

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 10, 1998

Marilyn L. Graves
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 § 808.10 and RULE 809.62, STATS.

No. 97-2725

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

CITY OF MILWAUKEE,

PLAINTIFF-RESPONDENT,

V.

DANIEL EDWARD HOLMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEAN W. DiMOTTO, Judge. *Reversed and cause remanded with directions.*

WEDEMEYER, P.J.¹ Daniel Edward Holman appeals from a judgment of conviction entered following a trial to the court for a civil forfeiture violation of § 244-18 of the MILWAUKEE CODE OF ORDINANCES. Holman claims

¹ This appeal is decided by one judge pursuant to § 752.31(2), STATS.

he was improperly denied a jury trial in circuit court following his conviction of a building code violation in municipal court. Because the circuit court that presided over the trial in this matter violated the general rule of comity and erroneously exercised its discretion when it overruled the pre-trial circuit court's decision to conduct a jury trial, this court reverses the judgment and remands to the circuit court with instructions that Holman be granted a jury trial.²

I. BACKGROUND

On September 20, 1996, Holman received a municipal citation for “snipe advertising” because he placed five signs on city-owned property without permission. He contested the citation, but was convicted of the violation in municipal court. He filed a notice of appeal to the circuit court. On April 1, 1997, the circuit court held a pre-trial conference. At this conference, Holman requested that his case be tried to a jury. The City objected because the jury fee was not paid. The circuit court declared Holman indigent and granted his request for a jury trial. The City then objected on the ground that the notice of appeal following the municipal court conviction requested a trial de novo. The circuit court responded that Holman was going to get a jury trial. A final pre-trial occurred on August 29, 1997. The record does not contain any further dispute regarding whether a jury trial will occur, but simply notes that the “jury trial” will occur on September 3, 1997, in Judge DiMotto's courtroom.

On September 3, 1997, both sides appeared for trial. Prior to the start of trial, however, the City stated: “There is maybe some minor confusion as

² The Hon. William R. Moser presided over both pre-trial conferences, the first on April 1, 1997, and the second on August 29, 1997. The Hon. Jean W. DiMotto presided over the bench trial on September 3, 1997.

to whether or not this is scheduled for a jury trial or if it is scheduled for a trial to the Court.” A discussion ensued, culminating in Judge DiMotto overruling Judge Moser’s decision to set Holman’s case for a jury trial. Judge DiMotto determined that, because Holman had requested a “trial de novo” instead of “trial by jury” on his initial notice of appeal from the municipal court, he was not entitled to a jury trial.

The case was tried to the court and Holman was convicted. He now appeals.

II. DISCUSSION

This case presents this court with a narrow issue: whether Judge DiMotto erred when she overruled Judge Moser’s decision which granted Holman’s request for a jury trial. This court concludes that Judge DiMotto did err.

Generally, judges of equal stature sitting on the same case should not overrule decisions of each other. *See generally State v. Schober*, 167 Wis.2d 371, 381, 481 N.W.2d 689, 693 (Ct. App. 1992) (trial court unempowered to overrule another circuit court on the same issue when circuit court of equal stature had previously ruled on the same issue). The reasons underlying this policy are discussed at length in *Commercial Union of America v. Angelo-South American Bank Ltd.*, 10 F.2d 937, 938-40 (2d Cir. 1925). *Commercial Union’s* absolute prohibition was subsequently overruled in *Dictograph Products Co. v. Sonotone Corp.*, 230 F.2d 131, 135-36 (2d Cir. 1956), where the court adopted a standard of discretion, although still adhering to the general principle of comity.

This general principle of comity was violated here. Judge Moser made a decision on the jury trial issue. He decided that Holman’s case would be

tried to a jury. Judge DiMotto, presiding over the same case and sitting in a court of equal stature to Judge Moser, overruled Judge Moser's decision on the very same issue. This action violated the general rule of comity. Further, the record does not contain sufficient facts suggesting that this case was one where Judge DiMotto should exercise her discretion to overrule Judge Moser's previous ruling.

This court concludes that Judge DiMotto's decision constituted an erroneous exercise of discretion based on fundamental notions of fairness. The record demonstrates the following. In April, Judge Moser granted Holman's request for a jury trial. There was no further discussion or objection to that ruling. The City did not move Judge Moser to reconsider his decision. The City did not attempt a discretionary appeal based on that ruling. It was not until the day trial was scheduled to begin on September 3rd, that the City raised the jury trial issue. Holman was expecting to have his case decided by a jury based on a decision made months earlier, and conducting the ordered jury trial certainly would have offered no prejudice to the City. Under this set of circumstances, this case does not present a situation calling for the invocation of the discretionary exception to the general rule of comity. Judge DiMotto's decision to overrule Judge Moser's ruling was an erroneous exercise of discretion and violated the general principle of comity.³

Accordingly, the judgment is reversed and this case is remanded to the circuit court with instructions that Holman receive a trial by jury.

³ Because of the disposition of this case, this court does not decide whether Judge Moser's decision granting Holman a jury trial was legally sound. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W.2d 663, 665 (1938) (only dispositive issues need to be addressed).

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

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

