COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

Nos. 00-3213-FT
00-3214-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

COUNTY OF PRICE,

PLAINTIFF-RESPONDENT,

V.

JEREMY L. KRAUS,

DEFENDANT-APPELLANT.

APPEALS from a judgment of the circuit court for Price County: DOUGLAS T. FOX, Judge. *Reversed and cause remanded with directions.*

¶1 CANE, C.J.[1] Jeremy L. Kraus appeals from a judgment finding him guilty of operating a motor vehicle while intoxicated, first offense, contrary to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g). This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

WIS. STAT. § 346.63(1)(a), and operating a motor vehicle with a prohibited alcohol concentration, PAC, first offense, contrary to WIS. STAT. § 346.63(1)(b). The single issue on appeal is whether the trial court erred when it failed to advise Kraus of his right to a continuance at his initial appearance. Because the legislature has set forth a specific mandated procedure for traffic matters requiring the court to ascertain whether the defendant wishes to plead or wishes a continuance, this court has no alternative but to reverse the judgment and remand the matter for further proceedings.

¶2 The relevant underlying facts are undisputed. Kraus was arrested on May 28, 2000, for OWI and PAC. Kraus then appeared in person at his scheduled initial appearance on June 27 and pled not guilty to both charges. At the initial appearance, the court did not individually inform Kraus of either his right to a continuance or his right to a jury trial. However, the court did make a general announcement at the beginning of the initial appearances for the day that those persons appearing were entitled to a jury trial if they posted the required fee within ten days of entering their plea. Absent from this announcement was any reference to the fact that those appearing were entitled to a continuance of their initial appearance.

¶3 Kraus pled not guilty to both charges, and the trial was to be scheduled later. At the initial hearing, Kraus neither asked for a continuance nor filed a jury tender with the court. After retaining private counsel, however, Kraus filed a motion on July 12 to enlarge the time to post a jury tender because of the court's failure to specifically advise him of rights to a continuance and a jury trial. The trial court denied the motion, concluding that it had advised him of his right to a jury trial and the time to post the jury fee. It also concluded that Kraus was not prejudiced at the initial appearance because of its failure to advise him of his right

to a continuance. The matter later proceeded to a bench trial where the court found Kraus guilty of both OWI and PAC.

¶4 Relying on ***City of Madison v. Donohoo***, 118 Wis. 2d 646, 348 N.W.2d 170 (1984), Kraus contends the courts are required to orally inform each defendant at the initial appearance of both the right to a jury trial and the right to one continuance of the initial appearance. He also cites WIS. STAT. § 345.34(1), which provides in relevant part that "the defendant shall be informed that he or she is entitled to a jury trial and then asked whether he or she wishes presently to plead, or whether he or she wishes a continuance."

¶5 Here, it is undisputed that the court did not ask Kraus whether he wished a continuance. Kraus argues this was error and that the trial court therefore should have permitted him additional time to tender the jury fee, thereby preserving his right to a jury trial.

¶6 In response, Price County reasons that a continuance is for the purpose of allowing a defendant to obtain counsel and decide whether to request a jury trial. The County contends that this court should apply the harmless error rule because Kraus could have timely requested a jury trial when he was represented by counsel. This court is not persuaded that it should apply the harmless error rule under these circumstances.

¶7 In ***Donohoo***, our supreme court reviewed the interplay of five statutory provisions, WIS. STAT. §§ 345.40, 345.34(1), 345.35, 345.36 and 345.43(1), which set forth the procedures for entering a plea in a traffic case and demanding a jury trial. It held:

> These statutes clearly set out a specific procedure for pleadings, initial appearance, entering a plea, trial, and

> demand for a jury trial. At the initial appearance the court informs the defendant that the defendant has a right to a jury trial. Sec. 345.34(1). Only after the defendant is so informed does the court inquire whether the defendant "wishes presently to plead" or "wishes a continuance." Sec. 345.34(1). A defendant who wishes to plead may plead guilty, not guilty, or no contest. Sec. 345.34(1). If the defendant requests a continuance the court must grant it. Sec. 345.34(1). This provision for a continuance is clearly designed to give the defendant a chance at "more time" before he is called upon to plead so that the defendant may obtain legal counsel or otherwise prepare for the arraignment without prejudice to the right to demand a jury trial.

Id. at 652-53.

¶8 ***Donohoo*** recognized that the legislative decision to grant the defendant one continuance before requiring the defendant to plead may cause delay. ***Id.*** at 653. It explained that the

> legislature has balanced the public's interest in speedy trials and in safeguarding a defendant's right to counsel and to a jury trial and has said that at the initial appearance the defendant is entitled as a matter of right to one continuance before entering a plea and that the defendant must be informed of that right by the court.

Id. Our supreme court concluded that the trial court erred by not informing Donohoo of his right to a continuance and, instead, requiring him to plead at the initial appearance. Accordingly, the court reversed the judgment and remanded the matter to the trial court with directions to grant Donohoo a jury trial.

¶9 Similarly, by failing to advise Kraus of his right to have a continuance of the initial appearance, the trial court in effect required him to plead at the initial appearance, thereby immediately starting the running of the ten-day

period for requesting a jury trial. That practice was not permitted in ***Donohoo*** and under the same rationale cannot be permitted here.[2]

¶10 Therefore, this court reverses the judgment, and the matter is remanded to the circuit court to grant Kraus a jury trial provided the jury fee is tendered within a ten-day notice from the circuit court. If the jury fee is not tendered within the ten-day period, the circuit court may reinstate its judgment previously determined.

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

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

[2] This court need not decide whether the general announcement to all the defendants making their initial appearance was insufficient because in any event, as in ***City of Madison v. Donohoo***, 118 Wis. 2d 646, 348 N.W.2d 170 (1984), the defendants who were present for the general announcement were never advised of their right to a continuance. However, this court notes that contrary to Kraus's argument, the ***Donohoo*** court never held that a general announcement to all the defendants making their initial appearance was not permitted. It was the content of that general announcement that failed to comply with the statutes.