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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II
Appeal Case No. 2020AP1421 & 2020AP1422

FOND DU LAC COUNTY,

Plaintiff-Appellant,

v.

JOHN ANTHONY HETTWER,

Defendant-Respondent.

On Appeal from and Order to Dismiss with Prejudice Entered in Fond du Lac County Circuit Court, the Honorable Robert J. Wirtz Presiding

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DEFENDANT- RESPONDENT'S REPLY BRIEF

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DEFENDANT- RESPONDENT'S REPLY BRIEF

STATEMENT OF THE ISSUE

Did the circuit court abuse its discretion when it dismissed the citations against Defendant, pursuant to Wis. Stat. § 805.03, with prejudice?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Respondent requests neither oral argument, nor publication. The briefs of the parties fully develop the legal arguments, such that oral argument would be of marginal value and is not justified by the additional expenditure of court time that such argument would entail.

FACTS

Defendant, John Hettwer, was cited for Operating

While Under the Influence, and Operating with a Prohibited Alcohol Concentration, on February 17. 2018. (Appendix of Appellant, (hereinafter "A.App" 1, 2)). His initial appearance date for these citations was April 2, 2018. ***Id.***

A jury trial was scheduled for both citations on July 11, 2019. Mr. Hettwer appeared on that date, ready for trial. A jury pool was sworn in, voir dire was conducted, final jurors selected, and the final jury panel was sworn in. (A.App. 3, pp.6-27). At this point, the prosecution informed the court that the phlebotomist, Ms. Dill, was unavailable. (***Id***. p. 29). As a result of the witness not being available, the court declared a mistrial. (***Id***. p. 32). It is not clear from the record whether Ms. Dill had been properly subpoenaed for trial.

A second jury trial was eventually scheduled, for January 23, 2020. Again Mr. Hettwer appeared for the trial, fully prepared to proceed. (A. App. 4). As in the first case, the County informed the court that there was an issue with the phlebotomist, Ms. Dill. Specifically, that she was not available for trial. (A. App. 4, p. 8, L 1-3). Despite having over six months to secure her attendance, the prosecutor informed the court that he had only learned of her unavailability that morning. (A.App. 4, p. 11, L 1-2). The court determined that Ms. Dill's non-appearance was "without justification, legally[]," (A.App. 4, p. 16, L 18-20), and granted the County's motion to dismiss without prejudice, allowing them to refile the case. The court also assessed the cost of the jury against the County as a sanction. (A.App. 4, p. 23, L 1-7).

Subsequent to the dismissal without prejudice, Mr. Hettwer filed a motion to reconsider (A.App. 5), wherein he asked the court to dismiss the action with prejudice. The County filed a response wherein they objected to dismissal with prejudice, and asked the court to reconsider the assessment of the cost of the jury against the county. (A.App. 6).

That motion was heard on July 10, 2020. (A.App. 7). After hearing the arguments of counsel, and in consideration of the record, the court granted Mr. Hettwers' motion, and dismissed the citations against him, with prejudice, based on the county's failure to prosecute the action. The court also

rescinded the order that the county pay the costs of the jury, reasoning that the dismissal was enough of a sanction. (A.App. 7, p. 29). This appeal followed.

ARGUMENT

I. THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT DISMISSED THE CIVIL FORFEITURE CASE AGAINST MR. HETTWER WITH PREJUDICE.

"A circuit court's decision to dismiss an action is discretionary, and will not be disturbed unless the party claiming to be aggrieved by the decision establishes that the trial court has abused its discretion. A discretionary decision will be sustained if the circuit court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 273, 470 N.W.2d 859, 863 (1991)(internal citations omitted).

"The principle is firmly established that in order to demonstrate that a dismissal order based upon the failure to prosecute was an abuse of discretion, the aggrieved party must show 'a clear and justifiable excuse' for the delay. This strict standard (clear and justifiable excuse for the delay) is applied as it is the 'duty' of trial courts, 'independent of statute,' to discourage protraction of litigation and to 'refuse their aid to those who *negligently* or abusively fail to prosecute the actions which they commence.' ***Trispel v. Haefer***, 89 Wis. 2d 725, 733, 279 N.W.2d 242, 245 (1979)(emphasis added).

"It is considered well established that a court has the inherent power to resort to a dismissal of an action in the interest of the orderly administration of justice. The general control of the judicial business before it is essential to the court if it is to function." ***Id.*** (citation omitted).

"A circuit court's decision to dismiss an action is discretionary and will not be disturbed unless the aggrieved party establishes that the circuit court abused its discretion." ***Monson v. Madison Family Inst.***, 162 Wis. 2d

212, 224 (1991).

The ***Monson*** court noted that a dismissal for failure to prosecute is an abuse of discretion in two situations: "(1) if there is no reasonable basis to support the circuit court's determination that the aggrieved party's conduct was egregious or (2) if the aggrieved party can establish a clear and justifiable excuse for the delay in prosecuting the action." ***Id.***

The present case does not present either of the situations in which dismissal for failure to prosecute constitutes an abuse of discretion and, therefore, this court should affirm.

A. THE FACTS SUPPORT THE CIRCUIT COURT'S DETERMINATION THAT THE COUNTY'S CONDUCT WAS EGREGIOUS.

As noted, the ***Monson*** court provided a two part test for determining whether a failure to prosecute amounts to an abuse of discretion. Notably, the test is an OR test. If either of the two situations listed is present, then the court abused its discretion. In this case, however, neither of the two situations is present.

Based on the totality of circumstances present in this case, the circuit court clearly had a reasonable basis to conclude that the county's actions were egregious.

As noted, the first trial of Mr. Hettwer took place more than six months prior to the second. Thus, the county had over six months to secure the attendance of Ms. Dill, the phlebotomist. And yet, she was out of the country getting married on the day that Mr. Hettwer, and all the potential jurors, showed up prepared for trial.

After learning of Ms. Dill's unavailability for the second trial, and questioning the county as to the circumstances surrounding her non-appearance, the court found that her "non-appearance is without justification, legally." (A. App. 4, p.16, L. 19-20). In addition, the court noted that "squarely, the – the blame for inability to proceed today is – is not with the defendant, it's with the . . .County . . . ." (***Id***. p. 22, L. 23-25). At the hearing on the motion to reconsider, the Court determined that "the matter has not been prosecuted adequately

and properly. . . .” (A.App. 7, L. 11-12).

Importantly, the failure of the phlebotomist to appear cannot be viewed in a vacuum. The county was aware of the issues it had with this same witness’s non-appearance several months prior, at the first trial. The county had over six months to get Ms. Dill properly served and secure her attendance at trial. Despite this, the attorney prosecuting the case apparently learned of her unavailability only after impaneling a jury on the day of trial. The county could not say when it was advised that Ms. Dill was out of the country, getting married, only that it was prior to the trial date.

Moreover, it appears that the county never personally served Ms. Dill with a subpoena. Had they done so, this issue would have been averted. Thus, such failure adds to the fact that there was no justifiable excuse for the delay in this matter.

It bears repeating that this was the second time a jury had been assembled for this case. Twice, the citizens of Fond du Lac County had borne the financial burden of empaneling a jury. Twice, numerous citizens lives were disrupted, employers businesses were impacted, and the defendant endured the cost, both monetary and emotional, of answering the charges against him. On both occasions, the proceedings were cut short, through no fault of the defendant.

Even assuming the county bore no fault in the first non-appearance of this witness, which is debatable given the prosecutor’s habit of not personally serving witnesses with subpoenas, it is clear that the county was clearly at fault in the second instance.

196 days. That is the amount of time that passed between the first aborted trial, and the day preceding the second. That is 6 months and 12 days. That is the amount of time that the County had to properly serve the phlebotomist with a subpoena. That is the amount of time that the County had to inform the defendant, and the court, that the phlebotomist would not be available for the second trial date. It should be noted that the witness was apparently not just unavailable, but that she was out of the country getting married! As noted by defense counsel at the time, this is the

type of unavailability that normally lends itself to advance notice. And, yet, the prosecution brings it to the attention of the defense and the court on the morning of trial. This is clearly egregious conduct, especially in light of the fact that a mistrial had already been ordered based upon the earlier unavailability of this same witness.

B. THE COUNTY HAS FAILED TO ESTABLISH A CLEAR AND JUSTIFIABLE EXCUSE FOR THE DELAY IN PROSECUTING MR. HETTWER.

The County does not even attempt to address the real issue leading to the delay in this case: the County's failure to properly subpoena a necessary witness. At the hearing on the motion for reconsideration, the court stated "I also think the [County], quite frankly, was negligent in not procuring that witness. They had time to get that witness. They didn't subpoena that witness properly." (A.App. 7, p. 25, L. 18-21).

The court went on to note, as justification for its decision to dismiss with prejudice, that "there was never presented to the Court any evidence from the County that Ms. Dill was subpoenaed, other than a statement that [the County] thought she was. Number two, no affidavit of service on her. No request that something happen to her because she violated the subpoena. . . ." (***Id***. p. 28, L. 14-19). Based on these facts, the court found "that [the witness] was not properly subpoenaed." (***Id***. L 21-22).

The County provides NO excuse for its failure to properly subpoena the witness. NONE. Clearly, they have failed to provide a clear and justifiable excuse for the delay in prosecuting Mr. Hettwer, when that delay was caused by the failure to properly subpoena the phlebotomist.

Lacking an excuse for its failure to properly subpoena the phlebotomist, the county attempts to reframe the issue. The County argues that they had a reasonable belief that the testimony of the phlebotomist was not necessary to go forward with the trial, and that that belief excuses the delay in prosecuting Mr. Hettwer.

Unfortunately for the county, such belief, if they indeed had such at the time of the trial, is patently unreasonable. While the County cites to the unpublished decision of ***County of Fond du Lac v. Bethke***, 2014 WI App 63, and ***State v. Wiedmeyer***, 2016 WI App 46, to support the reasonableness of its belief, neither of the cited cases lend support to the County's reasonableness argument.

First, ***Bethke*** is an unpublished decision. Wis. Stat. § 809.23(3)(b) clearly states that "an unpublished opinion cited for its persuasive value is not precedent, *it is not binding on any court in this state*." (emphasis added). The county's stated reliance on non-binding precedence is clearly unreasonable. If the county believed the phlebotomist was not a necessary witness, it could have, and in fact, should have, addressed the matter via a motion in limine prior to the trial date. The fact that the county failed to file such a motion lends support to the argument that they had no idea that there was an issue with the phlebotomist appearing, until the day of the trial.

Second, the ***Wiedmeyer*** case "concerned only whether the test results are inadmissible under § 343.305(6)(a)[,]" which is not at issue in this case. ***Wiedmeyer***, fn. 9. The issue in this case is compliance with 343.305(5)(b).

In the present case, the court specifically found "that the State will not be able to lay a foundation absent a phlebotomist testifying." (A. App. 4, p. 16, L. 3-5). There is no published opinion holding otherwise.

In ***Wiedmeyer***, the argument was that the person testifying lacked the proper credentials to test blood for the presence of controlled substances and, therefore, the State could not lay a proper foundation for admissibility of the blood test. ***Wiedmeyer***, ¶4. The ***Wiedmeyer*** court rejected this argument, however, holding that the blood results may be admitted "*if the State finds another way to lay the proper foundation*." ***Id***. (emphasis added).

The ***Wiedmeyer*** court opined that the State *may be* able to establish a sufficient foundation for admissibility of the blood test results via Wis. Stat. § 907.02, the statute regarding expert testimony. The court did not hold that a sufficient

foundation could be established via expert testimony, only that the State was free to try upon remand. Clearly, the case does not stand for the proposition that a phlebotomist is not necessary to lay a proper foundation.

In addition, it is obvious that, in order to lay the foundation via expert testimony, the expert would have to be present for trial. And they would actually have to be an expert. The issue in ***Wiedmeyer*** was not whether the analyst was qualified as an expert in their field. They apparently were. Thus, the expert, pursuant to Sec. 907.02, could potentially provide testimony, based on their qualifications as an expert, which would provide a sufficient foundation for the admission of the blood test results. But the expert witness would have to be present at trial to do so.

The present case is distinguishable from ***Wiedmeyer***. First, the issue in his case is not whether the phlebotomist possessed a certain certificate. It is whether they are qualified to draw blood pursuant to the statutory requirements. In other words, whether they truly are a phlebotomist. This is akin to whether the "expert" in ***Wiedmeyer*** was actually an expert. If they were not, they clearly could not provide testimony, pursuant to Sec. 907.02, to lay a proper foundation.

The ***Wiedmeyer*** court noted that "Wiedmeyer is free to challenge admissibility based on the analyst's qualifications at trial if he so chooses." ***Id***. As it relates to this case, and the court's ruling that the phlebotomist was a necessary witness, it is axiomatic that a defendant cannot challenge the qualifications of a witness who is not present.

CONCLUSION

"If matters of expediting court proceedings and assuring prompt and proper administration of justice are to be more than mere matters on the agenda at judicial or bar association workshops, the lead of the nation's high court is to be followed in upholding dismissals on the merits where . . . there has been a callous disregard of responsibilities owed by . . . counsel to the court and to the adversary parties." ***Trispel v. Haefer***, 89 Wis.2d 725, 734 (Wis. 1979)(citation omitted).

The county has failed to show that the circuit court abused its discretion in this matter. Accordingly, this court should affirm the decision of the circuit court.

Respectfully submitted 4/5/2021.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2500 words.

Dated 4/5/2021:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated 4/5/2021:

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