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DISTRICT IV

March 10, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2014AP2438	State of Wisconsin v. Jason M. Huberty (L.C. # 2013FO2164)
2014AP2439	State of Wisconsin v. Jason M. Huberty (L.C. # 2013FO2236)

Before Lundsten, J.

The State appeals the circuit court's order dismissing two forfeiture actions the State brought against Jason Huberty alleging a total of four violations of WIS. ADMIN. CODE § Adm 2.07(2). Section Adm 2.07(2) requires permits for items, such as signs, banners, and "artistic material," that are displayed or erected on state property. Based upon my review of the briefs

and record, I conclude that this case is appropriate for summary disposition.[1] *See* WIS. STAT. RULE 809.21(1). I summarily affirm because the State's argument for reversal was forfeited.

The two complaints against Huberty alleged that, on four different dates, Huberty used chalk to make drawings, write "sayings," or make other markings on State Capitol grounds. The parties agree that two of the four alleged counts fell under an old version of WIS. ADMIN. CODE § Adm 2.07(2) that was replaced by emergency rule, and that the other two counts fell under the emergency rule. Both versions of the rule contained the general requirement that state property users must obtain advance permission before erecting or displaying various items as already described. *See* WIS. ADM. REG. 688B (April 30, 2013) (referencing text of EmR1305); WIS. ADMIN. CODE § Adm 2.07(2) (April 1, 1998). However, the emergency rule added tailoring language that limits its coverage. That rule contained an exception for "any individual who holds a sign that is not larger than 28 [inches] in length or width, or to any item of clothing worn by an individual." *See* WIS. ADM. REG. 688B (April 30, 2013) (referencing text of EmR1305).

Huberty moved to dismiss all four counts against him, arguing that both versions of the rule were facially unconstitutional on First Amendment grounds. In briefing on the motion, Huberty identified the emergency rule's small-signs-and-clothing exception, but neither Huberty nor the State made constitutional arguments relating to that exception. In fact, the State did not even mention the newer narrowing language. Rather, the State argued that both versions of the rule were constitutional based on a state "Access Policy" purporting to limit the rules' effect. In a decision that makes no distinction between the old version and the newer version of the rule,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version.

the circuit court dismissed all counts based on its conclusion that "§ ADM 2.07(2) [is] facially unconstitutional."[2]

Now, on appeal, the State takes a new approach. The State says that it is not appealing the two counts under the old rule and, therefore, effectively declines to defend the constitutionality of the old rule. The State instead defends only the two counts under the emergency rule, and complains that the circuit court erroneously "decid[ed] the case based on a superseded version of the regulation." The State's new argument on appeal focuses on the newer rule's small-signs-and-clothing exception, and relies on this narrowing language to argue that the newer rule is constitutional. That is, the State now relies on the narrowing language as a necessary building block of its constitutional analysis.

In effect, the State argues that, based on the circuit court's mistaken belief that there was no constitutional difference between the old rule and the newer more narrow rule, the circuit court erroneously dismissed the two counts issued under the newer version of the rule. The State makes this argument now, despite the fact that it never asked the circuit court to make such a distinction. Nor did the State move for reconsideration, even though the circuit court's order dismissing all counts makes clear that the court was not drawing a distinction between the old version and the newer version of the rule.

The State's new argument is, therefore, forfeited, and I decline to consider it. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) ("The general rule is that issues not presented to the circuit court will not be considered for the first time on appeal."); ***State v.***

[2] The reasoning relied on by the circuit court is found in a decision in a different case decided by the same circuit court judge. That other case involved only the old rule. The State supplies a copy of that decision, and there seems to be no dispute that the reasoning in that decision is the reasoning the circuit court relied on to dismiss all of the counts here.

Rogers, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995) ("[This court] will not ... blindside trial courts with reversals based on theories which did not originate in their forum.").[3]

It is true that the forfeiture rule may be disregarded under some circumstances, namely, when a case presents a fully briefed legal question that is "of sufficient public interest to merit a decision." *See* ***Apex Elecs. Corp. v. Gee***, 217 Wis. 2d 378, 384, 577 N.W.2d 23 (1998). However, I see no good reason to disregard forfeiture here. As far as I can tell, applying the forfeiture rule in Huberty's case has no impact beyond the current controversy. The circuit court's decision is, of course, not precedential. And, I know of nothing that would prevent the State from making the arguments it now makes in a different case—even a case before the same circuit court judge—as support for the constitutionality of the emergency rule.

IT IS ORDERED that the circuit court's order is summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals

[3] The State also argues that a facial overbreadth challenge was not available to Huberty because Huberty could have brought an as-applied challenge. The State may intend this argument as an alternative, stand-alone argument. Regardless, I conclude that this argument is also forfeited. I see nothing in the State's circuit court briefing that would have alerted the circuit court to this argument.