

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 13, 2001

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

Nos. 00-2309, 00-2310

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

MICHAEL H. COPPENS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County:
SUE E. BISCHER, Judge. *Affirmed.*

¶1 PETERSON, J.¹ The State appeals an order dismissing three civil forfeitures against Michael Coppens. Coppens was charged with failure to notify police of an accident, operating a motor vehicle while under the influence of an

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

intoxicant (OWI), first offense, contrary to WIS. STAT. § 346.63(1)(a), and operating a motor vehicle with a prohibited alcohol concentration (PAC), first offense, contrary to WIS. STAT. § 346.63(1)(b). The State argues that it was denied due process when the circuit court denied, without a hearing, the State's motion to adjourn and when the circuit court failed to give notice of the time and date of the dismissal. We disagree and affirm the order.

BACKGROUND

¶2 On December 24, 1999, Coppens was issued traffic citations for OWI and failure to notify the police of an accident. Subsequently, a third citation was issued on January 10, 2000 for PAC. The initial appearance took place on January 19, 2000. On March 20, a final pre-trial conference was held and the case was set for trial on April 19, 2000. The State had another trial scheduled for that day and decided to proceed with that trial. Coppens' case was then rescheduled for June 21, 2000.

¶3 On June 16, the State filed a motion for adjournment. The circuit court and opposing counsel were not informed of the motion until June 20, the day before trial. Coppens' attorney opposed the motion.

¶4 The State was advised on the same day that the circuit court intended to deny the motion. The State then informed the circuit court that it wished to object on the record.

¶5 The circuit court sent a letter on June 23 informing the parties that the motion would be denied and that the case would be dismissed on that day. The circuit court based its decision on opposing counsel's objection, the lateness of the motion, the failure to request a hearing date regarding the motion, and the lack of

information regarding the adjournment. The case was dismissed, though not until June 27, 2000. This appeal followed.

STANDARD OF REVIEW

¶6 A circuit court's order dismissing a claim is reviewed under the erroneous exercise of discretion standard. *Buchanan v. General Cas. Co.*, 191 Wis. 2d 1, 7, 528 N.W.2d 457 (Ct. App. 1995). We will sustain the dismissal if there is a reasonable basis for the circuit court's determination that the noncomplying party's conduct was egregious and there was no clear and justifiable excuse for the party's noncompliance. *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 273-74, 470 N.W.2d 859 (1991). We only ask whether the trial court has provided a sound rationale based upon the facts of record. *See In re D.H.*, 76 Wis. 2d 286, 310, 251 N.W.2d 196 (1977).

DISCUSSION

¶7 The State's sole argument on appeal is that circuit court erroneously exercised its discretion because the State was denied a due process opportunity to be heard on its motion for adjournment, as well as the order for dismissal. We disagree.

¶8 Courts have inherent power to resort to a dismissal of an action in the interest of orderly administration of justice. *Latham v. Casey & King Corp.*, 23 Wis. 2d 311, 314, 127 N.W.2d 225 (1964). It is essential for the court to have general control of its judicial business if it is to function. *Id.* "Every court has inherent power, exercisable in its sound discretion, consistent within the Constitution and statutes, to control disposition of causes on its docket with economy of time and effort." *Id.* (quotation omitted).

¶9 WISCONSIN STAT. § 805.03 forewarns of a dismissal penalty for failure to pursue an action. This section is based on FED. R. CIV. P. 41(b). However, because of the harshness of the sanction, a dismissal under this section should be considered appropriate only in cases of egregious conduct. *See Latham*, 23 Wis. 2d at 315.

¶10 First, the State argues that it was not egregious conduct to file a motion for a continuance four work days before the trial even though it did not provide a courtesy copy to the court and did not request a hearing date. It relies on *Neylan v. Vorwald*, 124 Wis. 2d 85, 98, 368 N.W.2d 648 (1985), to argue that its due process rights were violated because the case was only three months old.

¶11 The due-process clause of the Fourteenth amendment requires “at least a fair and adequate warning by court rule or notice of the imposition of the sanctions or penalties to be invoked for the failure to comply with a court order. Lacking such forewarning, a hearing should be had on the imposition of a penalty.” *Id.* at 316.

¶12 However, the procedural guarantees of the due process clause “apply only to government action which deprives a person of interests encompassed by the Fourteenth Amendment’s protection of liberty or property.” *In re S.D.R.*, 109 Wis. 2d 567, 572-73, 326 N.W.2d 762 (1982). *Neylan* was a civil action involving actual persons and their insurance companies, not the State. The authorities cited by the State do not stand for the proposition asserted. *Neylan* does not give the State due process rights.

¶13 Furthermore, *Neylan* held that a dismissal order based upon failure to prosecute is subject to due process concerns if there is no advance actual notice of dismissal. *See Neylan*, 124 Wis. 2d at 95. Here, the State did not move to

adjourn until four work days before trial. In addition, the State did not bring the motion to the attention of either the circuit court or opposing counsel until the day before trial, nor did the State ask for a hearing as required by BROWN COUNTY, WIS., CIR. CT. R. 401.²

¶14 The State argues that the rule applies only to civil cases. However, the charges against Coppens are not crimes. The charges are civil forfeitures. We conclude that the circuit court did not abuse its discretion by choosing to apply local rule 401 under these circumstances.³ However, even if the local rules did not apply in this situation, we are convinced that there is a sufficient basis to dismiss.

¶15 The State next argues that it was denied due process because it did not receive actual notice of the day and time of the dismissal. The State contends the circuit court sent its letter on June 23, 2000, the day of the scheduled dismissal, so there was no actual notice. The State further argues that the actual dismissal did not occur until June 27, 2000, again without notices and appearances.

² BROWN COUNTY, WIS., CIR. CT. R. 401, reads as follows:

All motions shall be heard at a date and hour set by the judge or judge's designee. It is the attorney's responsibility to schedule the motion with the court. A motion filed only with the clerk of court will not be scheduled until a specific request by phone or in writing is made of the court for a date and time. Motion, supporting documents and briefs shall be filed at least 20 days before the hearing date unless provided otherwise by these rules or order of the court. Any motion requiring an evidentiary hearing may be placed at the foot of the motion calendar or scheduled for some other time convenient to the court's calendar.

³ The circuit court stated that the State was required to provide a courtesy copy of the motion with the court. However, an examination of the Brown County local rules reveals that a courtesy copy is required only when it is a motion for summary judgment. *See* BROWN COUNTY, WIS., CIR. CT. R. 404. Because this is not summary judgment, this rule cannot apply.

¶16 As stated in the record, both the State and opposing counsel knew on June 20 that the case was going to be dismissed. Moreover, the circuit court did not actually dismiss the case until nearly a week later, on June 27. The State did not appear for trial on June 21 to lodge a protest or to explain itself. Nor did it make an attempt to determine when the case would be dismissed or whether it could still be heard on the matter.

¶17 We are unpersuaded by the State's argument that it was denied a hearing on the motion. It never asked for one. We are also unpersuaded by the State's argument that it was denied a hearing on the dismissal. The State was told that the case would be dismissed. It then failed to appear for the scheduled trial or to request a hearing on some other date.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(10(b)4.

