COURT OF APPEALS
DECISION
DATED AND RELEASED

May 8, 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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3454 & 96-3455

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

VILLAGE OF DEERFIELD,

PLAINTIFF-RESPONDENT,

v.

CURTIS J. PHILIPP,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Affirmed.*

EICH, C.J.[1] Curtis Philipp appeals from a judgment entered on a jury verdict finding him guilty of driving after suspension and making an illegal U-turn in violation of ordinances of the Village of Deerfield, and from an order denying his postverdict motions. He argues that (1) the trial court erred in

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

allowing a computer printout showing his prior license suspensions into evidence; and (2) the evidence was insufficient to support a finding of guilt on the U-turn charge. We believe the trial court properly exercised its discretion in admitting the evidence and conclude that the evidence of the U-turn violation was sufficient. We therefore affirm the judgment and order.

Philipp's challenge to the admission of the computer printout, which contained information concerning his prior license suspensions—and which Philipp asserts contains "no signature or seal, no indication of authorship, and no indication as to who generated it, or where it was generated"—is that it (a) violates the "best-evidence" rule; (b) was improperly authenticated; and (c) constitutes inadmissible hearsay.

The best-evidence rule, which is codified in § 910.02, STATS., provides that "[t]o prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided … by statute."[2] Philipp cites ***State v. Mullis,*** 81 Wis.2d 454, 260 N.W.2d 696 (1978), for the proposition that, to prove the predicate prior suspension on a driving-after-suspension charge, the "best evidence" rule requires nothing less than a "certified copy of the Order of the Administrator of the Division of Motor Vehicles" imposing the suspension or revocation. ***Mullis*** does not so hold. The best-evidence rule was not at issue in the case and was never discussed by the court in the course of its opinion. In ***Mullis***, as part of its proof of a driving-after-revocation charge, the State introduced "a certificate of the Administrator of the

[2] Section 910.04, STATS., provides that the original is not required, "and other evidence of the contents of a writing, recording or photograph is admissible" if the original has been lost or destroyed, is otherwise not obtainable, or is in the possession or control of the party against whom it is offered.

Division of Motor Vehicles" indicating that the defendant's license had been revoked, and he objected to its admission on grounds of hearsay and misidentification. ***Id***. at 460, 260 N.W.2d at 699. In the course of arriving at its holding that the certificate was admissible as "an official record of a public officer," and was not objectionable as hearsay—no objection had been made on grounds of the best-evidence rule—the supreme court noted that "[because] the Administrator … is empowered to revoke drivers' licenses … when the revocation has been made by the Administrator, his order or revocation is the best evidence available to show the revocation of an individual's operating license." ***Id.*** at 460-61, 260 N.W.2d at 699. It is the ***Mullis*** court's use of the phrase "best evidence" in that sentence that Philipp seizes upon. Because the ***Mullis*** court was not considering the best-evidence rule in any manner or form, however, we consider the court's use of the phrase as descriptive only and not bearing in any way upon application of the best-evidence rule. Simply put, ***Mullis*** does not lend support to Philipp's advancement of a blanket rule that, as a matter of law, nothing short of the actual order of revocation or suspension is admissible to prove the fact of suspension.

Indeed, Deerfield points to several cases indicating that the rule does not apply when the fact sought to be proved exists independently of the writing. In ***York v. State***, 45 Wis.2d 550, 557, 173 N.W.2d 693, 696-97 (1970), for example, the supreme court stated:

> [I]t has come to be recognized that the best-evidence rule is applicable only when attempting to prove the contents of a writing, and that it has no application to a case where a litigant seeks to prove a fact which has an existence independent of any writing.

(Footnotes omitted.) *See also* ***Mitchell v. State***, 84 Wis.2d 325, 340, 267 N.W.2d 349, 356 (1978); ***Goetsch v. State***, 45 Wis.2d 285, 291, 172 N.W.2d 688, 690 (1969). Philipp does not discuss these cases in his reply brief.

We conclude, therefore, that the best-evidence rule does not restrict proof of prior suspensions to the certified copy of the suspension order, as Philipp argues on appeal.

Philipp's next argument—that the printout was inadmissible because it was improperly authenticated—incurs a similar fate. He begins the argument with a reference to the general "authentication and identification" statute, § 909.01, STATS., which states: "The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims." Then, ignoring the following statute, § 909.015, STATS., which sets forth an extensive but nonexhaustive list of examples of types of authentication or identification that would meet the requirements of § 909.01, Philipp moves directly to the "self-authentication" provisions of § 909.02, STATS., and hinges his argument on subsection (4), which provides that "extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to …. document[s] … certified as correct by [an authorized] person …."

Deerfield, however, does not rely on the computer printout as a self-authenticating document, nor did the trial court admit it into evidence on that basis. Village of Deerfield Police Officer Scott Salzwedel testified that the document was Philipp's driving record, which Salzwedel obtained from the Dane County Sheriff's Department by entering into the computer information on Philipp that he received while arresting him and issuing the citations. The trial court

overruled Philipp's objections to the document based on "lack of foundation on its face.… [a]uthenticity and hearsay," and Salzwedel went on to testify that it showed that Philipp's license was currently suspended and that he had two prior convictions for driving after suspension. Philipp's counsel did not cross-examine Salzwedel.

Section 909.015(1), STATS., states that one example of authentication or identification of a document that would meet the general requirements of § 909.01 is the "[t]estimony of a witness with knowledge that a matter is what it is claimed to be." We are satisfied that Officer Salzwedel's testimony meets that requirement. It was not subject to disallowance on authentication or identification grounds.

Finally, Philipp argues that, even if his other arguments are rejected, the document was still inadmissible as hearsay. He claims that the only grounds for its admission would be pursuant to the business- or public-record exceptions to the hearsay rule set forth in §§ 908.03(6) and (8), STATS. Section 908.03(6), entitled "RECORDS OF REGULARLY CONDUCTED ACTIVITY," states that the following items are not hearsay:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness.

Section 908.03(8), entitled "PUBLIC RECORDS AND REPORTS," provides that the following documents are also exceptions to the hearsay rule:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the

> activities of the office or agency, or (b) matters observed pursuant to duty imposed by law, or (c) in civil cases and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Philipp argues that there was no evidence establishing any or all of the "multiple requirements" for admission stated in the two wordy statutes.

What Philipp does not address, however, is the ultimate basis for the trial court's admission of the document. Expanding on its ruling at the hearing on Philipp's postconviction motions, the trial court noted that even if the document did not "explicitly" meet the requirements of §§ 908.03(6) or (8), STATS., the court was satisfied that it fell within the general exception contained in § 908.03(24): a statement or document "not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness," is not excluded by the hearsay rule. The court stated in this regard that the printout

> most clearly falls within [subsection] (24) given the description of what this document is offered by the officer, and the fact that there was no indication by any evidence offered by anybody that suggested that there was anything untrustworthy about the information contained in that document that the defendant's driving privileges had been suspended or revoked.
>
> As a result, I do find that that document had comparable circumstantial guarantees of trustworthiness that arose from the fact that this is the kind of document that a police officer would receive when inquiring about the driving history of somebody who is issued a citation … as part of his regularly conducted activities and that it is the kind of document that he would rely upon to make an assessment of the driving status and driving license status of a defendant who he was dealing with.

As Deerfield points out, trial courts have wide discretion with respect to their evidentiary rulings and "[w]e will not reverse a discretionary

determination by the trial court if the record shows that discretion was exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). A trial court's discretionary rulings are not tested by some subjective standard, or even by our own sense of what might be a "right" or "wrong" decision in the case, but rather will stand unless it can be said that "no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." ***State v. Jeske***, 197 Wis.2d 905, 913, 541 N.W.2d 225, 228 (Ct. App. 1995). Plainly, we cannot say that here. Philipp has not satisfied us that the trial court erroneously exercised its discretion when it admitted the document in question.

Philipp also challenges the sufficiency of the evidence to support the jury's finding that he violated the Deerfield ordinance dealing with illegal U-turns. He bases his challenge on § 346.02(7), STATS., which states:

> No provision of [the motor vehicle code] for which signs are required shall be enforced against an alleged violator if at the time and place of the alleged violation an official sign is not in proper position and sufficiently legible to be seen by an ordinarily observant person.…

He claims the only relevant evidence on the point was the following testimony of Officer Salzwedel:

> [W]e have signs posted several different places on Main Street and if in fact, there was a sign. The pickup truck was pulling out of a parking spot on Main Street and two parking spots up from there would be the intersection of Deerfield and Main Street and there is a sign, no U-turn sign posted on the lamp post at that intersection.

Philipp says that, given this testimony, the jury could only "speculate as to whether the sign was in a proper position, was sufficiently legible and, in fact, said what was claimed."

Appellate review of a challenged jury verdict is quite properly limited to a search for credible evidence—not for evidence that might sustain a verdict the jury could have reached, but did not, but for evidence supporting the verdict returned by the jury. ***Staehler v. Beuthin,*** 206 Wis.2d 609, 616, 557 N.W.2d 487, 489 (Ct. App. 1996). Thus, if there is any credible evidence in the record which, under any reasonable view, fairly admits of an inference that supports the jury's finding, that finding may not be overturned. ***Ferraro v. Koelsch***, 119 Wis.2d 407, 410-11, 350 N.W.2d 735, 737 (Ct. App. 1984), *aff'd*, 124 Wis.2d 154 (1985). To overturn a verdict, then, we must be satisfied that, considering all the credible evidence—and all reasonable inferences that can be drawn from that evidence—in the light most favorable to the verdict, there is no credible evidence to sustain the challenged finding. Section 805.14(1), STATS.; ***Kuklinski v. Rodriguez***, 203 Wis.2d 324, 331, 552 N.W.2d 869, 872 (Ct. App. 1996). And if more than one inference can be drawn from the evidence, the inference that supports the jury's finding must be followed unless the testimony was incredible as a matter of law. ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757 (1990). Finally, we give special weight to the jury's finding where, as here, it has the specific approval of the trial court. ***Nieuwendorp v. American Family Ins. Co.***, 191 Wis.2d 462, 472, 529 N.W.2d 594, 598 (1995).

Assuming, without deciding, that the provisions of § 346.02(7), STATS., are required elements of proof in this case, Officer Salzwedel's testimony provides adequate support for the verdict under these standards.

Finally, Deerfield seeks frivolous-appeal costs based on an affidavit stating that Philipp's attorney told Deerfield's attorney that if Philipp lost the case he would appeal in order to force the Village of Deerfield to incur additional attorney fees, and that he would not charge Philipp for his work on the appeal.

And while we note that Philipp's attorney on this appeal, the same one who represented him in the trial court, identifies himself as appearing "pro bono," he has, by his own affidavit, denied making the statements. Because we may not find facts where the evidence is in dispute, ***Wurtz v. Fleischman***, 97 Wis.2d 100, 107 n.3, 293 N.W.2d 155, 159 (1980), and because we cannot say as a matter of law that Philipp's appeal was frivolous, as that term is defined in § 809.25, STATS., we deny the motion as well as Deerfield's request for penalties under § 809.83(2), STATS. We also deny Philipp's motion pursuant to § 802.05(1)(a), STATS., for expenses incurred in responding to Deerfield's motion.

By the Court.—Judgment and order affirmed.

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