COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3074-FT **Cir. Ct. No. 99-TR-5377**

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

VILLAGE OF FONTANA,

PLAINTIFF-RESPONDENT,

V.

GARY M. ZAMECNIK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed*.

¶1 SNYDER, J.[1] Gary M. Zamecnik contends that the trial court misused its discretion in refusing to reopen the underlying operating a motor

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

vehicle while under the influence of intoxicants (OWI) case against him. We disagree and affirm the order of the trial court.

FACTS[2]

¶2 On September 26, 1999, Zamecnik was issued an OWI citation. He retained Attorney John Miller Carroll to represent him and signed an authorization permitting Miller Carroll to appear on his behalf. Miller Carroll was authorized to enter into a plea agreement if Zamecnik consented after consultation.

¶3 On February 7, 2000, a stipulation and order was filed with the trial court stating that Zamecnik agreed to enter a plea of no contest to the OWI charge with a six-month suspension of his driver's license and an alcohol and drug assessment; the remaining refusal charge would be dismissed. However, Zamecnik claimed that he never gave Miller Carroll permission to enter into this plea agreement nor was he consulted about the agreement. Zamecnik admitted that he was notified of this plea agreement by correspondence from Miller Carroll dated February 14, 2000.

¶4 As a result of this plea agreement, Zamecnik's Illinois driving privileges were revoked; he was notified of this revocation by letter in April 2000. At that time, Zamecnik was not working and was on disability. In June 2000, Zamecnik was seriously injured in a car accident.

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[2] Zamecnik has not provided one single citation to the record to corroborate the facts set forth in his brief. Such a failure is a clear violation of WIS. STAT. RULE 809.19(1)(d) and (3) of the rules of appellate procedure, which require the appellant to set out facts "relevant to the issues presented with appropriate references to the record." An appellate court is improperly burdened where briefs fail to cite to the record. ***Meyer v. Fronimades***, 2 Wis. 2d 89, 93-94, 86 N.W.2d 25 (1957). This court may impose an appropriate penalty upon a party or counsel for a rule violation. *See* WIS. STAT. RULE 809.83(2).

¶5 On July 2, 2001, Zamecnik filed a motion to reopen this case, pursuant to WIS. STAT. § 346.65(2g)(b), alleging that he was never consulted about nor made aware of the implications of the plea agreement. The trial court denied this motion and Zamecnik appeals.

DISCUSSION

¶6 Although in the trial court Zamecnik argued that his motion was brought pursuant to WIS. STAT. § 346.65(2g)(b), he abandons that argument on appeal and now maintains that the motion is brought pursuant to WIS. STAT. § 806.07(1)(h). We address this issue only because opposing counsel cited to § 806.07 at the October 3, 2001 motion hearing before the trial court.

¶7 WISCONSIN STAT. § 806.07 addresses relief from judgment or order and states, in relevant part:

> **(1)** On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> ....
>
> (h) Any other reasons justifying relief from the operation of the judgment.
>
> **(2)** The motion shall be made within a reasonable time, and, if based on sub. (1)(a) or (c), not more than one year after the judgment was entered or the order or stipulation was made. A motion based on sub. (1)(b) shall be made within the time provided in s. 805.16. A motion under this section does not affect the finality of a judgment or suspend its operation. This section does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to set aside a judgment for fraud on the court.

A circuit court's order denying a motion for relief under § 806.07 will not be reversed on appeal unless there has been an erroneous exercise of discretion. ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 541, 363 N.W.2d 419 (1985). An appellate court will not find an erroneous exercise of discretion if the record shows that the circuit court exercised its discretion and that there is a reasonable basis for the court's determination. ***Id***. at 542. The term "discretion" contemplates a process of reasoning which depends on facts that are in the record or are reasonably derived by inference from the record and yields a conclusion based on logic and founded on proper legal standards. ***Id***.

¶8 In exercising its discretion, the trial court should consider factors relevant to the competing interests of finality of judgments and relief from unjust judgments, including whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant, whether the claimant received the effective assistance of counsel, whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments, whether there is a meritorious defense to the claim and whether there are intervening circumstances making it inequitable to grant relief. ***Id***. at 552-53.

¶9 Zamecnik argues that his motion to reopen was filed within a reasonable time period, pursuant to WIS. STAT. § 806.07(2), and the trial court did not undertake any examination consistent with the exercise of discretion but "simply made a determination that it felt too much time had elapsed to reopen the judgment." We disagree that the trial court erroneously exercised its discretion in denying Zamecnik's motion to reopen this matter. In denying Zamecnik's motion, the trial court stated:

> Well, first of all, in looking at the history of the case, there was a refusal. His driving privileges would have been revoked for one year as a result of the refusal.
>
> There was a motion to get the refusal reopened, and that was denied. And then Mr. Carroll, acting under an authorization, made an agreement which reduced his driver's license revocation to a six-month suspension. He would have been revoked for a year. He would have had -- that would [have] transferred to a revocation down in Illinois under any circumstances.
>
> But being that as it may ... you authorized him to act for you. He did act for you. He reduced your period without a license from one year to six months. He notified you.
>
> Now, I'm not saying that everything he did here was perfect by any means, and you may have every reason to be angry with what -- with what took place here, but he notified you on February 14th. You didn't need an attorney at that point to write a letter to the Court to say, hey, whoa, wait a minute. This is not my agreement. I want to come back in. You don't need a lawyer to do that. But you sat there and did nothing. You slept on your rights, especially after being alerted by the State of Illinois in April of 2000 that your driver's license had been revoked for a year. Then you want me to feel sorry for you because in violation of that order and the Department of Motor Vehicle revocation, you went out and drove and got in an accident and you were revoked.
>
> ....
>
> You sat on this for fifteen months. That's too long. That's beyond every statute. There is no basis for reopening this.
>
> The motion to reopen is denied.

¶10 The trial court acknowledged that Miller Carroll's behavior was less than perfect but considered that Zamecnik authorized Miller Carroll to appear and act on his behalf, that Miller Carroll negotiated a lesser penalty for him and that Miller Carroll notified him of the arrangement in February 2000. The trial court observed that despite Miller Carroll's notification and the notice from the Illinois

Department of Motor Vehicles, Zamecnik still did nothing to contact the court to contest the agreement or reopen the case. The trial court noted that despite being notified of the license suspension, Zamecnik "went out and drove and got in an accident" and waited fifteen months before petitioning the court to reopen the matter.

CONCLUSION

¶11 We conclude that the trial court factored the ***M.L.B.*** criteria into its decision. Consequently, the court did not erroneously exercise its discretion in denying Zamecnik's motion for relief from the OWI judgment. We therefore affirm the order of the trial court.

By the Court.—Order affirmed.

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