COURT OF APPEALS
DECISION
DATED AND FILED

January 13, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1763 **Cir. Ct. No. 2009CV470**

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

VILLAGE OF BUTLER,

PLAINTIFF-RESPONDENT,

V.

LEVARN CLAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: Linda M. Van De Water, Judge. *Reversed and cause remanded with directions.*

¶1 BROWN, C.J.[1] Levarn Clay did not show up for his OWI (first offense) trial, although his attorney did. The trial court, noting that he had not shown up for his suppression hearing either and further noting that it had ordered

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Clay to appear at all subsequent judicial proceedings, ordered a default judgment. We reverse. Our supreme court long ago held that a court may not default a defendant to a noncriminal action so long as the defendant appears by his attorney. We are bound by that law, as is the trial court.

¶2 The pertinent facts are as follows: Clay lost in the municipal court and took advantage of our state statute allowing a de novo proceeding in our trial courts. He filed a motion to suppress but did not appear at the hearing. His counsel did appear. When counsel would not stipulate to Clay's identity, the trial court ordered Clay to appear in person at all further proceedings including trial. Clay did not appear at trial, though again, his counsel did. The trial court found Clay to be in default for disobeying the court order and entered a judgment of conviction. Clay appeals.

¶3 Wisconsin Supreme Court Rule 11.02 (2002) governs appearances by attorneys on behalf of their clients. It provides:

> (1) Authorized. Every person of full age and sound mind may appear by attorney in every action or proceeding by or against the person in any court except felony actions, or may prosecute or defend the action or proceeding in person.

SCR 11.02(1) (2002).

¶4 Under SCR 11.02, a party in a civil action does "'appear' at trial by the fact that … counsel appeared." ***Sherman v. Heiser***, 85 Wis. 2d 246, 254-55, 270 N.W.2d 397 (1978) (trial judges should not grant default judgment under WIS. STAT. § 806.02(5) when a person appears through an attorney based on WIS. STAT. § 757.27, the statutory predecessor to SCR 11.02). The importance of ***Sherman*** cannot be understated. It is the law and it applies to this case. It has

been on the books for over thirty years and has not been overruled. We are bound by that case.

¶5 The Village does not cite to or attempt to distinguish ***Sherman*** in any way. Instead, it argues that this was not so much a default judgment for failing to appear, but a default judgment for failing to obey a court order in a civil case. And, under WIS. STAT. § 805.03, the Village asserts that the court had the authority to enter a default for this reason. But the Village apparently assumes that the court had the inherent authority to order Clay to be present and also assumes that, because of this inherent authority, the trial court's action was not a misuse of discretion.

¶6 The Village is wrong. First, a trial court may not enter an order that is in clear contravention to established case law. The erroneous exercise of discretion occurs in many forms, but one of them is a discretionary choice based upon an error of law. *See*, *e.g.*, ***Rohde-Giovanni v. Baumgart***, 2004 WI 27, ¶18, 269 Wis. 2d 598, 676 N.W.2d 452. Here, the trial court acted against the established law. Second, not only is the case law against the trial court's discretionary choice, so is our state constitution. Clay is entitled to appear by counsel in a civil matter pursuant to WIS. CONST. art. I, § 21, governing the rights of suitors. It provides: "In any court of this state, any suitor may prosecute or defend his suit either in his own proper person or by an attorney of the suitor's choice." ***Id.***, § 21(2). This provision gives the right, in a civil trial, to choose whether to defend oneself or to have an attorney do it. ***City of Sun Prairie v. Davis***, 217 Wis. 2d 268, 278, 579 N.W.2d 753 (Ct. App. 1998), *rev'd on other grounds*, 226 Wis. 2d 738, 595 N.W.2d 635 (1999).

¶7 The third reason requires a separate paragraph. We understand the trial court's order to be directed to that tactic of some traffic defense lawyers to make the government prove identity without the defendant being in the courtroom. Although the effectiveness of this tactic is doubtful and its use is arguably puerile, there is no law against it. In fact, the law has evolved so as to manage it. *See* ***United States v. Morrow***, 925 F.2d 779, 781 (4th Cir. 1991) (a courtroom identification is unnecessary if other evidence reasonably allows the inference that the defendant on trial is the person who committed the charged acts); *see also* ***State v. Hill***, 520 P.2d 618, 619 (Wash. 1974) (identity involves a question of fact and "any relevant fact, either direct or circumstantial, which would convince or tend to convince a person of ordinary judgment … of the identity of a person, should be received and evaluated").

¶8 We surmise that the trial court's order was designed to prevent the use of that tactic. But why? The only cogent reason that this court can envision is that the trial court must have felt that it had the inherent power to enhance the search for the truth and to prohibit what it believed to be a tactical exercise to prevent such enhancement.

¶9 As it happens, our supreme court has spoken to a court's inherent power to control that tactical exercise. In ***City of Sun Prairie v. Davis***, 226 Wis. 2d 738, 595 N.W.2d 635 (1999), the supreme court was presented with just such a tactic. While it is true that the case was based on an occurrence in a municipal court, our supreme court spoke more generally to the question of whether any court has the inherent authority to order a defendant in a noncriminal case to personally appear on grounds that doing so will foster a search for the truth and thereby aid the orderly and efficient administration of justice. Our supreme court stated, in pertinent part:

> [T]he City has cited to no case in this state nor any other jurisdiction in which a court has recognized the judiciary's power to order a defendant to personally appear based solely on inherent authority, and we have found none….
>
> In fact, this court has previously stated that a defendant who failed to personally appear in a civil action nonetheless appeared "'since he was entitled to and did appear by his attorney.'" ***Sherman v. Heiser***, 85 Wis. 2d 246, 255, 270 N.W.2d 397 (1978) (citations omitted). The defendant in ***Sherman*** appeared by the fact that his counsel appeared on his behalf. ***Id***. at 254, 270 N.W.2d 397. "The most generous interpretation that could be given to Sherman's action [failure to personally appear] is that he was willing to let his attorney try the case without him. This he had a right to do." ***Id***. at 256, 270 N.W.2d 397.
>
> [W]e determine that the existence of … the orderly and efficient exercise of … jurisdiction is not dependent upon the presence appearance of the defendant.

Id. at 759-760. Thus, to the extent that one may argue how the trial court may circumvent the holding in ***Sherman*** by relying on its inherent authority, ***City of Sun Prairie*** puts that to rest.

¶10 We categorically reject the Village's argument that the trial court had authority under WIS. STAT. § 345.37(1) to deem a nonappearance at trial as tantamount to a plea of no contest and to enter judgment accordingly. As we have seen from the above, Clay *did* appear—albeit by counsel. We also categorically reject the argument that Clay had to bring a motion under WIS. STAT. § 806.07, seeking relief from a default judgment. The order by the trial court in this instance was based on what it believed to be its statutory and inherent authority to sanction Clay for failure to obey a court order. Because the court had no basis in law to make such order, it follows that Clay did not have to use § 806.07 to seek relief since the order itself was invalid as a matter of law. Section 806.07 is reserved for those instances where a judgment, though valid, should nonetheless be vacated for other reasons. The judgment here, being based on an invalid order, is itself invalid

and unconstitutional. We reverse and remand for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.