COURT OF APPEALS
DECISION
DATED AND FILED

February 20, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP709 **Cir. Ct. No. 2006CV5905**

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

CORSTAN COURT,

PLAINTIFF-APPELLANT,

V.

CITY OF MILWAUKEE FIRE AND POLICE COMMISSION,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Curley, P.J., Wedemeyer and Kessler, JJ.

¶1 KESSLER, J. Corstan Court appeals a circuit court order concluding that a Milwaukee Police Department rule under which Court was disciplined was constitutional. The Milwaukee Fire and Police Commission (Commission) found that Court violated the department rule in his supervisory

capacity as a patrol sergeant when, as the first police supervisor on the scene of what is now known in Milwaukee as the "Frank Jude beating," Court did not take control of the situation and scene, did not begin a criminal investigation, and allowed the situation to deteriorate. His demotion to police officer was sustained by the Commission over Court's objection that the rule involved was unconstitutionally vague.[1] By certiorari petition and appeal to the circuit court, the Commission findings and conclusions were upheld in all respects. We affirm.

BACKGROUND

¶2 The only issue appealed is whether the Milwaukee Police Department rule applied in this instance is constitutional; the Commission's factual findings are not challenged here. These findings include:

> On October 24, 2004, on-duty Sergeant Court was dispatched shortly before 3:00 a.m. to a "fight" on South Ellen Street in the City of Milwaukee.
>
> [A two officer squad] was also dispatched, arrived first and made contact with a number of off-duty police officers and an injured citizen. It became immediately apparent to [the two on-duty officers] that the "fight" had involved the off-duty officers and the citizen whom officers accused of stealing an officer's badge.
>
> Sergeant Court arrived in the vicinity of the incident, spoke to one off-duty officer some distance from the actual scene, and then left the scene…. Prior to leaving the scene Court made no effort to contact the on-duty officers on the scene, determine the condition of the injured citizen or verify what the off-duty officer told him about a foot pursuit.

[1] Before the Commission, Court objected to the demotion on numerous grounds, including whether there was a factual basis under the rule applied. The Commission found against him on all grounds. Only the constitutionality of the rule is raised on this appeal.

While away, Court made no attempt to utilize his radio to verify the information about the foot chase or communicate with the officers on the scene…. In Court's absence, and in significant part due to his failure to take charge of the scene, many off-duty officer/witnesses fled and the injured citizen was assaulted further by one or more of the off-duty officers.

Upon Court's return to the scene it remained chaotic. The off-duty officers were allowed to remain free to talk collectively and wander about the scene, interfering with attempts by the on-duty officers to gain control and obtain witness statements.…

No criminal investigation was initiated by Court regarding the assault on the citizen. The two female citizen witnesses were separated from each other and placed in squad cars, but the off-duty officers were not. It was only after the arrival of a Sergeant Grubich almost an hour later that the off-duty officers were finally separated from each other as is standard procedure in essentially any criminal investigation.

Court was called upon to make necessary decisions and gain control of a crime scene as he had been trained to do since joining the Milwaukee Police Department more than 7 years earlier. He had fairly obvious facts to work with – a seriously injured individual; an unruly and uncooperative mob; numerous possible suspects. Basic crime scene management as taught in the academy to all rookie police officers would have been sufficient to outline the steps necessary to take: obtain necessary medical attention for the injured individual; identify and interview possible witnesses; identify, detain and separate possible witnesses; secure the scene to avoid the destruction of evidence. This was not done and the record makes it quite clear why it was not done – the unruly and uncooperative mob was comprised almost entirely of off-duty police officers, some of whom were intoxicated, and many of whom were not interested in having anyone learn of what had happened that evening.

Sergeant Corstan Court had the duty and the authority to take control of the scene and had on-duty officers to assist him in doing so.… An individual is made a supervisor not simply because he or she is able to memorize statutes, rules and procedures, but also because that person has indicated a willingness to lead and to help others make necessary decisions regardless of how difficult

> those decisions may be. This … is where Corstan Court failed.

¶3 Court appealed the decision of the Commission pursuant to WIS. STAT. § 62.50(22) (2005-06),[2] and sought certiorari review of the decision pursuant to § 62.50(20).[3] The trial court affirmed the Commission's decision in all respects.

DISCUSSION

¶4 On certiorari, we review the decision of the Commission, not the decision of the trial court. ***State ex rel. Sprewell v. McCaughtry***, 226 Wis. 2d 389, 393, 595 N.W.2d 39 (Ct. App. 1999). Review of certiorari is a question of

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[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

WISCONSIN STAT. § 62.50, entitled "Police and fire departments in 1st class cities," states, in pertinent part:

> **(22)** COSTS; REINSTATEMENT. No costs may be allowed in the action to either party and the clerks' fees shall be paid by the city in which the department is located. If the decision of the board is reversed, the discharged or suspended member shall forthwith be reinstated in his or her former position in the department and shall be entitled to pay the same as if not discharged or suspended. If the decision of the board is sustained, the order of discharge, suspension or reduction shall be final and conclusive in all cases.

[3] WISCONSIN STAT. § 62.50(20) states, in relevant part:

> CIRCUIT COURT REVIEW; NOTICE. Any officer or member of either department discharged, suspended or reduced, may, within 10 days after the decision and findings under this section are filed with the secretary of the board, bring an action in the circuit court of the county in which the city is located to review the order. Such action shall begin by the serving of a notice on the secretary of the board making such order and on the city attorney of such city.

law which we review *de novo*. ***Id.*** Our review on certiorari of the decision by an administrative body is limited to: (1) whether the Commission kept within its jurisdiction; (2) whether it proceeded on the correct theory of law; (3) "whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment[;] and (4) whether the evidence was such that it might reasonably make the order or determination in question." ***State ex rel. Gudlin v. Civil Serv. Comm'n***, 27 Wis. 2d 77, 82 133 N.W.2d 799 (1965).

¶5 The legislature has specifically incorporated rule enforcement in the power of the chief and of the Commission by delineating the standards the Commission is to apply in review of the chief's decisions. WISCONSIN STAT. § 62.50(17) provides:

> **62.50 Police and fire departments in 1st class cities.**
>
> **(17)** DECISION, STANDARD TO APPLY.
>
> ….
>
> (b) No police officer may be suspended, reduced in rank, suspended and reduced in rank, or discharged by the board under sub. (11), (13) or (19), or under par. (a), based on charges filed by the board, members of the board, an aggrieved person or the chief under sub. (11), (13) or (19), or under par. (a), unless *the board determines whether there is just cause*, as described in this paragraph, *to sustain the charges.* In making its determination, *the board shall apply the following standards, to the extent applicable*:
>
> 1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.
>
> 2. Whether the rule or order that the subordinate allegedly violated is reasonable.
>
> 3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.

> 4. Whether the effort described under subd. 3. was fair and objective.
>
> 5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.
>
> 6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.
>
> 7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

(Emphasis added.)

¶6 The Commission determined there was just cause to demote Court under WIS. STAT. § 62.50(17)(b)1.-7., which determination was affirmed under the appeal provisions of § 62.50(22). The Commission argues here that the just cause finding sustained on appeal is now final and binding because it was affirmed by the trial court, relying on ***Jendrzejewski v. Board of Fire & Police Commissioners***, 257 Wis. 536, 539, 44 N.W.2d 270 (1950). *See* ***id.*** (Commission's appeal of a circuit court order reinstating the officer was not authorized by previous version of § 62.50(22), which contained the identical language as the current version of the statute as to finality of a circuit court decision on appeal). Court does not dispute this assertion. The only issue developed by Court on appeal is his claim that the rule which the Commission found he violated, "Police Sergeant Position Responsibility - Section 4/070.00(2)" (hereinafter, the Rule) is unconstitutionally vague. Court argues that if the Rule is unconstitutionally vague, the Commission exceeded its jurisdiction in enforcing the Rule. This argument is essentially identical to a claim that the Commission's conclusion that the Rule is not unconstitutional is an incorrect theory of law. Both are questions of law which we may consider on certiorari review of a trial court

decision. Court develops no argument that the Rule is unconstitutional on its face; we, therefore, consider only whether the Rule is unconstitutional as applied to him.

¶7 Court's argument that the Rule is unconstitutional as applied to him is, essentially, that the Rule did not give him fair notice that his conduct at the scene of the Jude beating would violate the Rule. Thus, only the statutory standards of review by the Commission under WIS. STAT. § 62.50(17)1. and 2. are involved here. The facts here support the implicit Commission finding that Court could reasonably be expected to know the probable consequences of his failure to control the scene, and that a rule requiring police officers and their supervisors to take reasonable steps to control a crime scene is both reasonable and fundamental to police operations.

¶8 The Rule Court was charged with, and found to have violated, required him, as a sergeant, to "assist and instruct" officers "under his/her supervision in the proper discharge of their duties" which included, by reference, a requirement that a sergeant be familiar with all department rules and procedures applicable to his rank and to subordinate ranks. Milwaukee Police Dep't Rules and Procedures Manual, Rule 4 § 4/070.00(2). The first applicable rule under which this requirement arises is Rule 4 § 2/010.00, which provides:

> All members of the Department shall familiarize themselves with all the provisions of the Department's Rules and Procedures Manual within 30 days of the issuance thereof.
>
> It shall be the duty of all members of the Department to thoroughly familiarize themselves with such provisions of the Department's Rules and Procedures Manual as deal specifically and generally with the duties of their rank, grade, or position, within 20 days from the date of assuming that rank, grade or position.
>
> ….

> Failure on the part of members of the Department to acquaint themselves with and abide by the provisions of the Department's Rules and Procedures Manual as hereby directed shall be considered neglect of duty and shall subject such members to disciplinary action.

The Department's Rules and Procedures Manual, referred to in Rule 4 § 2/010.00, contains Rule 4 § 4/070.00(2) dealing with the responsibilities of a sergeant. Rule 4 § 4/070.00(2) provides:

> A Patrol Sergeant shall thoroughly familiarize himself/herself with all subjects pertaining to the duties of a Police Officer, and shall assist and instruct the Police Officers under his/her supervision in the proper discharge of their duties; and shall be held strictly responsible for their efficiency, discipline, general good conduct and appearance.

¶9 Administrative rules, such as the police department rule challenged here, are subject to the same void for vagueness constitutional challenge as more frequently occurs in the context of criminal proceedings. In ***State ex rel. Kalt v. Board of Fire & Police Commissioners for the City of Milwaukee***, 145 Wis. 2d 504, 510, 427 N.W.2d 408 (Ct. App. 1988), we noted that:

> It is a fundamental constitutional rule that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." This rule applies to administrative regulations affecting conditions of governmental employment in the same manner as it applies to penal statutes. "The root of the vagueness doctrine is a rough idea of fairness."

(Footnotes and brackets omitted.) A statute or regulation challenged for vagueness is presumed constitutional. ***State v. McCoy***, 143 Wis. 2d 274, 285, 421 N.W.2d 107 (1988). The person challenging the statute or regulation must prove unconstitutionality beyond a reasonable doubt. ***Id.***; ***State v Bartlett***, 149 Wis. 2d 557, 562, 439 N.W.2d 595 (Ct. App. 1989).

¶10 We considered a challenge to another administrative regulation on the grounds that it was unconstitutionally vague in ***State v. LaPlant***, 204 Wis. 2d 412, 555 N.W.2d 389 (Ct. App. 1996). LaPlant, a landlord charged with multiple violations of housing codes, complained that the phrases "good operating condition," "safe operating condition," "substantial hazard to health and safety," and "disclose," which are peppered throughout WIS. ADMIN. CODE § ATCP 134.04(2)(b), were unconstitutionally vague. ***LaPlant***, 204 Wis. 2d at 423. We noted that:

> A law does not have to attain the precision of mathematics or science since "a certain amount of vagueness and indefiniteness is inherent in all language." An administrative rule will withstand a vagueness challenge if it is "sufficiently definite so that potential offenders … are able to discern when they are approaching the zone of proscribed conduct."

Id. (citations omitted). We held that the challenged regulation was not unconstitutionally vague because "[f]rom the ordinary meaning of these phrases, a landlord should not have difficulty determining when he or she is reaching the zone of conduct proscribed by the ordinance." ***Id.***

¶11 A police sergeant should not have difficulty understanding his duty under Rule 4 § 4/070.00(2) to "assist and instruct" police officers under his supervision in "the proper discharge of their duties," in the context of the facts here. The proper use of police powers invariably requires the exercise of judgment and discretion. It would be as impossible to anticipate, and write a rule governing, the details of every situation in which a sergeant must exercise leadership by "assisting and instructing" subordinates as it would have been in ***LaPlant*** to define every condition which a landlord must disclose as "a substantial hazard to health and safety." Here, a reasonable person, trained in police work,

should immediately recognize as imperative the need to get medical treatment for those injured, to control an unruly mob, to identify and detain witnesses, and to begin a criminal investigation.

¶12 The Commission is charged with interpreting and applying the rules of the Milwaukee Police Department. The Commission found that what Court failed to assist and instruct the on-duty officers to do was basic police work for which he had been trained since he joined the Department as a rookie officer.

> Court was called upon to make necessary decisions and gain control of a crime scene as he had been trained to do since joining the Milwaukee Police Department more than 7 years earlier.… Basic crime scene management as taught in the academy to all rookie police officers would have been sufficient to outline the steps necessary to take.

¶13 Common sense confirms that, for a police officer, basic crime scene management is certainly part of "the proper discharge of [police] duties." Rule 4 § 4/070.00(2) plainly requires a patrol sergeant, such as Court, to be familiar with all police officer duties and to "assist and instruct" officers under his supervision in performing those duties. As applied to the facts in this case, Court's responsibility was to take control of the crime scene and instruct on-duty officers so that control could be efficiently accomplished. He did not do that.

¶14 It is not necessary that an administrative rule provide a check list or describe, with mathematical precision, what specific action is required. ***LaPlant***, 204 Wis. 2d at 423. As the Commission found, the sergeant who arrived on the still unsecured scene an hour after Court arrived had no apparent difficulty in directing the on-duty officers to do things that secured the scene, separated the off-duty officer witnesses, and began the criminal investigation. A sergeant's performance requirements were not so vague as to be incomprehensible to the

patrol sergeant who actually did "assist and instruct" the on-duty officers at the scene. Court has not established that the Rule here, as applied to him, is unconstitutionally vague.

By the Court.—Order affirmed.

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