COURT OF APPEALS
DECISION
DATED AND RELEASED

February 1, 1996

No. 95-1719

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

CITY OF WAUTOMA,

Plaintiff-Respondent,

v.

DAVID H. JANSEN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Waushara County: LEWIS MURACH, Judge. *Affirmed*.

EICH, C.J.[1] David H. Jansen, appearing pro se, appeals from a judgment finding him guilty of speeding and operating a vehicle with a blood alcohol concentration of more than 0.1%, in violation of the Wautoma city ordinances.

He argues that: (1) his case was illegally tried to a jury; (2) he was denied due process of law because he was "misled and confused" by the notices he received from the court concerning his case; (3) the breath test was

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

improperly administered; (4) the jury's verdict was inconsistent because he was found guilty of the blood alcohol violation but not guilty of operating while intoxicated; and (5) the trial court erroneously exercised its discretion in "sentencing" him. We reject his arguments and affirm the judgment.

The basic facts are not in dispute. Jansen was stopped by Officer Douglas Diekfuss of the Wautoma Police Department after being clocked at 41 miles per hour in a 25 mph zone. When Diekfuss noticed an odor of intoxicants on Jansen's breath, he administered several field sobriety tests and, on the basis of those tests, arrested Jansen for driving while intoxicated. At the police station, Jansen took an Intoxilyzer test which registered a blood alcohol count of 0.13%.

Jansen was charged with speeding, driving while intoxicated and driving with a prohibited blood alcohol content. As indicated, the jury found him not guilty of driving while intoxicated and guilty of the other two violations. The court imposed a forfeiture of $114 for speeding and $583 for the blood alcohol violation.

Jansen argues first that the judgment as to his speeding charge should be reversed because the charge should not have been tried to a jury. As authority, he refers to the statement "from the back of the Wisconsin Uniform Citation" to the effect that, in municipal court, jury trials may be demanded only in cases of driving while intoxicated. The speeding citation in the record contains no such language on its reverse side. Additionally, the various communications and notices from the court--which Jansen himself has included in the appendix to his brief--indicate that the case was being scheduled for jury trial, and there is no record that he ever expressed any objection to the process. Indeed, the record contains Jansen's own demand for a jury trial "[i]n regards to a Speeding Charge" as well as the charge of driving while intoxicated. We see no merit in his argument.[2]

[2] In his reply brief, Jansen claims for the first time that the speeding ticket cited to the wrong statute--§ 346.57(4)(d), STATS., speeding in an alley--rather than § 346.57(5), exceeding zoned or posted limits. We do not consider arguments raised for the first time in a reply brief. ***State v. Lewandowski***, 122 Wis.2d 759, 763, 364 N.W.2d 550, 552 (Ct. App. 1985). Even so, the transcript of the trial and the jury verdict leave no doubt in our minds

Jansen next argues that he was never personally served with a summons, nor given twenty days "in which to answer th[e] summons ...." as provided in chapter 801 of the code of civil procedure. He also complains that the trial court never entered a "scheduling order" as required by the code. Finally, he suggests that the notices he received from the court were "confusing." Procedures in traffic forfeiture proceedings are governed by ch. 799, STATS., and Jansen has not pointed to any violation of ch. 799 procedures in his brief. As to the clarity of the notices he received, the city notes that he made each and every required court appearance throughout the proceedings. We see no due process violation.

Jansen next argues that the Intoxilyzer test was improperly administered. He claims, as he testified at trial, that the operator's statement that he had not vomited prior to taking the test was incorrect because "he lost control of his stomach contents [due to] a ruptured esophagus which made him vomit into his mouth and then he swallowed because he was embarrassed." He also claims that the operator failed to run a "calibration check" on "the second Subject Test." The operator testified at length about how the test was administered, and his testimony established compliance with the sample-calibration-analysis procedures set forth in § 343.305(6)(c)(1), STATS. We will sustain a jury's verdict if there is any credible evidence to support it, ***Foseid v. State Bank of Cross Plains***, No. 94-0670, slip op. at 8 (Wis. Ct. App. Oct. 19, 1995, ordered published Nov. 28, 1995), and we see no reason that the jury could not credit the operator's testimony as to the propriety of the machine's operation.

Jansen next argues that because the jury found him not guilty of driving while intoxicated, it could not consistently find him guilty of driving with a prohibited blood alcohol content. The two offenses are not mutually exclusive. To be guilty of driving while intoxicated, the defendant's ability to operate a vehicle must be found to be "materially impaired." ***State v. Waalen***, 130 Wis.2d 18, 28, 386 N.W.2d 47, 51 (1986). A jury may properly conclude that a person's blood alcohol level exceeded the statutory standard, even though the evidence of impaired driving ability was insufficient to support a finding that he or she was driving while under the influence of an intoxicant. As the

(..continued)
that Jansen was tried for violating a Wautoma city ordinance adopting § 346.57(5): exceeding zoned or posted limits.

legislature has stated in the statute: each offense "require[s] proof of a fact for conviction which the other does not require." Section 346.63(1)(c), STATS.

Finally, Jansen argues that the court improperly "sentenced" him for a non-criminal act, but he does not explain the argument further, other than to suggest that the city attorney used the word "sentence" at least once during the proceedings and thereby improperly turned the trial into a "criminal" proceeding.[3] The record plainly indicates that Jansen was found guilty of a civil violation and was ordered to pay a civil forfeiture therefor. Should he not pay the forfeiture, he could be ordered to jail, as specifically authorized by § 345.47(1), STATS.

By the Court.—Judgment affirmed.

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

[3] Nor does the court's use of a printed-form judgment that appears to be more appropriate to a criminal proceeding, in that it is one of "conviction and sentence" indicating that the defendant is being "sentenced," require reversal. The terms of the judgment state plainly that Jansen is being assessed a "forfeiture/fine" for the violation.