

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-0553

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

TOWN OF MOUNT PLEASANT,

PLAINTIFF-RESPONDENT,

V.

GERALD A. HOORNSTRA,

DEFENDANT,

SCOTT HOUDEK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County:
DENNIS J. BARRY, Judge. *Affirmed.*

SNYDER, J. Scott Houdek appeals from a circuit court order dismissing his two appeals from a municipal court judgment. The sole issue is whether Houdek is entitled to perfect his appeals from the Town of Mount Pleasant Municipal Court to the Racine County Circuit Court without executing a

bond to the municipality as required by § 800.14(2), STATS. We conclude that Houdek's failure to comply with the statute deprived the circuit court of jurisdiction over the appeals, and we affirm the order dismissing the appeals.

The procedural facts are extensive but undisputed. On March 12, 1997, the Town obtained a judgment against Houdek for an ongoing violation of a town ordinance (the ordinance)¹ requiring him to repair or raze his building. On March 19, 1997, the Town's municipal court imposed a forfeiture of \$58,800 or forty-five days in jail. On April 1, 1997, Houdek served a notice of appeal on the Town which included the statement, "I am prepared at this time to execute a surety bond in the full amount of the forfeiture (\$58,800.00) that if the judgment is affirmed in whole or in part I shall pay the judgment and all costs awarded on appeal." The notice of appeal was returned to Houdek with a notation from the town clerk that "Per [Town of Mount Pleasant Municipal] Judge [William R.] Binetti I cannot accept this without the \$58,800 in cash as bond for the appeal." Shortly after Houdek filed his April 1 notice of appeal, Judge Binetti told Houdek's attorney, Joe E. Kremkoski, that a surety bond in the amount of \$58,800, rather than cash, was acceptable. Kremkoski then advised Judge Binetti that Houdek was unable to post either cash or a surety bond in that amount. Houdek never executed a bond to perfect his appeal.

Houdek filed a motion for relief from the Town's judgment on May 21, 1997, and on September 3, 1997, Houdek was given the opportunity to avoid the \$58,800 judgment forfeiture if he met the Town's thirty-day requirement

¹ An ordinance violation had been issued pursuant to § 10.05 of the Town of Mount Pleasant General Code of Ordinances.

to make his building habitable in compliance with the ordinance.² On September 4, 1997, Houdek then filed a second notice of appeal from the Town's offer to compromise in response to his motion for relief from the judgment. Judge Binetti refused to accept the second notice of appeal.

Houdek filed an alternative writ of mandamus in the circuit court, and on September 30, 1998, the municipal court was ordered to accept the notices of appeal dated April 1, 1997, and September 4, 1997. The order, however, noted that both appeals had to be in compliance with statutory requirements.³ On December 4, 1998, the Town moved for dismissal of the appeals because Houdek never executed a bond as required by § 800.14(2), STATS.

At the December 21, 1998 dismissal hearing, Town Attorney Edward J. Bruner advised the circuit court that “[a]s we stand here today, there has never been any bond that has been provided by Mr. Houdek.” Kremkoski advised the court that Houdek could not obtain a surety bond to perfect the appeals and stated, “We can’t post cash. We can’t even post surety. He doesn’t have sufficient assets that are exempt from judgment to cover \$58,000.” The circuit court granted the motion of the Town to dismiss after finding that § 800.14(2), STATS., requires that on appeal a bond must be executed to the Town and that Houdek had failed to do so. Houdek appeals from that order of dismissal.

² If Houdek brought his building into compliance with the town ordinance within thirty days, he would be fined \$100 per day until full compliance had been obtained, with a maximum penalty of \$3000. If he failed to bring the building into compliance in that time, the original forfeiture of \$58,800 would stand.

³ In his later ruling dismissing the appeals, Circuit Court Judge Dennis J. Barry quoted from Circuit Court Judge Wayne J. Marik’s grant of the mandamus order: “Even if a timely notice of appeal is given, an appeal may still later be subject to dismissal for failure to comply with procedural requirements. The bond requirement is one such procedural requirement.”

In order to perfect an appeal of a municipal judgment to the circuit court, a defendant is required to comply with § 800.14(1) and (2), STATS., which read:

(1) Appeals from judgments of municipal courts may be taken by either party to the circuit court of the county where the offense occurred. The appellant shall appeal by giving the municipal judge written notice of appeal within 20 days after judgment.

(2) On appeal by the defendant, the defendant shall execute a bond to the municipality with or without surety, approved by the municipal judge, that if the judgment is affirmed in whole or in part the defendant shall pay the judgment and all costs awarded on appeal.

Houdek concedes that he failed to comply with the § 800.14(2), STATS., requirement to perfect the appeals in his framing of the appellate issue which asks, “Should an [a]ppeal be dismissed on the merits for a failure to comply strictly with statutory procedure, without giving the party an opportunity to cure the defect?” We disagree that the appeals were dismissed on the merits and view the appellate issue as whether Houdek’s appeals were properly before the circuit court in the absence of Houdek complying with the bond requirement of § 800.14(2).⁴

An appellate court has jurisdiction to consider a lower court’s jurisdiction or lack thereof. See *Sheehan v. Industrial Comm’n*, 272 Wis. 595, 601, 76 N.W.2d 343, 347 (1956). An issue of jurisdiction is always a proper question even if raised sua sponte. See *State v. Omernik*, 54 Wis.2d 220, 222, 194 N.W.2d 617, 617 (1972) (citing *Yaeger v. Fenske*, 15 Wis.2d 572, 573, 113

⁴ An appellate court is not required to address the appellate issues as structured by a party. See *State v. Waste Management of Wis., Inc.*, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978).

N.W.2d 411, 412 (1962)). Section 800.14, STATS., grants circuit courts appellate jurisdiction over municipal court decisions. *See City of Middleton v. Hennen*, 206 Wis.2d 347, 351, 557 N.W.2d 818, 819 (Ct. App. 1996). The interpretation and application of § 800.14 to undisputed facts is a question of law that we review de novo. *See Miller Nat'l Ins. Co. v. City of Milwaukee*, 184 Wis.2d 155, 164, 516 N.W.2d 376, 378 (1994).

The record confirms the circuit court's finding and Houdek's concession that a bond was never executed to the Town as required by § 800.14(2), STATS. "The right of appeal is not discretionary ... and jurisdiction can only be acquired ... by the circuit court acting as an appellate court under the rules of appealability established by the legislature." *Walford v. Bartsch*, 65 Wis.2d 254, 258, 222 N.W.2d 633, 635 (1974). While Houdek concedes that he failed to comply with a rule established by the legislature, he contends that he should be allowed to cure that failure and proceed with his appeals because: (1) he could not afford a bond; (2) § 800.14(2) does not establish with certainty what is required of an appellant in executing a bond; and (3) the circuit court erred in dismissing the appeals rather than providing an opportunity to execute a bond. We address each contention in turn.

As to Houdek's ability to afford a bond, Kremkoski essentially contended that Houdek was indigent and was being denied the opportunity for an appeal on the merits because of that indigency. However, Houdek never executed a bond without a surety as authorized by § 800.14(2), STATS., nor did he submit such a bond to the municipal judge for approval. Had he done so and had the municipal court approved the bond, the legislative requirement for perfecting his appeal would have been met. Because Houdek failed to do so, the issue of whether the municipal court may have wrongly denied a bond executed to the

municipality without a surety is not before us. We need not address issues that are not preserved for appellate review. See *Segall v. Hurwitz*, 114 Wis.2d 471, 489, 339 N.W.2d 333, 342 (Ct. App. 1983).⁵

Houdek's contention that his obligation to execute a bond to the municipality to perfect his appeal was uncertain or confusing also fails. When interpreting a statute, we first turn to the plain language of the statute and will hold that the statute is ambiguous as to a question only if the plain meaning of the statute does not resolve the question. See *NBZ, Inc. v. Pilarski*, 185 Wis.2d 827, 836, 520 N.W.2d 93, 96 (Ct. App. 1994). Section 800.14(2), STATS., requires that "the defendant shall execute a bond to the municipality." We are convinced that the requirements of the statute are plain and unambiguous. Houdek failed to execute a bond to the municipality or to make reasonable efforts to accomplish the requirement. We are not persuaded that the statutory bond requirement is a mere formality as suggested by Houdek.

Lastly, we address Houdek's contention that the circuit court erred in not allowing him an opportunity to file the required appeal bond. Section 800.14(2), STATS., however, plainly mandates that the bond be executed in order to perfect the appeal to the circuit court. "It is manifest that an appellate court does not acquire jurisdiction of a case until the jurisdiction of the lower court is superseded. The lower court retains jurisdiction of the case until everything necessary to perfect the appeal has been done." *Todorvic v. Hirschberg*, 172 Wis. 14, 15, 177 N.W. 884, 884 (1920). We conclude that the circuit court had no

⁵ If he was indigent, Houdek could also have filed an affidavit with the municipal court seeking waiver of the payment of costs, bonds and fees pursuant to § 814.29, STATS. He failed to do so.

authority to grant Houdek the opportunity to cure the § 800.14(2) bond defect because jurisdiction remained in the municipal court.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

