

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 2, 2014

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. 2014AP976

Cir. Ct. No. 2013FO456

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

COUNTY OF SHAWANO,

PLAINTIFF-RESPONDENT,

V.

DAMIEN T. PLASKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Shawano County:
WILLIAM F. KUSSEL, JR., Judge. *Reversed.*

¶1 STARK, J.¹ Damien Plaski was convicted of violating a Shawano County ordinance that prohibits a transient merchant from engaging in sales in the county without first registering with the county clerk. Plaski argues the County

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

failed to meet its burden to prove he was a transient merchant. We agree and reverse.

BACKGROUND

¶2 The County issued Plaski a citation for violating Shawano County Ordinance No. 8-05. That ordinance provides, “It shall be unlawful for any transient merchant to engage in sales within the County of Shawano without being registered for that purpose as provided herein.” SHAWANO CNTY., WIS., ORDINANCES No. 8-05, § 1 (2005). Section 2(A) of the ordinance defines a transient merchant as “any person, firm or corporation who engages in the retail sale of merchandise at any place in this state temporarily, and who does not intend to become and does not become a permanent merchant of such place.” SHAWANO CNTY., WIS., ORDINANCES No. 8-05, § 2(A) (2005). Section 2(B) defines a permanent merchant as

any person who, for at least one year prior to the consideration of the application of this ordinance to said merchant:

1. Has continually operated an established place of business in the local trade area among the communities bordering the place of sale or,
2. Has continuously resided in the local trade area among the communities bordering the place of sale and now does business from his/her residence, or
3. Has purchased an “on-going” business where his predecessor in business has met the qualifications of either Section 2(B)(1) or Section 2(B)(2) above.

SHAWANO CNTY., WIS., ORDINANCES No. 8-05, § 2(B) (2005).

¶3 Plaski pled not guilty, and a bench trial was held on March 18, 2014. At trial, Janice Wright testified Plaski approached her residence in the Town of

Westcott on September 19, 2013, in a van with “an emblem of a cow and chicken” on it. Plaski offered to sell Wright frozen seafood. Wright asked to see Plaski’s “credentials,” but he stated he had just given away his last copy. After Plaski left, Wright reported the incident to the Shawano County Sheriff’s Department.

¶4 Sheriff’s deputy Shawn Copsy responded to Wright’s complaint. Copsy testified he located Plaski and asked to see his transient merchant permit for Shawano County. Plaski showed Copsy a “license,” but it was expired. When Copsy asked to see a current license, Plaski stated he had left it on his kitchen table. Copsy subsequently confirmed Plaski had neither applied for nor been granted a transient merchant permit.

¶5 Plaski, pro se, testified he has resided and operated his business in Shawano County since 2008, when he purchased his home in the Village of Birnamwood. He submitted a map, on which he stated he had traced his regular sales routes in the County over the course of several years. He further stated he “run[s] ads in the paper[,]” and “anybody that’s ever ... dealt with me knows exactly where I’m at.” Based on this evidence, Plaski contended he was a permanent merchant, rather than a transient merchant. Accordingly, he asserted he was not subject to the registration requirement in Shawano County Ordinance No. 8-05.

¶6 On cross-examination, the County asked Plaski whether he was operating as a transient merchant when he attempted to sell Wright frozen seafood on September 19, 2013. Plaski responded he did not believe so. The County then asked whether Plaski had an established business relationship with Wright prior to that date. Plaski confirmed he did not. The County also confronted Plaski with the fact that he had failed to show Copsy a current “license” upon request. Plaski

responded he had a current license. However, he stated, “I grabbed my licens[e] this morning and did not realize that I had grabbed last year’s license I meant to show you. You can check with the Wisconsin Department of Agriculture and Consumer Protection. My license is current.”

¶7 The circuit court found Plaski guilty of violating Shawano County Ordinance No. 8-05. The court found that Plaski “did come to the home of [Wright]; did offer for sale some type of frozen seafood.” The court further observed that, when initially questioned by Copsey, Plaski stated he had a current license, but the license he produced was expired. The court also noted the county clerk confirmed Plaski did not have a transient merchant permit. The court therefore concluded, “[T]o the extent that [Plaski] said he has a current license, that was an untrue statement.” The court also found it “telling” that Plaski never indicated to Copsey that he was a permanent merchant. Finally, the court discredited the map Plaski submitted purporting to show his regular sales routes, noting that nearly all the marks on the map appeared to have been made with the same kind of ink, and it would be “unusual” for Plaski to have used the same pen over the course of several years.

¶8 Based on these findings, the circuit court concluded:

I am convinced, sir, that you did violate Ordinance 8-05. I do believe you were a transient merchant. I do not believe that this is a sales [sic] that you normally made in this matter of what you normally sold and this individual was not one that—you did not sell before. Therefore, I do find that you did not have a valid license and any license you had would have expired. I find you guilty of the violation.

The court imposed a forfeiture of \$767.50. Plaski now appeals.

DISCUSSION

¶9 Plaski claims the evidence presented at trial was insufficient to prove by a preponderance of the evidence that he violated Shawano County Ordinance No. 8-05.² In determining the sufficiency of the evidence, “[o]ur task as a reviewing court is limited to determining whether the evidence presented could have convinced a trier of fact, acting reasonably, that the appropriate burden of proof had been met.” *City of Milwaukee v. Wilson*, 96 Wis. 2d 11, 21, 291 N.W.2d 452 (1980). We must view the facts in the light most favorable to sustain the judgment, and where more than one inference may be drawn from the evidence presented at trial, we are bound to accept the inference drawn by the fact finder. *See State v. Forster*, 2003 WI App 29, ¶2, 260 Wis. 2d 149, 659 N.W.2d 144. In addition, when the circuit court acts as the fact finder, it is the ultimate arbiter of the witnesses’ credibility, *Gehr v. City of Sheboygan*, 81 Wis. 2d 117, 122, 260 N.W.2d 30 (1977), and its findings of fact will not be set aside unless clearly erroneous, WIS. STAT. § 805.17(2).

² Plaski actually claims the County failed to prove he violated Shawano County Ordinance No. 8-05 by clear and convincing evidence. However, an ordinance violation must be proved by clear and convincing evidence only where the violation involves “acts which are also made criminal by statute[.]” *City of Milwaukee v. Wilson*, 96 Wis. 2d 11, 21-22, 291 N.W.2d 452 (1980); *see also Reinke v. Personnel Bd.*, 53 Wis. 2d 123, 136-37, 191 N.W.2d 833 (1971) (clear-and-convincing-evidence burden “applies only to those forfeiture actions for violation of municipal ordinances, where the violation involves an ordinance which has a statutory counterpart”).

Although sales by unlicensed transient merchants were previously prohibited by WIS. STAT. § 130.065, that statute was repealed in 1989. *See* 1989 Wis. Act 336, § 250op. Accordingly, the County was merely required to prove Plaski violated Shawano County Ordinance No. 8-05 by a preponderance of the evidence. *See Wilson*, 96 Wis. 2d at 21-22 (for ordinance violations that do not involve acts made criminal by statute, the lower, preponderance-of-the-evidence burden applies).

¶10 To prove Plaski violated Shawano County Ordinance No. 8-05, the County needed to establish that he was a transient merchant, as the ordinance defines that term. Based on the evidence presented at trial, a trier of fact, acting reasonably, could not have found by a preponderance of the evidence that Plaski met this definition. *See Wilson*, 96 Wis. 2d at 21.

¶11 Specifically, there was no evidence introduced at trial that Plaski “[did] not intend to become and [did] not become a permanent merchant” of Shawano County. SHAWANO CNTY., WIS., ORDINANCES No. 8-05, § 2(A) (2005). The ordinance defines a permanent merchant as a person who has: (1) continually operated an established place of business in the local trade area for at least one year; (2) continuously resided in the local trade area for at least one year and does business from his or her residence; or (3) purchased an ongoing business from a person who qualified as a permanent merchant. SHAWANO CNTY., WIS., ORDINANCES No. 8-05, § 2(B) (2005). No evidence was introduced at trial to show that Plaski did not qualify as a permanent merchant under this definition at the time he attempted to sell seafood to Wright, nor was there any evidence that he did not “intend to become” a permanent merchant at that time. The County did not inquire, or produce any other evidence, regarding whether Plaski had operated an established place of business for over one year, had resided in the area for over one year and did business from his home, or had purchased his business from a permanent merchant.

¶12 Moreover, Plaski testified he has resided and operated his business in Shawano County since purchasing his home there in 2008, which supports a reasonable inference that Plaski continuously resided in the area for over one year and did business from his residence. Given Plaski’s testimony, and the County’s failure to present any evidence relevant to the definition of the term “permanent

merchant,” a reasonable fact finder could not have concluded by a preponderance of the evidence that Plaski did not intend to become and did not become a permanent merchant of Shawano County. The County therefore failed to meet its burden of proof.

¶13 The County emphasizes our deferential standard of review, observing that we must defer to the circuit court’s credibility determinations and accept its findings of fact unless they are clearly erroneous. Be that as it may, the circuit court’s factual findings do not support a conclusion that Plaski did not intend to become and did not become a permanent merchant. The court found that Plaski went to the home of Wright, who was not a previous customer, and attempted to sell her frozen seafood. However, selling merchandise door-to-door—even when the merchant does not have a previous relationship with the customer—is not inconsistent with the ordinance’s definition of a permanent merchant. In fact, the ordinance specifically exempts from registration as a transient merchant any permanent merchant who “takes orders at the home of the buyer for merchandise regularly offered for sale by such merchant within this County” and “delivers such merchandise in their regular course of business[.]” SHAWANO CNTY., WIS., ORDINANCES No. 8-05, § 3(D) (2005).

¶14 The circuit court also found that Plaski falsely told Copey he had a “license.” The County claims the fact that Plaski falsely “claimed that he had a valid Transient Merchant Permit ... mitigates against a finding that [he] was a permanent merchant.” We disagree. Whether Plaski falsely indicated he had a

transient merchant permit when questioned by Copsey has no bearing on whether he actually met the definition of a permanent merchant set forth in the ordinance.³

¶15 The circuit court also found it “telling” that Plaski never told Copsey he was a permanent merchant. Again, this finding is not relevant to whether Plaski met the ordinance’s definition of a permanent merchant. Nothing in the ordinance requires a person to assert that he or she is a permanent merchant upon questioning by law enforcement. Whether Plaski believed he was a permanent merchant at the time he was questioned by Copsey and whether he actually met the definition of a permanent merchant are two different questions, only the latter of which is relevant to whether the County met its burden of proof.

¶16 Finally, the circuit court discredited the map Plaski submitted purporting to show the regular sales routes he had established over the years. The court concluded the map was not credible because all the routes were drawn using the same kind of ink. We defer to the court’s determination that the map was not credible evidence of Plaski’s regular sales routes. Nevertheless, for the reasons explained above, even without the map, the evidence was insufficient for a reasonable fact finder to conclude by a preponderance of the evidence that Plaski did not become and did not intend to become a permanent merchant of Shawano County.

³ In addition, although we need not decide whether the circuit court’s finding that Plaski made a false statement to Copsey is clearly erroneous, we observe it is clear from Plaski’s testimony that when he used the word “license,” he was actually referring to a license issued by the Wisconsin Department of Agriculture, Trade and Consumer Protection, not a transient merchant permit issued by Shawano County. *See* WIS. STAT. § 97.30 (discussing licensure requirements for retail food establishments).

¶17 In addition to highlighting the circuit court’s findings of fact, the County observes that Plaski “produced no credentials of any kind” when asked to do so by Wright. Yet again, we fail to see how this fact is relevant to whether Plaski qualified as a permanent merchant under Shawano County Ordinance No. 8-05. The ordinance does not require a permanent merchant to produce any sort of “credentials” upon request.

¶18 For the foregoing reasons, we conclude the County failed to meet its burden to prove, by a preponderance of the evidence, that Plaski was a transient merchant. Accordingly, Plaski’s conviction for violating Shawano County Ordinance No. 8-05 must be reversed.

By the Court.—Judgment reversed.

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

