

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

MARCH 12, 1997

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.

NOTICE

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

No. 96-2112

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CITY OF OSHKOSH,

Plaintiff-Respondent,

v.

CHRISTOPHER MACK,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Winnebago County: WILLIAM E. CRANE, Judge. *Affirmed.*

ANDERSON, J. Christopher Mack appeals from a judgment of conviction for improper stop at a stop sign in violation of § 346.46, STATS., as adopted by § 27-7 of the General Ordinances of the City of Oshkosh. On appeal, Mack complains that the trial judge improperly denied his request for substitution or, in the alternative, erred in refusing to recuse himself. Because both of Mack's complaints are waived, we affirm.

We are required to define the nature of Mack's conviction for violation of a traffic regulation. In the trial court and on appeal, Mack has sought the right to appellate counsel and free transcripts, ordinarily protections accorded individuals alleged to have violated the criminal law of this state. Mack has not been charged or convicted of a crime. He has been charged and convicted with violating § 346.46, STATS., and the penalty upon conviction is a forfeiture. See § 346.49(1)(a), STATS. Section 345.20(1)(b), STATS., provides that a "[t]raffic regulation" means a provision of ... chs. 341 to 349 for which the penalty for violation is a forfeiture" See *State v. Borowski*, 164 Wis.2d 730, 734, 476 N.W.2d 316, 317 (Ct. App. 1991). And, § 939.12, STATS., defines a crime as "conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime." Mack's only punishment is a forfeiture; therefore, he has been convicted of a violation of a traffic regulation and not of a crime. Mack is not entitled to the constitutional protections we bestow upon those convicted of a crime.¹

We now turn our attention to the issues Mack has raised on appeal. When Mack was issued a citation for the violation, he was ordered to appear in the trial court on July 3, 1996. Prior to the scheduled appearance date,

¹ In a motion filed with this court, Mack has asserted that the collateral consequences of his conviction, including increased insurance premiums, makes his conduct a crime. The obstacle Mack fails to clear is that if the legislature had meant to define "crime" and "traffic regulation" by the collateral consequences a defendant might face upon conviction, it would have included a laundry list of such collateral consequences in each definition. The silence of the legislature is deafening. Collateral consequences are not considered in deciding whether a defendant has been convicted of a traffic regulation or a crime, and collateral consequences are of no significance in resolving whether a defendant is entitled to the full panoply of constitutional protections.

Mack filed a not guilty plea, a motion to dismiss and a demand for a jury trial. These filings triggered a "Notice to Appear" from the trial court dated July 2, 1996, setting the case for a court trial on July 18. Prominently displayed on the face of the notice was the name of the trial judge assigned to the case, the Honorable William E. Crane. On July 11, Mack renewed his motion to dismiss and the next day he filed a "Request for Substitution of Judge William Crane Ch. 801, 968 to 973 Wis Stats." On the same day, July 12, Judge Crane issued an order denying the request for substitution on the grounds that it was untimely under the provisions of § 345.315(1), STATS. The next event recorded in the official record is the court trial of July 18; the clerk's minutes sheet discloses that Mack's motion to dismiss was denied, testimony was taken and Mack was found guilty of violating § 346.46, STATS.

On July 22, the clerk of court date-stamped and filed a "Court Trial Appearance." This document was dated by Mack on July 18. In this document, Mack requested that Judge Crane recuse himself from presiding over this case: **First**, you held a hearing on Monday, February 28, 1994. Regarding the ongoing murder of Christopher's grandfather Lloyd B Mack. You did disqualify all the Judges in Winnebago County from presiding in any manner connected with Lloyd Mack or otherwise. Therefore, for you to now take any matter, traffic or otherwise, regarding Lloyd Mack's grandson is improper judicial conduct and you must step down and assign another judge.

Mack also asked Judge Crane to reconsider his decision that the July 12 request for substitution of judge was untimely.

The scope of our review is necessarily limited to the record before us. *D.L. v. Huebner*, 110 Wis.2d 581, 597, 329 N.W.2d 890, 897 (1983). Mack has the burden to provide this court with the record necessary to review the issues raised. See *State Bank of Hartland v. Arndt*, 129 Wis.2d 411, 423, 385 N.W.2d 219, 225 (Ct. App. 1986). In the absence of a trial transcript, we will assume that the facts necessary to sustain the trial court's decision are supported by the record. *Suburban State Bank v. Squires*, 145 Wis.2d 445, 451, 427 N.W.2d 393, 395 (Ct. App. 1988).

The record before us is deficient in two ways. First, although Mack's "Court Trial Appearance" is dated on the same day as the court trial, we cannot conclude that it was in fact presented to the trial judge on July 18. The clerk's minutes do not reflect that either the recusal of the judge or the reconsideration of the substitution request was discussed on the day of the court trial. Further, without a transcript we cannot independently verify what occurred on July 18 and will rely upon the clerk's minutes as an accurate summary of what transpired. See *Waukesha County v. Darlene R.*, 201 Wis.2d 633, 642, 549 N.W.2d 489, 493 (Ct. App. 1996) (clerk's minutes are a portion of the mandatory recording of all court proceedings). Without competent evidence from Mack that this document was presented to the judge on July 18, we conclude that it was not filed until July 22, the date of the clerk of courts' date and file stamp. See *Boston Old Colony Ins. Co. v. International Rectifier Corp.*, 91 Wis.2d 813, 822-23, 284 N.W.2d 93, 97-98 (1979). Second, § 809.15(1)(a)13, STATS., requires a transcript of the proceedings to be included in

the record on appeal. Mack has chosen not to secure a transcript of the proceedings.²

It may seem harsh to hold Mack to the basic rules of appellate practice because in certain circumstances pro se litigants are granted some leniency. However, leniency is only extended to pro se prisoner litigants. See *Waushara County v. Graf*, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992). In

Waushara County, the supreme court mandated:

Pro se appellants must satisfy all procedural requirements, unless those requirements are waived by the court. They are bound by the same rules that apply to attorneys on appeal. The right to self-representation is “[not] a license not to comply with relevant rules of procedural and substantive law.” *Farretta v. California*, 422 U.S. 806, 834 n.46 (1975). While some leniency may be allowed, neither a trial court nor a reviewing court has a duty to walk pro se litigants through the procedural requirements or to point them to the proper substantive law.

Id. at 452, 480 N.W.2d at 20.

Because there is no evidence in the record that Mack requested Judge Crane to recuse himself before the conviction, he has waived the appeal of this issue, “A party seeking reversal may not advance arguments on appeal which were not presented to the trial court.” See *State v. Rogers*, 196 Wis.2d

² Mack did file a motion for free transcripts and, pursuant to *State ex rel. Girouard v. Circuit Court*, 155 Wis.2d 148, 454 N.W.2d 792 (1990), we remanded this matter to the circuit court for a determination of whether Mack was indigent and this appeal has arguable merit. The trial court answered both questions in the negative and we ratified the trial court’s conclusion in an order denying Mack’s motion to strike the order of the circuit court. Our order also cautioned Mack that if he did not file a transcript, his appeal would be decided without the benefit of a transcript.

817, 826, 539 N.W.2d 897, 900 (Ct. App. 1995). The waiver rule was designed for cases such as this to prevent a party from deliberately supplementing the record for appeal by filing ersatz arguments, never made to the trial court, after conviction with the intent to argue a trial court error that never transpired. See *State v. Holt*, 128 Wis.2d 110, 124, 382 N.W.2d 679, 686 (Ct. App. 1985). We will not knowingly be part of Mack's attempt to obfuscate the issue on appeal and conclude that he has not preserved the issue of the self-disqualification of the trial judge.³

We also conclude that he has waived the question of whether his request for substitution of the judge was timely. On July 12, the trial court issued a written order that the substitution request was untimely. From the limited record on appeal, it is clear that Mack did not seek reconsideration of that order at his trial on July 18; he did not seek a review by the chief judge of the judicial administrative district and he did not seek a writ of prohibition from this court. The rule in Wisconsin is simply stated: "once a defendant is informed that a request for substitution has been denied as being untimely and the defendant desires review of that decision, it is the defendant's obligation to *promptly* seek review, either by the chief judge of the administrative district or via a writ of prohibition." *State ex rel. Nowak v. Circuit Court*, 169 Wis.2d 395, 397, 485 N.W.2d 419, 420 (Ct. App. 1992). Where the defendant has failed to promptly act on a denial of a request for substitution because it was untimely,

³ The reasons Mack advances for the recusal of the trial judge are libelous, malevolent and scurrilous. We will address the remarks later in this decision when we decide if sanctions are required for Mack's odious assault on the trial judge.

he or she has waived the right to complain about having his or her trial heard by the judge assigned. *See id.* at 398, 485 N.W.2d at 421.

SANCTIONS

The City of Oshkosh asks us to impose sanctions under § 802.05, STATS., upon Mack for his conduct in this appeal, including his scandalous and libelous claims against the trial court.⁴ In his briefs, Mack made at least nine scurrilous accusations that Judge Crane was a participant in the murder of Mack's grandfather, Lloyd Mack. In two motions filed with this court during the pendency of this appeal, Mack has repeated these abusive attacks. The substance of these remarks is reflected in the following:

The facts of William Crane's involvement in the murder of a loved member of Appellant's family cannot be disputed, denied, evaded or ignored, as a well established matter of law. Neitzke v. William, *Supra*. The issue

⁴ Section 802.05(1)(a), STATS., provides in part:

The signature of ... [a] party constitutes a certificate that the ... party has read the pleading, motion or other paper; that to the best of the ... party's knowledge, information and belief, formed after reasonable inquiry, the pleading, motion or other paper is well-grounded in fact ... and that the pleading, motion or other paper is not used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. ... If the court determines that ... [a] party failed to read or make the determinations required under this subsection before signing any petition, motion or other paper, the court may, upon motion or upon its own initiative, impose an appropriate sanction on the person who signed the pleading, motion or other paper, or on a represented party, or on both. The sanction may include an order to pay to the other party the amount of reasonable expenses incurred by that party because of the filing of the pleading, motion or other paper, including reasonable attorney fees.

that William Crane was required to but did not address was whether given that he was involved in the murder of the defendant's grandfather and that the defendant is a material witness to Crane's involvement in that murder, could William Crane preside in the case as judge in which the material witness is defendant?

In addition, Mack accused Judge Crane of performing "a series of Class E Felony crimes" for acting in excess of his lawful authority.

There is no basis in fact to accuse a respected member of Wisconsin's judiciary of conspiracy to commit murder and other criminal violations. These remarks are disrespectful and scandalous. The only conclusion we can reach is that these remarks were made to harass the trial judge and are a cause of consternation and personal discomfort for the trial judge. Accordingly, these libelous and scurrilous remarks merit a substantial sanction that is designed to deter similar conduct in the future by Mack and protect the integrity of the justice system. We recognize that Mack is indigent, at least for the purpose of being permitted to file appeals without the payment of filing fees. We also recognize that any sanction we impose should be narrowly tailored to serve its purpose. Our purpose is to tame Mack's disrespectful and scandalous assertions in the material he submits to this court and to the trial courts. Therefore, we impose a monetary sanction of \$500.

We also put Mack on notice that it is our intent that further disrespectful and scandalous statements made by him will be met with a sanction barring him from filing any paper in a trial court or the court of appeals except where he is a defendant in a criminal case or is seeking habeas

corpus relief. It is our hope that the possibility of such a sanction will have the desired effect of correcting or deterring Mack's future behavior.

Mack has also violated rules of appellate practice, §§ 809.19(2) and 809.15, STATS., by including in a supplemental appendix to his reply brief two fugitive documents, a "Notice of Torture-Murder as Completed Act" signed by Richard Mack and a document purporting to be a "Corrected Record of the Proceeding" in a case in Winnebago County Circuit Court captioned *Richard Mack v. Honorable Robert Hawley*. In this latter document there are "certifications" that Mack is the son of Richard Mack.⁵ We have the authority under § 809.83(2), STATS., to impose monetary sanctions for the failure to comply with the requirements of the rules of appellate practice; therefore, we order a monetary penalty of \$100.

⁵ Unfortunately, the scurrilous attacks upon the courts and the judges are not limited to those made by Mack in this appeal. In an appeal from a Winnebago County circuit court case, Richard Mack made allegations of "conspiracy," "clandestine activity," "a secret meeting" and "a mock hearing." *Richard Mack v. Honorable Robert Hawley*, No. 95-0976, unpublished summary order (Wis. Ct. App. Apr. 3, 1996). In *Waushara County v. Richard Mack*, Nos. 94-2157 and 94-2226, unpublished slip op. (Wis. Ct. App. Aug. 10, 1995), we imposed a monetary sanction on Richard Mack for disrespectful and scandalous accusations against the trial court. Finally, the Seventh Circuit Court of Appeals in *Support Systems Int'l, Inc. v. Mack*, 45 F.3d 185 (7th Cir. 1995), examined Richard Mack's dishonest and frivolous pro se litigation behavior. The court concluded the best sanction was to order the clerks of the federal courts within the circuit to return unfiled any papers submitted either directly or indirectly by or on behalf of Richard Mack, with the exception of criminal cases in which Mack is a defendant and applications for habeas corpus. See *id.* at 186-87. This order was reviewed and approved in *In re Skupniewitz*, 73 F.3d 702 (7th Cir.), cert. denied, 116 S. Ct. 1360 (1996); the underlying basis of that case was a state court action Richard Mack had commenced against the Seventh Circuit Court of Appeals and some of its member judges. He sought to hold the defendants liable for the alleged torture and murder of Mack's father, attempted murder of Mack, medicare fraud, mail fraud, extortion, obstruction of justice and criminal defamation. See *id.* at 704.

Mack is ordered to pay within sixty days from the date of this decision, to the Clerk of the Court of Appeals, 110 East Main Street, P.O. Box 1688, Madison, WI, 53701, the sum of \$600. As a further sanction, the City of Oshkosh is authorized to seek treble costs.

By the Court. – Judgment affirmed.

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