COURT OF APPEALS
DECISION
DATED AND FILED

March 16, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-2693

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

CITY OF MADISON,

PLAINTIFF-RESPONDENT,

V.

CYNTHIA J. VERNON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

¶1 DYKMAN, P.J.[1] This is an appeal from an order affirming Cynthia J. Vernon's conviction of operating a motor vehicle while under the influence of an intoxicant (OMVWI). This is the second time we have considered this case. We previously vacated the circuit court's order affirming Vernon's

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (1997-98).

conviction and remanded to the municipal court for further proceedings. *See* ***City of Madison v. Vernon***, No. 98-2101, unpublished slip op. (Wis. Ct. App. Nov. 25, 1998).

¶2 It is necessary to trace the history of this case. After a trial in the Madison Municipal Court, Vernon was convicted of violating Madison General Ordinances § 12.64(1)(a), which adopts WIS. STAT. § 346.63(1)(a) (1997-98),[2] OMVWI. She was apparently also convicted of violating Madison General Ordinances § 12.64(1)(b), which adopts WIS. STAT. § 346.63(1)(b), operating a motor vehicle with a prohibited alcohol concentration (PAC).[3] Vernon appealed her convictions to the circuit court for Dane County, and the circuit court concluded: "ACCORDINGLY, the court rules that reversal of the defendant's conviction is granted and a new trial is warranted."

¶3 The City of Madison asked the circuit court to reconsider its decision, arguing that regardless of the evidence which supported the PAC conviction, the evidence was sufficient to support the OMVWI conviction. The circuit court agreed with the City, but by that time, the record had been remanded to the municipal court. Vernon appealed, and we concluded that the circuit court was without jurisdiction to enter its order on reconsideration because the case had been remitted to the municipal court. We therefore vacated the circuit court's order and remanded this case "to the municipal court of Madison for further proceedings."

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[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[3] The record contains no record of the PAC citation, though the municipal court's May 28, 1999 decision notes that the court originally found Vernon guilty of both OMVWI and PAC.

¶4 Since we vacated the circuit court's reconsideration order, what remained after our remand was the circuit court's order reversing Vernon's conviction and concluding that a new trial was warranted. The municipal court did not conduct a new trial. Instead, it reviewed the record, ignored the test results of Vernon's blood alcohol concentration, and found Vernon guilty of OMVWI. Vernon appealed again, and the circuit court for Dane County affirmed. Vernon again appeals to this court.

¶5 It is not necessary to quibble over this court's previous mandate. After our remand, this case was in exactly the same position as it was when, on November 10, 1997, the circuit court reversed Vernon's conviction and granted a new trial. The question is whether Vernon was entitled to a new trial or whether the trial court's review of the record was sufficient. We review questions of law de novo. *See* ***State v. Brunton***, 203 Wis. 2d 195, 201, 552 N.W.2d 452 (Ct. App. 1996).

¶6 Questions of law decided by an appellate court on a first appeal become the law of the case on remand. *See* ***Johnson v. Industrial Comm'n***, 14 Wis. 2d 211, 217, 109 N.W.2d 666 (1961). The law of the case doctrine "generally restrains a circuit court from reconsidering an order that an appellate court has affirmed." ***State v. Brady***, 130 Wis. 2d 443, 446, 388 N.W.2d 151 (1986). A decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of litigation. *See* ***id.*** at 447. We see no reason why the law of the case doctrine should not apply when the appellate court is the circuit court and the trial court is the municipal court.

¶7 Vernon cites ***Burch v. American Family Mut. Ins. Co.***, 198 Wis. 2d 465, 470 n.1, 543 N.W.2d 277 (1996), for the proposition that, "[a] trial judge may

not simply reject instructions on remand because he [or she] disagrees with the appellate court's legal analysis."[4]

¶8 But, as ***Burch*** also notes, "the law of the case may be disregarded when "'cogent, substantial and proper reasons exist'" such as a subsequent contrary decision from a controlling authority." ***Burch***, 198 Wis. 2d at 470 n.1 (quoting ***Mullen v. Coolong***, 153 Wis. 2d 401, 410, 451 N.W.2d 412 (1990)). That is the situation here. When the circuit court reversed Vernon's conviction in November of 1997, it did so because a recent court of appeals case, ***State v. Baldwin***, 212 Wis. 2d 245, 264, 569 N.W.2d 37 (Ct. App. 1997), held that the results obtained from using certain models of Intoxilyzer machines were not entitled to automatic admissibility. The circuit court concluded that the results from the Intoxilyzer used to test Vernon's breath were inadmissible under ***Baldwin***. However, by the time we released our previous opinion in this case, the supreme court had reversed the decision of the court of appeals in ***Baldwin***. *See* ***State v. Busch***, 217 Wis. 2d 429, 576 N.W.2d 904 (1998). Though the circuit

[4] Other than the quoted material, Vernon's counsel provides no discussion of ***Burch***, except for a later statement, assertedly supported by ***Burch***, that the municipal court had no choice but to conduct a new trial. This is a misrepresentation of the holding in ***Burch***. ***Burch*** explains that: "This court has previously recognized, however, that the binding effect of an appellate ruling is not absolute. For example, the law of the case may be disregarded when "'cogent, substantial and proper reasons exist'" such as a subsequent contrary decision from a controlling authority." ***Burch v. American Family Mut. Ins. Co.***, 198 Wis. 2d 465, 470 n.1, 543 N.W.2d 277 (1996) (quoting ***Mullen v. Coolong***, 153 Wis. 2d 401, 410, 451 N.W.2d 412 (1990)).

The comment to SCR 20:3.3, Candor Toward the Tribunal, discusses misleading legal argument: "Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities." Counsel's argument was in Vernon's brief-in-chief. It is not possible to accurately discuss ***Burch*** without discussing the whole of footnote one, including the existence of exceptions to the law of the case doctrine. Misleading legal arguments are at best unhelpful, and do not advance a client's cause. We anticipate that counsel will more carefully and thoroughly discuss pertinent authority in future briefs.

court's decision, which had remanded for a new trial was the law of the case, that law had been overruled by the supreme court. It would have been ridiculous to have another trial when the reason for a new trial had evaporated. The exception to the law of the case doctrine noted in ***Burch*** applied when the municipal court again received Vernon's case. Therefore, the municipal court did not err by failing to follow the circuit court's mandate of November 1997, and it follows that the circuit court did not err by affirming the municipal court's decision convicting Vernon of OMVWI. We find it insignificant that in the municipal court's May 28, 1999 decision, it concluded that Vernon's PAC conviction remained in the circuit court as the final court of review. Whether that is correct or not, there is nothing to presently challenge the municipal court's May 1999 conclusion that Vernon was guilty of OMVWI, a conclusion affirmed by the circuit court in September of 1999, and now by this court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.