COURT OF APPEALS
DECISION
DATED AND FILED

June 23, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP3058 **Cir. Ct. No. 2009CV6474**

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

CITY OF MIDDLETON,

PLAINTIFF-RESPONDENT,

V.

SCOTT J. PIERNOT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed*.

¶1 VERGERONT, P.J.[1] The Middleton municipal court determined that Scott Piernot, owner of SCATZ Sports Bar & Night Club, LLC, was guilty of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) and (3) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

a noise ordinance violation. Piernot contends the municipal court applied an erroneous standard of law and that the facts do not support the court's decision that he violated the ordinance. Therefore, he contends, the circuit court erred in dismissing his appeal. We disagree and affirm.

BACKGROUND

¶2 About 11:00 p.m. on April 14, 2009, City of Middleton Police Officer Darrin Zimmerman responded to a noise complaint made by the Courtyard by Marriot hotel. The hotel had received a complaint from a guest in room 402 regarding the volume of music coming from SCATZ, Piernot's bar and night club. When Officer Zimmerman arrived, this guest did not wish to be disturbed, so the officer went to room 404, a room on the same floor and the same side of the hotel as room 402.

¶3 Officer Zimmerman testified at trial as follows. When he arrived in room 404, he heard loud music coming from what appeared to be SCATZ. While he was in the room, he heard sirens from a fire engine responding to a call. At times the sound from the sirens was at the same level as the music, and at times the music "drowned out the fire engine sirens." The officer ultimately issued a citation for a violation of the noise ordinance on the ground that "a reasonable person would not be able to get a peaceful night's sleep given the volume of the music and the hour of the day."

¶4 After a trial to the Middleton municipal court, the court found Piernot guilty of violating the noise ordinance. Piernot appealed to the circuit court for a transcript review pursuant to WIS. STAT. § 800.14(5). The circuit court conducted a hearing and concluded that the municipal court had applied the correct legal standard and that its factual findings were not clearly erroneous.

Therefore, the circuit court affirmed the municipal court's decision. Piernot appeals the circuit court's decision.

DISCUSSION

¶5 On appeal, Piernot contends that the municipal court applied an erroneous legal standard and that the facts do not support its decision. Therefore, he contends, its decision must be reversed. Alternatively, he requests a new trial.

¶6 We review a municipal court record under WIS. STAT. § 800.14(5) using the same standard of review as the circuit court. ***Village of Williams Bay v. Metzl***, 124 Wis. 2d 356, 362, 369 N.W.2d 186 (Ct. App. 1985). We do not review the record de novo, but rather search the record for evidence to support the municipal court's decision. ***Id.*** at 361-62. We uphold the municipal court's factual findings unless they are clearly erroneous, and give due regard "to the opportunity of the municipal court to judge the credibility of the witnesses." ***Id.*** at 361. The interpretation of a municipal ordinance is a question of law that we review de novo. ***A&A Enters. v. City of Milwaukee***, 2008 WI App 43, ¶16, 308 Wis. 2d 479, 747 N.W.2d 751.

¶7 CITY OF MIDDLETON ORDINANCE § 16.05(2) states in relevant part:

> Prohibition of Noises Disturbing the Peace. No person and no person, firm, or corporation occupying or having charge of any building or premises, or any part thereof, shall within the City:
>
> ….
>
> (b) Cause, suffer or allow any loud, excessive or unusual noise in the operation or use of any radio, phonograph, or other mechanical or electronic or electrical device, instrument or machine, which loud, excessive or unusual noise shall tend to unreasonably disturb the comfort, quiet, or repose of persons therein or in the vicinity.

The use of the word "unreasonably" in the ordinance requires the municipal court to apply the reasonable-person standard. *See* ***City of Madison v. Baumann***, 162 Wis. 2d 660, 677-78, 470 N.W.2d 296 (1991). The reasonable person is a reasonable person under the circumstances. ***Id.*** at 678.

I. Reasonable-Person Standard

¶8 Piernot first contends that the municipal court mistakenly believed that the standard was a subjective standard. He relies on the portion of the transcript in which the municipal court stated:

> This ordinance is not – is a subjective ordinance. It does not have objective sound levels in it.… The law enforcement role is to determine whether or not in this particular case it was a noise level that was unreasonable…. They only needed to have the tools which is basically I think their ears to determine whether it was an unreasonable level of noise…. What I'm hearing is the defendant doesn't think this ordinance should be subjective. It should be objective, and it would be easier for SCATZ and for the City and for Marriot if there was an objective standard, but there isn't.

¶9 There was evidence presented at trial regarding the industry standard decibel level and decibel levels in another City of Middleton noise ordinance. It is clear from the context of the statement and the evidence presented at trial that by "subjective standard," the municipal court meant that the ordinance does not contain an objective decibel limit that constitutes unreasonable noise. Furthermore, the court correctly described the reasonable-person standard several times, stating "[t]he reasonableness test goes to whether a reasonable person would be disturbed by the noise," and "[i]t's a test of whether … the noise would unreasonably disturb them." We are satisfied that the municipal court understood the correct standard.

¶10 Piernot also claims that the court erroneously applied a subjective standard because it considered actual, hypersensitive persons rather than the hypothetical and objective reasonable person. He contends that the court's reliance on testimony from Officer Zimmerman and the hotel's manager indicates that the court considered only whether specific persons would be bothered by the noise, and not whether a reasonable person would be. We do not agree. Officer Zimmerman testified that the noise was such that he did not think that a reasonable person would be able to sleep. This testimony does not address whether the officer was subjectively bothered by the noise, but rather whether a reasonable person would be. The hotel manager testified that the hotel had refunded money seventy-eight times due to noise complaints. This evidence supports the conclusion that many people, not simply hypersensitive persons, were disturbed by noise coming from SCATZ. Contrary to Piernot's contention, the court did not refer to individual complaints made by specific persons. Instead, the court considered all of the evidence in order to determine whether a reasonable person would have been disturbed. Therefore, it properly applied the reasonable-person standard.

¶11 Piernot next contends that the municipal court erroneously applied the reasonable-person standard because it failed to consider the circumstances. He argues that these circumstances include the allegedly substandard construction of the hotel, the fact that there was a musical venue in SCATZ's location before the hotel was built, whether the City used a decibel meter and disregarded the reading, whether the heater or air conditioning unit was in use in the hotel room, the location of the hotel, and the lack of complaints from another nearby hotel that, according to Piernot, has a better quality of construction.

¶12 We do not agree that the municipal court failed to consider the circumstances. First, Piernot does not explain why the factors he lists affect whether a reasonable person *in this hotel* (and otherwise in the circumstances of the person who reported the noise) would be disturbed by the noise. Second, Officer Zimmerman's testimony, which the court credited, indicates that the officer did consider the circumstances. He listened to the noise from a room on the same floor and on the same side of the hotel as the room of the complaining guest. He concluded that, given the noise and the time of night, a reasonable person would not be able to get a peaceful night's sleep. This testimony explicitly considers a reasonable person in the relevant circumstances.

¶13 Piernot next contends that the municipal court failed to find that Officer Zimmerman understood and correctly applied the reasonable-person standard, and, without such a finding, a court cannot find a violation of the City's noise ordinance. In support, he cites ***County of Jefferson v. Renz***, 222 Wis. 2d 424, 436, 588 N.W.2d 267 (Ct. App. 1998), *rev'd on other grounds by* 231 Wis. 2d 293, 603 N.W.2d 541 (1999), and ***Baumann***, 162 Wis. 2d at 680-81. While these cases indicate that officers must apply the reasonable-person standard, they do not support the proposition that a court is required to make any express findings regarding the officers' knowledge of the standard. Furthermore, it is clear from Officer Zimmerman's testimony that he understood that a violation of the ordinance must be based on the reasonable-person standard and that he correctly applied it.

¶14 Finally, Piernot argues that the municipal court erroneously applied the reasonable-person standard because it failed to determine whether public

policy consideration barred liability. He relies on cases discussing public policy considerations in tort cases.[2] However, he does not cite to any legal authority for his conclusion that such factors must be considered in cases involving violations of noise ordinances. We decline to address this undeveloped argument.

II. The Facts of the Record Support the Municipal Court's Decision

¶15 Piernot argues that, even if the municipal court applied the correct standard, the facts do not support its finding that Piernot violated the noise ordinance. To the extent Piernot contends that the court failed to consider the relevant circumstances and failed to consider public policy considerations, we have already rejected these arguments. Officer Zimmerman's testimony—that a reasonable person would not be able to sleep considering the amount of noise and the time of night—supports the court's decision, as does the evidence of numerous complaints from other guests. Piernot attempts to challenge Officer Zimmerman's credibility, but it is evident that the municipal court found him credible, and we accept that credibility determination. *See* ***Metzl***, 124 Wis. 2d at 361.

CONCLUSION

¶16 We conclude that the municipal court properly applied the reasonable-person standard and that the facts in the record support its decision. Accordingly, we affirm the circuit court's judgment affirming the municipal court.

By the Court.—Judgment affirmed.

[2] ***Butler v. Advanced Drainage Sys., Inc.***, 2006 WI 102, ¶31, 294 Wis. 2d 397, 717 N.W.2d 760; ***Fandrey ex rel. Connell v. American Family Mut. Ins. Co.***, 2004 WI 62, ¶¶18-19, 272 Wis. 2d 46, 680 N.W.2d 345; ***Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.***, 2002 WI 80, ¶32, 254 Wis. 2d 77, 646 N.W.2d 777.

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