

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 25, 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. 98-2101

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CITY OF MADISON,

PLAINTIFF-RESPONDENT,

V.

CYNTHIA J. VERNON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
DANIEL R. MOESER, Judge. *Vacated and cause remanded with directions.*

DYKMAN, P.J.¹ Cynthia J. Vernon appeals from an April 28, 1998 order from the Dane County Circuit Court affirming her conviction for operating a motor vehicle while intoxicated, contrary to § 346.63(1)(a), STATS. The April 28 order was issued after a motion for reconsideration of the circuit court's previous

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

final order. The city argues that § 800.14, STATS., implicitly grants the circuit court the authority to reconsider its own orders and decisions. However, we conclude that the circuit court had no jurisdiction to grant a motion for reconsideration once the record of the case had been certified to the municipal court pursuant to § 800.14(6). Therefore, we vacate the April 28 order and remand the case to the circuit court with instructions to remand to the Madison Municipal Court.

BACKGROUND

This case arises out of a Dane County Circuit Court review of a Madison Municipal Court decision pursuant to § 800.14, STATS. Vernon was found guilty by the municipal court for operating a motor vehicle while intoxicated (OMVWI), contrary to § 346.63(1)(a), STATS., and for operating a motor vehicle with a prohibited blood alcohol concentration, contrary to § 346.63(1)(b). Vernon appealed to the Dane County Circuit Court, requesting a review of the record pursuant to § 800.14(5).

The circuit court issued two decisions. The first, dated November 10, 1997, reversed Vernon's conviction and granted a new trial. On November 11, 1997, the clerk certified the record to the municipal court for "final disposition of the case in accordance with § 800.14(6)." On November 21, the City of Madison moved for reconsideration asserting that the November decision was ambiguous. Upon reconsideration, the circuit court issued a second decision, dated April 28, 1998, affirming Vernon's OMVWI conviction.

DISCUSSION

An appellate court has jurisdiction to consider a lower court's jurisdiction or lack thereof. *Sheehan v. Industrial Comm'n*, 272 Wis. 595, 601, 76 N.W.2d 343, 347 (1956). We must examine the circuit court's jurisdiction even though the parties did not raise the issue and it was not considered by the circuit court. *Sipl v. Sentry Indem. Co.*, 146 Wis.2d 459, 462-63, 431 N.W.2d 685, 686 (Ct. App. 1988).

Section 800.14, STATS., grants to circuit courts appellate jurisdiction over municipal court decisions. See *City of Middleton v. Hennen*, 206 Wis.2d 347, 351, 557 N.W.2d 818, 819 (Ct. App. 1996). Therefore, whether a circuit court has jurisdiction to reconsider its final order once it has certified the record to the municipal court is a question of statutory interpretation. When interpreting a statute, we turn first to the plain language of the statute; however, if the plain meaning of a statute does not resolve a question, we will hold that the statute is ambiguous as to that question. *NBZ, Inc. v. Pilarski*, 185 Wis.2d 827, 836, 520 N.W.2d 93, 96 (Ct. App. 1994). The canons of statutory construction dictate that we should not construe a statute in derogation of any common law rule unless the abrogation is so clearly expressed as to leave no doubt of the legislature's intent. *Id.*

Section 800.14(6), STATS., provides that once a final order is rendered, "[t]he disposition of the appeal shall be certified to the municipal court ... within 30 days of the judgment by the reviewing court." The statute does not state whether the reviewing court retains jurisdiction once the reviewing court has certified the record to the municipal court. The statute is ambiguous in this respect, and we turn to the common law to resolve the issue.

In Wisconsin, the general rule is that once a record has been regularly remitted to the court below, the appellate court's jurisdiction over the case terminates. *State v. American TV & Appliance*, 151 Wis.2d 175, 178-79, 443 N.W.2d 662, 663 (1989). In *State ex. rel. Schmelzer v. Murphy*, 195 Wis.2d 1, 9, 535 N.W.2d 459, 462 (Ct. App. 1995), *rev'd on other grounds*, 201 Wis.2d 246, 548 N.W.2d 45 (1996),² we recognized that we had no authority to vacate or modify a judgment after we had remitted the record to the circuit court. The term "regularly remitted" refers to any record remitted without inadvertence or fraud. *See American TV*, 151 Wis.2d at 179, 443 N.W.2d at 663.³ While RULE 809.24, STATS., allows this court to reconsider its opinion, we cannot do so once the record has been remitted to the court below. *See Estey v. Sheckler*, 36 Wis. 434, 437 (1874) ("having been regularly remitted, we know of no way to get [the record] back again except by another appeal.").

While the court of appeals generally may not remit a case until thirty-one days after it releases an opinion, this is a matter dictated by supreme court rule. *Kuechmann v. School Dist.*, 170 Wis.2d 218, 226, 487 N.W.2d 639, 642 (Ct. App. 1992). Under RULE 809.26, STATS., the court of appeals "shall transmit to the trial court the judgment ... and the record of the case ... 31 days after the filing of the decision of the court." In contrast, § 800.14(6), STATS.,

² In *State ex. rel. Schmelzer v. Murphy*, 201 Wis.2d 246, 548 N.W.2d 45 (1996), the supreme court reviewed the court of appeals' decision in that case. The supreme court concluded that it has the power to allow a late filing of a petition for supreme court review. However, the court did not state that the court of appeals has this authority, nor did the court address the issue of remittitur. Therefore, we do not view *Schmelzer* as overruling the general rule or *American TV*.

³ There exists one exception to the rule, where a party alleges that a judge in the appellate court was disqualified by law, the court will entertain a rehearing because the decision and order rendered by the appellate court may be void as a matter of law. *State v. American TV & Appliance*, 151 Wis.2d 175, 179, 443 N.W.2d 662, 663 (1989).

states that the circuit court shall certify the record and disposition to the municipal court *within* thirty days. The circuit court chose to remit this case to the municipal court the day after issuing its final order. Under a plain reading of § 800.14(6), this remittitur was certainly valid.

The City of Madison cites *City of Middleton v. Hennen* for the proposition that, because § 800.14(5), STATS., is silent on the process to be used by the circuit court, the legislature must have intended to grant circuit courts wide latitude in conducting appellate review of municipal courts. Therefore, the City reasons, “[t]hat authority must surely include the authority for circuit court judges to entertain and rule upon timely motions for reconsideration.” We agree that circuit court judges have the authority to entertain motions for reconsideration. They just cannot do so after certification to the municipal court.

The City also argues that the April 28 decision of the court is valid because the conditions for reconsideration of a final order under § 806.07, STATS., are satisfied. But an appellate court cannot address the merits of an issue raised when it lacks jurisdiction. *Southern Wis. Cattle Credit v. Lemkau*, 140 Wis.2d 830, 834, 412 N.W.2d 159, 161. The statutory standard is irrelevant in the absence of jurisdiction.

CONCLUSION

We conclude that § 800.14, STATS., is silent regarding the jurisdiction of a circuit court to take further action in a case once the record has been certified to the municipal court. The general rule in Wisconsin is that once a reviewing court has remitted a record to the court below, it loses jurisdiction to take further action regarding the issues of the case. Therefore, we conclude that the circuit court was without jurisdiction when it granted the City’s motion to

reconsider the court's final order. We therefore vacate the circuit court's decision and order dated April 28, 1998, and remand this case to the municipal court of Madison for further proceedings.

By the Court.—Order vacated and cause remanded with directions.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.

