COURT OF APPEALS
DECISION
DATED AND FILED

August 3, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0935-FT

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

COUNTY OF WAUPACA,

PLAINTIFF-APPELLANT,

v.

SAMUEL J. HYLAND,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waupaca County: JOHN P. HOFFMANN, Judge. *Dismissed.*

¶1 VERGERONT, J.[1] The State appeals from an order dismissing citations issued against Samuel Hyland for operating a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited

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

blood alcohol content in violation of WIS. STAT. § 346.63(1)(a) and (b), respectively. The State contends that the trial court erred in determining that the State had not met its burden of proving by clear, satisfactory and convincing evidence that Hyland was operating a motor vehicle. In response, Hyland contends that the trial court's determination should be affirmed, and also contends that the State's appeal violates his constitutional right against double jeopardy and should be dismissed on this ground. Because the State does not submit a reply brief and dispute the double jeopardy contention, we dismiss the appeal.

¶2 Hyland was given a citation for operating a motor vehicle while under the influence of an intoxicant by Officer Peter Bosquez of the Waupaca County Sheriff's Department, after Bosquez came upon Hyland in a vehicle with the engine running in the parking lot of a tavern. Bosquez issued Hyland a citation for operating a motor vehicle with a prohibited alcohol concentration after Hyland agreed to an evidentiary chemical test of his breath and the test result was .10%. Hyland moved to dismiss the citations on two grounds—there was no probable cause to arrest and he was not operating the motor vehicle at the time of his arrest.

¶3 By agreement between the parties, the court conducted a hearing on the motion and a trial at the same time. The State presented the testimony of Bosquez. Hyland testified in his defense and presented three other witnesses. At the conclusion of the evidence, the court heard the arguments of counsel, which addressed both the issue whether there was probable cause to arrest Hyland and the issue whether the State had proved his guilt on both charges. The court concluded that the officer had probable cause to believe that Hyland was operating a motor vehicle while under the influence of an intoxicant, and then went on to decide whether the State had met its burden of proving by clear, satisfactory and convincing evidence that Hyland was guilty of either charge. The court

determined there was sufficient evidence that he was under the influence of an intoxicant and did have a prohibited blood alcohol concentration of .10 or more. However, the court determined that the State had not met its burden with respect to the element that Hyland was operating a motor vehicle. The court accepted Hyland's testimony and the testimony of Jason Walter that Walter, not Hyland, turned on the engine and that Hyland simply got in the vehicle on the driver's side and remained in the vehicle while it was idling in the parking lot of the tavern. The court therefore ordered the citations dismissed.

¶4 The State appealed the order of dismissal, arguing that the trial court erred because Hyland operated the vehicle by placing himself in the driver's seat of a vehicle with the engine running. In response, Hyland contends the trial court's determination was correct, and also argues that the State's appeal is a violation of Hyland's constitutional right against double jeopardy.[2] He contends that under WIS. STAT. § 972.07(1) jeopardy attaches "in a trial to the court without a jury when a witness is sworn" and therefore jeopardy attached when the first witness was sworn. Then, citing ***State v. Gecht***, 17 Wis. 2d 455, 461-62, 117 N.W.2d 340 (1962), Hyland argues that when a trial court acts both as jury and judge and makes an ultimate determination of not guilty, and it is clear that the court is speaking of as a trier of fact, appeal of that final order constitutes double jeopardy. Hyland also cites to WIS. STAT. § 974.05(1)(a) which provides that a state may appeal from a final order or judgment adverse to the state "if the appeal would not be prohibited by constitutional protections against double jeopardy."

[2] Article I, Section 8 of the Wisconsin Constitution provides that "no person for the same offense may be put twice in jeopardy of punishment."

¶5 The State did not file a reply brief. A proposition asserted by a respondent on appeal and not disputed by the appellant in the reply brief is taken as admitted. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). Accordingly, we conclude that the State has conceded that this appeal violates Hyland's right against double jeopardy and we therefore dismiss the appeal.

By the Court.—Order dismissed.

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