[5] and 346.57(6)(a),[6] and further erred by failing to give jury instructions describing these requirements. The Village responds that these provisions do not apply because the charge is not a violation of a posted speed limit pursuant to § 346.57(5). Rather, the Village asserts, the charge is based on § 346.57(4)(e). This subsection provides the speed limit "on any highway within the corporate limits of a city or village, other than on highways in outlying districts in such city or village" is

[5] See footnote 3.

[6] WISCONSIN STAT. § 346.57(6)(a) provides in relevant part:

> On state trunk highways and connecting highways and on county truck highways or highways marked and signed as county trunks, the speed limits specified in sub. (4)(e) and (f) are not effective unless official signs giving notice thereof have been erected by the authority in charge of maintenance of the highway in question.

twenty-five miles per hour "unless different limits are indicated by official traffic signs."[7]

¶14 Resolution of this issue requires an interpretation of § 346.57(4)(e). Statutory interpretation presents a question of law, which we review de novo. ***State v. Fischer***, 2010 WI 6, ¶15, 322 Wis. 2d 265, 778 N.W.2d 629.

¶15 Nowak concedes that the proper speed limit is twenty-five miles per hour. Her contention is that, because the Village chose to post a sign—though it was not required to—the sign must be an "official traffic sign" for *any* speed limit to be enforceable.

¶16 We disagree. WIS. STAT. § 346.57(4) plainly states that the relevant presumptive fixed limits apply "unless different limits are indicated by official traffic signs." In this case, the posted speed limit is the same as the presumptive fixed limit. Therefore, the presumptive fixed limit is applicable, regardless of whether the posted sign is an "official traffic sign."

¶17 Nowak cites ***Harmann v. Schulke***, 146 Wis. 2d 848, 854, 432 N.W.2d 671 (Ct. App. 1988), in support of her argument. However, ***Harmann*** has

[7] WISCONSIN STAT. § 346.57(4) provides in relevant part:

> FIXED LIMITS: In addition to complying with the speed restrictions imposed by subs. (2) and (3), no person shall drive a vehicle at a speed in excess of the following limits unless different limits are indicated by official traffic signs:
>
> ….
>
> (e) Twenty-five miles per hour on any highway within the corporate limits of a city or village, other than on highways in outlying districts in such city or village.

no application here. ***Harmann*** holds that, if a municipality erects a stop, warning, or yield sign, even if it has no affirmative duty to do so, it must "properly maintain the sign as a safety precaution to the traveling public …" and failure to do so may be actionable negligence. ***Id.*** at 854-55 (quoting ***Firkus v. Rombalski***, 25 Wis. 2d 352, 358, 130 N.W.2d 835 (1964)).

¶18 Because we conclude the requirements of "official traffic signs" are irrelevant, we also conclude the circuit court did not err in declining to give the proposed instructions.[8]

CONCLUSION

¶19 We affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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

[8] We assume without deciding that Nowak preserved her objection to the jury instructions the court gave. There is no record of the instruction conference or her objections.