COURT OF APPEALS
DECISION
DATED AND FILED

July 25, 2013

Diane M. Fremgen
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2568-CR **Cir. Ct. No. 2011CT91**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL E. MAUERMANN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Affirmed*.

¶1 BLANCHARD, J.[1] Michael Mauermann appeals a judgment convicting him of operating a motor vehicle while intoxicated in violation of WIS.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All further references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

STAT. § 346.63(1)(a), second offense, and an order denying his motion for postconviction relief. Mauermann was initially stopped for squealing the tires of a vehicle in violation of Iowa County Ordinance § 600.08, which prohibits certain types of noises, including tire squeals, that are loud and unnecessary and that may tend to annoy or disturb others. He contends that the ordinance is unconstitutionally vague, and therefore that the traffic stop was improper and that evidence arising from the stop should have been suppressed. For the following reasons, I affirm.

BACKGROUND

¶2 The sole witness at the suppression hearing was the Iowa County sheriff's deputy who stopped Mauermann, and it is apparent that the circuit court largely credited the deputy's testimony. This court thus relies on that testimony for purposes of the background facts.

¶3 The deputy testified that one night he observed a vehicle come to a stop at a stop sign. After a pause, the deputy witnessed the vehicle accelerate through the intersection, producing a loud squealing of tires. The deputy stated that the duration of the squeal was longer than that produced by someone turning sharply or pumping the accelerator by accident and that the squeal continued as the vehicle travelled entirely through the intersection. The deputy stated that, in his view, an accidental "small squawk would be understandable" and not unlawful. However, in this instance the squeal of the tires seemed to the deputy to have been deliberate. The vehicle was stopped and, when the vehicle accelerated, it "jerk[ed]" and went through the intersection with a squeal. The deputy stated that what he observed and heard looked and sounded as though the driver was "attempting to leave a skid mark."

¶4 The deputy pursued and stopped the vehicle. Subsequent investigation, not in itself challenged in this appeal, led to Mauermann's arrest and charges for drunk driving offenses.

¶5 Mauermann filed a motion to suppress for unlawful stop, detention, and arrest. The circuit court denied the motion. Mauermann subsequently pled no contest to operating while intoxicated.[2]

¶6 Mauermann then filed a postconviction motion raising the issue of whether the ordinance under which he was stopped was unconstitutionally vague. The circuit court denied the motion, concluding that Mauermann failed to show beyond a reasonable doubt that the ordinance was unconstitutional.[3]

DISCUSSION

¶7 Whether the tire squeal portion of Iowa County Ordinance § 600.08 is void as unconstitutionally vague is a question of law subject to de novo review. ***State v. Bertrand***, 162 Wis. 2d 411, 415, 469 N.W.2d 873 (Ct. App. 1991). "Judicial review of legislation starts with a presumption of constitutionality and the requirement that the challenger prove unconstitutionality beyond a reasonable doubt." ***Wilke v. City of Appleton***, 197 Wis. 2d 717, 726, 541 N.W.2d 198 (Ct. App. 1995).

[2] Although the judgment of conviction in the record states that there was a plea of not guilty, the plea hearing transcript reflects that Mauermann pled no contest. The discrepancy is immaterial for purposes of this appeal.

[3] The State did not argue during the postconviction proceedings, and does not argue on appeal, that Mauermann forfeited or waived the issue of the constitutionality of the ordinance by failing to raise this issue before being convicted on his plea of no contest. Therefore, we do not address that potential issue.

¶8 "The concept of vagueness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." ***State v. Courtney***, 74 Wis. 2d 705, 709, 247 N.W.2d 714 (1976). An ordinance may be deemed unconstitutionally vague if "persons of ordinary intelligence do not have fair notice of the prohibition and those who enforce the laws and adjudicate guilt lack objective standards and may operate arbitrarily." ***State v. Pittman***, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993) (quoting ***State v. Wickstrom***, 118 Wis. 2d 339, 351-52, 348 N.W.2d 183 (Ct. App. 1984)).

¶9 The first prong of the vagueness test is whether the statute sufficiently warns persons wishing to obey the law when their conduct approaches the proscribed area. ***State v. Ruesch***, 214 Wis. 2d 548, 561, 571 N.W.2d 898 (Ct. App. 1997). An ordinance is void for vagueness "only if it is so obscure that persons of common intelligence must necessarily guess at its meaning and differ as to its applicability." ***State v. Tronca***, 84 Wis. 2d 68, 86, 267 N.W.2d 216 (1978). In other words, those intent on obedience must be given reasonable or fair notice of the prohibited conduct. *See* ***City of Madison v. Baumann***, 162 Wis. 2d 660, 677, 470 N.W.2d 296 (1991); ***State v. Zwicker***, 41 Wis. 2d 497, 507, 164 N.W.2d 512 (1969).

¶10 The second prong of the vagueness test is concerned with whether objective standards are provided to those who enforce and apply the law. ***Ruesch***, 214 Wis. 2d at 561. An objective standard avoids the danger of arbitrary and discriminatory applications. ***State v. Popanz***, 112 Wis. 2d 166, 173, 332 N.W.2d 750 (1983). Therefore, under the second prong, a statute (or ordinance) is vague when triers of fact and officials must apply their own standards of culpability, rather than those it proscribes. *See* ***Ruesch***, 214 Wis. 2d at 561-62.

¶11 The ordinance reads in relevant part, as follows:

> LOUD AND UNNECESSARY NOISE PROHIBITED
>
> No person shall operate a motor vehicle so as to make any loud, disturbing or unnecessary noise in or about any public street, alley, park or private residence which may tend to annoy or disturb another by causing the tires of said vehicle to squeal, horn to blow excessively or motor to race excessively.

Iowa County Ordinance § 600.08. For the following reasons, I conclude that Mauermann fails to show that the tire squeal portion of the ordinance is unconstitutionally vague.

¶12 Mauermann makes arguments under both prongs of the vagueness test, many of which are overlapping. We address each argument, with reference to the standards of each prong as appropriate.

¶13 Mauermann argues that the ordinance is vague because it fails to define the term "squeal." However, an ordinance does not need to define every term it uses. "All that is required is a fair degree of definiteness." ***Tronca***, 84 Wis. 2d at 86.

¶14 Although the ordinance does not define the term "squeal," the ordinance, read in its entirety, gives reasonable notice of what conduct is prohibited. "[E]ven if there be an inherent vagueness of some terms utilized by a statute, the vagueness may be dispelled by other provisions of the same statute." ***Id.*** at 86-87. The ordinance prohibits "any loud, disturbing or unnecessary noise … which may tend to annoy or disturb another by causing the tires … to squeal." The other terms within the ordinance give meaning to the word "squeal." Even without a specific definition of "squeal," a person of common intelligence, reading the ordinance in its entirety, would readily understand that a tire noise is

prohibited if it is loud, disturbing, or unnecessary and may tend to annoy or disturb another.

¶15 The dictionary defines a squeal, in relevant part, as "a shrill sharp somewhat prolonged … noise." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 2215 (1993). I note that under this definition the phrase "somewhat prolonged," while not precisely quantifiable, distinguishes a squeal from such terms as "squeak" or "squawk." The definition of "squawk" is "a loud harsh abrupt raucous outcry." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 2215 (1993). The dictionary evidences a distinction in the difference of length between the two terms, specifically, "prolonged" versus "abrupt."

¶16 This basic definitional distinction undermines the bulk of Mauermann's arguments. This is because the thrust of Mauermann's argument is that the ordinance is vague because its language does not allow the public or law enforcers to distinguish between lawful, abrupt tire squawks and prohibited, prolonged tire squeals. However, the test for vagueness "does not demand that the line between lawful and unlawful conduct be drawn with absolute clarity and precision." ***Courtney***, 74 Wis. 2d at 710. It is not sufficient to void a statute that there exist "particular instances of conduct the legal or illegal nature of which may not be ascertainable with ease." ***Id.*** at 711.

¶17 Furthermore, the deputy's testimony, taken as a whole, shows that he did not make a determination to stop Mauermann based on an idiosyncratic or otherwise incorrect standard. Instead, he concluded, based on his observations, that the tire noise was not a small squawk but instead was a long and loud squeal, indeed one that appeared to be deliberately long. This amounted to an objective

determination that, under the circumstances, a reasonable person would find that Mauermann created a noise that was "loud, disturbing, or unnecessary," and that "may tend to annoy or disturb another."

¶18 It is certainly conceivable that a relatively small "squawk," perhaps one created merely by accident, might be experienced by particularly sensitive listeners as a "loud, disturbing, or unnecessary" sound that is annoying. However, the ordinance is not void as unconstitutionally vague just because the subjective experiences of some listeners will vary.

¶19 Mauermann hypothesizes that in different instances officers may apply different standards of what kind of squeal is permissible, ranging from a one-second squeal to a four-second squeal. But Mauermann fails to explain why this matters, and I do not see how it adds to Mauermann's other arguments. The ordinance is reasonably understood as prohibiting both short and long "squeals," as long as the squeals otherwise meet the ordinance's standards. It may be true that, at some point, a squeal-like tire noise might be so short in duration as to raise a difficult question regarding whether it violates those standards or fits the ordinary understanding of a "squeal." However, as already explained, the fact that difficulty arises on the margins does not make an ordinance vague. *See* ***id.*** at 710-11. Here, there can be no doubt, based on the deputy's testimony, that Mauermann's squeal was well within the range of conduct the ordinance plainly prohibits. Moreover, if Mauermann means to argue that the ordinance must be invalidated because the ordinance could be vague as applied to some other, hypothetical case, that argument fails. Where, as here, First Amendment issues are not raised:

> [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.

See ***id.*** at 713.

¶20 Mauermann points out that some other Iowa County Ordinances are more specific in establishing standards for what is permissibly loud and therefore this ordinance must be equally specific. However, the fact that other ordinances may provide more specific standards, such as the length of a permissible horn blast, does not mean that such levels of specificity are a constitutional requirement in any ordinance involving noise. Mauermann cites no authority showing that an ordinance with a level of specificity matching what is used here has been held unconstitutionally vague.

¶21 Mauermann points out that the ordinance places the qualifying word "excessively" following the prohibited conduct of horn blowing and engine revving but not after tire squeal. Mauermann argues that this lack of a qualifying word is another example of why the tire squeal portion of the ordinance is unconstitutionally vague. However, the ordinance makes clear that the squeal must in any case be "loud, disturbing or unnecessary" and of a type that may "tend to annoy or disturb another." Thus, I do not agree with Mauermann that the omission of the word "excessive" in reference to tire squeals renders the ordinance unconstitutionally vague. Nor do I agree with Mauermann's more general argument that the ordinance contains "nothing" or "no standards" by which to determine what type of tire noise is a violation.

¶22 The Wisconsin Supreme Court has suggested that the concept of "unreasonableness" may be a crucial limiting factor when it comes to whether an

ordinance is vague. Specifically, in ***Baumann***, the court concluded that the inclusion of the term "unreasonably" in a noise ordinance was pivotal:

> [T]he word, "unreasonably," is the linchpin that prevents excessive discretion in the police and which gives guide to persons in respect to their conduct …. [T]he concept of reasonableness is what prevents the actor from being at the mercy of the hypercritical. It is what will disturb a reasonable person that is actionable.

Baumann, 162 Wis. 2d at 680. The court has also explained that "[u]nreasonably" is implicit in the phrase "tends to disturb or annoy others." ***Id.*** at 679 (quoting ***State v. Givens***, 28 Wis. 2d 109, 116-17, 135 N.W.2d 780 (1965)). And, as already indicated, the ordinance here prohibits only "loud, disturbing or unnecessary" noise that may "tend to annoy or disturb another." Thus, although the ordinance does not explicitly use the words "reasonable" or "unreasonable," ordinary persons would understand the ordinance's terms as the equivalent of a prohibition on unreasonable tire squeals. The ordinance therefore provides fair notice to persons of common intelligence who are intent on obeying the law.

¶23 Mauermann argues that the ordinance fails to satisfy the requirement of avoiding arbitrary and discriminatory application. However, as discussed above, the terms of the ordinance imply a reasonableness standard. A reasonableness standard permits flexibility in assuring law and order, but also is definite enough to prevent abuses in administration. ***Id.***

¶24 Mauermann also argues that portions of the deputy's testimony demonstrate that the ordinance is unconstitutionally vague. However, Mauermann cites no authority for the proposition that the vagueness inquiry focuses on an arresting officer's subjective definition of ordinance terms. Instead the question is whether the statutory terms are objectively too vague for citizens to comply and

for police in general (not just this arresting officer) to enforce fairly and consistently.

¶25 Nonetheless, for purposes of argument, I will assume, without deciding, that the deputy's understanding of the ordinance or of terms such as "squeal" or "squawk" may be relevant to the question of vagueness. To the extent that Mauermann means to argue that the deputy was vague in his description of Mauermann's tire squeal, this argument is without merit. The sound of tires squealing from rapid acceleration of a vehicle is indisputably a well-known and widely recognizable sound, and therefore not a rare or strange sound that calls for detailed description. Moreover, the deputy described its duration in sufficient detail: It was "a continuous burst at the start going through the intersection … sustained as he was going through." The deputy further gave his characterization of the squeal as loud and apparently deliberate, which would have meaning as a relevant observation in this context. To the extent that Mauermann focuses narrowly on the deputy saying that he would not have made a stop for a "squawk" of tires, discussion above explains the meaningful difference between the sounds denoted by these two terms, consistent with the deputy's common sense view. The deputy's testimony, when read as a whole, provides a reasonable definition of a squeal and therefore does not support Mauermann. The record dispels any vagueness in the deputy's use of descriptive terminology when he contrasts a "squawk" to "a continuous burst at the start going through the intersection … sustained as he was going through."

¶26 The purpose of an objective standard is to prevent arbitrary and discriminatory application. ***Popanz***, 112 Wis. 2d at 173. Mauermann argues that the deputy had difficulty testifying about the standard he used and therefore the deputy had difficulty applying the standard without being arbitrary and

discriminatory. First, as discussed above, I see no relevant ambiguity in the deputy's testimony regarding the definition of "squeal" under the ordinance. Second, even assuming ambiguity in the testimony on this definitional point, this would not have been the result of a lack of clear standards in the statute. And, the record is sufficient to show that the deputy did not in fact rely on an erroneous, subjective opinion of what violates the ordinance.

CONCLUSION

¶27 In sum, for all of the reasons stated, I reject Mauermann's argument that the ordinance is unconstitutionally vague and affirm the judgment of conviction and postconviction order.

By the Court.—Judgment and order affirmed.

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