

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 7, 2011

A. John Voelker
Acting 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. 2010AP2031

Cir. Ct. No. 2010FO219

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,**

v.

**LEONARD E. REIMER,
DEFENDANT-APPELLANT.**

APPEAL from a judgment of the circuit court for Milwaukee County: JONATHAN D. WATTS, Judge. *Affirmed.*

¶1 KESSLER, J.¹ Leonard E. Reimer appeals, *pro se*, from “the final judgment or order, entered on 6/22/10.” That judgment imposed a \$1000 fine after the trial court found that Reimer violated WIS. ADMIN. CODE § NR 216.46(1), because he did not develop a site erosion control plan, as required by the Department of Natural Resources (DNR), for the property upon which he

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2009-10).

apparently intended to construct a basement and then move a home onto the basement.

¶2 Conservation Warden Gervis Myles issued Reimer a citation alleging that on October 22, 2009, Reimer violated WIS. ADMIN. CODE § NR 216.46(1),² because he had failed to develop an appropriate site erosion control plan. Reimer entered a not guilty plea by mail and made an initial appearance. The matter subsequently was scheduled for a court trial eight months after the date of Reimer's ticket, and three months after his not guilty plea, before the Honorable Jonathan D. Watts. At trial, the State called four witnesses, identified in the docket sheet as "D. Myles, John K., Susan E., and Skip B." Reimer also testified. At the conclusion of the evidence and arguments, the trial court found Reimer guilty and imposed a forfeiture of \$1000, including costs.

¶3 Fifteen exhibits were received into evidence. Following the trial, all the exhibits were returned to the parties who had submitted them, and they are not part of the record on appeal.

¶4 Reimer appealed. While this appeal was pending, Reimer asserted his indigency and requested that transcripts be prepared at government expense.

² WISCONSIN ADMIN. CODE § NR 216.46(1) provides:

Erosion Control Plan Requirements. (1) SITE-SPECIFIC PLAN. The permittee or landowner required to submit a notice of intent under this subchapter shall develop a site-specific erosion control plan for each construction site regulated by this subchapter. The permittee or landowner required to submit a notice of intent under this subchapter, or their representative, shall implement and maintain as appropriate all best management practices specified in the erosion control plan from the start of land disturbing construction activities until final stabilization of the construction site.

The Court of Appeals remanded the case to the trial court to determine, pursuant to *State ex rel. Girouard v. Circuit Court for Jackson Ctny.*, 155 Wis. 2d 148, 454 N.W.2d 792 (1990), whether Reimer was in fact indigent and whether he had an arguably meritorious claim on appeal.

¶5 The trial court found Reimer was indigent and directed him to submit a statement of his appellate claims. Reimer did so, and included various documents in support of his assertions that: (1) the evidence at trial was insufficient because he located documents and permits which he alleged showed that he had not committed the violation alleged in the ticket, and (2) he had inadequate notice to prepare for trial. Attached to his response were the following documents, copies of which appear in the record before this court:

- what appeared to be a blank building permit form;
- a construction permit;
- a building permit application;
- a notice of building permit approval;
- a request for plan review for a footing and foundation permit for 7907 W. Angela Ave.;
- a notice of exemption from *Storm Water Management Plan* requirements for property at 7818 R West Glenbrook Drive;
- a request for a *Storm Water Management Plan* exemption for property at 7818 R West Glenbrook Drive;
- a “Special Conditions Report” showing a *Storm Water Management Plan* was not required for property at 7907 W. Angela Ave.;
- a second request for plan review, for a footing and foundation permit for 7907 W. Angela Ave.;
- a Department of Public Works document showing that a building permit plan had been reviewed for 7907 W. Angela Ave.;

- several maps or surveys of property on W. Angela Ave.;
- documents demonstrating the forfeiture imposed and what appears to be Nancy Reimer’s financial situation.

(Emphasis added.)

¶6 The trial court issued a detailed findings of fact. Based on those facts, the trial court found that: (1) the new evidence that was not offered during the court trial “does not present an arguably meritorious claim for relief on appeal,” and (2) Reimer had “more than three months from the date he filed his not guilty plea to prepare for the court trial,” making the claim of inadequate notice “not arguably meritorious.”

¶7 This court ordered that Reimer would be responsible for the costs of the transcripts for the appeal and that he was required to file a statement of transcript within ten days. Thereafter, Reimer filed a statement that transcripts were not necessary for the appeal. Consequently, neither transcripts of the trial nor of the *Girouard* hearing are part of the record.

¶8 Reimer’s *pro se* brief does not contain references to any legal authority. Based on his failure to include references to legal authority, the court of appeals could choose not to consider his arguments at all. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (“Arguments unsupported by references to legal authority will not be considered.”). However, this court will briefly address his arguments to explain why the trial court must be affirmed.

¶9 Reimer’s entire appellate argument consists of (1) his claim of new facts which “were not available at the time of trial”—namely the permits he claimed to have but which he was unable to locate; and that (2) he has “original

copies of the permit now in [his] possession” and is submitting copies to this court.

¶10 Reimer misunderstands the concept of new evidence “not available at trial.” Foremost, new evidence *may* result in a new trial but it does not automatically result in reversing the findings of the trial court. Due process requires a new trial only if the defendant satisfies the following criteria: (1) the evidence was discovered after trial; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue; (4) the evidence is not merely cumulative to the evidence presented at trial; and (5) a reasonable probability exists of a different result in a new trial. *State v. Bembenek*, 140 Wis. 2d 248, 252, 409 N.W.2d 432 (Ct. App. 1987).

¶11 The documents on which Reimer relies are part of the record considered by the trial court at the *Girouard* hearing, not at the trial. These documents were discovered after trial. However, Reimer admits he had them in his possession before trial but could not find them. Thus, Reimer’s own negligence in mislaying these documents is what made them unavailable earlier. More importantly, however, not one of the documents he offers is relevant, much less material, to any issue that was before the trial court. No document even mentions a *site erosion control plan*.³ The only issue before the court, based on the DNR citation, was whether Reimer had violated WIS. ADMIN. CODE § NR 216.46(1) by failing to develop a *site erosion control plan*. Because there are no

³ Perhaps Reimer believed that his *storm water control plan* was the same as a *site erosion control plan*. Intuitively, they sound like similar concepts. All of the material Reimer produced in this appeal, and in the *Girouard* hearing, relate to his compliance with *storm water control* requirements. See *State ex rel. Girouard v. Circuit Court for Jackson Cnty.*, 155 Wis. 2d 148, 454 N.W.2d 792 (1990). However, these are not the same plans, and compliance with the requirements of both plans is demanded of those wishing to construct buildings on real estate located in a municipality. See WIS. ADMIN. CODE §§ NR 216.46 and 216.47.

transcripts or exhibits from the trial available for review, it is impossible to determine whether this evidence is, or is not, merely cumulative to the evidence presented at trial.

¶12 “It is the appellant’s responsibility to ensure completion of the appellate record and ‘when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court’s ruling.’” *State v. McAttee*, 2001 WI App 262, ¶5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774 (citation omitted). The trial court found Reimer guilty, thus it must have found that Reimer failed to “develop an appropriate site erosion control plan” as alleged in the DNR citation. This court is required to assume the missing transcripts and trial exhibits support the trial court’s findings. *Id.* It is indisputable that the “new evidence” Reimer located after trial does not in any way support his claim that he had the necessary permits. Every document he submitted, which is not a blank form, refers to a *storm water management plan*. Because the record does not demonstrate that Reimer ever presented any evidence relating to his claimed submission of, and approval for, a *site erosion control plan*, this court has no choice but to affirm.

For all the foregoing reasons the judgment of the trial court is affirmed.

By the Court.—Judgment affirmed.

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

