COURT OF APPEALS
DECISION
DATED AND FILED

February 27, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2716-FT

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES D. PAULSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Iron County: PATRICK J. MADDEN, Judge. *Reversed.*

¶1 HOOVER, P.J.[1] James Paulson appeals a conviction for operating a snowmobile with an excessively noisy exhaust system, contrary to WIS. STAT.

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

§ 350.10(1)(d) and an order denying his reconsideration motion.[2] He argues that, as a matter of law, the evidence was insufficient to support the trial court's finding that the snowmobile made excessive or unusual noise.[3] He further contends that § 350.10(1)(d) is unconstitutional as applied in this case. This court holds that the State failed to prove under an objective standard that Paulson violated § 350.10(1)(d). The trial court's judgment of conviction and order denying Paulson's motion to reconsider are therefore reversed.

FACTS

¶2 This matter was tried to the court. John Windt testified that he was a Wisconsin conservation warden with approximately eleven years' experience enforcing snowmobile laws. On February 13, 2000, while on snowmobile patrol, he heard a group of snowmobiles coming down the trail. Windt cited Paulson and another with an excessive noise violation because "they were both loud and excessive compared to the average machines I hear every day which is in excess of 500 machines." Windt inspected Paulson's snowmobile and determined that the muffler system had been altered with "after-market pipes." Operating a snowmobile that has been modified is illegal if the alteration amplifies or otherwise increases the total noise emission above that emitted by the snowmobile as originally constructed. *See* WIS. STAT. § 350.09(7).[4] Notwithstanding, Windt

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[2] WISCONSIN STAT. § 350.10(1)(d) proscribes operating a snowmobile "[I]n such a way that the exhaust of the motor makes an excessive or unusual noise."

[3] Paulson frames the issue as, "[t]he trial court erred in concluding that the evidence was sufficient, as a matter of law, to find …'excessive … noise'…." An appellate court may structure the issue as it deems appropriate. *See* ***State v. Waste Mgmt.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

[4] WISCONSIN STAT. § 350.09(7) provides:

(continued)

"issued [Paulson] a citation not for the after-market pipes, [but] just for operating a snowmobile that produces unusual or excessive noise."

¶3 Windt testified that one of his duties while on snowmobile patrol was to determine whether a machine is "stock," meaning that it has original factory-installed parts, or has after-market parts. He further testified that based upon his eleven years' experience observing 500 snowmobiles a day, he can usually determine whether a given machine is louder than when it was in stock condition. However, when asked if Paulson's machine was louder than the normal stock snowmobile, Windt did not answer the precise question but, rather, testified that Paulson's machine produced loud, excessive noise, which is why Windt stopped him. Indeed, when asked if it would surprise him that one of the stock machines in Paulson's group was actually louder than Paulson's, Windt replied that "[i]f it was a stock machine, it could have been."

¶4 Windt did not know whether Paulson's after-market muffler system was louder or quieter than the original stock muffler system. Windt conceded that not all after-market mufflers are louder than the original mufflers and that Paulson's could have been quieter on February 13 than when purchased. He also testified that he has encountered snowmobiles with factory-installed mufflers that

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> Every snowmobile manufactured after July 1, 1972, and offered for sale or sold in this state shall be so constructed as to limit total vehicle noise to not more than 82 decibels of A sound pressure at 50 feet, as measured by society of automotive engineers standards. Every snowmobile manufactured after July 1, 1975, and offered for sale or sold in this state shall be so constructed as to limit total vehicle noise to not more than 78 decibels of A sound pressure, as measured by society of automotive engineers standards. *No snowmobile shall be modified by any person in any manner that shall amplify or otherwise increase total noise emission above that emitted by the snowmobile as originally constructed, regardless of date of manufacture.* (Emphasis added.)

he considered excessively loud. Moreover, if Paulson had a stock muffler that was twice as loud as what Windt heard, he would nevertheless not have cited Paulson. Windt testified that he did not have the equipment necessary to determine whether Paulson's machine exceeded the statutory decibel limit.

¶5 Paulson testified that two of the stock machines in his group were louder than his and that in his opinion his after-market muffler was no louder than the original.

¶6 Paulson argued that Windt actually cited him because he had after-market equipment, not because of excessive noise. He also contended that there was no evidence that (1) his muffler was louder than the original; (2) his machine was louder than the others in his group with stock mufflers; and (3) his snowmobile exceeded the statutory decibel limit.[5]

¶7 The trial court found Windt's testimony credible. It further concluded that Windt's training and experience qualified him to determine whether Paulson's snowmobile was excessively loud. The trial court thus found Paulson guilty of operating a snowmobile that made excessive and unusual noise.

STANDARD OF REVIEW

¶8 Taking Windt's testimony as true, the facts necessary to decide this case are undisputed. Whether undisputed facts fit a legal standard is a question of law this court reviews de novo. ***Bantz v. Montgomery Estates, Inc.***, 163 Wis. 2d 973, 978, 473 N.W.2d 506 (Ct. App. 1991).

[5] Paulson filed a motion to reconsider in which he first squarely raised the issue he presents to this court.

DISCUSSION

¶9 The gist of Paulson's argument is that "[i]t is impossible to say what is 'excessive noise' without some added benchmarks or guidance."[6] Those benchmarks are found, he suggests, in WIS. STAT. § 350.09(7), pertaining to a seventy-eight-decibel limit and after-market equipment. Paulson contends that because the State failed to prove the decibel output of Paulson's snowmobile or the comparative noise between the factory-installed and the after-market muffler, the evidence is insufficient to support the court's finding that the snowmobile was excessively noisy. He also complains that the trial court did not otherwise indicate how it interpreted the phrase "excessive and unusual noise." Taking these perceived deficiencies together, Paulson contends that the trial court "failed to determine or apply the correct statutory standard."[7]

¶10 Paulson first relies upon ***City of Madison v. Baumann***, 162 Wis. 2d 660, 470 N.W.2d 296 (1991). In ***Baumann***, two street musicians were cited for violating the city's anti-noise ordinance.[8] ***Id.*** at 665. The issue was whether the

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[6] Without guidelines, Paulson argues, "[t]here appears to be no guidance for law enforcement agencies on how to enforce such a law, and no guidance for citizens who wish to abide by the law."

[7] Paulson raises a second argument, that WIS. STAT. § 350.10(1)(d) is unconstitutional as applied in this case. This court is unable to discern any difference between the substance of this contention and that of Paulson's primary argument. It will therefore not be addressed separately. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1977).

[8] MADISON, WIS., ORDINANCES, ch. 24.04(1), provides:

> No person shall make or assist in making any noise tending to unreasonably disturb the peace and quiet of persons in the vicinity thereof unless the making and continuing of the same cannot be prevented and is necessary for the protection or preservation of property or of the health, safety, life or limb of some person.

ordinance was void for vagueness. More precisely, the question was whether the term "unreasonably" rendered the ordinance unconstitutionally vague as providing no notice or guidance as to when the ordinance is violated. ***Id.*** at 677. Rather than finding the term vague, the court concluded:

> [T]he word, "reasonably," saves the ordinance from the infirmity of vagueness. The reasonable-person standard is one that has been relied upon in all branches of the law for generations. It permeates our negligence law. In the opinion cited above, the reference to the provisions that save the ordinance are those that give "reasonable" notice of what is prohibited conduct. While it is argued that the terms, "reasonable" or "unreasonable," only have meaning in context, i.e., egress or ingress to a place which is being protected or in propinquity to a school, "reasonable" is always conceptual. The reasonable person is a reasonable person in the circumstances. It is what is "[f]it and appropriate to the end in view." In the instant case, the circumstances are adequately spelled out. They are simply what a reasonable person would conclude would disturb the peace and quiet of the vicinity. The test for a possible violator is simply the time honored and time validated reasonable person test, i.e., what effect will my conduct—singing or playing—have upon persons in the vicinity under the circumstances.

Id. at 677-78 (citations and footnote omitted). Thus, the court determined that the term "unreasonably" "provided a sufficient standard to prevent excessive discretion and guide people in their conduct" where the ordinance sufficiently identified the circumstances delimiting what is unreasonable. ***County of Jefferson v. Renz***, 222 Wis. 2d 424, 435, 588 N.W.2d 267 (Ct. App. 1998), *rev'd on other grounds*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999).

¶11 In ***Renz***, the case upon which Paulson principally relies, Wisconsin's motor vehicle muffler noise statute, WIS. STAT. § 347.39(1),[9] was challenged as

[9] WISCONSIN STAT. § 347.39 provides:

(continued)

unconstitutionally vague. The arresting officer, Drayna, cited Renz because he believed Renz's muffler was excessively loud. ***Id.*** at 428. Drayna testified that he used as "a basic rule of thumb" that if a vehicle was louder than a car with a muffler that had "just 'come from the factory,'" it was excessively loud. ***Id.*** It is unclear whether Drayna knew what Renz's vehicle sounded like when it left the factory, or merely that he knew what volume was normal for a factory-installed muffler. ***Id.***

¶12 Contrasting the ordinance considered in ***Baumann***, Renz argued that the muffler statute was unconstitutionally vague because it provided no objective standard for law enforcement personnel and therefore permitted them to create their own subjective standards and to operate arbitrarily. ***Renz***, 222 Wis. 2d at 434. He specifically contended that the terms "excessive" and "unusual" to describe "noise" simply call for subjective opinions of individuals. ***Id.***

> (1) No person shall operate on a highway any motor vehicle subject to registration unless such motor vehicle is equipped with an adequate muffler in constant operation and properly maintained to prevent any excessive or unusual noise or annoying smoke. This subsection also applies to motor bicycles.
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> (2) No muffler or exhaust system on any vehicle mentioned in sub. (1) shall be equipped with a cutout, bypass or similar device nor shall there be installed in the exhaust system of any such vehicle any device to ignite exhaust gases so as to produce flame within or without the exhaust system. No person shall modify the exhaust system of any such motor vehicle in a manner which will amplify or increase the noise emitted by the motor of such vehicle above that emitted by the muffler originally installed on the vehicle, and such original muffler shall comply with all the requirements of this section.
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> (3) In this section, "muffler" means a device consisting of a series of chambers of baffle plates or other mechanical design for receiving exhaust gases from an internal combustion engine and which is effective in reducing noise.

¶13 We recognized that a statute is unconstitutionally vague if, "because of some ambiguity or uncertainty in the gross outlines of the conduct prohibited, persons of ordinary intelligence do not have fair notice of the prohibition,[10] and those who enforce the laws lack objective standards and may operate arbitrarily." ***Id.*** Relying on ***Baumann***, however, this court rejected Renz's argument. We turned to the dictionary definition of "excessive" to conclude that the term means "unreasonable" and applied the ***Baumann*** rule that the concept of reasonableness is sufficiently definite to satisfy the vagueness test if the circumstances are sufficiently spelled out. ***Renz***, 222 Wis. 2d at 435-36. We concluded that viewing the three subsections of the muffler statute as a whole, it was "clear that excessive or unusual noise is to be judged against the noise emitted by a muffler that meets the statutory requirements when originally installed on the vehicle." ***Id.*** at 436. "This is a sufficiently specific context in which to judge the reasonableness of the noise emitted by a muffler." ***Id.***

¶14 Looking at the manner in which the arresting officer interpreted the statute, we were

> persuaded, as was the court in ***Baumann***, that the officer understood and properly applied the statutory standard. *See* ***Baumann***, 162 Wis. 2d at 680-81 …. Officer Drayna understood that the standard for a reasonable, usual or normal amount of noise was that amount of noise emitted when a muffler was originally installed on a car. He knew what that sounded like and he knew this sound was louder ….

[10] The court did not perceive Renz to argue that the muffler statute did not give fair notice of the proscribed conduct to a person who wishes to comply. Paulson, on the other hand, does challenge WIS. STAT. § 350.10(1)(d) on this basis. However, in light of this court's holding, it need not address this issue. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

Id. We thus concluded that the vehicle muffler statute provided an objective standard for law enforcement to employ and that the officer applied that standard rather than an arbitrary or subjective one. ***Id.*** at 437.

¶15 For purposes of this appeal, this court agrees with Paulson's contention that WIS. STAT. § 347.39(1), requiring mufflers that prevent "any excessive or unusual noise," is "nearly identical" to WIS. STAT. § 350.10(1)(d). He asserts that the court in ***Renz*** "indicated that although the particular section under which the defendant was cited gave no guidance as to what was 'excessive or unusual noise,' the section could be viewed in its overall statutory context in order to save it from vagueness." Similarly, Paulson argues that WIS. STAT. § 350.10 offers "no guidance whatsoever as to what might be excessive other than a reading over 78 db or a muffler louder than the original." Because of the similarity between §§ 347.39 and 350.10, this court agrees with Paulson's contention that the ***Renz*** decision controls the outcome of this case.

¶16 Paulson next asserts that the State failed to prove that his muffler made excessive noise under ***Renz***. He notes that there is no evidence that his snowmobile muffler exceeded the statutory decibel limit or that the modified muffler system was louder than the original or than stock exhaust systems. Again, this court agrees.

¶17 Under ***Renz***, the objective standard—***Baumann's*** "circumstances"—is not what Windt perceives as normal or usual snowmobile noise, as reliable as that may be. Rather, under the circumstances of this case, noise is to be judged against that emitted by a muffler that meets the statutory requirements when originally installed on the machine. *See* ***Renz***, 222 Wis. 2d at 436. In contrast to the officer in ***Renz***, Windt did not understand and properly

apply the statutory standard. ***Id.***; ***Baumann***, 162 Wis. 2d at 680-81. While Windt referred to a "normal" amount of noise, he did not understand "that the standard for a reasonable, usual or normal amount of noise was that amount of noise emitted when a muffler was originally installed …." *See* ***Renz***, 222 Wis. 2d at 436. Unlike the officer in ***Renz***, Windt did not know what that standard sounded like so that he could know that Paulson's machine sounded louder.[11] Thus, the State did not prove a violation of the statute's objective standard rather than an arbitrary or subjective one. *See* ***id.*** at 437.[12]

¶18 Because the State failed to prove that Paulson's exhaust system was excessively loud under the proper standard, the circuit court's judgment of conviction and order denying Paulson's motion to reconsider are reversed.

By the Court.—Judgment and order reversed.

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

[11] There was no testimony that Windt either knew what Paulson's machine or his brand and model originally sounded like. To the extent that he indicated knowledge of what factory-installed systems in general sound like, it appears he believed them to vary to the extent that some leave the factory with excessively noisy systems.

[12] Paulson correctly contends that Windt's testimony demonstrated that he determined excessive or unusual noise under a subjective standard. For example, he stated that he considers anything "above the normal" or "compared to the average" to be excessively loud.