COURT OF APPEALS
DECISION
DATED AND FILED

February 27, 2008

David R. Schanker
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2007AP2261
2007AP2262
2007AP2263
2007AP2264
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2007AP2266
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Cir. Ct. Nos. 2007FO81
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STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KORRY L. ARDELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Affirmed.*

¶1 ANDERSON, P.J.[1] Korry L. Ardell appeals pro se from his convictions on nine separate charges of improper grading or removal of soil from the bank of a navigable waterway in violation of WIS. STAT. § 30.19(1g)(c). Ardell asserts that the trial court made two procedural errors that entitle him to a reversal of the convictions. First, he contends that the court improperly denied his request that each charge be tried before a separate jury. Second, he maintains the court erred in not granting his oral request for adjournment of the jury trial. We affirm, holding that the court exercised its discretion appropriately when considering both of Ardell's requests.

¶2 On February 23, 2007, a warden employed by the Wisconsin Department of Natural Resources issued nine Natural Resources Citations to Ardell alleging violations of WIS. STAT. § 30.19(1g)(c) on separate dates between February 9, 2006, and October 16, 2006. Ardell responded by entering nine not guilty pleas by mail on March 5, 2007; the letter also contained a jury demand and the required jury fee was paid. On the same day, Ardell filed a discovery demand.[2] The State claims to have compiled the discovery demanded and notified Ardell that he was responsible for the cost of preparing the discovery and the fee

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] It appears that Ardell copied, verbatim, the standard discovery demand used by the state public defender and by defense attorneys in municipal forfeiture actions. For example, paragraph nineteen seeks exculpatory evidence in possession of "the City."

had to be paid prior to release of the discovery; however, there is nothing in the record to support this claim.

¶3 In response to his jury demand, a hearing was scheduled for July 9, 2007, and a six-person jury trial was scheduled for July 25, 2007. At the July 9 hearing, Ardell claims he orally requested that each citation be tried separately before different juries. The trial court denied the request, reasoning that because all nine citations involved the same statutory violation, the same evidence and the same witnesses, judicial economy would best be served by a single trial.

¶4 At the start of the jury trial, Ardell moved for an adjournment:

> **[ARDELL]:** Judge, I'd like to request an adjournment for the trial today. I requested discovery demand. At this point, I never received a copy of it. I was told I needed to pay a $97 fee for the discovery demand. I think that comes out to around 25 cents a copy, which is higher than industry standard for a copy. I can go to Office Max and get a copy made for nine cents.
>
> ….
>
> **THE COURT:** And [Assistant District Attorney], anything you wanted to say?
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> **[ADA]:** Briefly, Judge. I ask the motion be denied. It already has been, but I ask so for the record. The statutes do allow that there be a charge for discovery that is provided. The defendant was well aware of the fee; in fact, he quoted what that was for discovery. He did not provide that money, and he's been notified of the ability to request this discovery and to pay that fee for a substantial period of time. We had a final pretrial a week to two weeks ago, and there was not a request at that time in this vein, so I ask the motion be denied.

> **THE COURT**: Well, the issue that Mr. Ardell raises is interesting because if discovery is priced to such an extent that it's unavailable, then it's something I think the Court needs to address. However, Mr. Ardell didn't file a motion until today—and he didn't really file a motion, he just made an oral request that the matter be adjourned, and we already had the jury present. And I was not going to grant an adjournment at that late date, at this late moment. So the request is denied.
>
> Also, as indicated, we did have a pretrial about a week to two weeks ago, and I asked if the parties would be ready, and they said they would, so we'll proceed.

¶5 The jury convicted Ardell of all nine violations. Ardell appeals.

¶6 Both of Ardell's complaints involve the exercise of judicial discretion; whether or not to grant an adjournment request is within the discretion of the court. ***State v. Williams***, 2000 WI App 123, ¶15, 237 Wis. 2d 591, 614 N.W.2d 11. Likewise, the power to order separate trials is within the court's discretion. ***Rohloff v. Folkman***, 174 Wis. 504, 506, 182 N.W. 735 (1921). As in all cases where the appellant is challenging the trial court's exercise of discretion, our standard of review is whether the trial court erroneously exercised its discretion. *See* ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). "The 'abuse of discretion' standard of review of trial court decisions is well-known, and is difficult to overcome in the best of cases." ***Nelson v. Machut***, 138 Wis. 2d 301, 309, 405 N.W.2d 776 (Ct. App. 1987). A circuit court properly exercises its discretion if the facts support the circuit court's decision and the circuit court applied a correct legal standard. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). An exercise of discretion is not the equivalent of unfettered decision-making but must reflect the circuit court's

"reasoned application of the appropriate legal standard to the relevant facts in the case." ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 471, 326 N.W.2d 727 (1982).

¶7 Before we address Ardell's issues, we will restate two general principles. First, Ardell has appeared pro se throughout these proceedings; pro se litigants 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." ***Waushara County v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992) (citation omitted). Second, all nine citations are forfeitures and are civil actions. As a civil action, a forfeiture action is one in which the rules of civil, not criminal, procedure apply. ***Village of Bayside v. Bruner***, 33 Wis. 2d 533, 535, 148 N.W.2d 5 (1967); *see* WIS. STAT. § 23.50(2). Since these citations are for violations of WIS. STAT. § 30.19(1g)(c), WIS. STAT. §§ 23.50 to 23.85 establish the specific procedure that governs recovery of forfeitures. Sec. 23.50(1) and (2). The Code of Civil Procedure, WIS. STAT. chs. 801-847, will apply only when there is no equivalent specific provision of procedure in §§ 23.50 to 23.85. *See* WIS. STAT. § 801.01(1).

¶8 Ardell's first complaint is that the court erred in not granting his request made at the July 9 hearing that the nine citations be tried separately. There is no transcript of the July 9 hearing; lack of a transcript limits review to those parts of the record available to the appellate court. *See* ***Jocius v. Jocius***, 218 Wis. 2d 103, 119, 580 N.W.2d 708 (Ct. App. 1998). All that is available to us is Ardell's letter to the court, written postconviction, purporting to memorialize his

request for an adjournment. In this letter, Ardell claims separate trials were needed "due to the amount of discovery for these cases it would be easier to make a defense for myself if these cases were heard separately." There is a written response from the court stating it did not order separate trials for reasons of judicial economy. "All nine citations involved the same offense, the same evidence, and the same witnesses."

¶9 In deciding whether to order separate trials, the court should consider factors such as "potential prejudice to the parties, the complexity of the issues and potential to confuse the jury, and the relative convenience, economy or delay that might result." ***Zawistowski v. Kissinger***, 160 Wis. 2d 292, 301, 466 N.W.2d 664 (Ct. App. 1991), *overruled on other grounds by* ***Waters v. Pertzborn***, 2001 WI 62, ¶30, 243 Wis. 2d 703, 627 N.W.2d 497. The court correctly concluded that because all of the citations alleged a violation of erosion control standards in the grading permit and were issued by the same DNR warden, the demands of judicial economy outweighed any benefit to Ardell of trying each case separately. The only benefit that we can imagine is that with nine separate jury trials, Ardell is increasing the chances that reversible error will creep into the nine trials.

¶10 Ardell's second complaint is that the circuit court erred in not granting his oral request for an adjournment made the morning of trial. He complained to the court that the State's demand that he pay for copies compiled in

response to his discovery request was onerous.[3] There are several problems with Ardell's argument. First, the motion was untimely; the rules applicable to DNR forfeiture actions require a procedural motion to be made prior to trial. WIS. STAT. § 23.69. Second, the motion was not in writing. WIS. STAT. § 802.01(2)(a). Third, Ardell's discovery demand was made on March 5, yet he waited more than four months to complain to the court about the fee the State sought to charge. We note he appeared in court on April 4, 2007, and July 9, 2007, and there is no record that he registered a complaint that the State was charging an onerous fee for discovery.

¶11 There is no set test for determining whether the trial court erroneously exercised its discretion; rather, that determination must be based upon the particular facts and circumstances of each case. *See* ***State v. Anastas***, 107 Wis. 2d 270, 273, 320 N.W.2d 15 (Ct. App. 1982). The exercise of discretion upon a request for an adjournment is the weighing of the rights and interests of Ardell against the prompt and efficient administration of justice. *See* ***State v. Echols***, 175 Wis. 2d 653, 680, 499 N.W.2d 631 (1993). Prejudice must be shown in order to set aside the trial court's ruling. *See* ***Schwab v. Baribeau Implement Co.***, 163 Wis. 2d 208, 216, 471 N.W.2d 244 (Ct. App. 1991).

[3] Ardell has not appealed the State's request that he pay for the discovery he demanded; therefore, we do not address the propriety of charging a defendant for complying with a discovery demand.

¶12 Ardell does not develop this argument with evidence of prejudice or citation to legal authority and we decline to abandon our neutrality in an attempt to develop an argument for him. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987). He makes the unsupported claim that without the discovery he requested, he "never knew what facts were officially based on for these citations at the time of trial." Contrary to his claim, any reasonable person who had been issued a detailed grading permit from the DNR would know when his efforts at erosion control did not meet the standards established in the permit.

¶13 We conclude the court correctly exercised its discretion when it denied Ardell's request because it was untimely, being made on the day of trial with the jury present, and at the July 9 hearing, Ardell assured the court that he was ready for trial.

¶14 We affirm because the court properly exercised its discretion in denying Ardell an adjournment and denying his request for nine jury trials.

By the Court.—Judgment affirmed.

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