COURT OF APPEALS
DECISION
DATED AND FILED

April 22, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2834

Cir. Ct. Nos. 2007TR19555
2007TR19556

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

CITY OF SOUTH MILWAUKEE,

PLAINTIFF-APPELLANT,

V.

KAY KLEPPEK,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: JOHN F. FOLEY, Judge. *Reversed and cause remanded.*

¶1 KESSLER, J.[1] The City of South Milwaukee appeals from an order dismissing Kay Kleppek's WIS. STAT. § 800.14(4) appeal to the circuit court, pursuant to a municipal court conviction for operating a vehicle while intoxicated

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

and having a blood alcohol level in excess of the legal maximum. Kleppek was found to have violated South Milwaukee's ordinances, which adopted WIS. STAT. § 346.63(1)(a) & (b). The circuit court dismissed the appeal because the audio recording system employed by South Milwaukee during the municipal court trial malfunctioned, making it impossible for South Milwaukee to honor Kleppek's request for a transcript of the municipal trial. The circuit court found that the lack of a transcript of the municipal court trial prevented Kleppek from using that transcript to impeach witnesses in the new trial in the circuit court which she selected as her appeal. The circuit court then concluded that it was not "fair to proceed" and dismissed the case.

¶2 When the appellant elects to appeal from a municipal court decision by requesting a new trial in the circuit court, there is no statutory right to a transcript of the municipal court proceeding. Consequently, the circuit court's determination that it was not fair to proceed with the new trial must have been based on the conclusion that the lack of a transcript deprived Kleppek of a constitutionally protected right. We may "independently review the facts … to determine whether any constitutional principles have been offended." ***State v. Clappes***, 136 Wis. 2d 222, 235, 401 N.W.2d 759 (1987). We review *de novo* the circuit court's application of fact to constitutional principles. ***State v. Weed***, 2003 WI 85, ¶10, 263 Wis. 2d 434, 666 N.W.2d 485.

¶3 Instead of an appeal to the circuit court pursuant to WIS. STAT. § 800.14(5), which is based on the record of the municipal court trial, Kleppek selected to appeal pursuant to § 800.14(4), which provides for a completely new trial:

> **Appeal from municipal court decision.**
>
> ….
>
> **(4)** Upon the request of either party within 20 days after notice of appeal under sub. (1), or on its own motion, the circuit court shall order that a new trial be held in circuit court. The new trial shall be conducted by the court without a jury unless either party requests a jury trial within 10 days after the order for a new trial.

WIS. STAT. § 800.14(4).

¶4 Although a municipal court is not a court of record, Wisconsin statutes require a municipality to electronically record municipal court proceedings.[2] If the appeal selected is a review of the record by the circuit court pursuant to WIS. STAT. § 800.14(5),[3] the municipality must provide a transcript of the municipal trial. Review under § 800.14(5) is analogous to appellate review of a trial to the court under WIS. STAT. § 805.17(2).[4] *See* ***Village of Williams Bay v. Metzl***, 124 Wis. 2d 356, 357, 369 N.W.2d 186 (Ct. App. 1985). However, when the request is for a new trial pursuant to § 800.14(4), there is no similar statutory

[2] WISCONSIN STAT. § 800.13, entitled "Recording in municipal court," states: "**(1)** Every proceeding in which testimony is taken under oath in a municipal court shall be recorded by electronic means for purposes of appeal. **(2)** Notwithstanding sub. (1), a municipal court is not a court of record."

[3] WISCONSIN STAT. § 800.14(5) states, in pertinent part:

> If there is no request or motion under sub. (4), an appeal shall be based upon a review of a transcript of the proceedings. The municipal judge shall direct that the transcript be prepared from the electronic recording …. The electronic recording and the transcript shall be transferred to the circuit court for review.

[4] WISCONSIN STAT. § 805.17(2) describes a trial to a circuit court without a jury, and the nature of review thereof. The statute requires, among other things, that "[t]he court shall either file its findings and conclusions prior to or concurrent with rendering judgment, state them orally on the record following the close of evidence or set them forth in an opinion or memorandum of decision filed by the court."

requirement that a transcript be prepared, as the proceeding before a circuit court is a 'do over'—a new trial—managed generally pursuant to WIS. STAT. § 345.30, *et seq.*, as a civil traffic forfeiture trial. As we noted in ***City of Middleton v. Hennen***, 206 Wis. 2d 347, 355, 557 N.W.2d 818 (Ct. App. 1996):

> [A] party appealing from an adverse municipal court judgment is given an opportunity to be heard in the circuit court in a most meaningful manner: by trying the case anew to either a judge or jury. If an appellant chooses the de novo option, any errors committed by the municipal court are completely vitiated. A party may also raise issues in the circuit court that he or she failed to raise in the prior proceeding, an opportunity not usually afforded appellants in this court.

Because Kleppek had no statutory right to a transcript of the municipal court proceedings for a new trial, we examine whether the trial court's conclusion that the lack of the transcript so diminished her ability to impeach witnesses at a circuit court trial that the lack of the transcript deprived her of a constitutionally protected right. We conclude it did not.

¶5 Case law consistently has held that the ultimate solution for appeal from a court of record, where all or part of the record is missing and cannot be reconstructed, is not dismissing the case, but ordering a new trial. ***State v. Raflik***, 2001 WI 129, ¶¶1, 57, 248 Wis. 2d 593, 636 N.W.2d 690; ***State v. Perry***, 136 Wis. 2d 92, 105, 401 N.W.2d 748 (1987). Appellate decisions discussing the absence of all or part of a trial court record generally involve review by a court of appeals of proceedings before a court of record. The appellate review is limited to the record made at trial. In that situation, we have acknowledged

> the absolute and constitutional necessity for providing a criminal defendant a transcript that will make possible a meaningful appeal…. An appellate court cannot function if it has no way to determine whether error has been committed. In most instances, a transcript is required for

> appellant's counsel to locate error and for an appellate court to verify or disprove it.… Moreover, whether error is prejudicial or harmless is usually determinable only in the context of the entire record.

Perry, 136 Wis. 2d at 105.

¶6 Where an appeal on the record is not possible because of an unavailable transcript (which cannot reasonably be reconstructed), the cases cited by Kleppek demonstrate that the long-established remedy is a new trial. *See, e.g.*, ***Pacific Nat'l Fire Ins. Co. v. Irmiger***, 254 Wis. 207, 213, 36 N.W.2d 89 (1949) (when court reporter died before preparing transcript, making appellate review of the record impossible, remedy is a new trial). Those cases all dealt with an appeal which was a review limited to the record below, not a completely new trial, as she has elected under WIS. STAT. § 800.14(4). *See, e.g.*, ***Raflik***, 248 Wis. 2d 593, ¶57 (reconstruction of a telephonic record of search warrant application was sufficient to avoid suppression of the evidence seized). ***Hardy v. United States***, 375 U.S. 277 (1964), demonstrates, by the quote referenced by Kleppek, that a transcript is needed for appellate advocacy after a criminal trial in a court of record. *See* ***id.*** at 288 (Goldberg, J., concurring). Kleppek's appeal of the municipal ordinance violation is not an appeal of a criminal trial, and does not involve appellate advocacy based on the review of a trial court record. Rather, Kleppek's appeal involves trial advocacy in a court of record.

¶7 However, Kleppek is not appealing from a court of record to an appellate court. Although WIS. STAT. § 800.13(1) requires municipal courts to make audio recordings of their proceedings, § 800.13(2) specifically states that "a municipal court is not a court of record." In the legislative scheme created by WIS. STAT. § 800.14(4) & (5) for review of municipal court decisions, review is to the circuit court, which in Wisconsin is the trial level court of record. Further, the

party appealing from an adverse municipal court judgment is provided with a "most meaningful" opportunity to be heard in the circuit court—"by trying the case anew to either a judge or jury." *See* ***City of Middleton***, 206 Wis. 2d at 355.

¶8 Kleppek does not argue that her inability to obtain testimony for impeachment purposes from the witnesses against her *before* the municipal court trial deprived her of fundamental fairness in the municipal court proceeding. The question then is how the circuit court trial offends the constitution because, as at the municipal court, she does not have prior testimony for impeachment purposes. We perceive no constitutional difference between the two proceedings, and none has been suggested.[5] Essentially, what Kleppek argues is that she has lost the equivalent of a discovery deposition in a civil proceeding because of the malfunction of the recording equipment. However, she cites no authority from Wisconsin or elsewhere holding that a constitutional right is violated by the lack of discovery in ordinance violation proceedings, or in a new trial appeal from the ordinance violation.

¶9 Because a person electing review of a municipal ordinance violation by a new trial at the circuit court has no statutory right to a transcript of the municipal court proceeding, and because we find no constitutional requirement that a transcript of municipal court proceeding be provided for use at the new trial, we reverse and remand for trial in the circuit court pursuant to WIS. STAT. § 800.14(4).

[5] Kleppek does not challenge the process of audio recording, with subsequent preparation of a transcript. Indeed, the transcript of the hearing before the circuit court which resulted in this appeal was electronically recorded and the transcript prepared thereafter.

By the Court.—Order reversed and cause remanded.

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