COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1790 **Cir. Ct. No. 2007TR2135**

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

OZAUKEE COUNTY,

PLAINTIFF-RESPONDENT,

V.

JENNIFER N. SCOTT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed*.

¶1 NEUBAUER, J.[1] Jennifer Scott appeals pro se from a forfeiture judgment after the trial court found her guilty of speeding. As best we understand

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

it, Scott's primary argument is that insufficient evidence supports the finding of guilt, especially as it relates to the radar unit's reliability and accuracy. She also contends the speed limit was not shown to comply with federal requirements and that she should have been granted a continuance to retain an attorney upon learning that her non-lawyer father could not represent her at trial. Her arguments do not persuade us. We affirm.

¶2 The facts, revealed through trial testimony, are undisputed. In the early morning hours of March 9, 2007, Ozaukee County Deputy Sheriff Chad Eibs was running stationary radar on Interstate 43. A "clear, steady, high pitch" on the radar device indicated a lone vehicle traveling toward him at eighty-two miles per hour. The posted speed limit is sixty-five miles per hour. Eibs performed a traffic stop and identified the driver as Scott. Eibs issued her a citation for going over sixty-five miles per hour on a freeway or expressway, contrary to WIS. STAT. § 346.57(4)(gm).[2] Eibs testified that he is trained in stationary radar device use; that he verified the unit's proper operation at the start of his shift and again after use, via both an external check by tuning forks and an internal test; and that the area where the unit detected Scott's speeding was free of road and weather

[2] WISCONSIN STAT. § 346.57(4)(gm) reads in relevant part:

> **346.57 Speed restrictions.**
>
> ….
>
> **(4)** FIXED LIMITS. In addition to complying with the speed restrictions imposed by subs. (2) and (3), no person shall drive a vehicle at a speed in excess of the following limits unless different limits are indicated by official traffic signs:
>
> ….
>
> (gm) Sixty-five miles per hour on any freeway or expressway.

interference. Scott testified that she was "going 67, 68." The trial court found her guilty and she appeals.

¶3 Scott argues that the State failed "to establish probable cause to stop" her vehicle. After considering Scott's entire argument, we understand her challenge to be to the sufficiency of the evidence to sustain the trial court's finding of guilt. The standard of review in a bench trial is whether the court's findings of fact are clearly erroneous. *See* WIS. STAT. § 805.17(2); *see also* ***Ozaukee County v. Flessas***, 140 Wis. 2d 122, 130-31, 409 N.W.2d 408 (Ct. App. 1987).

¶4 The evidence shows that Scott herself admitted that her speed exceeded sixty-five miles per hour and that Eibs locked her speed in on radar at eighty-two miles per hour. Scott challenges the reliability and accuracy of the radar evidence, however, and contends the trial court erroneously took "judicial notice" of the accuracy of the radar unit. Approximately two months after receiving her citation, Scott sought performance and calibration records of the specific radar unit. Scott does not say, but her request evidently was not a motion under WIS. STAT. § 345.421.[3] As a courtesy the County furnished the police records, which did not include radar data. Scott argued at trial that those records were useless to her defense, that Eibs' testimony about the radar was "only

[3] WISCONSIN STAT. § 345.421 provides in relevant part:

> Neither party is entitled to pretrial discovery except that if the defendant moves within 10 days after the alleged violation and shows cause therefor, the court may order that the defendant be allowed to inspect and test under s. 804.09 and under such conditions as the court prescribes, any devices used by the plaintiff to determine whether a violation has been committed, including … devices used … to measure speed, and may inspect under s. 804.09 the reports of experts relating to those devices.

hearsay," and that the best evidence rule, *see* WIS. STAT. § 909.02, required the County to offer evidence beyond Eibs' testimony of the radar's certification. The trial court ruled that she was not entitled to pretrial discovery under § 345.421 because her request was made well more than ten days after the incident. Based on its findings that a trained officer operated the radar unit away from other vehicles, heard the high audio tone, and tested the device both before and after taking the reading at issue, it found her guilty of speeding and concluded that the radar reading was accurate.

¶5 These findings are not clearly erroneous. The County did not have to affirmatively prove accuracy and reliability of the radar unit because stationary radar enjoys a prima facie presumption of accuracy. *See* ***City of Wauwatosa v. Collett***, 99 Wis. 2d 522, 523, 299 N.W.2d 620 (Ct. App. 1980). Scott's challenges to the reliability or accuracy go only to the weight of the evidence. *See* ***State v. Frankenthal***, 113 Wis. 2d 269, 272-73, 335 N.W.2d 890 (Ct. App. 1983). Eibs' testified about his training and the manner in which the radar was used and tested, and Scott admitted she was traveling over the speed limit. It was for the trial court to determine the weight to give the evidence. *See* ***State v. Schmitt***, 145 Wis. 2d 724, 733, 429 N.W.2d 518 (Ct. App. 1988). Furthermore, WIS. STAT. § 345.421 is the exclusive method to obtain discovery in traffic cases. *See* ***Flessas***, 140 Wis. 2d at 129-30. Scott does not contend that her discovery request comported with the statute. Scott did not rebut the presumption of accuracy; accordingly, her challenge to the radar evidence fails.

¶6 Next, Scott apparently questions whether the speed limit complied with various federal requirements. This argument also lacks clarity, but through citations to United States Code sections and the National Manual of Uniform Traffic Control Devices, she seems to claim that the posted speed limit on I-43

was derived by arbitrary and capricious means and not pursuant to a qualified engineering study. She raises this argument in the context of WIS. STAT. § 346.57(5), however, which regulates "zoned and posted" speed limits established by state or local authorities. She does not explain why she believes state or local authorities set the speed limit on I-43; further, that is not the statutory section under which she was cited.

¶7 Moreover, despite suggesting otherwise in her "Issues Presented for Review," Scott did not raise this argument below. We generally do not review a claim of error unless it has been properly preserved. ***State v. Bannister***, 2007 WI 86, ¶42, 302 Wis. 2d 158, 734 N.W.2d 892. Thus, Scott has waived her right to have this issue reviewed on appeal. In consideration of Scott's pro se status, we will take a moment to explain the reason for the waiver rule. The rationale partly is rooted in efficiency, since a timely raised objection may eliminate the need for appellate attention to that issue. It also is a matter of courtesy. Challenges raised below afford the opposite party and the trial court the opportunity to address the asserted error and to correct it if necessary. *See* ***id.*** Finally, the court of appeals' primary function is error correcting. ***Cook v. Cook***, 208 Wis. 2d 166, 188, 560 N.W.2d 246 (1997). We cannot review for error an action the trial court was not given a chance to take. The lack of an objection also deprives us of the informed thinking the trial judge could have offered on the matter. *See* ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974). We decline to address this issue further.

¶8 Finally, Scott asserts that she was deprived of a fair legal defense after the trial court denied her request[4] for a continuance to find a lawyer after learning that her father, Brian, would not be allowed to represent her. Brian, a police officer who does not have a license to practice law, maintained at trial that he felt qualified to handle his daughter's case due to his eighteen years of law enforcement experience, his daughter's confidence in him, and his research. He adds here that he was not working for compensation. The trial court noted that the question was not whether he was "capable of doing it [but] are you allowed to do it." The court permitted him to sit at the table with his daughter, consult with and advise her, make an offer of proof and occasional comments to the court, and to elicit testimony from his daughter. Despite those accommodations, Brian moved for the continuance to secure legal representation for his daughter "in light of these new circumstances … that I'm not going to be able to defend my daughter here."[5]

¶9 A motion for a continuance is directed to the sound discretion of the trial court. ***State v. Wright***, 2003 WI App 252, ¶49, 268 Wis. 2d 694, 673 N.W.2d 386. We will not reverse that ruling on appeal absent a clear showing of erroneous exercise of discretion. ***Id.*** When a party has been denied a continuance after claiming surprise, three qualifications must be met before we will hold the trial court's denial to be a misuse of discretion. ***State v. Fink***, 195 Wis. 2d 330, 339,

[4] Brian Scott actually made the request.

[5] Neither Scott nor her father pursued the motion for continuance; therefore, the trial court technically did not deny it. We opt to address it here, however, since she made the request. *See* ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶17, 273 Wis. 2d 76, 681 N.W.2d 190 ("The waiver rule is a rule of judicial administration, and as such, a reviewing court has the inherent authority to disregard a waiver.").

536 N.W.2d 401 (Ct. App. 1995). These qualifications are: (1) actual surprise by something unforeseeable; (2) where the surprise is caused by unexpected testimony, the party who sought the continuance must have made some showing that contradictory or impeaching evidence likely could be obtained within a reasonable time; and (3) denial of the continuance must have caused the movant actual prejudice. ***Id.*** at 339-340. To show prejudice, Scott must demonstrate what would have happened differently had the continuance been granted and why the difference creates a reasonable possibility of a different outcome. *See* ***L. M. S. v. Atkinson***, 2006 WI App 116, ¶19, 294 Wis. 2d 553, 718 N.W.2d 118, *review denied,* 2007 WI 61, 300 Wis. 2d 192, 732 N.W.2d 858.

¶10 On the first qualification, Scott claims actual surprise that her father could not represent her. This does not ring true. Even the most cursory investigation would have revealed that it is unlawful for any person not licensed to practice law in this state to appear for, or on behalf of, another in any court of record in this state. *See* ***State v. Kasuboski***, 87 Wis. 2d 407, 421-22, 275 N.W.2d 101 (Ct. App. 1978); *see also* WIS. STAT. § 757.30. Scott had the right to represent herself, but with it came the responsibility to comply with relevant rules of procedural and substantive law. *See* ***Waushara County v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992); *see also* ***Holz v. Busy Bees Contracting, Inc.***, 223 Wis. 2d 598, 608, 589 N.W.2d 633 (Ct. App. 1998) (pro se litigants are required to reasonably investigate the facts and the law). That Brian Scott was not being paid to represent his daughter changes nothing; compensation is not an element of the practice of law under WIS. STAT. § 757.30. *See* ***Life Science Church v. Shawano County***, 221 Wis. 2d 331, 335, 585 N.W.2d 625 (Ct. App. 1998).

¶11 The second qualification, surprise caused by unexpected testimony, does not apply, and Scott utterly fails to address the third qualification, actual prejudice. She argues only that the trial court should have allowed her the latitude to be assisted by a non-lawyer "with legal and criminal justice experience" and that the record does not support that she intelligently, voluntarily and understandingly waived her constitutional right to counsel. A speeding violation is not a crime. *See* ***State v. Kramsvogel***, 124 Wis. 2d 101, 116-17, 369 N.W.2d 145 (1985); *see also* WIS. STAT. § 939.12 (providing that conduct punishable only by a forfeiture is not a crime). There is no constitutional guarantee of representation by counsel in a civil matter. ***Village of Big Bend v. Anderson***, 103 Wis. 2d 403, 405, 308 N.W.2d 887 (Ct. App. 1981).

¶12 Lastly, we address Scott's appellate brief. Proceeding pro se may be daunting, and we try to afford flexibility to the degree possible. Nonetheless, the right to self-representation does not grant "a license not to comply with relevant rules of procedural and substantive law." ***Graf***, 166 Wis. 2d at 452 (citation omitted). Pro se appellants are bound by the same appellate rules as apply to attorneys; we have no duty to walk pro se litigants through the procedural requirements or to point them to the proper substantive law. ***Id.***

¶13 Besides Scott's problematic arguments, her brief itself does not comport with WIS. STAT. RULE 809.19 in many respects. Most notably, Scott certified that her appendix complies with RULE 809.19(2)(a), specifically, that it contains relevant trial court record entries, the trial court's findings or opinion and portions of the record essential to our understanding of the issues. It does not. Instead, the appendix contains only abbreviated case excerpts, some no more than a sentence, none of them relevant. A deficient appendix places an unwarranted burden on the reviewing court and could be grounds for imposition of a penalty or

costs. *See* WIS. STAT. § 809.83(2); *see also* ***State v. Bons***, 2007 WI App 124, ¶¶20-25, 301 Wis. 2d 227, 731 N.W.2d 367.

¶14 Pro se appellants should have no advantage over appellants represented by counsel. ***Graf***, 166 Wis. 2d at 452. By the same token, a respondent should not suffer a disadvantage for serendipitously being opposite a pro se appellant. We urge pro se appellants to take advantage of some of the many resources available, such as the guide the Wisconsin Court System offers. *See* "Filing an Appeal: A Citizen's Guide to Filing an Appeal in the Wisconsin Court of Appeals," available at http://wicourts.gov/ca/citizensguide.pdf.

By the Court.—Order affirmed.

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