COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1562-CR **Cir. Ct. No. 2002CT18**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

RICK PEASE, JR.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Forest County: ROBERT A. KENNEDY, JR., Judge. *Dismissed and cause remanded with directions*.

¶1 PETERSON, J.[1] The State of Wisconsin appeals a nonfinal order approving a jury instruction the circuit court intends to give at Rick Pease's trial

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

for operating while under the influence, third offense. Pease responds that the State's appeal is barred by double jeopardy. Because the State fails to reply, thereby effectively conceding the argument, we dismiss the appeal and remand with directions to dismiss the complaint with prejudice.

¶2 The criminal complaint alleges that the offense occurred on the frozen waters of Lake Metonga in the City of Crandon. Pease originally waived his right to a jury trial. He stipulated to all the elements of the offense except whether Lake Metonga is a place where operating while under the influence is prohibited.

¶3 WISCONSIN STAT. § 346.61 applies the OWI statute to highways and to premises held open to the public for use of their motor vehicles. The State presented two witnesses at the court trial and argued that the frozen lake was a premise held open to the public. The circuit court disagreed and concluded that "the defendant is acquitted." In its written order, the court characterized the issue as a "legal question," holding that "premises" does not apply to "frozen waters of navigable lakes." The written order concluded, "For reasons not related to the merits, this case is dismissed," rather than repeating the court's oral pronouncement that Pease was "acquitted."

¶4 The State appealed. The State repeated its argument that the frozen lake constituted premises held open to the public. Alternatively, the State asserted that the frozen lake was a highway. Pease did not respond to the State's alternative argument.[2] Following long-standing precedent, we therefore deemed

[2] Curiously, Pease also did not raise the issue he raises here – that Pease was acquitted by the circuit court's decision.

the State's alternative argument admitted. Accordingly, we reversed and remanded.

¶5 On remand the circuit court set the case for jury trial. Pease again stipulated to all elements except whether Lake Metonga is a place where operating under the influence is prohibited. In a pretrial hearing, the State proposed a jury instruction stating that Lake Metonga is a highway. The circuit court instead stated it would give the standard jury instructions, WIS JI—CRIMINAL 2660B and 2663, which do not include a definition of highway. The State then petitioned for leave to appeal a nonfinal order. We granted the petition.

¶6 The State claims the circuit court's proposed instructions are erroneous for several reasons. Pease responds that the appeal is barred by double jeopardy. Pease argues that when the case was originally before the circuit court as a trial to the court, the court in essence made a factual finding that Lake Metonga is not a premise held open to the public. Hence, the court said Pease was "acquitted." The circuit court may have characterized its determination as a legal one, but Pease insists it was in reality a factual one.

¶7 The State does not reply to Pease's argument. From the first appeal in this case, the State is clearly on notice of the consequences of failing to refute an opponent's argument: the argument is deemed admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). In order to be even-handed, we must apply the same principle we applied to Pease's failure to respond to the State's argument in the first appeal. Consequently, we conclude that the continued prosecution and, consequently, this appeal are barred by double jeopardy.

¶8 We would ordinarily end our decision here. However, two other matters deserve comment. First, Pease also argues that the State's appeal is premature because the circuit court's order regarding the jury instruction is not a final order. Pease's argument is frivolous. Pease's attorney, Jeffrey T. Jackomino, is aware that the State filed a petition for leave to appeal a nonfinal order. In fact, Jackomino filed a brief opposing the petition. When we granted the petition, our order was sent to Jackomino, as well as to the district attorney, judge and clerk of court. Thus, Jackomino knows that the appeal of the nonfinal order was allowed by this court. *See* WIS. STAT. RULE 809.50. There is absolutely no basis in law or fact for Pease's argument.

¶9 Second, in our review of the transcripts, we discovered the following remarks by Pease's attorney, Jackomino. At the June 18, 2003, status conference, Jackomino stated:

> Quite frankly, I think that the court of appeals decision is ludicrous on its face and I'm going to put that on the record for Judge Hoover, because I think this is devoid of any rational thought process. And I don't know if he is annoyed with me or annoyed with the court or both of us.

Later in that hearing, he added, "That's why I think, quite frankly, Judge Hoover is asinine." Nearly a year later, at the May 5, 2004, hearing on the jury instruction, he stated:

> I believe that Judge Hoover's ruling is asinine. Quite frankly – I quite frankly don't believe that he looked at the briefs and there is no way that he can use the Sharlavoy [sic] case that he relied upon in a criminal context.

¶10 Jackomino's remarks are impertinent and beyond the bounds of permissible advocacy. The remarks violate the oath Jackomino took when admitted to practice law in Wisconsin: "I will maintain the respect due to courts

of justice and judicial officers." SCR 40.15. They also violate the Rules of Professional Conduct which require, among other things, that a "lawyer shall not make a statement … with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge …." SCR 20:8.2(a). Finally, the remarks violate the Standards of Courtesy and Decorum for the Courts of Wisconsin. Ch. SCR 62. Those standards require lawyers to abstain from making disparaging or demeaning remarks about a judge. SCR 62.02(1)(c). The standards also require lawyers to conduct themselves in a manner that demonstrates sensitivity to the integrity of the judicial process. SCR 62.02(1)(h).[3]

¶11 Jackomino's remarks cannot be excused as a momentary lapse in judgment. He made the remarks on two separate occasions during the first hearing. If that were not bad enough, he aggravated his misconduct by repeating the remarks almost a year later at another hearing.[4]

¶12 In short, Jackomino's remarks are unprofessional and have no place in the adversary system of justice. Because the remarks are so beyond the pale and because they were repeated, the author of this opinion concludes that a copy of this opinion will be furnished to the Office of Lawyer Regulation.

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[3] We are troubled that the trial court was silent when Jackomino made his remarks. A trial judge has a responsibility to uphold the integrity of the judiciary, including requiring appropriate conduct in the courtroom. SCR 60.02, 60.04(1)(c). Here, the trial judge sat passively while a lawyer, on the record, called another judge "asinine." In the performance of his own ethical responsibilities, we would have expected the trial judge to at least caution, if not reprimand, the lawyer.

[4] We also note that Jackomino's comments demonstrate an ignorance of appellate law. The case he intended to refer to, ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 279 N.W.2d 493 (Ct. App. 1979), has indeed been used in criminal cases. *See, e.g.,* ***State v. Ballos***, 230 Wis. 2d 495, 503, 602 N.W.2d 117 (1999); ***State v. Chu***, 2002 WI App 98, ¶¶41, 53, 253 Wis. 2d 666, 643 N.W.2d 878.

By the Court.—Appeal dismissed and cause remanded with directions to dismiss the criminal complaint with prejudice.

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