COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2569 **Cir. Ct. No. 2005FO33**

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

COUNTY OF WALWORTH,

PLAINTIFF-RESPONDENT,

V.

WILLIAM H. GUTH,

DEFENDANT-APPELLANT.

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

¶1 SNYDER, P.J.[1] William H. Guth appeals from an order wherein the circuit court held that Guth's shed is located in a public right-of-way, contrary

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise indicated.

to Walworth County zoning code setback requirements. Essentially, Guth presents three claims of error by the circuit court: (1) that the court found a legal right-of-way where none existed; (2) that in doing so, it relied on inadmissible evidence; and (3) that even if the shed encroached on a public right-of-way, it was a legal nonconforming structure. For reasons set forth below, we affirm the order of the circuit court.

BACKGROUND

¶2 Guth owns property located at N8636 Booth Lake Heights Road in the Town of Troy in Walworth County, which he purchased in 1996. The prior owner had placed a shed on the property. On May 6, 2003, Walworth County's land use and resource management department received a complaint from the Town of Troy indicating that Guth's shed was located in the right-of-way of their town road. The County performed a site inspection on May 21, and as a result, the County sent a letter to Guth advising him of a code violation. Having received no response from Guth, the County sent a second, certified letter on September 23. The certified letter was returned unclaimed.

¶3 On November 12, 2004, Darrin Schwanke, a code enforcement officer with Walworth County's land use and resource management department, made a personal visit to the Guth property. He observed a shed that stood approximately five feet from the edge of the pavement on the west side of the road. As a result of his observations, Schwanke issued Guth a citation for having a shed that was placed in the right-of-way. The citation was sent by certified mail and was returned unclaimed. Schwanke issued a second citation on January 7, 2005, and this lawsuit followed on January 10. On April 20, Guth pled not guilty to the charge of violating the zoning code.

¶4 At the bench trial on July 19, 2005, the County offered testimony by Schwanke, who identified a plat survey prepared by RSV Engineering, Inc., on January 12, 2001. The survey showed Guth's property, the edge of the paved road and the shed in the right-of-way. Schwanke also indicated that the road reservation on the survey did not match up with what was paved by the Town and that the survey showed Guth's shed to be in a private road easement. The circuit court indicated that "[p]rivate roads are private roads until they are accepted [by the municipality] and then they become public roads." The court adjourned the hearing for thirty days, and directed the County to return with evidence that the private road easement had become a public right-of-way.

¶5 The trial reconvened on September 1, 2005. There, the County offered five additional exhibits. The first was a petition from the Booth Lake Heights subdivision asking the Town of Troy to take over and maintain the road. The County also offered town board meeting minutes from 1961 acknowledging the petition and a letter from the Department of Transportation local road coordinator indicating that the petition was approved and that Booth Lake Heights Road was eligible for general transportation aids as of January 1, 1962. The circuit court entered judgment in favor of the County and ordered Guth to pay a forfeiture of $297. Guth appeals.

DISCUSSION

¶6 Guth contends that the trial court erred by finding the existence of a legal public right-of-way along Booth Lake Heights Road. The court's finding leads to the unavoidable conclusion that Guth's shed violates WALWORTH

COUNTY, WIS., SHORELAND ZONING ORDINANCE § 74-163 (2005), which requires "accessory structures" to be set back at least ten feet from a road right-of-way.[2] Guth concedes that his shed is within five feet of the paved portion of Booth Lake Heights Road.

¶7 Guth primarily challenges the court's weighing of the evidence.[3] Guth argues that there was insufficient evidence to overcome the depiction of a private road easement on Plaintiff's exhibit 2, a plat of survey dated January 12, 2001. Guth argues that when the Town paved the road it "arbitrarily widened the road and did not follow the private road easement." He argues that there is no evidence to show that his shed was within ten feet of the "previously traveled portion of the road," as depicted in Exhibit 2.

¶8 When considering the sufficiency of the evidence, we apply a highly deferential standard of review, and the fact finder's determination and judgment will not be disturbed if more than one inference can be drawn from the evidence. *See* ***Johnson v. Merta***, 95 Wis. 2d 141, 151, 289 N.W.2d 813 (1980). Here, the record demonstrates that the court made a substantial effort to ascertain the full history of the private road and the public right-of-way and to weigh the evidence

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[2] WALWORTH COUNTY, WIS., SHORELAND ZONING ORDINANCE § 74-163 (2005) states in relevant part: "Accessory structures 1,200 square feet or less in size … shall conform to the setbacks required by the zone district …. When located in the street yard on waterfront lots, they shall not be located closer than three feet to the lot line, five feet to an alley line, nor ten feet to the road right-of-way."

[3] In his brief, Guth also complains of the circuit court's decision to adjourn the trial to allow the County to retrieve and present additional evidence. Because this issue is presented as a gripe rather than a legal argument, we need not address it. Furthermore, dismissal would likely have been without prejudice because public interests were involved. *See* ***State v. Miller***, 2004 WI App 117, ¶16, 274 Wis. 2d 471, 683 N.W.2d 485, *review denied,* 2004 WI 123, 275 Wis. 2d 296, 687 N.W.2d 523 (No. 2003AP1747-CR.

accordingly. The record includes the testimony of Schwanke and photographs he took of Guth's shed, the 2001 plat of survey, and a letter from the local road coordinator for the Wisconsin DOT indicating that, in 1961, the Town of Troy took over Booth Lake Heights Road and it has been eligible for General Transportation Aids since January of 1962. Guth's argument that there is insufficient evidence to sustain the trial court's decision is simply unsupported by the record.[4]

¶9 Guth also contends that the circuit court relied on inadmissible evidence. He directs us to WIS. STAT. § 909.02, which indicates that any document that is not self-authenticating must be offered in conjunction with "[e]xtrinsic evidence of authenticity as a condition precedent." Guth raises no issue that the documents offered by the County are not what they purport to be. We reject Guth's argument for two reasons.

¶10 First, the requirement of authentication is generally met where the court is satisfied that the document "is what its proponent claims." *See* WIS. STAT. § 909.01. Here, no one contends that the documents offered on the adjourned date were not what they purported to be. Second, because this argument was not presented at trial, it is waived. *See* WIS. STAT. § 901.03(1)(a) ("Error may not be predicated upon a ruling which admits ... evidence unless … a timely objection or motion to strike appears of record.").

[4] Guth also observes that, while the exhibits offered on the original trial date were admitted into evidence, those offered on the adjourned date were moved into evidence but the court never ruled on the motion. Thus, he argues, "there was no more proof, no more credible evidence, that the County had met its burden on September 1, 2005 than there was when the trial 'adjourned' on July 19, 2005." The procedural oversight is inconsequential in light of the court's extensive questioning about the documents, Guth's opportunity to respond and object, and the court's role as finder of fact.

¶11 We recognize that Guth participated in the trial pro se; however, we will not disregard his failure to raise a timely objection. While we are careful to avoid unnecessarily strict application of the waiver rule where litigants are not represented by counsel, we also hesitate to allow litigants to voluntarily forego counsel at trial only to litigate new arguments on appeal once an attorney is engaged. *See e.g.* ***Waushara County v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992) ("While some leniency may be allowed, neither a trial court nor a reviewing court has a duty to walk *pro se* litigants through the procedural requirements or to point them to the proper substantive law.").

¶12 The waiver rule also applies to Guth's contention that his shed should be considered a legal nonconforming use. Guth did not raise this argument in the trial court and therefore we give it no further consideration. The reason for the waiver rule is plain. If the issue had been raised below, it may have been met by the opposing party by way of additional proof or alternative arguments. *See* ***Cappon v. O'Day***, 165 Wis. 486, 490-91, 162 N.W. 655 (1917).

CONCLUSION

¶13 We conclude that sufficient evidence supports the trial court's determination that Guth's shed violates the setback requirement imposed by WALWORTH COUNTY, WIS., SHORELAND ZONING ORDINANCE § 74.163. We further conclude that Guth waived his argument regarding the admissibility of the documents offered at the adjourned proceeding as well as his argument that the shed is a legal nonconforming use.

By the Court.—Order affirmed.

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