

FILED
04-07-2022
CLERK OF WISCONSIN
COURT OF APPEALS

No. 21-AP-1696

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

JEFFREY S. WEIN,
Defendant-Appellant.

Appeal from the Circuit Court for Waukesha County, the Honorable Jennifer R.
Dorow Presiding

Case No. 20-FO-335

BRIEF FOR
DEFENDANT-APPELLANT, JEFFREY S. WEIN

MARK P. POWERS
State Bar No. 1038398
Attorney for Defendant-Appellant

HUPPERTZ & POWERS SC
W240N1221 Pewaukee Road
Waukesha, WI 53187-0215
T: (262) 549-5979
F: (262) 970-0298

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
ISSUES PRESENTED.....	4
ORAL ARGUMENT AND PUBLICATION.....	4
STATEMENT OF THE CASE.....	5
I. FACTUAL BACKGROUND.....	5
II. PROCEDURAL BACKGROUND.....	6
STANDARD OF REVIEW.....	6
ARGUMENT.....	7
I. The Circuit Court Erred by Finding that Mr. Wein did Operate a Motorboat While Under the Influence.....	7
CONCLUSION.....	11
CERTIFICATE OF COMPLIANCE.....	12
CERTIFICATE OF APPENDIX CONTENT.....	13
APPENDIX TABLE OF CONTENTS.....	14

TABLE OF AUTHORITIES**UNITED STATES SUPREME COURT CASES**

<i>United States v. United States Gypsum Co.</i> , 333 U.S. 364 (1948).....	6
--	---

WISCONSIN CASES

<i>Gehr v. City of Sheboygan</i> , 81 Wis.2d 117, 260 N.W.2d 30 (1977).....	7
<i>Phelps v. Physicians Ins. Co.</i> , 319 Wis.2d 1, 768 N.W.2d 615 (2009).....	6
<i>State v. Jenkins</i> , 303 Wis.2d 157, 736 N.W.3d 24 (2007).....	6
<i>State v. Poellinger</i> , 153 Wis.2d 493, 451 N.W.2d 752 (1990).....	7
<i>State v. Watkins</i> , 255 Wis.2d 265, 647 N.W.2d 244.....	7

ISSUE PRESENTED

In the circuit court, all parties stipulated that Mr. Wein was under the influence of an intoxicant. The State and County argued that Mr. Wein was the operator of the motorboat, as he was seated in the captain's chair when Wisconsin Conservation wardens approached. The Defendant argued that he was not operating the motorboat while under the influence. Thus, the sole issue in this appeal: was there clear, convincing, and satisfactory evidence to find that Mr. Wein operated the motorboat?

At approximately 7:30 PM on July 17, 2020, Mr. Wein, his wife, and five (5) additional couples embarked on a boat ride utilizing Mr. Wein's boat. They left from the Wein residence on Okauchee Lake. The parties were headed back to the Wein residence when the motorboat was stopped by Conservation Warden Drew Starch and Mitch Groenier, due to a boating violation, namely that the motorboat had its docking light on, improperly. Neither Conservation Warden saw Mr. Wein operate the motorboat on July 17, 2020, but Starch did see Mr. Wein near the captain's chair as he and Groenier approached the boat.

Mr. Wein was asked to get onto the motorboat being operated by Conservation Warden Groenier and administered field sobriety tests on the watercraft. Mr. Wein ultimately provided two (2) breath samples and was cited for Operating a Motorboat While Under the Influence of Intoxicant, Refusal to Provide Required Sample/Submit to Chemical Test, and Failure to Comply with Federal Boat Lighting Requirements.

1. Was there satisfactory evidence to find Mr. Wein was operating the motorboat during his encounter with Conservation Wardens on July 17, 2020?

The circuit court wrongly found that Mr. Wein was operating his motorboat on July 17, 2020.

ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary. Publication is warranted, as this matter involves an issue of great import, whether the circuit court finding was clearly erroneous.

STATEMENT OF THE CASE

I. Factual Background.

Around 10:15 P.M. on July 17, 2020, State Department of Natural Resources conservation warden Mitchell Groenier was on his regular patrol, checking boating compliance on Okauchee Lake, in the main channel area, just north of Lake Drive, which is near the Golden Mast Restaurant. (R.34:14). Warden Groenier was joined by Warden Starch, both of whom observed what they believed to be a lights violation, specifically a pontoon boat that had its docking lights illuminated. (R.34:15). It was determined that Wardens Groenier and Starch would stop the boat and make contact. (R.34:16).

As they approached the boat, both wardens simultaneously coordinated efforts and turned their lights on at the same time and pointed the lights towards the pontoon boat, to question the operator regarding the lighting violation. (*Id.*). Once the lights were shining onto the pontoon boat, Warden Starch believed he witnessed an individual later identified as Jeffrey Wein, in the captain's chair of the pontoon boat. (*Id.*). Warden Starch advised Mr. Wein that he needed to put the boat in neutral, as the pontoon boat was still in motion, under engine power. (*Id.*).

Warden Starch made contact with Mr. Wein, who he believed to be the operator of the boat. (R.34:16). It was also subsequently determined that Mr. Wein was the registered owner of the boat. (*Id.*). When making contact with individuals on the pontoon, Warden Starch detected a very strong odor of alcohol coming from the boat, generally, as well as from Mr. Wein, specifically. (R.34:19).

Warden Starch conducted a boat equipment check and asked Mr. Wein to retrieve life jackets for each person on the pontoon, which he was able to do. (R.34:21).

At this point, Mr. Wein was ordered onto the boat being operated by Warden Groenier, where field sobriety tests were administered. Subsequently, Mr. Wein was transported to the Town of Oconomowoc Police Department's boating shed on Okauchee Lake, for which DNR had access, after he was placed under arrest. (R.34:21).

II. Procedural Background.

On July 17, 2020, Waukesha County cited Mr. Wein with Failure to Comply with Federal Boat Lighting Requirements, Operating a Boat While Intoxicated, and Boater Refuse/Take Breathalyzer. (R.1:1).

On December 14, 2020, the parties had their first court appearance and at that time, the matters were scheduled for a court trial on March 30, 2021 at 8:30 A.M.

Prior to the scheduled court trial of March 30, 2021, the matters were rescheduled for court trial on May 18, 2021 at 8:30 A.M. However, on May 18, 2021, the State submitted correspondence to the circuit court indicating that there was an available audio recording from Warden Starch that had not previously been submitted to any of the parties, including the state, in advance of trial. (R.14:1-2). On that same day, a hearing was held and it was determined the court trial would be adjourned to September 7, 2021 at 8:30 A.M.

On September 7, 2021, the circuit court held a trial finding that Mr. Wein was guilty of all three (3) charges, specifically Failure to Comply with Federal Boat Lighting Requirements, Operating a Boat While Intoxicated, and Boater Refuse/Take Breathalyzer. (R.21:1-2).

On September 28, 2021, Mr. Wein timely filed his Notice of Appeal. (R.22:1-2). This appeal follows.

STANDARD OF REVIEW

Appeals courts apply the clearly erroneous standard of review to a conclusion of fact made by a judge. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). An appellate court will only overturn a trial court's finding of fact if it is clearly erroneous. *State v. Jenkins*, 303 Wis.2d 157, 736 N.W.2d 24, 34 (2007); Wis. Stats. 805.1(2). A finding of fact is clearly erroneous when it is "against the great weight and clear preponderance of the evidence." *Phelps v. Physicians Ins. Co.*, 319 Wis.2d 1, 768 N.W.2d 615, 628 (2009).

ARGUMENT

I. The Circuit Court Erred in Finding that Mr. Wein did Operate a Motorboat.

When reviewing the sufficiency of the evidence after a bench trial, "an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990); *see also State v. Watkins*, 2002 WI 101, ¶68, 255 Wis. 2d 265, 647 N.W.2d 244.

In nonjury trials, such as this, the circuit court must determine the credibility of witnesses. *Gehr v. City of Sheboygan*, 81 Wis.2d 117, 122, 260 N.W.2d 30 (1977). In the present case the circuit court heard testimony from nine (9) separate witnesses at the time of the court trial, only one (1) of whom testified that they believed Mr. Wein was operating the boat when it was stopped by law enforcement on July 17, 2020.

The first witness to testify was Warden Andrew Starch. (R.34:10). Warden Starch testified that he believed Mr. Wein to be the driver of the pontoon boat on July 17, 2020, because as he and Warden Groenier were approaching the pontoon boat, he saw Mr. Wein on or near the captain's chair. (R.34:16). Warden Starch later testified that he never observed Mr. Wein physically touch the steering wheel as Warden Groenier approached the pontoon boat. (R.34:19). Arguably, this demonstrates that Mr. Wein was not operating the boat at that time, as operation requires that Mr. Wein had the means to control the speed or operation of the motorboat. See Wis. Stats. 346.63(3)(b).

Warden Starch went on to testify that he and Warden Groenier were approximately 20 yards away from the pontoon boat when they first activated their emergency lights. He testified that the initial stop was based on an alleged light violation, which if true, would have made it difficult for anyone in the immediate area to see as the docking lights of the pontoon boat were illuminated. All Warden Starch observed were silhouettes. (R.34:29-30).

The second witness to testify was Warden Mitchell Groenier. (R.34:33). Warden Groenier testified that as he and Warden Starch approached the pontoon boat, he did see someone in the captain's chair, but that ultimately Warden Starch was responsible for identifying that individual. (R.34:39-10).

Warden Groenier subsequently testified that it was his job to determine if anyone else on the boat was capable of driving and that Mr. Wein's wife was the only person on the boat who was capable of doing so, as she was not intoxicated. (R.34:52). Warden Groenier stated that as best as he could recall, only one other individual on the boat was given a preliminary breathalyzer test (PBT). (R.34:53).

After the state rested, the defense did call its first witness, Karl Rekowski, who was a passenger on Mr. Wein's boat on July 17, 2020. (R.34:54). Mr. Rekowski recounted, under oath, that he was driving the pontoon boat on July 17, 2020, and that at the point when Wardens Starch and Groenier approached the boat, Mr. Wein was talking to his wife at the front of the boat. (R.34:56). Mr. Rekowski testified that he was the responsible party for placing the pontoon boat in neutral so that it stopped moving after he saw the blue lights of law enforcement approaching. (*Id.*). Lastly, Mr. Rekowski testified that contrary to the testimony of Warden Groenier, at no time were any of the passengers on the pontoon boat asked if they were too impaired to drive or asked to provide a PBT.

Furthermore, Mr. Rekowski states that he remembers specifically that he was asked by Mr. Wein to begin driving the boat so that Mr. Wein and his wife could determine whether they would go to another bar. (R.34:61).

Next, Matthew Collins testified for the defense. (R.34:65). Mr. Collins was also a passenger on Mr. Wein's pontoon boat and stated that Karl Rekowski was operating the pontoon boat as law enforcement approached. (R.34:66). He also stated that Mr. Wein was at the front of the boat with he and his wife. (*Id.*). Mr. Collins also recalled that the only time Mr. Wein was in the general area of the steering wheel was when he was attempting to get registration information for law enforcement. (R.34:67).

The fifth witness to testify was Thomas Donahue, who was also a passenger on Mr. Wein's pontoon boat. (R.34:70). Mr. Donahue testified that as the pontoon boat was approached by law enforcement on July 17, 2020, Mr. Rekowski was responsible for its operation. (R.34:72). Mr. Donahue also testified that numerous individuals onboard the pontoon had advised law enforcement that Mr. Wein had not been operating the pontoon boat. (R.34:73).

Next, Ryan Safranek, who was also a passenger, testified on behalf of the defendant. (R.34:75). Mr. Safranek testified that during that evening, several individuals had operated the pontoon boat, including himself. (R.34:76). At the time when law enforcement was approaching the pontoon boat, Mr. Safranek identified Karl (Rekowski) as the driver and indicated he and his wife were next to

Karl and Karl's wife on the boat. (R.34:77). Mr. Safranek stated that Karl put the boat in neutral as law enforcement docked next to the pontoon boat. (*Id.*). He also testified that at no time did law enforcement or the wardens ask or administer preliminary breath tests on the pontoon to any of the occupants. (R.34:78). As the two boats drifted apart, Mr. Safranek recalls that occupants of the pontoon boat were yelling to the wardens that Mr. Wein had not been driving the boat. (R.34:79-80).

Joseph Frohna, who was also a passenger, testified that Karl Rekowski was operating the boat at the time of law enforcement contact and that his wife, Kim Frohna, took the boat back to the Wein residence and docked it after Mr. Wein was arrested. (R.34:83).

Kelly Wein, wife of the defendant, also testified. (R.34:87). Ms. Wein was a passenger and stated that she and Mr. Wein were speaking about whether or not they would go to another bar, the Hideaway, when they were pulled over on July 17, 2020. (*Id.*). She also testified that Mr. Rekowski was driving the boat at that time and was responsible for placing the boat in neutral, before getting out of the captain's chair and moving towards the front of the boat to speak with law enforcement. (*Id.*).

Lastly, Jeffrey Wein took the stand to testify. (R.34:91). Mr. Wein testified that at the time the pontoon boat was approached by law enforcement, Karl Rekowski was driving, and that he was in front of the boat with Matthew Collins, speaking with his wife, Kelly Wein. (R.34:94). He also stated that he could hear individuals yelling from the pontoon boat towards the warden's boat, inquiring as to what was happening to Mr. Wein. (R.34:96).

The circuit court relied heavily, if not exclusively, on the testimony of both Warden Starch and Warden Groenier, in determining that there was clear, satisfactory, and convincing evidence that Mr. Wein operated a boat, while under the influence on July 17, 2020. This was contrary to the testimony provided by passengers, all of whom had an unobstructed view of who was operating the pontoon boat, as compared to Wardens Starch and Groenier, who were admittedly blinded by the docking light.

The circuit court found that while much of the testimony presented was conflicting, including who was operating the pontoon boat, it was uncontested that at the time the motorboat was stopped, Mr. Wein was in the captain's chair. (R.34:112). This is disingenuous, as many of the witnesses were not even asked about who was in the captain's chair at the time law enforcement approached and

stopped the boat. Much, if not all of the testimony elicited from defense witnesses surrounded who was operating the pontoon boat at the time individuals began to see flashing lights from law enforcement and not who was seated in the captain's chair. Not one single passenger indicated Mr. Wein was operating the pontoon boat, instead, each of the witnesses on the pontoon boat testified that another known individual, Karl Rekowski, was operating the boat.

It is clear from the decision that the circuit court gave the testimony of law enforcement more weight than that of the passengers on the Wein boat, despite the fact that several statements made by Warden Starch and Warden Groenier were later contested by witnesses present on the pontoon boat. Specifically, Warden Groenier indicated he asked one passenger to perform a PBT, when others present indicated that never occurred. Warden Groenier also testified that Ms. Wein was the only individual on the boat who was sober enough to drive the boat after the stop. However, Joseph Frohna testified that his wife, Kim Frohna, was responsible for docking the boat after the stop.

What we do know for sure is that Wardens Starch and Groenier stopped the boat registered to Jeffrey Wein on July 17, 2020. We know that the stop was due to an alleged equipment violation, namely that Wein's pontoon boat had its docking lights illuminated. We know from testimony that this is very dangerous as the docking lights are so bright that when they are illuminated, the red and green navigation lights are drowned out and it becomes difficult for other nearby boats to navigate. We also know from testimony that there were only two (2) wardens that were attempting to determine who was operating the pontoon boat from approximately 20 yards away, in the dark of night, using two (2) flashlights. These two (2) wardens were responsible for keeping track of the twelve (12) passengers on board. We know for certain that the main duty of one of those two approaching wardens was to drive up alongside the pontoon boat, while the other warden was to attempt to ascertain who was operating the pontoon boat.

Each passenger provided similar testimony insofar as each stated that Karl Rekowski was operating the pontoon boat prior to having contact with law enforcement on July 17, 2020. Although there is minimal evidence to support the circuit court's finding, it is clear that based upon review of the entire evidence, a mistake has been committed in determining that Mr. Wein did operate a motorboat.

CONCLUSION

This Court should reverse the circuit court's finding that Mr. Wein was operating his pontoon boat on July 17, 2020, at the time the stop was effectuated by law enforcement.

Dated at Waukesha, Wisconsin this 6th day of April, 2022.

Respectfully submitted,
HUPPERTZ & POWERS SC

Signed Electronically by Mark P. Powers

MARK P. POWERS
State Bar No. 1038398

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,664 words.

Dated at Waukesha, Wisconsin this 6th day of April, 2022.

Respectfully submitted,
HUPPERTZ & POWERS SC

Signed Electronically by Mark P. Powers

MARK P. POWERS
State Bar No. 1038398

CERTIFICATION BY ATTORNEY OF APPENDIX CONTENT

I hereby certify that filed with this brief is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings of opinion of the circuit court; (3) a copy of any unpublished opinion cited under Wis. Stat. § 809.23(3)(a) or (b), and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further 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 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 at Waukesha, Wisconsin this 6th day of April, 2022.

Respectfully submitted,
HUPPERTZ & POWERS SC

Signed Electronically by Mark P. Powers

MARK P. POWERS
State Bar No. 1038398

APPENDIX TABLE OF CONTENTS

Court Trial Transcript (09/07/2021).....	App. 1
Judgment of Conviction (20-FO-335).....	App. 123
Judgement of Conviction (20-FO-336).....	App. 125
Judgement of Conviction (20-FO-337).....	App. 127
Notice of Appeal (All Cases).....	App. 129