

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2016AP836

COUNTY OF SHEBOYGAN,

Plaintiff-Respondent ,

vs.

LEE F. KLEINHANS,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

**Appealed from a Judgment of Conviction Entered in the Circuit
Court of Sheboygan County, Wisconsin on March 31, 2016,
the Honorable Rebecca Persick presiding.
Trial Court Case No. 2015 TR 5218**

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STATEMENT OF THE ISSUE

Defendant Appellant-Kleinhans seems to list four separate issues or arguments in his brief between the Table of Contents (trial court errors regarding (1) Highway Department language usage, and (2) “admission of hearsay” during closing argument by the prosecutor) and Issues Presented ((3) trial court errors for failure to reference “Manual on Uniform Traffic Control Devices” regarding proper placement of road signs, and (4) failure to consider the 70 citations issued in a three and a half month period in that particular construction zone.)

The County of Sheboygan respectfully submits that there is but ONE central issue to be parsed in this case, and that is...

Whether Defendant-Appellant Lee Kleinhans violated Wis. Stat. § 346.04(2) (failure to obey traffic sign or signal) on October 30, 2015 when he drove through a construction area marked off with “road closed” and staggered barrier signs.

The trial court answered: **YES.**

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not believe that oral argument is necessary in this case because the issues raised on appeal will be fully developed in the briefs submitted to the Court. The state also believes that publication is not necessary because the issues involve no more than the application of well-settled law to a common fact situation.

STATEMENT OF THE CASE

On Friday, October 15, 2015 at approximately 2:15 p.m., Sheboygan Sheriff's Deputy Brian Beernink was on duty near the intersection of County Road A and County Road EE (Weeden Creek Road) in Sheboygan County, Wisconsin. (Transcript pp. 4,5) The intersection had been under construction for some time for the purpose of installing a roundabout at the intersection. (Transcript 5:20-24) It is undisputed that the intersection was marked off by signs that said "road closed," and by traffic barriers which were staggered at the entrance of the construction zone to allow access for construction crews and machinery, emergency vehicles, and local traffic. (Transcript pp. 6-7).

At the above date and time, Deputy Beernink observed a vehicle driven by Defendant-Appellant Kleinhans enter the construction zone by driving around the staggered barricades east of the roundabout, past the roundabout, and out the other side of another set of barricades. (Transcript 8:6-15) Deputy Beernink initiated a traffic stop of the vehicle, and cited Mr. Kleinhans for violating Wis. Stat. § 346.04(2), failure to obey a traffic sign or signal. (Transcript 10:9-12)

A court trial was held in Branch 4 of Sheboygan County Circuit Court before the Honorable Rebecca Persick on March 21, 2016. Deputy Beernink testified as to his observations and actions that day, as did Mr.

Kleinhans. Judge Persick ruled that the County had met its burden of proof and found Mr. Kleinhans guilty. (Transcript 33:10-12) This appeal followed.

ARGUMENT

Mr. Kleinhans was properly convicted of violating Wis. Stat. § 346.04(2) (failure to obey sign/signal) because he drove through a construction area which was clearly marked as “closed” to regular traffic.

As a threshold matter, the County notes that one of Mr. Kleinhans’ issues on appeal—that the trial court failed to take note of the number of similar traffic tickets issued in the area he drove through on October 30, 2015—is not only irrelevant but not properly brought before the Court of Appeals because it was not first raised in the trial court. Brandmiller v. Arreola, 189 Wis.2d 215, 233 (Wis. App. 1994) (“*issues not raised at the trial court are generally waived on appeal*”)

Wis. Stat. § 346.04(2) states that “no operator of a vehicle shall disobey the instructions of any official traffic sign or signal unless otherwise directed by a traffic officer.”

It is undisputed that on October 30, 2015 at the time that Mr. Kleinhans was cited for violating this statute, the intersection of County Road A and County Road EE—also known as Weeden Creek Road—was a construction zone for the purpose of replacing the conventional intersection with a roundabout. (Transcript

11:19-22) It is undisputed that the route taken by Mr. Kleinhans was marked off by staggered construction barriers and “road closed” signs. (Transcript 6:12-22) It is undisputed that Mr. Kleinhans saw the staggered barriers and drove around them anyway to reach a business on the other side of the construction zone, Weeden Creek Orchard, and Weeden Creek itself for purposes of checking out potential salmon fishing sites. (Transcript 24:10-14) It is also undisputed that Mr. Kleinhans could have taken an alternate—though more circuitous route—to get to his destination without driving through the construction zone. (Transcript 20:2-7) It appears from the record that Mr. Kleinhans had been aware that this particular area was under construction prior to the date that he was ticketed in October, based on his response to Judge Persick’s direct questioning: “I was unable to walk that distance to ask the workers when it was going to be finished ’cuz nobody seems to have known all summer long. It’s been closed for a couple months, no work being done on it. The neighbors didn’t know. And that was the only way I was going to get an answer.” (Transcript 23:19-25)

What appears to be the sticking point for Mr. Kleinhans during the court trial and now on appeal is his insistence that in his view and experience, construction barricades that were staggered to allow for the ingress and egress of emergency vehicles, construction vehicles

and local traffic (rather than arranged as a blockade to any traffic) did not serve to preclude his passage through.

Mr. Kleinhans stated during the trial—although the court disallowed the statement as hearsay—that he had contacted a Highway Department regarding the area in question and had been told that “it was open to business, it was open to homeowners, and it was open to emergency vehicles.” (Transcript 25:18-22). Even if Judge Persick had not sustained the County’s objection to this as hearsay (Transcript 26:2-4), the alleged information supplied by (whatever) Highway Department does not support Mr. Kleinhans’ position, since the apple orchard that he was intent on visiting was not *within* the construction zone but was instead *beyond* it.

Mr. Kleinhans’ assertion that one of the reasons he entered the construction zone was to find a construction worker who could tell him when the project would be finished is similarly not relevant to whether he was permitted to drive into and through the construction zone marked with “road closed” signs and barricades either.

Assistant District Attorney James Haasch correctly summed up the state of the law in his closing argument when he noted “the fact of the matter remains you have the barricades set up that indicate road closed. Any reasonable driver understands that you can’t go past these because of the construction that’s going on. The fact that other people may or may not do it really is not a defense.” (Transcript 30:16-20)

Judge Persick correctly applied the law when she found Mr. Kleinhans guilty of violating Wis. Stat. § 346.04(2). In rendering her decision, she noted that “I think you viewed the staggered placement of the barricades as an invitation to go through. But the plain language of the sign was it said ‘road closed, local traffic only.’ The sign is what closed the road, not the barricades.” (Transcript 32:6-10).

Judge Persick further noted that in her “experience driving around, it’s pretty common for me to see situations like this where the sign said ‘road closed, local traffic only’ and there are staggered barricades for that exact reason. But it doesn’t mean just anyone can go through.” (Transcript 32:17-21) And last, she noted “I think the plain language of the sign speaks for itself, ‘road closed, local traffic only.’ You weren’t local traffic. You weren’t going to a business that wasn’t accessible through only that way.” (Transcript 33:6-9).

CONCLUSION

Judge Persick ruled correctly when she found Mr. Kleinhans guilty of violating Wis. Stat. § 346.04(2) by driving through a construction zone clearly marked “road closed” and partially blocked by barricades. The fact that Mr. Kleinhans intended to reach a business on the other side of the prohibited area in question did not render his

driving *through* the area lawful. He was neither a local resident; the business he was going to visit was not located within the “road closed” construction zone; he was not working on constructing the roundabout in the area; and he was not experiencing any emergency or driving an emergency vehicle.

For these reasons, the County respectfully asks that Mr. Kleinhans’ conviction stand, and that his appeal to have it overturned be denied.

Respectfully submitted, this _____ day of September, 2016.

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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stats., § 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Minimum printing resolution of 200 dots per inch; 13 point body text; 11 point text for quotes and footnotes; leading of min. 2 points; maximum of 60 characters per full line of body text. The length of this brief is 1,711 words.

I further certify that the electronic copy of this brief is identical to the paper copy of the brief which has been filed with the Wisconsin Supreme Court.

I also certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this _____ day of September, 2016.

Signed:

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