COURT OF APPEALS
DECISION
DATED AND FILED

May 9, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1601

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

CITY OF MANITOWOC,

PLAINTIFF-RESPONDENT,

v.

MICHAEL L. MCKENNA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] Michael L. McKenna appeals from his conviction for failure to yield from a stop sign in violation of WIS. STAT. § 346.18(3) as adopted by CITY OF MANITOWOC, WIS., ORDINANCE § 10.01. On appeal,

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(b) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

McKenna contends that the evidence is insufficient to support the circuit court's conclusion that he failed to yield the right-of-way from a stop sign. In reviewing a challenge to the sufficiency of the evidence to support a conviction for a traffic offense, the role of the court of appeals is not to conduct a new trial; rather, our role is limited to reviewing the evidence presented to the circuit court and deciding whether there is credible evidence to support the decision of the circuit court. In this appeal, we affirm the circuit court's decision that McKenna is guilty of failing to yield from a stop sign because there is ample credible evidence to sustain that decision.

¶2 On October 26, 1999, McKenna was issued a traffic citation for failure to yield from a stop sign as the result of a traffic accident at the intersection of South Water Street and Franklin Street in the City of Manitowoc. McKenna entered a not guilty plea in municipal court, and after a trial, he was found guilty. McKenna filed a timely appeal under WIS. STAT. § 800.14(4), and the matter was transferred to the circuit court for a new trial. At the conclusion of the new trial, McKenna was again found guilty and now pursues this appeal.

¶3 On appeal, McKenna argues that the preponderance of the evidence supports a "not guilty" finding. Specifically, he argues that the circuit court ignored evidence that the other driver (1) was speeding; (2) signaled a right turn prior to the accident, but failed to make a right turn; (3) was drunk and smelled of hard liquor; (4) was distracted; and (5) panicked and lost control of her car.[2]

[2] McKenna also alleges that in the trial before the municipal court, the other driver testified that when the accident occurred she was turning to go to the hospital and the circuit court ignored this testimony. There is no transcript of the municipal court trial in the appeal record before this court, and we are prohibited from addressing this issue. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("An appellate court's review is confined to those parts of the record made available to it.").

¶4 The role of an appellate court in reviewing the evidence presented in a trial before a circuit court is limited by statute. WISCONSIN STAT. § 805.17(2) provides that in all actions tried upon the facts without a jury, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Under this statute, the role of the appellate court is to search the record for evidence to support findings of fact reached by the circuit court. ***Johnson v. Merta***, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980).

¶5 As the result of a two-car accident, McKenna was issued a citation for failing to yield from a stop sign:

> RULE AT INTERSECTION WITH THROUGH HIGHWAY. The operator of a vehicle shall stop … before entering a through highway, and shall yield the right-of-way to other vehicles which have entered or are approaching the intersection upon the through highway.

WIS. STAT. § 346.18(3).

¶6 The City of Manitowoc presented two witnesses at the trial—Judith Irish, the driver of the other car, and City of Manitowoc Police Officer Dennis LeDuc, the investigating officer. Irish testified that just before the accident, she was proceeding westerly on Franklin Street as she approached the intersection with South Water Street:

> I saw the defendant at the stop sign and I was close enough where I could see him. He looked west, he was at a dead stop, looked west and did not look east, he just took off and at that point there was nothing I could do.

She testified that she was travelling between twenty and twenty-five miles per hour, she was not distracted prior to the accident, she had not been consuming alcoholic beverages and she did not panic when McKenna left the stop sign.

¶7 LeDuc testified that from his investigation and interviews with McKenna and Irish, he concluded that McKenna had failed to yield from the stop sign. He related that there is a stop sign on South Water Street where it intersects with Franklin Street. LeDuc stated that McKenna was on South Water Street, facing south at the stop sign and planning to turn east on Franklin Street. The officer recounted his interview with McKenna at the accident scene where McKenna stated that he never saw Irish before he left the stop sign. At the accident scene, McKenna complained of a sore knee but declined assistance from the rescue squad and the officer did not observe any other injuries to McKenna.

¶8 LeDuc's version of his interview with Irish was consistent with her testimony before the circuit court. Irish told LeDuc that she was westbound on Franklin Street traveling approximately twenty-five miles per hour when McKenna pulled out in front of her from South Water Street and she had nowhere to go.

¶9 In his investigation, LeDuc found no evidence that Irish was speeding before the accident. Likewise, he found no evidence that she had forfeited the right-of-way. Similarly, he did not detect the odor of alcohol on Irish's breath after the accident.

¶10 McKenna presented a version of the accident that was at odds with the testimony of Irish and LeDuc. He testified that he was at the stop sign for up to a minute and looked to his left and then to his right. After traffic on Franklin Street cleared, he again looked to his left and saw Irish put on her right blinker and pull out of the left westbound lane on Franklin into the right westbound lane. He stated that Irish then pulled over, stopped and he saw her reach down for something under the front seat. He testified that he pulled away from the stop sign

when Irish was stopped. He went on to testify that he heard tires squealing and slammed on his brakes, but it was too late and Irish hit him.

¶11 McKenna also contradicted previous testimony about the extent of his injuries. While confirming that he had a sore knee, he also testified that as a result of the collision, he got a bump on his head after hitting the ceiling of his car very hard. In response to questions from the assistant city attorney, McKenna claimed that the bump on the head caused him to suffer from amnesia for two weeks after the accident. He explained that the amnesia is why his testimony at trial was different from the statements he gave to LeDuc at the scene of the accident.

¶12 When a circuit court hears conflicting testimony, as it did in this case, the credibility of witnesses is important and the circuit court must choose one version, which requires the rejection of the testimony supporting a conflicting version. *See* ***Caraway v. Leathers***, 58 Wis. 2d 321, 326, 206 N.W.2d 193 (1973). WISCONSIN STAT. § 805.17(2) requires that we defer to the circuit court's determination of which witness was credible and which witness was not credible. Appellate court deference considers that the circuit court has the superior opportunity to observe the demeanor of witnesses and gauge the persuasiveness of their testimony. *See* ***Johnson***, 95 Wis. 2d at 151-52. The circuit court's credibility assessments will not be overturned on appeal unless they are inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975).

¶13 The circuit court recognized the conflict in the testimony and gave cogent reasons for accepting the testimony of Irish and LeDuc and rejecting the testimony of McKenna.

> In this case … there's a conflict in the testimony. Mr. McKenna initially did not tell the officer at the time of the accident that he saw Ms. Irish's vehicle with the turn signal on. He indicated today that he remembers situations better and that she did have the turn signal on.
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> The officer testified that neither driver reported to him at the time that Ms. Irish had her turn signal on. If Ms. Irish had testified that she was going to say Holy Family Memorial Medical, seems the Court would be more inclined to wonder whether or not the turn signal was on, but because she was driving to Walgreens there was no reason for her to turn right at the intersection and I certainly can't find, based on the evidence introduced, that she had her turn signal on.
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> Likewise there is also no evidence to really support the fact that she was speeding. There hasn't been any evidence introduced as to any skid marks, the length of any skid marks before impact or whether there were any, nor has there been any specific evidence with respect to the damage of the vehicles such that the damage was—would indicate by itself speed, and that would be very difficult to establish without any expert any way.

¶14 Where a circuit court hears inconsistencies in the testimony between witnesses, it may choose to believe one version of the testimony rather than another. ***State v. Saunders***, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995). In this case, the circuit court gave two logical reasons for believing the testimony of Irish and LeDuc. Also, when a witness gives sworn testimony that is diametrically opposed to his or her previous statements—McKenna's trial testimony contradicts his statements to LeDuc—the circuit court is free to reject all of that witness's testimony. ***Ruiz v. State***, 75 Wis. 2d 230, 232, 249 N.W.2d 277 (1977). Considering the circuit court's superior position to observe the

witnesses and weigh the persuasiveness of their testimony, we have no quarrel with its assessment of the credibility of the witnesses.

¶15 McKenna merely highlights evidence favorable to his position. He does not address the evidence upon which the circuit court relied, nor does McKenna attempt to show why the circuit court's findings are patently incredible or otherwise clearly erroneous. Further, he provides us with no reason to reject the circuit court's credibility determinations. Because the circuit court's findings are supported by the record and have not been shown to be clearly erroneous, this court affirms McKenna's conviction for failing to yield from a stop sign.[3]

By the Court.—Judgment affirmed.

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

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[3] After this case was submitted for decision, the City of Manitowoc filed a motion to strike exhibits from the supplemental appendix of McKenna's reply brief because they violated WIS. STAT. RULE 809.19(2). The Wisconsin Supreme Court has repeatedly held that our review of a case is limited to the record made before the circuit court and "the record is not to be enlarged by material which neither the trial court nor this court, acting within their respective jurisdictions, have ordered incorporated in it." ***State ex rel. Wolf v. Town of Lisbon***, 75 Wis. 2d 152, 155, 248 N.W.2d 450 (1977). We have reviewed the record before the circuit court and have failed to find copies of these documents or testimony referencing these documents. Therefore, we conclude that McKenna has violated rules of appellate practice, WIS. STAT. RULES 809.19(2) and 809.15, by including in a supplemental appendix to his reply brief a three-page document labeled "Police Report," correspondence and a bill for services rendered from a law firm, an insurance claims form, and a diagram of the accident scene. We grant the City's motion to strike those exhibits from the supplemental appendix of McKenna's reply brief.

We would be remiss if we did not point out that portions of McKenna's reply brief and supplemental appendix are offensive, particularly as to the assistant city attorney and Irish, against whom it levels irrelevant and scandalous criminal allegations without any foundation or support. We do not countenance scurrilous and inappropriate briefs or briefs which are offensive in content. ***A.J.N. v. W.L.D.***, 167 Wis. 2d 315, 344, 481 N.W.2d 672 (Ct. App. 1992), *aff'd*, 174 Wis. 2d 745, 498 N.W.2d 235 (1993). In addition, in the reply brief, McKenna makes unfounded accusations that portions of the circuit court record were either doctored or removed before it was submitted to this court. It is only McKenna's pro se status and obvious lack of knowledge and understanding of the rules of appellate procedure that prevent us from imposing sanctions.