COURT OF APPEALS
DECISION
DATED AND FILED

April 11, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1434 **Cir. Ct. No. 2015FO212**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JOHN D. WALKER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

¶1 HRUZ, J.[1] The State appeals an order dismissing a citation charging John Walker with violating state anti-baiting regulations. We affirm.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

BACKGROUND[2]

¶2 Walker was cited for violating WIS. ADMIN. CODE § NR 10.07(2)(a)1. (July 2015),[3] and a bench trial was held. Conservation warden Russell Fell testified he was conducting aerial observations in Washburn County on the day before gun-deer hunting season when he flew over a plat of land Walker owned. Fell observed a deer enter a clearing on Walker's plat and approach what he observed to be three pumpkins. Fell later circled back to that location and saw a truck was parked where the deer and pumpkins had been seen.

¶3 Continuing to observe Walker's plat from the air, Fell testified that the truck had relocated to near a hunting tower stand. He observed two large piles of what appeared to be shell corn near the vehicle and the tower stand, along with two dogs and a person carrying a sack. Fell also observed another tower stand on the plat with two more piles of corn near it. While flying over a separate, noncontiguous property Walker also owned, Fell observed somewhere between five to twelve pumpkins resting underneath a tree in a clearing.

¶4 Fell directed warden David Swanson to investigate the locations on Walker's property. Swanson, who made personal contact with Walker on the first-observed plat, testified that he saw three separate "bait" locations on the plat and confirmed he discovered corn at the place where Fell earlier spotted the pumpkins

[2] We acknowledge that Walker, who represented himself at trial, has not filed a brief in response to this appeal. This court may sanction him with summary reversal for this omission under WIS. STAT. RULE 809.83(2), but we instead elect to address the merits of this case.

[3] All references to the Wisconsin Administrative Code are to the July 2015 register date unless otherwise noted. The applicable regulations are materially unchanged from the current May 2016 register date.

and the truck. He further testified that Walker told him he had placed the corn under the tower stand to feed his dogs. Walker also admitted there was at least one pumpkin on the separate plat of land.[4]

¶5 Fell additionally testified that he called Walker by phone after Swanson had made contact with him. Fell testified that during this call, Walker asked if he could hunt near the sites of the bait, to which Fell responded he would have to wait ten days following the bait's removal. Walker also asked if he could hunt on another forty-acre plat on which bait was not placed or in the tower stands on his property during the last weekend of the season. Walker did not testify at the trial.

¶6 The circuit court dismissed the citation and provided its findings and conclusions in an oral ruling:

> Statute requires no person may place, use, or hunt over bait or feed material for the purpose of hunting wild animals or training dogs. You have to show that the purpose was to hunt and that there was an active hunting going to take place. The mere fact that there's corn piles and pumpkins perhaps in the woods the day before deer season, that doesn't necessarily indicate somebody's going to hunt over those. There was no review of the deer stands. There was no evidence that the deer stands were ready for hunting. … [T]here was no admission from Walker directly to the warden that he intended to hunt over that. I think the State has failed to carry its burden, and the case is dismissed.

[4] The wardens did not testify at the trial about any possible purposes for the placement of the pumpkins on Walker's lands. The circuit court's findings and conclusions evidently made no distinction between the purposes for placing the corn and the pumpkins, and neither does the State's appellate argument.

The State appeals.[5]

DISCUSSION

¶7 This appeal involves a rather specific subject: Does WIS. ADMIN. CODE § NR 10.07(2)(a)1. require the State to show that a person intended to hunt over the bait or feed material he or she places? The State argues it does not, claiming that "the plain language of the baiting regulations provides that a person not place bait where baiting and feeding are prohibited." "Construction of administrative rules is governed by the same principles that apply to statutory construction" and thus subject to independent appellate review. ***State v. Bucheger***, 149 Wis. 2d 502, 506-07, 440 N.W.2d 366 (Ct. App. 1989). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

¶8 The Department of Natural Resources (DNR) has created a general prohibition against baiting wild animals, providing that "[n]o person may place, use or hunt over bait or feed material *for the purpose of hunting wild animals* or training dogs, except as provided in par. (b) or sub (2m)[.]" WIS. ADMIN. CODE § NR 10.07(2)(a)1. (emphasis added). "A person may place, use or hunt over bait or feed" if that person complies with the regulations on baiting exceptions. WIS. ADMIN. CODE § NR 10.07(2)(b). Meanwhile, under WIS. STAT. § 29.336(2)(a),

[5] This court dismissed the State's prior appeal in this matter because the circuit court had not entered a final written order dismissing the citations. The circuit court subsequently entered a written order, which the State now appeals.

the legislature has directed the DNR to "promulgate rules that prohibit feeding deer for hunting or viewing purposes" in counties affected by Chronic Wasting Disease (CWD). Accordingly, "[d]eer baiting and feeding is prohibited in entire counties" that have been established as CWD-affected areas. WIS. ADMIN. CODE § NR 10.07(2m)(b)1. Washburn County is one such county.[6]

¶9 The State first argues that the prepositional phrase "for the purpose of hunting wild animals" in WIS. ADMIN. CODE § NR 10.07(2)(a)1. only modifies "feed material" and not also the conjoined term "bait." In support, the State employs the definition of "Bait" in WIS. ADMIN. CODE § NR 10.001(2s) and notes "feed that is used for hunting purposes" is included as a subset category of "Bait."[7] In the context of this definition, the State claims § 10.07(2)(a)1. creates two distinct violations regarding the action of "placing": "to place bait" and "to place feed that one is using as bait for hunting."

¶10 This interpretation is untenable, and we instead conclude that WIS. ADMIN. CODE § NR 10.07(2)(a)1. requires the State to prove not only that bait or feed material was placed or used, but also that the person's purpose for doing so was to hunt wild animals or train dogs. Grammatically, it is improper to read "for the purpose of hunting animals" to modify only "feed material" and not "bait."

[6] This court grants the State's request to take judicial notice that the DNR has established, pursuant to WIS. ADMIN. CODE § NR 10.41(3), that Chronic Wasting Disease was found in Washburn County and that this is reflected on the agency website at http://dnr.wi.gov/topic/wildlifehabitat/regulations.html. *See* WIS. STAT. § 902.01(2)(b); WIS. STAT. § 908.03(8) (admission of record or statement of public agency setting forth matters observed according to duty imposed by law).

[7] WISCONSIN ADMIN. CODE § NR 10.001(2s) states, in full, that "'Bait', for the purposes of this chapter, means any material placed or used to attract wild animals, including liquid scent and feed that is used for hunting purposes under s. 29.336 (4), Stats., but does not include plain drinking water or decoys."

We believe reading WIS. ADMIN. CODE § NR 10.07(2)(a)1. as a whole makes this clear. This includes the fact that the phrase beginning with "for the purposes of" itself has two disjunctive objects—"hunting wild animals" or "training dogs"—the latter of which is ignored by the State's construction and seems clearly to implicate actions involving both "bait" or "feed." More problematic for the State, however, is the very definition of "Bait" in WIS. ADMIN. CODE § NR 10.001(2s) upon which the State relies. According to the DNR's definition, that term means "any material placed or used *to* attract wild animals." (Emphasis added.) This language demonstrates that any placement must involve an intent to attract wild animals, as opposed to different placements or uses of the materials. *Cf.* ***Bucheger***, 149 Wis. 2d at 507 (phrase "use of [bait]" in past version of WIS. ADMIN. CODE § NR 10.12(1)(h) "suggests an active participation or cooperation between hunter and bait").

¶11 The flaws of the State's construction are also apparent when reading WIS. ADMIN. CODE § NR 10.07(2) as a whole, including its other references to placing, using or hunting over bait or feed. *See, e.g.*, WIS. ADMIN. CODE § NR 10.07(2)(b) ("A person may place, use or hunt over bait or feed as follows …"); (2)(b)8. ("For the purpose of hunting [certain animals] over bait or feed placed in compliance with …"); (2)(b)10. ("Feed or bait material placed or used for …"). This analysis extends to a reading of other subsections of the statute as well. *See, e.g.,* WIS. ADMIN. CODE § NR 10.07(2m)(d) ("Bait or feed may be placed and used for the purpose of hunting bear or training bear dogs, except no person may place, use or hunt over bait or feed …."); (e)2. ("Bait or feed may be placed and used for hunting deer …, except no person may place, use or hunt over bait or feed … [i]n excess of 2 gallons of bait or feed at any feeding site."). None

of these provisions can be read as making the distinction between placing "bait" and placing "feed" that the State proffers.

¶12 Indeed, the term "bait" itself seems to beg the question of the purpose for which any particular material is used, as many types of "materials" may attract wild animals, particularly the hungry ones. Consideration of scenarios beyond the facts of this case seems to amplify this point. For example, large containers of picked fruit placed on a patio and then forgotten could likely attract wild animals. Is the placement of festive jack-o'-lanterns a violation of the regulation if it is done without any intent to attract wild animals? It would seem not. What is more, the State never explains why the DNR in WIS. ADMIN. CODE § NR 10.07 would make the distinction it advocates between the placement of "bait" versus "feed" when it comes to the import of someone's intent in placing either type of item. All in all, the State's interpretation of the regulation is not only untenable but could lead to absurd results, which is to be avoided. *See* ***Kalal***, 271 Wis. 2d 633, ¶46.

¶13 The State seems to further argue that Walker's mere act of placing "bait" is illegal because it occurred in a county designated a CWD-affected area. This argument fails for the same reason as its interpretation of WIS. ADMIN. CODE § NR 10.07(2)(a)1. The exceptions and prohibitions regarding CWD counties outlined above, *see supra* ¶8, are also subject to the requirement that bait and feed material be "placed" in a manner as understood in § 10.07(2)(a)1. Therefore, Walker's placement of bait becomes a violation of WIS. ADMIN. CODE § NR 10.07(2m)(b)1. only if it was done "for the purpose of hunting deer," even in a county designated a CWD-affected area. The State's interpretation is thus at odds with WIS. STAT. § 29.336(2)(a), which requires the DNR to promulgate rules to "prohibit feeding deer for hunting or viewing purposes" in counties with CWD,

not merely to prohibit placing any item that may be considered "feed" or "bait" more generally.

¶14 Having determined the State must show that the purpose of placing bait or feed material was for hunting (or training dogs), the only issue left is whether such evidence was presented here. The circuit court found that the State failed in its burden to prove Walker had a purpose to hunt when he placed the bait on his land. On appeal, the State does not argue that the circuit court's factual finding regarding Walker's intent was clearly erroneous. Rather, it relies solely on its contention that such intent is irrelevant as a matter of law. We have rejected the State's argument in this regard. Accordingly, we affirm the order's dismissal of the citation.

By the Court.—Order affirmed.

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