COURT OF APPEALS
DECISION
DATED AND RELEASED

April 24, 1997

NOTICE

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.

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No. 96-2865

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TERRENCE M. JORDAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed.*

VERGERONT, J.[1] Terrence Jordan appeals from a conviction for speeding in violation of § 346.57(4)(h), STATS. He argues that the trial court erroneously denied his motion to strike the testimony of the officer who issued the citation because the officer had no independent recollection of the stop, and this violated his right under the Sixth Amendment to the United States Constitution to

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

confront the witness against him. We reject his arguments and affirm the conviction.

James Ausloos, a trooper with the Wisconsin State Patrol, issued Jordan a citation which stated that he was traveling seventy-seven miles per hour with a fifty-five mile per hour speed limit.[2] Both Ausloos and Jordan testified at trial. Jordan represented himself. According to Jordan's testimony, he was engaged in the practice of law in Illinois and had been since approximately 1976.

In his direct testimony, Ausloos described stopping Jordan's vehicle, some conversation with Jordan, the location of the stop, the citations that he wrote out and gave to Jordan after he stopped him, how he obtained the reading that Jordan's vehicle was traveling at seventy-seven miles per hour using the stationary speed computer, his training and experience in using that equipment, and his opinion that the speed he observed Jordan's vehicle to be traveling was consistent with the 77.9 reading of the computer. Jordan did not make any objections based on Ausloos's ability to recall the events to which he testified.[3]

On cross-examination, Jordan asked Ausloos at several different points whether testimony Ausloos had just given was something he could specifically recall or was based on the "incident report," that is, the citation. Ausloos responded in different ways, saying that particular testimony was "based on his incident report," that he did not have "an independent recollection" of certain testimony, that "he did recall the stop," that "he recalled certain testimony

[2] At the same time, Ausloos issued a citation for failure to fasten his seat belt in violation of § 347.48(2m), STATS., but the court found Jordan not guilty on that charge.

[3] At various points Jordan made other objections that are unrelated to the issue on appeal.

'according to' his incident report," and that "he could not remember all the details." Jordan made no motion to strike Ausloos's testimony during or at the end of his cross-examination. There was no redirect examination of Ausloos. Jordan made no motion before Ausloos was excused.

After Jordan began the presentation of his defense, the court had to interrupt the trial to hear another matter. There was discussion about when the trial would be reconvened later that day. In that context, the court asked whether Ausloos was needed to testify later that day. It appears from the transcript that the court was addressing the question to Jordan, but this answer is attributed to "Mr. Thompson," the prosecutor: "I doubt it Your Honor. At this point, no, but I don't know what else is coming." From the context of the question and answer, it appears that Jordan rather than the prosecutor answered, but we cannot be sure. In any event, Jordan was present and a part of this discussion when the exchange took place.

Jordan resumed presenting his defense later that afternoon. The State did not present rebuttal. Neither Jordan nor the State introduced the citation into evidence. After both parties said they had no further evidence to present, Jordan moved to strike Ausloos's testimony on the ground that Ausloos had testified that he had no present recollection of the occurrence, the citation had not been introduced into evidence, and there was therefore no competent testimony of the incident. The State opposed the motion and the court denied it. The court did not state its reason for denying the motion. It appears the court was about to

explain its reason when Jordan interrupted saying he had another matter to raise, and the court then took up the other matter.[4]

Jordan brought a posttrial motion renewing his motion to strike Ausloos's testimony and raising other matters. The court issued a written decision on this motion. The court concluded that if it erred in denying the motion to strike, the error was harmless: Jordan had the citation, had the opportunity to cross-examine Ausloos on it, the citation, and it would have made no difference to the outcome whether the court heard Ausloos's testimony or looked at the citation.

Jordan is correct that, if a witness, after viewing a writing he or she made, has no independent recollection of the facts reflected in the writing, the writing itself, provided certain foundation is laid, may come into evidence but not the testimony. *See* ***Harper, Drake & Assoc., Inc. v. Jewett & Sherman Co.***, 49 Wis.2d 330, 343, 182 N.W.2d 551, 558 (1971). However, it is also true that objections to the admission of evidence, or motions to strike evidence, must be timely before error may be predicated on the admission of the evidence. *See* *§* 901.03(1)(a), STATS. Objections must be made as soon as the opponent reasonably becomes aware of the nature of the testimony. ***Coleman v. State***, 64 Wis.2d 124, 129, 218 N.W.2d 744, 747 (1974).

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[4]

THE COURT: Okay. The Court has heard substantial testimony in this case, and there are two citations. One is a speeding, one is a seat belt citation. The testimony of the officer will not be stricken. That motion is denied. The testimony of the officer --

MR. JORDAN: Judge, I do have another matter to raise before we go on to something else.

THE COURT: Yes. What it is?

We conclude that Jordan's motion to strike was untimely. Jordan made no objection during Ausloos's direct testimony on this point, even though Ausloos referred to the citation in his testimony. Jordan did not bring the motion to strike during his cross-examination, even though it was then that he received the answers that he claims are the basis for the motion. He did not bring the motion until after the discussion of whether Ausloos needed to attend in the afternoon and after the close of evidence in the afternoon. Had he made the motion or objection in a timely manner, no doubt there would have been further questioning of Ausloos, likely resulting in a ruling that either his testimony or the citation was admissible and thereby removing any predicate for claiming error on appeal. This is precisely one purpose for the rule in § 901.03(1)(a), STATS. Since Jordan's motion to strike was untimely, he has waived the right to challenge the court's ruling on appeal, and we will not address it.

Jordan's Sixth Amendment argument is presented in a cursory fashion and we are unable to understand it. The State responds that the right to confront accusers does not apply in this proceeding because this is a civil forfeiture. Jordan does not reply to this argument in his reply brief, and makes no reference to the Sixth Amendment in his reply brief. We consider the failure to reply to be a concession, and we do not address the constitutional argument. *See* ***Schlieper v. DNR***, 188 Wis.2d 318, 322, 525 N.W.2d 99, 101 (Ct. App. 1994) (a proposition asserted by a respondent on appeal and not disputed by the appellant's reply is taken as admitted).

By the Court.—Order affirmed.

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