STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2022AP668-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

KEVIN R. RADDEMANN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, BRANCH IV, THE HONORABLE SANDRA J. GIERNOTH PRESIDING, TRIAL COURT CASE NO. 21-CM-699

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE LOWER COURT HAD AN OPPORTUNITY TO ADDRESS THE CONSTITUTIONALITY OF THE MUNICIPAL ORDINANCE.

The State's lead argument regarding Mr. Raddemann's challenge in the instant case is that his challenge—at least insofar as he questions the constitutionality of Hartford Municipal Ordinance No. 27.13(1)—should be rejected because "the circuit court [did not have] the opportunity to address the constitutionality of the ordinance, ..." State's Response Brief, at p.7 [hereinafter "SRB"].[1] This is not the case.

As the State correctly notes, Mr. Raddemann *did* provide notice to the circuit court of his constitutional challenge to the ordinance at issue in his Motion for Consideration. SRB at p.6; R36. In fact, the State even concedes that "the circuit court denied the Defendant's Motion for Reconsideration." SRB at p.6; R37. Remarkably, however, the State maintains that the circuit court was "not allow[ed] . . . the opportunity to address the constitutionality of the ordinance, ..." SRB at p.7. Mr. Raddemann is at a loss to understand the State's argument. Clearly, Record Item No. 36 expressly raises a challenge to whether the Hartford Ordinance is constitutional, thus there was notice to the lower court. The lower court elected to deny Mr. Raddemann's motion summarily on procedural grounds rather than address the substance of his complaint. This was a choice made by the circuit court, but it certainly does not mean the court lacked an "opportunity" to address the issue Mr. Raddemann raised. The lower court could have, if it so elected, addressed the issue. It chose not to do so, but this does not equate to a *denial* of the "opportunity" to address the same.

The State then asserts that this Court should not take up Mr. Raddemann's challenge on the ground that neither the municipality nor the attorney general was

[1]The State begins numbering the pages of its brief with the notation that its actual page four is page "1," and then continues sequentially therefrom using standard Arabic numbers. The State left its cover page unnumbered and used lower case Roman numerals for its Table of Contents page through its Table of Authorities page. The State's numbering format is contrary to Wis. Stat. § 809.19(8)(bm) which requires "sequential [Arabic] numbering starting at '1' on the cover." Given this discrepancy, Mr. Raddemann will refer to specific pages of the State's brief not by the erroneous page numbering it employed, but rather, by the page's actual cardinal position if the cover of its brief had been treated as page one (1) as it should have been.

provided with an opportunity to defend the constitutionality of the ordinance under Wis. Stat. § 806.04. SRB at p.7. While it is true that the failure to provide notice under Rule 806.04 may provide procedural grounds upon which a constitutional challenge may be denied, it is also true that "**[g]enerally**, a party must notify the attorney general 'in all cases involving constitutional challenges.'" *In re A.P.*, 2019 WI App 18, ¶ 25, 386 Wis. 2d 557, 927 N.W.2d 560 (emphasis added), quoting *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 117, 280 N.W.2d 757 (1979). Note the use of the term "generally" by the *In re A.P.* court. "Generally"[2] implies that the rule is not unyielding or absolute, but that exceptions to the typical procedures apply.

Among these exceptions, it is "recognize[d that] constitutional challenges may be raised by general demurrer, ..." *Kurtz*, 91 Wis. 2d at 117, citing *State v. Texaco, Inc.*, 14 Wis. 2d 625, 111 N.W.2d 918 (1961); *see also Ocean Accident & Guarantee Corp. v. Poulsen*, 244 Wis. 286, 12 N.W.2d 129 (1943). "The constitutionality of a statute may be raised by general demurrer where a cause of action depends on that statute." *Texaco, Inc.*, 14 Wis. 2d 631. In this case, the complaint, or "cause of action," filed against Mr. Raddemann is that he violated the ordinance prohibiting entry into the cemetery at issue. Mr. Raddemann filed his demurrer—or objection to the plaintiff's assertion—in the form of his argument that the ordinance is unenforceable because (now that the gates have physically been removed from the cemetery entrance) there is neither proper notice to the citizenry regarding what conduct is prohibited and no objectively enforceable standard by which law enforcement officers can determine whether the ordinance has been violated. This form of pleading a defense, without express notice to the attorney general or municipal attorney, is permitted under cases such as *Texaco, Inc.* and *Ocean Accident & Guarantee Corp.*, and therefore, Mr. Raddemann's appeal need not be rejected on procedural grounds.

It should be noted that Mr. Raddemann's case does not present a circumstance in which he is levying, *for example*, an action against the Hartford Ordinance under 42 U.S.C. § 1983 for damages. Undoubtedly, if this was the case, a failure to comply with Rule 806.04 would be fatal to such a challenge. This is *not*, however, what has transpired herein. In the instant case, the State has levied a complaint against Mr. Raddemann which is premised upon an ordinance that he

[2]https://www.dictionary.com/browse/generally

believes is unenforceable for several reasons which, among these, there are constitutional challenges. Mr. Raddemann is not bringing a suit in which *he* challenges the ordinance as an original action, but rather, he is merely attempting to defend himself against the charges levied. This is precisely the type of circumstance in which the *Texaco, Inc*. and *Ocean Accident & Guarantee Corp.* courts approved of general demurrers *without* simultaneously holding that before such defenses can be raised, there must first be compliance with Rule 806.04.

II. COMMON SENSE SHOULD CONTROL IN THIS MATTER.

The State correctly observes in its brief that an ordinance "must be sufficiently definite so that potential offenders who wish to abide by the law are able to discern when the region of proscribed conduct is neared . . . ." SRB at p.8, citing *State v. Courtney*, 74 Wis. 2d 705, 711, 247 N.W.2d 714 (1976). In furtherance of its rebuttal argument, the State continues by providing this Court with the *Webster's New Universal Unabridged Dictionary* definition of what constitutes a "gate." SRB at p.9.

Mr. Raddemann understands why the State would rely upon *Webster's* denotative definition, however, Mr. Raddemann also believes that engaging in such a pedantic, sophistic approach to interpreting the Hartford Ordinance overlooks one key element that is worthy of this Court's consideration, namely: common sense. More specifically, Mr. Raddemann believes that the *vast* majority of the public, if surveyed, would define a "gate" *connotatively* as a swinging barrier. After all, it is not unreasonable to believe that if one gathered 100 individuals in a room and asked them to clear their minds and then suddenly asked them to picture a "gate," ninety percent (or perhaps more) would picture something akin to a swinging barrier in a white picket fence entry to a private yard rather than an "opening" in a wall or fence.

It is this "common sense" connotative approach which Mr. Raddemann urges this Court to take. Taking an overly technical denotative approach is unreasonable in light of common parlance and understanding. Mr. Raddemann's point in this regard is even supported by the arresting officer's own testimony in the instant matter when he admitted on cross-examination, the "gates" had been ***removed*** from the entryway. R31 at 22:16-18. Undeniably, Officer Albea's thinking in this matter is the same as the "common sense" one Mr. Raddemann suggests. If law enforcement officers consider that the "gate" has been removed from the cemetery,

Mr. Raddemann must question how the Hartford Ordinance can possibly be enforced in a manner in which members of the lay public "are able to discern when the region of proscribed conduct is neared . . . ?" *Courtney*, 74 Wis. 2d at 711.

The State also argues that Mr. Raddemann lacks standing to challenge the ordinance. SRB at p.10. Among all of the State's rebuttal arguments, this one is perhaps the most far-fetched. Mr. Raddemann clearly has standing to challenge the ordinance because (1) he is being subject to prosecution for a violation thereof and (2) the common law, as discussed above, allows for general demurrers to complaints on constitutional grounds. *See* Section I., at p.3., *supra*.

III. NO ARTICULABLE FACTS EXIST IN THE INSTANT MATTER UPON WHICH A "REASONABLE SUSPICION" TO DETAIN MAY BE PREMISED.

In its closing salvo, the State proffers that Officer Albea had "specific and articulable facts" upon which a reasonable suspicion to detain under the Fourth Amendment could be premised. SRB at pp. 9-17. Mr. Raddemann's response to the State's position is two-fold.

First, there is no *objective* "articulability" to the officer's claims because even he conceded that the gate to the cemetery had been removed. If the officer no longer believes that any "gates" to the cemetery entrance exist, how can any other lay citizen—who is exercising common sense—imagine a "gate" where an officer claims one no longer exists? Both objectivity and articulability "go right out the window" because the officer's assessment blurs the line between what is objectively enforceable versus what is not. It is no stretch to imagine that the removal of the gate might lead one officer to conclude that entry into the cemetery is permissible up until the point at which the posted "Cemetery is closed after daylight hours" sign becomes legible, whereas another officer might imagine that the gates still existed and therefore believe entry into the cemetery may not be made after that point. It is this difference in how officers view the proper enforcement of the ordinance—its *subjective* interpretation because it is no longer clear—which leads to its unenforceability for failing to be "objective" and thereby provide a universally "articulable" basis for enforcement.

Second, the State correctly observes that "there are postings ***after*** the entrances right as you pull in" to the cemetery. SRB at p.13 (emphasis added)(the signage which advises that the cemetery is closed during hours of darkness is set *well behind* the stone pylons; *see* R25; D-App. at 108. This concession plays right into Mr. Raddemann's point. If the signage is located *"after the entrance*," a person who reasonably believes there is no gate because it had previously been removed, would not know entry to the cemetery is prohibited until *after* he or she has passed the location where there had once been a gate. Unbeknownst to the individual who may be lost, simply turning their vehicle around, stopping to safely make a phone call, *etc*., they would be violating the law in the opinion of *some* officers who believe that the opening between the cemetery pylons is a gate while not violating the law in the mind of those officers who believe that entry to the cemetery is only prohibited beyond the visible signage. This distinction renders an officer's enforcement of the ordinance *subjective* and therefore violates the Fourth Amendment's reasonable suspicion standard.

CONCLUSION

Because no objective standard by which any member of the motoring public can determine whether he was acting in violation of Hartford Municipal Ordinance No. 27.13(1) exists, Mr. Raddemann respectfully requests that this Court reverse the decision of the lower court and remand this matter for further proceedings not inconsistent with the Court's judgment.

Dated this 6th day of October, 2022.

Respectfully submitted:
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Electronically signed by:
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CERTIFICATION OF LENGTH

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 1,881 words.

I also certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief.

Dated this 6th day of October, 2022.

MELOWSKI & SINGH, LLC

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