

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 30, 2007

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2007AP750-FT

Cir. Ct. No. 2006TR6490

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

COUNTY OF GRANT,

PLAINTIFF-RESPONDENT,

v.

KEVIN E. TURNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County:
GEORGE S. CURRY, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Kevin Turner appeals a circuit court judgment imposing a forfeiture for driving with a prohibited alcohol concentration. After

¹ This is an expedited appeal under WIS. STAT. RULE 809.17 (2005-06), decided by one judge pursuant to WIS. STAT. § 752.31(2)(c). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

proceedings before a jury, the circuit court directed a guilty verdict. Turner argues that the circuit court erred in doing so. For the reasons explained below, we affirm the judgment.

¶2 Turner argues that a circuit court may not direct a verdict in a traffic forfeiture case. Turner apparently means to argue more narrowly that the circuit court may not grant a *plaintiff's* motion for a directed verdict of guilty in a traffic forfeiture case—Turner and the State agreed to have the circuit court direct a *not guilty* verdict for a separate charge against Turner for passing in a no passing zone.

¶3 Regardless which argument Turner is making, it is foreclosed by *City of Omro v. Brooks*, 104 Wis. 2d 351, 311 N.W.2d 620 (1981). In *Brooks*, also a traffic forfeiture case involving an intoxicated driving offense, the supreme court concluded that the circuit court should have directed a guilty verdict when the evidence showed that the elements of the offense were uncontroverted. *Id.* at 352-53, 359. Thus, a circuit court may direct a verdict in a traffic forfeiture case when the facts warrant it.

¶4 Turner fails to address *Brooks*. He instead relies on *State v. Schneck*, 2002 WI App 239, 257 Wis. 2d 704, 652 N.W.2d 434. But the question in *Schneck* was whether summary judgment, not a directed verdict, is permissible in a traffic forfeiture proceeding. It is not. *See id.*, ¶¶1, 16. If there is a reason why *Brooks* should be re-examined in light of *Schneck* or other case law, Turner does not identify it. In any event, we are bound by *Brooks*. *See Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

¶5 Turner also asserts that, even if a circuit court may direct a guilty verdict in a traffic forfeiture case, the circuit court should not have directed a guilty verdict under the facts here. Turner points out that two of the County's

witnesses testified that the incident occurred on September 27, 2006, while two other County witnesses testified that it occurred on October 27, 2006. Without further explanation, Turner asserts that this created a “credibility issue” that the fact finder had to decide. We disagree.

¶6 At trial on February 5, 2007, two witnesses responded to prosecution questions incorporating the date of September 27, 2006, rather than October 27, 2006:

Q Were you on duty on September 27, 2006, at about 8:29 p.m.?

A Yes, I was.

....

Q I want to direct your attention to September 27, 2006, at about 10:25 p.m. Do you remember drawing blood at that time?

A Yes, I do.

The prosecutor later clarified the proper date through another witness:

Q Okay. Now earlier today were you present in the courtroom?

A Yes, I was.

Q And I was referring to September 27. Was it September or was it October?

A It was October.

Q Okay. So I was mistaken about the month?

A Yes.

¶7 Turner did not suggest to the jury and does not suggest now that there was something more than inadvertence underlying the prosecutor’s obviously erroneous references to September. Similarly, other than these

references, Turner points to nothing at trial as an alleged reason for any “credibility issue.” Under the circumstances, the only reasonable inference for the jury was that the two “September” witnesses remembered the events correctly, but erroneously relied on the date the prosecutor used in his questions.

¶8 We therefore reject Turner’s argument that the circuit court should not have directed the verdict because there was a credibility issue for the jury. *See Millonig v. Bakken*, 112 Wis. 2d 445, 451, 334 N.W.2d 80 (1983) (“[A] verdict should be directed only where there is no conflicting evidence as to any material issue and the evidence permits only one reasonable inference or conclusion.”).

By the Court.—Judgment affirmed.

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

