COURT OF APPEALS
DECISION
DATED AND RELEASED

MARCH 25, 1997

No. 96-2778-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TONY L. SUTTON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Barron County: JAMES C. EATON, Judge. *Affirmed.*

Before LaRocque, Myse and Mangerson, JJ.

PER CURIAM. Tony Sutton appeals a judgment convicting him of harassing a police animal contrary to § 951.095(1)(b), STATS. He argues that (1) § 951.095 is unconstitutionally vague and (2) the trial court considered an improper factor at sentencing. We reject his arguments and affirm the judgment.

Sutton fled on foot after a uniformed city police officer stopped the vehicle in which Sutton was riding to arrest him on outstanding warrants.

Officers pursued on foot as Sutton ran to a golf course. When it became apparent that the officers were not going to be able to apprehend Sutton on foot, they shouted a warning to stop or they would send a police dog after him. Sutton continued running across the golf course and the dog was released. As the dog approached Sutton, Sutton stopped, turned to face the dog and began to punch and kick the dog. The record indicates the dog was well trained and following the instructor's commands. The dog's handler testified that the dog was in control and not attacking Sutton. Officers arrived within a minute and ordered the dog to leave, which it did. It went and sat down next to another officer. Officers placed Sutton in handcuffs.

Sutton had kicked the dog alongside its head, and the dog was bleeding from its jaw. There was swelling and a small laceration on its left front leg. Sutton received scratches to his chest and arm. Sutton testified on his own behalf to the effect that he had not heard the officers' warnings and had only reacted in self-defense.

Section 951.095(1)(b), STATS., makes it unlawful to "Strike, shove, kick, or otherwise subject the animal to physical contact." The trial court instructed the jury that the State must prove five elements: (1) The animal was being used to perform agency functions; (2) Sutton knew the animal was being used by a law enforcement agency to perform agency functions; (3) Sutton struck, shoved, kicked or otherwise subjected the animal to physical contact; (4) the striking, shoving, kicking or otherwise subjecting the animal to physical contact caused injury to the animal; and (5) Sutton intended to cause injury to the animal by striking, shoving, kicking, or otherwise having physical contact. The court also instructed on self-defense. The jury returned a guilty verdict.

Sutton argues that § 951.095(1)(b), STATS., is unconstitutionally vague because it proscribes casual contact with a police animal. The constitutionality of a statute is a question of law that we review de novo. ***State v. Pittman,*** 174 Wis.2d 255, 276, 496 N.W.2d 74, 83 (1993). "No person may 'be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'" ***State v. Heredia,*** 172 Wis.2d 479, 488, 493 N.W.2d 404, 408 (Ct. App. 1992) (quoting ***United States v. Harriss***, 347 U.S. 612, 617 (1954)). "Unless First Amendment values are implicated, however, a person to whose conduct a statute patently applies may not challenge it for vagueness." ***Id.***

No First Amendment values are suggested. Here, Sutton's conduct of punching and kicking the dog falls squarely within the stated prohibitions of "striking" and "kicking" the police animal. Because § 951.095(1)(b), STATS., patently applies to Sutton's conduct, Sutton may not challenge the statute on grounds of vagueness.

Sutton argues that § 951.095, STATS., is impermissibly vague because it prohibits any sort of contact with a police animal such that a person bent on compliance with the law would not have fair notice of the proscribed conduct. He also argues that the natural reaction to fend off an attacking animal is to strike, shove, kick or otherwise subject the animal to physical contact.

The circumstances Sutton suggests have no bearing on the case before us. By his own admission, Sutton was not bent on compliance with the law but instead fleeing the officers who were attempting to arrest him on a warrant. Also, the record shows that the animal was not attacking, but rather was released by its handler and following instructions, which included leaving when directed to do so. We need not address hypothetical arguments about other possible factual situations. ***State v. Olson,*** 113 Wis.2d 249, 257, 335 N.W.2d 433, 438 (Ct. App. 1983).

Next, Sutton argues that the trial court failed to reasonably exercise its sentencing discretion. We disagree. Sutton concedes that the sentencing court may take into consideration conduct that may constitute uncharged offenses for the purpose of considering a defendant's character and rehabilitative needs. ***Elias v. State,*** 93 Wis.2d 278, 286 N.W.2d 559 (1980). Sutton contends that the trial court isolated the fleeing incident and placed undue weight on the officers' trepidation during the arrest.

The weight a sentencing court accords each factor is discretionary. ***Ocanas v. State,*** 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975). In considering the nature of the offense, the trial court observed that the injury to the dog was slight. However, the court concluded that the context of the crime was important. The court considered Sutton's fear of the animal, his claim of self-defense, and the fact that the officers' lives are in jeopardy every time they chase a fleeing criminal. The court considered Sutton's character, intelligence, ability to work hard, family relationships, and prior record. The court also considered

protection of the public. In light of the various factors, the court sentenced him to eighteen months in prison, consecutive to the sentence he was serving. These are appropriate factors. ***State v. Echols,*** 175 Wis.2d 653, 682, 499 N.W.2d 631, 640 (1993). The eighteen-month sentence was within the two-year maximum. Sections 951.095(1)(b), and § 951.18(2m), STATS. The record reveals a proper exercise of sentencing discretion.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.