COURT OF APPEALS
DECISION
DATED AND RELEASED

July 17, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-3570

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MELVIN W. RANGE, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

VERGERONT, J.[1] Melvin W. Range, Inc. (Range) appeals from a judgment entered on September 28, 1995, convicting it of group axle overload contrary to § 348.15(3)(c), STATS., and imposing a forfeiture of $5,315.26. A Wisconsin State Patrol trooper determined that a semitrailer and tractor unit,

[1] This appeal is decided by one judge pursuant to § 752.31(2)(g), STATS.

driven by Range's agent, was carrying a load on the highway that was 60,520 pounds overweight. Range contends that the evidence of the truck's weight should be suppressed because having the driver drive the truck from the location on the highway where it was stopped to the nearest weigh scale station constituted an arrest and was unlawful since there was no probable cause. Range also contends that § 348.15 is unconstitutional because the fines it authorizes are so great as to constitute a criminal penalty for a civil offense.

Before reaching the merits, we must address a threshold issue: whether the trial court erroneously exercised its discretion in granting relief under § 806.07(1)(h), STATS., from a prior judgment entered on February 10, 1995. We previously held that we did not have jurisdiction to review the February 10, 1995 judgment. *See* ***State v. Melvin W. Range, Inc.***, No. 95-0601, slip op. (Wis. Ct. App. May 5, 1995). Subsequently the trial court granted relief from that judgment under § 806.07(1)(h), and the trial resulting in the September 28, 1995 judgment took place. Based on the recent supreme court opinion in ***Edland v. Wisconsin Physicians Service Ins. Corp.***, ___ Wis.2d ___, 563 N.W.2d 519 (1997), we conclude that the court properly exercised its discretion in granting relief from the February 10, 1995 judgment.[2] On the merits, we conclude that the trial court properly denied the suppression motion and that § 348.15, STATS., is not unconstitutional. We therefore affirm.

[2] We issued a decision in this appeal on June 27, 1996, in which we concluded that the trial court did not have the authority to grant relief from judgment under § 806.07, STATS., relying on ***Eau Claire County v. Employers Ins.***, 146 Wis.2d 101, 430 N.W.2d 579 (Ct. App. 1988), and ***ACLU v. Thompson***, 155 Wis. 2d 442, 455 N.W.2d 268 (Ct. App. 1990). We withdrew that opinion on August 22, 1996, and subsequently ordered that this appeal be placed on hold pending the supreme court's decision in ***Edland v. Wisconsin Physicians Service Ins. Corp.***, ___ Wis.2d ___, 563 N.W.2d 519 (1997).

SECTION 806.07, STATS., MOTION

Trooper Jeffrey Zuzunaga issued a citation for group axle overload in violation of § 348.15(3)(c), STATS. Range entered a plea of not guilty. Range filed a motion to suppress certain evidence on the ground that the arrest of Range's agent, Wesley Quinn, was unlawful. Range also filed a motion to dismiss on the ground that § 348.15 is unconstitutional. A hearing was held on the suppression motion, at which Zuzunaga testified.

After the trial court denied both motions, the parties agreed in writing to a stipulated trial. The parties agreed that the court could consider certain documents for purposes of trial and that the parties were waiving opening statements, closing arguments, cross-examination of witnesses, and presentation of evidence other than the stipulated documents. The stipulation also stated that the parties recognized that Range was preserving, for purposes of appeal, the legal issues presented by the two motions denied by the court. Pursuant to the stipulation, the court entered a judgment of conviction on June 3, 1994. The parties were not notified of the entry of the judgment. The forfeiture imposed in the judgment—$5,315.26—was the same amount that Range had been required to post as a condition of bail.

When the parties learned that the judgment had been entered, the appeal time had run. They stipulated to vacating and re-entering the judgment of conviction. The court entered an order on February 9, 1995, which provided in part that "this action having been before this court for a stipulated trial on May 5, 1994, and the court having entered judgment of guilt in the above case, without notice to either party … it is ordered that this action be reopened and a judgment

of guilt be reentered on February 10, 1995." A "new conviction" date of February 10, 1995, is listed on the Conviction Status Report.

On March 14, 1995, Range filed an appeal from the February 10, 1995 judgment of conviction. After ordering the parties to brief the issue of whether we had jurisdiction over the appeal, we concluded, in an order dated May 5, 1995:

> It appears that the trial court vacated and re-entered the order solely for the purpose of extending the time to appeal. No other reason is advanced. However, a trial court cannot extend the time to appeal a final judgment by vacating and re-entering the judgment. ***Eau Claire County v. Employers Ins.***, 146 Wis.2d 101, 111, 430 N.W.2d 579, 583 (Ct. App. 1988). We therefore lack jurisdiction and must dismiss the appeal as untimely, notwithstanding the fact that the original order was entered without notice to the parties.
>
> We note the appellant's motion to strike the State's response, which argues for dismissal, on the grounds that the State breached an agreement to allow the appeal. Whether this appeal is timely is not an issue that can be resolved by stipulation. The State's alleged breach of its agreement is therefore irrelevant to our determination.

Remittitur to the trial court occurred on June 6, 1995.

On June 29, 1995, Range filed a motion under § 806.07, STATS., for a new trial or, in the alternative, a new sentencing hearing on the grounds of surprise, misconduct of an adverse party, and any other reason justifying relief.[3]

[3] Section 806.07, STATS., provides in pertinent part:

> (1) On motion and upon such terms as are just, the court may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect;
>
> ….

(continued)

The motion in the form of an affidavit of defense counsel stated that Range had been surprised at the entry of judgment and imposition of a "severe sentence" with no notice given. The affidavit also stated that when the State argued in its brief before the court of appeals that the appeal was untimely, it breached its agreement "that the defense be permitted to pursue its appeal," which was the point of the stipulation. Finally, the motion asserted that, "the parties never had an opportunity to be heard as to sentence, when the defense would have argued for a much lower forfeiture."

The State opposed the motion for a new trial. The trial court granted the motion under § 806.07(1)(h), STATS. The court concluded the motion was brought within a reasonable time. The court determined that defense counsel, after "that initial gap" when she did not know that the conviction had been entered, acted promptly, quickly and reasonably. The court found it was not unreasonable for defense counsel not to know that the conviction had been entered in "the unique circumstances in this case." The court stated that such stipulated trials were rare and there was not an established court procedure to deal with the

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> (c) Fraud, misrepresentation, or other misconduct of an adverse party;
>
> ….
>
> (h) Any other reasons justifying relief from the operation of the judgment.
>
> (2) The motion shall be made within a reasonable time, and, if based on sub. (1) (a) or (c), not more than one year after the judgment was entered or the order or stipulation was made. A motion based on sub. (1) (b) shall be made within the time provided in s. 805.16. A motion under this section does not affect the finality of a judgment or suspend its operation. This section does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to set aside a judgment for fraud on the court.

situation. The court stated that, after it had determined a judgment of conviction should be entered based on the stipulation and so advised its clerk, it assumed the clerk of court's office would notify Range in some way that it had to pay the fine. The court noted that did not happen, apparently because the clerk of court simply took the money already posted, which was the amount of the fine. The court stated that the parties had agreed to reopen and re-enter the judgment so that Range could appeal, but that the State now legitimately had a different position after reading the order of our court with respect to the appeal of the February 10, 1995 judgment.

The court concluded this was not a case of ineffective assistance of counsel or lack of diligence by Range or its counsel and that it would be harsh and unfair to deny Range the opportunity to appeal the forfeiture "when it was clear that everything we did was to preserve the right to appeal."

After the new trial, at which Trooper Zuzunaga again testified, the court adjudged Range guilty and asked for argument on the appropriate penalty. The prosecutor stated that the minimum fine, computed as required by the statute, was $5,315.26, the amount posted as bail, and he was not going to argue for a higher amount. Defense counsel stated that he had no argument on the penalty, but was challenging the constitutionality of the statute. The court imposed a fine of $5,315.26. Range now appeals this judgment of conviction entered on September 28, 1995.

A decision whether to vacate a judgment under § 806.07, STATS., is directed to the discretion of the trial court. ***Eau Claire County v. Employers Ins.***, 146 Wis.2d 101, 109, 430 N.W.2d 579, 582 (Ct. App. 1988). We will not reverse

such a decision if there is a process of reasoning based upon the facts of record and the proper legal standard. ***Id.***

The State argues that the trial court did not apply the proper legal standard because it did not have authority to grant a new trial under § 806.07(1)(h), STATS. Using essentially our reasoning in dismissing the appeal of the February 10, 1995 judgment, the State argues that under ***Eau Claire County***, the court may not grant a motion under § 806.07 for the purpose of affording a new trial from which a timely appeal could be taken. In ***Eau Claire County***, we concluded that § 806.07(1)(h) did not authorize the trial court to vacate two earlier judgments and enter a consolidated judgment similar in substance to the two earlier judgments, where the plaintiff had filed an untimely notice of appeal from the two earlier judgments on the mistaken belief that it had to combine the two earlier judgments in a single appeal. ***Id.*** at 110-11, 430 N.W.2d at 582-83. The State argues that we have earlier determined in this case that ***Eau Claire County*** did not permit the appeal time for the judgment of conviction entered on June 3, 1994, to be extended by the court's entry of an order pursuant to the parties' stipulation to vacate and re-enter the judgment of conviction at a later date. According to the State, the subsequent motion under § 806.07, which resulted in the trial and September 28, 1995 conviction, is simply another effort to do the same thing and is also prohibited under ***Eau Claire County***.

The supreme court's recent decision in ***Edland v. Wisconsin Physicians Service Ins. Corp.***, ___ Wis.2d ___, 563 N.W.2d 519 (1997), requires us to re-examine our interpretation and application of ***Eau Claire County*** and ***ACLU v. Thompson***, 155 Wis.2d 442, 455 N.W.2d 268 (Ct. App. 1990). In ***Edland***, the court held that, where the trial court indicated an intent to mail a copy of its decision and order to the parties' attorneys, as indicated by a "c.c." at the end

of the order, but failed to do so, and subsequently acknowledged its failure to carry out that intention, the court could effectively extend the time to appeal by vacating and reinstating that order under § 806.07(1)(a), STATS.[4] The supreme court concluded that the trial court's failure to send a notice of its decision and order, as it intended and as it later acknowledged it intended, constituted a mistake for purposes of § 806.07(1)(a).

In reaching this conclusion, the supreme court discussed ***Eau Claire County*** and stated that it "did not create a blanket proscription against extending the time to appeal by vacating and reinstating a judgment. Indeed, such a proscription would be inconsistent with the normal operation of the statute [§ 806.07], since vacating an order and entering another will invariably start a new the time period for appeal." ***Edland***, ___ Wis.2d at ___, 563 N.W.2d at 522. The court distinguished the facts in ***Eau Claire County*** from the facts in ***Edland*** in that the plaintiff in ***Eau Claire County*** did receive notice of judgment well before the expiration of the appeal period, whereas in ***Edland*** none of the parties had notice of the order until after the appeal period expired. Also, the failure to file a timely appeal in ***Eau Claire County*** resulted from the plaintiff's misunderstanding of procedure, whereas in ***Edland*** the plaintiff's failure to file a timely notice of appeal was the result of the court's error alone—that is, the court's failure to send the notice of the order as it had intended.

The supreme court in ***Edland*** also discussed our decision in ***ACLU v. Thompson***, 155 Wis.2d 442, 455 N.W.2d 268 (Ct. App. 1990), in which we

[4] There was no court of appeals decision in ***Edland v. Wisconsin Physicians Ins. Corp.***, ___ Wis.2d ___, 563 N.W.2d 519 (1997), because the court of appeals certified the issue to the supreme court and the supreme court accepted certification, affirming the order of the circuit court which had vacated and reinstated the order.

affirmed the circuit court's denial of the plaintiff's motion to vacate and reinstate a judgment under § 806.07(1)(a) and (h), STATS. In ***ACLU,*** the plaintiffs had received no notice that a final judgment had been entered against them, and that was the reason for the failure to file the notice of appeal. Citing ***Eau Claire County***, we stated in ***ACLU*** that the reason "why plaintiffs received no notice of the judgment is irrelevant …." ***ACLU***, 155 Wis.2d at 455 n.5, 455 N.W.2d at 268. The supreme court in ***Edland*** stated that ***ACLU*** was correct insofar as it held that a circuit court has no authority to vacate and enter an order or judgment "when its sole basis for doing so is the unadorned desire to allow an appeal." ***Edland***, ___ Wis.2d at ___, 563 N.W.2d at 522. However, the supreme court "overrule[d] that portion of ***ACLU*** which stands for the proposition that regardless of the reason, a court can never effectively extend the time period for appeal by vacating and re-entering an order or judgment." ***Id.*** at ___, 563 N.W.2d at 523.

Under ***Edland***, then, there is no blanket proscription against vacating and re-entering an order or judgment even though it has the effect of extending the time period for an appeal. As ***Edland*** instructs, we must focus on the trial court's reason for granting the motion to vacate. We conclude that the circumstances here, as in ***Edland***, constitute "a compelling equitable consideration" that "outweighs the goal of finality and provides a basis for effectively extending the time for appeal." ***Id.*** at ___, 563 N.W.2d at 523.

The trial court here acknowledged that it assumed the parties would be notified by the clerk of court that payment of the fine was required because the judgment of conviction had been entered. However, that was not done through no fault of Range or its counsel but because the court lacked a procedure for dealing with this unusual situation. This is sufficient to support a conclusion that there was a mistake by the court within the meaning of § 806.07(1)(a), STATS.

The time limit for bringing a motion under § 806.07(1)(a), STATS., is a reasonable time, not to exceed one year. Range filed its motion on June 29, 1995. The trial court granted relief under § 806.07(1)(h) noting that this subsection did not have a one-year time limit on it, but rather a "reasonable time" limit. Apparently the trial court considered that the time limit for Range's motion ran from the entry of the first judgment of conviction on June 3, 1994, which occurred more than a year before the motion was filed on June 29, 1995. However, the June 3, 1994 judgment was vacated and replaced by the February 10, 1995 judgment, and the motion filed on June 29, 1995, was to set aside that judgment and grant a new trial.

In addition, Range did act within a year of the June 3, 1994 judgment, in that, by stipulation of the parties which the judge approved, that judgment was vacated by the February 9, 1995 order. Although the vacation was not the result of a formal motion under § 806.07, STATS., that is, in effect, what occurred. The court minutes reflect that the lack of notice was discussed with the attorneys on February 1, 1995. The court accepted the parties' stipulation by order February 9, 1995, and the "new" judgment of conviction was entered on February 10, 1995. Under ***Edland,*** the trial court's mistake in not notifying the parties supported the court's decision to accept the parties' stipulation and vacate the June 3, 1994 judgment of conviction and re-enter it, as it did on February 10, 1995. However, viewing ***Eau Claire County*** as establishing a blanket proscription, which we then did, we did not examine the reason that Range did not receive notice of the vacated (June 3, 1994) judgment.

In ruling on the § 806.07, STATS., motion, the trial court found that Range's counsel acted reasonably and promptly in taking each of the steps it took to obtain relief. If the critical time is considered to be either from June 3, 1994 to

February 9, 1995, or from February 10, 1995 to June 29, 1995, relief is proper under § 807.06(1)(a), STATS. If the critical time is, as the court apparently determined, from June 3, 1994 to June 29, 1996, then relief is proper under § 806.07(1)(h), STATS. The mistake of the court resulting in the lack of notice of the June 3, 1994 judgment, together with the parties' stipulation and court's order vacating and re-entering a judgment because of that lack of notice, and our dismissal of the appeal from the re-entered judgment based on a mistaken reading of ***Eau Claire County*** combine to constitute reasons justifying relief under § 806.07(1)(h).

Since the court properly exercised its discretion in vacating the February 10, 1995 order, the appeal from the September 28, 1995 judgment of conviction is timely. We now turn to the two issues the defendant raises in its challenge to that conviction.

SUPPRESSION MOTION

We first address the defendant's contention that having Quinn drive the truck from the location on the highway to the next weigh scale station was the functional equivalent of an arrest and unlawful because there was no probable cause. We begin by summarizing Trooper Zuzunaga's testimony at the suppression hearing.

At the time of this incident, Trooper Zuzunaga had been a trooper with the Wisconsin State Patrol for just over seven years. Before that he was an inspector with the State Patrol for a short period of time. He observed Range's truck parked in the westbound lane of Highway 19 on the shoulder in an area that is marked by official traffic signs as "no parking." At Trooper Zuzunaga's

request, Quinn, the driver, identified himself.[5] Trooper Zuzunaga had been informed from the permanent inspectors for the Wisconsin State Highway Patrol that, based on their experience, Range always ran overweight and he should expect to receive only one bill of lading when in fact the truck might be carrying up to three or four bills of lading at any one time. He was advised that he should be especially aware of the truck being overweight if the truck was traveling westbound with loads of steel.

Trooper Zuzunaga asked Quinn for the bills of lading. Quinn provided one bill of lading that indicated that the truck carried steel and was traveling westbound to Minnesota. Trooper Zuzunaga observed that the tires, especially on the trailer and in the rear, were "squatting" more than normal and that the trailer at the back end looked like it was bowing down and hanging low toward the ground, as though there were a great deal of weight. There was not as much flattening of the tires on the tractor portion as the rear of the trailer; the flattening of the latter was quite obvious. He was not able to observe the load because of the sides of the trailer and the tarp covering the entire load. He did not uncover the tarp because it appeared to be a difficult operation. In Trooper Zuzunaga's experience, it is not common for semitrailers to have under-inflated

[5] Before the trial court, as on appeal, Range concedes that Trooper Zuzunaga had reasonable suspicion to stop and detain Quinn for a parking violation. An officer may make an investigatory stop consistent with the Fourth Amendment prohibition against unreasonable search and seizures when the officer reasonably suspects, in light of his or her experience, that some kind of criminal activity has been taking place. ***State v. Richardson***, 156 Wis.2d 128, 139, 456 N.W.2d 830, 834 (1990). An investigatory stop is permissible when the person's conduct may constitute only a civil forfeiture. ***State v. Krier***, 165 Wis.2d 673, 678, 478 N.W.2d 63, 65 (Ct. App. 1991). Reasonable suspicion is a common sense test: whether under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience. ***State v. Jackson***, 147 Wis.2d 824, 834, 434 N.W.2d 386, 390 (1989).

tires. In his experience, either overweight or low pressure can cause tires to appear low.

According to Trooper Zuzunaga, he "took Quinn" to the Cottage Grove weigh scale. Trooper Zuzunaga drove ahead of Quinn in his car and Quinn drove the truck. The weigh station was approximately nine to ten miles away and was, as far as Trooper Zuzunaga's knew, the closest available certified scale. The purpose of going there was to weigh the truck and to be in an area that would permit a more thorough inspection. Quinn drove approximately thirty-five to forty miles to the weigh scale, although it was both a fifty-five mile an hour and a sixty-five mile an hour speed zone. Trooper Zuzunaga testified that, although he had not officially arrested Quinn, Quinn was "not free to leave." [6]

In denying the motion to suppress the evidence of the weight of the truck, the trial court determined that Quinn had no reason to believe that he was under arrest at any time during his contact with Trooper Zuzunaga. The court reasoned that the truck could have been weighed in Quinn's absence just as well in his presence; that if Quinn was not aware that he was free to leave at any time without the truck and its load, that lack of awareness could not be blamed on the State. The court also determined that even if Quinn understood the request that he drive to the weigh station as a seizure or arrest, § 348.19(1)(a), STATS., permits an officer to order a weighing when he has "reason to believe" that a truck is overweight. The court agreed with the State that this standard was lower than that

[6] There is no elaboration in the record as to what "taking" Quinn to the weigh station meant, other than that Quinn drove the truck, following Trooper Zuzunaga. The trial court does not make specific findings on whether Quinn consented to go, but implies that Trooper Zuzunaga did not require that he go. As will be seen later in the opinion, we assume without deciding that Trooper Zuzunaga required Quinn to drive the truck to the weigh station.

for a probable cause arrest and was met in this case by the uneven distribution of weight on the rear axles, Quinn's failure to submit bills of lading accurately representing the total weight of the load, and the information gained from the other inspectors about past practices of the defendant.

The defendant's argument that an arrest took place when Trooper Zuzunaga had Quinn drive to the nearest weigh scale is based on ***Dunaway v. New York***, 442 U.S. 200 (1979). In ***Dunaway***, the officers took the defendant from a neighbor's home in a police car to the police station where they interrogated him. ***Id.*** at 212. The Court held that this was an unlawful seizure under the Fourth Amendment in the absence of probable cause, even if the officers did not formally arrest him. ***Id.*** at 216. Since no probable cause existed, the incriminating statements and sketches obtained from the defendant were suppressed. ***Id.*** at 218-19. The evidence that Range apparently seeks to suppress here is the weight of the truck, which was determined at the weigh station. Range does not explain how, even if Trooper Zuzunaga's having Quinn drive the truck to the Cottage Grove scale were considered an arrest without probable cause, that would result in suppression of the weight of the truck. The weight of the truck was not information supplied by or obtained from Quinn.

It is not clear to us whether Range is challenging the seizure of the truck as a violation of the Fourth Amendment. Section 348.19(1)(a), STATS., provides that an officer:

> having reason to believe that the gross weight of a vehicle is unlawful … may require the operator of such vehicle to stop and submit the vehicle and any load it may be carrying to a weighing … and may require that such vehicle be driven to the nearest usable portable or certified station.

The State, by analogy to § 968.26, STATS., which governs John Doe proceedings, argues that "reason to believe" is a lesser standard than probable cause. Range, without citation, argues that "reasonable grounds" is a term used in the traffic code that has been construed by case law to mean "probable cause," and that "reason to believe" in § 348.19(1)(a) must likewise be interpreted to mean probable cause in order to avoid raising questions as to its constitutionality. Presumably Range means that unless the seizure of the truck is justified by probable cause, there is a violation of the Fourth Amendment.

We assume without deciding that "reason to believe" in § 348.19(1), STATS., means the same as probable cause. We conclude that Trooper Zuzunaga had probable cause to believe that the truck was overweight.

Probable cause exists when the totality of the circumstances within the officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably violated the statute. *See* ***State v. Babbitt***, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). Probable cause does not require proof beyond a reasonable doubt or even that guilt is more likely than not. ***Id.*** at 357, 525 N.W.2d at 104.

Trooper Zuzunaga observed that the rear trailer tires were low, and were lower than those on the tractor. The trailer is the load bearing part of the vehicle. From his experience there were two causes for the low tires—either an overloaded truck or simply low pressure in the tires. Range argues that since there were two inferences possible from the low tires, either of which was possible, Trooper Zuzunaga had reasonable suspicion, but not probable cause, to believe the truck was overweight. If the low tires were all Trooper Zuzunaga observed, we would agree with Range. However, Trooper Zuzunaga also testified that the

trailer at the back end appeared to be bowing down, hanging low toward the ground "as though there were a great deal of weight." This observation made it more likely that the tires were low because the truck was overweight than that they were low solely because there was insufficient inflation. We conclude Trooper Zuzunaga had probable cause to believe the truck was overweight even without the information he had from inspectors about prior violations by Range carrying steel on westbound routes.

Because we conclude that there was probable cause to believe that the truck was overweight, the requirements of the § 348.19(1), STATS., and the Fourth Amendment were met at the time Quinn drove the truck to the weigh station. Therefore, even if Trooper Zuzunaga required Quinn to drive the truck to the weigh station and even if that was the functional equivalent of an arrest, as Range frames the analysis, there was probable cause to support that arrest.

CONSTITUTIONALITY OF § 348.15, STATS.

Range argues that the penalty imposed pursuant to § 348.21, STATS., for a violation of § 348.15, STATS., is punitive and therefore violates the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and the equivalent provisions of the Wisconsin Constitution. We conclude there is no merit to this argument.

Range relies on ***U.S. v. Halper***, 490 U.S. 435 (1989). In ***Halper***, the Court held that the double jeopardy clause of the Fifth Amendment is violated when an individual has been criminally prosecuted, convicted and sentenced for an offense, and in a subsequent civil action, a penalty is imposed that does not solely serve a remedial purpose. ***Id.*** at 449. However, the Court also stated that the double jeopardy clause is not implicated when the government seeks the full range

of civil penalties for a person who has not already been punished for the same conduct, even if the civil sanctions are punitive. ***Id.*** at 450. Range's argument completely omits any reference to this critical portion of the holding in ***Halper***. Since Range has not previously been subject to criminal prosecution for this same overweight violation, the punitive nature of the fine, assuming without deciding that it is punitive, does not violate the double jeopardy clause. Range provides us with no authority for its due process argument other than ***Halper*** and Wisconsin cases following it.

It is true that the Eighth Amendment proscription against excessive fines applies to fines imposed by the government in civil actions. *See* ***Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.***, 492 U.S. 257, 276 n.21 (1989). However, in ***State v. Trailer Service, Inc.***, 61 Wis.2d 400, 409, 212 N.W.2d 683, 689 (1973), our supreme court considered whether the fines imposed for violations of § 348.15, STATS., were unconstitutional as "excessive fines" and concluded they were not.[7] Range dismisses ***Trailer Services*** as "obsolete" because it was decided before ***Halper*** and did not address a challenge based on the Fifth Amendment. Range does not explain how ***Halper*** would affect the Eighth Amendment analysis in ***Trailer Services***. And, as we have already held, the double jeopardy analysis in ***Halper*** is inapplicable to this case.

[7] The Wisconsin Constitution equivalent to the Eighth Amendment is Article I, Section 6.

By the Court.—Judgment affirmed.

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