

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 20, 2012

Diane M. Fremgen
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 No. 2011AP1432

Cir. Ct. No. 2011CV1404

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CITY OF MADISON,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY S. SMITH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
STEPHEN E. EHLKE, Judge. *Reversed.*

¶1 HIGGINBOTHAM, J.¹ Timothy S. Smith, pro se, appeals an order dismissing an appeal of a municipal court decision pursuant to WIS. STAT.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

§ 805.03 for failure to timely prosecute and failure to comply with the requirements for appealing a municipal court decision as set forth in WIS. STAT. § 800.14. For the reasons we explain below, we conclude that the circuit court erroneously exercised its discretion in dismissing the appeal. Accordingly, we reverse and remand to the circuit court for further proceedings.

BACKGROUND

¶2 On July 22, 2010, the Madison Municipal Court found Smith guilty of speeding and imposed a fine of \$114 or eleven hours of community service. It is undisputed that Smith submitted a timely notice of appeal. The notice of appeal listed three different types of appeal from which Smith could choose. Smith chose the first option, which provides, in relevant part:

An appeal to circuit court without a new trial. The circuit court judge will review a transcript of the tape recorded trial and exhibits. Fees are payable as follows: \$10 to Madison Municipal Court and \$129.50 to Dane County Circuit Court.

¶3 Smith also submitted an affidavit to the municipal court, in which he stated that he had been unemployed since November 2008 and that he had “no money to defray the costs of the underlying appeal or transcript costs.” The municipal court sent the municipal court record to the circuit court, with a form indicating that Smith requested a waiver of fees. In December 2010, Smith contacted the circuit court to inquire about the status of his appeal. Smith was informed that the circuit court never received a completed waiver of fee form and therefore did not accept his appeal. Smith subsequently petitioned the circuit court for waiver of the appeal fee. The court granted the petition.

¶4 In April 2011, the court held a status conference. At the status conference, the City moved to dismiss pursuant to WIS. STAT. § 805.03 on the grounds that Smith failed to prosecute in a timely manner and failed to comply with the procedural requirements for appealing the municipal court decision under WIS. STAT. § 800.14. The court granted the City’s motion and dismissed the appeal with prejudice. Smith appeals.

DISCUSSION

¶5 The issue before us is whether the circuit court erred in granting the City’s motion to dismiss pursuant to WIS. STAT. § 805.03.² A court has discretion to dismiss an action under WIS. STAT. § 805.03 for failure to prosecute or failure to comply with procedural statutes. *Hefty v. Strickhouser*, 2008 WI 96, ¶¶72-74, 312 Wis. 2d 530, 752 N.W.2d 820. We review a court’s decision to dismiss a case with prejudice for an erroneous exercise of discretion. *Haselow v. Gauthier*, 212 Wis. 2d 580, 590-91, 569 N.W.2d 97 (Ct. App. 1997). We affirm the court’s exercise of discretion “unless it fails to properly apply the law or makes an unreasonable determination under the existing facts and circumstances.” *Hudson Diesel, Inc. v. Kenall*, 194 Wis. 2d 531, 542, 535 N.W.2d 65 (Ct. App. 1995).

¶6 Based on our reading of Smith’s brief-in-chief, we understand him to be arguing that the court erroneously exercised its discretion in dismissing the appeal because Smith did not receive notice of the City’s motion to dismiss. The City responds that it was not required to provide Smith with notice of the motion

² Smith raises other arguments on appeal, several of which relate to the municipal court’s underlying decision. We do not address Smith’s other arguments because they are not properly before this court.

to dismiss because, pursuant to WIS. STAT. § 802.01(2)(a), a motion need not be made in writing when made during a hearing.

¶7 Whether a court may dismiss a case for failure to prosecute in the absence of notice was addressed in *Neylan v. Vorwald*, 124 Wis. 2d 85, 90, 368 N.W.2d 648 (1985). The court determined that, because WIS. STAT. § 805.03 by its language does not provide constructive notice as to what is expected of litigants to avoid dismissal for failure to timely prosecute, actual notice to the parties is required. *Id.* at 90-93; *see also Theis v. Short*, 2010 WI App 108, ¶23, 328 Wis. 2d 162, 789 N.W.2d 585 (concluding that where a party had “no actual or constructive notice that [the party’s] conduct might result in dismissal before [the opposing party] filed his motion to dismiss for failure to prosecute, dismissal violated due process requirements”).

¶8 Here, the City does not dispute that Smith was not provided actual notice of the City’s motion to dismiss for failure to prosecute prior to the status conference. Because Smith was not provided with actual notice that his conduct might result in dismissal, we conclude that the court erroneously exercised its discretion in dismissing the appeal for failure to prosecute.

¶9 While a court may not dismiss an action for failure to prosecute without the parties having actual notice, a court may dismiss an action for failure to comply with procedural statutes without the parties having actual notice. *See Neylan*, 124 Wis. 2d at 93. This is because the conduct that violates a statute is “precise and ascertainable.” *Id.* Thus, WIS. STAT. § 805.03 provides constructive notice to litigants of the actions a court may take for failure to comply with procedural statutes, and therefore actual notice is not required.

¶10 Accordingly, the question turns to whether the court erred in dismissing Smith's appeal on the ground that he violated the procedures for appealing a municipal court decision as set forth in WIS. STAT. § 800.14. Pursuant to WIS. STAT. § 800.14(1), an appellant must appeal a municipal court decision within twenty days of the decision "by giving the municipal judge and other party written notice of appeal." There is no dispute that Smith complied with this requirement. Additionally, WIS. STAT. § 800.14(5) provides, in relevant part:

An appellant shall, within 20 days after notice of appeal, submit payment of the estimated cost of the transcript, as determined by the municipal court, but shall be responsible for the actual cost of preparing the transcript. A defendant claiming an inability to pay with regard to the bond or the transcript fee may petition the municipal court for a waiver. A defendant claiming an inability to pay with regard to the appeal fee or jury fee may petition the circuit court for a waiver.

¶11 Smith appears to contend that he complied with WIS. STAT. § 800.14(5) by submitting an affidavit, seeking a waiver of the appeal and transcript fees. Smith acknowledges that he did not petition the circuit court for a waiver of the appeal fee until after he contacted the court in December 2010. However, Smith points out, the court granted his petition.

¶12 We conclude that the circuit court erroneously exercised its discretion because it improperly applied the law when it determined that Smith failed to comply with WIS. STAT. § 800.14. Under WIS. STAT. § 800.14(5), Smith was required, within twenty days after notice of appeal, to pay the estimated cost of the transcript, or, alternatively, petition the municipal court for a waiver. Smith satisfied this requirement by petitioning the municipal court for a waiver of the

transcript fee within the statutory time limit.³ In addition, Smith was required to pay the appeal fee or petition the circuit court for waiver of the appeal fee. Although Smith did not at first comply with this requirement, he ultimately submitted a waiver of the appeal fee, which the circuit court granted. Accordingly, there are no requirements under WIS. STAT. § 800.14 that Smith failed to meet. Therefore, we conclude that the circuit court erroneously exercised its discretion in dismissing the appeal on the ground that Smith failed to comply with WIS. STAT. § 800.14.

¶13 Because the circuit court erroneously exercised its discretion in dismissing Smith’s appeal, we reverse and remand this case to the circuit court for further proceedings.

By the Court.—Order reversed.

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

³ We note that the City is correct that the circuit court properly denied Smith’s request for waiver of the \$10 transcript fee because the court lacked the statutory authority to grant the request. However, the City is incorrect that Smith’s correspondence to this court during the pendency of this appeal, stating that he paid the \$10 transcript fee to the municipal court, demonstrates that he “in fact, had the ability to gather the necessary \$10 [transcript fee].” We cannot conclude that the fact that Smith appears to have paid the transcript fee now demonstrates that Smith was able to pay the transcript fee at the time he submitted his affidavit.

