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DISTRICT IV

April 3, 2025

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You are hereby notified that the Court has entered the following opinion and order:

2023AP669

County of Wood v. Dominic Gregory Lewis (L.C. # 2021TR2448)

Before Taylor, J.¹

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Based on my review of the briefs and record, I conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. Dominic Gregory Lewis appeals a circuit court judgment convicting him of operating a motor vehicle while under the influence of an intoxicant ("OWI") and the denial of his pre-trial motions for a directed verdict and for

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2023-24). All references to the Wisconsin Statutes are to the 2023-24 version unless otherwise noted.

reconsideration. On appeal, Lewis argues that the court improperly denied his motions for a directed verdict and for reconsideration concerning the OWI citation. He also argues that the court deprived him of his due process rights at the trial when it prevented him from presenting evidence outside of the parties' written stipulation of facts and prevented him from making arguments for a finding of not guilty. I affirm the denial of Lewis's motions concerning a directed verdict and for reconsideration but reverse the judgment of conviction and remand for additional proceedings consistent with this opinion.

In October 2021, Lewis was issued a citation for OWI as a first offense in violation of WIS. STAT. § 346.63(1)(a), following a single-vehicle accident that occurred in August 2021.² By letter from Lewis's defense counsel, Lewis entered a not guilty plea and demanded a jury trial.

The uncontested, pertinent facts concerning Lewis's appellate arguments are as follows. Lewis challenged the statutory six-month administrative suspension of his operating privileges, which occurred automatically after a blood test result revealed a prohibited alcohol concentration. *See* WIS. STAT. § 343.305(7). After a Department of Transportation ("DOT") review hearing that Lewis requested, the hearing examiner continued the administrative suspension of Lewis's operating privileges. *See* § 343.305(8)(b)6. Lewis filed with the circuit court, the Honorable Todd P. Wolf presiding (the "original circuit court"), a request for judicial review of the DOT hearing examiner's administrative suspension decision. *See*

² Lewis was also issued a citation for allegedly operating a motor vehicle with a Prohibited Alcohol Concentration as a first offense in violation of WIS. STAT. § 346.63(1)(b) following the August 2021 accident. This citation was ultimately dismissed by the circuit court pursuant to the parties' stipulation and is not at issue in this appeal. I will not reference this citation further.

§ 343.305(8)(c)1. A judicial review of an administrative suspension of operating privileges “shall be conducted at the time of the trial of the underlying offense under [WIS. STAT. §] 346.63.” Sec. 343.305(8)(c)1. If the DOT is not notified within 60 days of the request for the judicial review hearing of an order from the circuit court continuing the suspension, the DOT must vacate the administrative suspension. Sec. 343.305(8)(c)2.

Following Lewis’s request for a judicial review hearing, the original circuit court issued separate notices to the parties for an “initial appearance” and for a “hearing” scheduled for January 21, 2022.

At the start of the January 21, 2022 circuit court proceedings, Lewis requested a continuance of the initial appearance, alerted the original circuit court that he had filed a written notice of substitution pursuant to WIS. STAT. § 345.315(1) and (1m), and requested that the court grant the substitution request. In the event that the court denied the continuance and substitution requests, Lewis stated that he would waive the jury trial request and instead proceed with a court trial. In prior correspondence from defense counsel and as represented by the County in the proceedings, neither party was prepared to proceed to a jury trial on the date of the judicial review hearing.

The original circuit court did not address the requests for a continuance or for judicial substitution before proceeding with the judicial review hearing, in which the County indicated that it had no evidence to present. The court stayed the administrative suspension of Lewis’s operating privileges. The court then held the initial appearance on the OWI offense, entered Lewis’s not guilty plea, and signed the order for judicial substitution. The case was reassigned to circuit court judge, the Honorable Nicholas J. Brazeau, Jr. (the “trial court”).

Approximately five weeks later, Lewis filed a motion before the trial court requesting a directed verdict on the OWI citation. Lewis argued that, because the judicial review hearing must occur at the time of the trial of the underlying offense and because the County failed to present any evidence at the judicial review hearing, the County had failed to present any evidence at trial that Lewis was guilty of OWI, and he was therefore entitled to a verdict of not guilty and a judgment of acquittal.

In a written decision, the trial court denied the motion. The court concluded that, because of the pending judicial substitution motion at the time of the judicial review hearing, the original circuit court could not conduct further proceedings except as specifically set forth in the applicable judicial substitution statute. The court also orally denied Lewis's motion for reconsideration.

On April 19, 2023, the trial court held the trial on Lewis's OWI charge. Based on certain facts to which the parties had stipulated prior to trial, the court found Lewis guilty of OWI. Lewis objected to the court's finding of guilt without providing Lewis an opportunity to cross-examine the arresting officer, or present arguments for a not guilty finding. The court overruled Lewis's objections.

On appeal, Lewis renews his argument that the trial court erred in denying his motions for a directed verdict and for reconsideration. Lewis also argues that the court violated his due process rights at the trial by preventing Lewis from cross-examining the arresting officer, and preventing him from presenting arguments for a not guilty determination.

A motion for a directed verdict challenges the sufficiency of the evidence presented at trial. WIS. STAT. § 805.14(4). When reviewing the denial of a motion for a directed verdict, the

standard of review requires this court to consider whether, taking into account “all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion was made, there is any credible evidence to sustain a finding in favor of that party.” *Re/Max Realty 100 v. Basso*, 2003 WI App 146, ¶7, 266 Wis. 2d 224, 667 N.W.2d 857. This court affirms a circuit court’s decision on a motion for a directed verdict unless the decision was “clearly wrong.” *State v. Leach*, 124 Wis. 2d 648, 665, 370 N.W.2d 240 (1985). “‘A circuit court’s evidentiary determination is clearly wrong when there is any credible evidence to support the position of the non-moving party.’” *Emer’s Camper Corral, LLC v. Alderman*, 2020 WI 46, ¶15, 391 Wis. 2d 674, 943 N.W.2d 513 (citation omitted).

Here, Lewis has not demonstrated that the trial court’s decisions denying the directed verdict and the reconsideration motions were clearly wrong. As stated, the court denied Lewis’s motion for a directed verdict because a written request for judicial substitution was pending before the original circuit court prior to the judicial review hearing, which Lewis does not dispute or discuss in this appeal. Lewis stated in his written request for judicial substitution and orally to the original court prior to the judicial review hearing that he had filed a proper and timely written request for judicial substitution. As a result, Lewis asserted that the original court lacked jurisdiction to conduct the judicial review hearing. Following the judicial review hearing, the original court approved the judicial substitution request, finding that the substitution request was proper and timely. When a written request for judicial substitution is pending in a traffic case, the judge against whom the request is filed remains statutorily authorized to set bail, to take a plea, and to consider whether the substitution request is timely and in proper form. *See* WIS. STAT. § 345.315(1) (“The judge against whom a [judicial substitution] request has been filed may set initial bail and accept a plea.”); *see also* § 345.315(1m) (“When the clerk of court

receives a request for substitution, the clerk shall immediately contact the judge whose substitution has been requested for a determination of whether the request was made timely and in proper form. If the request is found to be timely and in proper form, the judge named in the request has no further jurisdiction.”). Here, once the request for judicial substitution was filed, the original court lacked competency to act on matters other than setting bail, taking a plea and considering whether the request for judicial substitution was proper and timely. *See City of La Crosse v. Jiracek Cos.*, 108 Wis. 2d 684, 697, 324 N.W.2d 440 (Ct. App. 1982) (“[T]he [circuit court] was not competent to proceed with the case after substitution was requested, except for the limited purposes specified in connection with the request.”). Following the judicial review hearing, the original court determined that the judicial substitution request was proper and timely and signed the substitution order. Because the original court lacked competency to conduct the judicial review hearing or a trial, I reject Lewis’s claim that he is entitled to a directed verdict of not guilty and a judgment of acquittal. Accordingly, I affirm the trial court’s denial of Lewis’s motion for a directed verdict on the OWI offense and his motion for reconsideration. Because the original court lacked competency to conduct a judicial review hearing, I vacate that court’s order following the judicial review hearing that stayed the suspension of Lewis’s operating privileges.³

³ I note that, had the circuit court not conducted the judicial review hearing, the DOT would have been statutorily required to vacate the operating privileges suspension shortly thereafter because no judicial review hearing was timely held. *See* WIS. STAT. § 343.305(8)(c)2. (“The department shall vacate the administrative suspension ... unless, within 60 days of the date of the request for judicial review of the administrative hearing decision, the department has been notified of the result of the judicial review or of an order of the court entering a stay of the hearing examiner’s order continuing the suspension.”).

I turn now to Lewis's second claim that the trial court violated his Fourteenth Amendment due process rights to present a defense at the April 2023 trial. Lewis requests a remand to the trial court in order to allow him to present evidence and make arguments of nonguilt that he alleges he was precluded from doing.

Prior to the trial, the parties filed a written, signed stipulation with the trial court. The stipulation set forth a series of agreed-upon facts, including in part: that a vehicle registered to Lewis was found abandoned in a creek; that Lewis was shortly thereafter located at his residence; that Lewis indicated to the responding officer that he had consumed alcohol and made other inculpatory statements; that in administering field sobriety tests, the officer observed signs of intoxication; that, upon his arrest, Lewis voluntarily submitted to a chemical test of his blood; and that Lewis's blood alcohol concentration was 0.149g/100mL at the last time of operating the vehicle. The parties further agreed that Lewis would withdraw his request for a jury trial, but he would continue to assert his not guilty plea and argue at trial that the County had not met its burden to prove his guilt of OWI by clear and convincing evidence. In the event of a guilty determination, the parties jointly recommended that the court impose various penalties.

At the beginning of the court trial and at the parties' request, the trial court admitted the stipulation into evidence and inquired as to the parties' plan for the trial. The County indicated that the parties intended to call the arresting officer as a witness. The court questioned the necessity of that testimony, stating "[e]verything is in this stipulation. I can make my findings right now of guilt, and I will do that. I find Mr. Lewis guilty of OWI." Lewis interjected that the parties' plan was to elicit some brief testimony from the arresting officer with the defense's intention through the testimony and argument to advocate for a not guilty finding. The court responded that, based on the stipulated facts, additional testimony would be superfluous. The

court proceeded to find Lewis guilty of OWI, entered a judgment of conviction, and imposed the parties' jointly recommended penalties.

Both the Wisconsin Constitution under Article I, Section 8, and the United States Constitution under the Fourteenth Amendment guarantee civil litigants the right to fair trials. *Central Auto Co. v. Reichert*, 87 Wis. 2d 9, 16, 273 N.W.2d 360 (Ct. App. 1978); *see also State v. Roberson*, 2019 WI 102, ¶44, 389 Wis. 2d 190, 935 N.W.2d 813. The right to a fair trial encompasses several foundational rights, including an opportunity to present one's case, an opportunity to defend oneself by confronting adverse witnesses, and the right to present arguments and evidence orally. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970).

Lewis alleges on appeal that he was denied a fair trial because he was prevented from introducing additional evidence and presenting arguments for a not guilty determination. Specifically, Lewis asserts that he intended at the trial to establish through the cross-examination of the arresting officer and to argue to the trial court that the County failed to prove by clear and convincing evidence that Lewis's "ability to operate a vehicle was impaired because of consumption of an alcoholic beverage." *See* WIS JI—CRIMINAL 2668. Although the fact-finder—here, the trial court—can find that Lewis was under the influence of an intoxicant from solely Lewis's blood alcohol concentration at the time that he operated the vehicle, to which Lewis stipulated exceeded the legal limit, the fact-finder is not required to do so and must make this determination in consideration of all of the evidence in its entirety as presented at trial. *State v. Vick*, 104 Wis. 2d 678, 695-96, 312 N.W.2d 489 (1981); *see also* WIS JI—CRIMINAL 2668 (the fact-finder is "to decide this question on the basis of all the evidence in th[e] case"). Our supreme court has referred to this type of presumption as a "permissive presumption," which is

left to the fact-finder to apply or not apply based on all of the facts before it. *Vick*, 104 Wis. 2d at 688.

Here, the trial court stated that any additional evidence would be superfluous to the stipulated facts introduced. In concluding that the stipulated facts established Lewis's guilt of OWI by clear and convincing evidence, however, the court denied Lewis an opportunity to cross-examine the arresting officer and to argue for a not guilty determination, which are accepted constitutional standards to ensure that the due process rights of civil litigants are protected.

The County's position on appeal is that any trial testimony presented by the arresting officer would have supported solely a verdict of guilt.⁴ The County may have intended to argue that any constitutional error was harmless, given the scope of the parties' stipulated facts. But the County neither develops an argument on this point nor cites supporting authority for this argument. The County's response also begs the question presented on appeal concerning whether Lewis should have been allowed at trial to cross-examine the arresting officer and present arguments for a not guilty determination. The County offers no persuasive argument to refute Lewis's allegations that he was denied the opportunity to exercise these rights at trial so that the trial court could consider all of the facts presented at trial in deciding whether to apply, or not apply, the permissive presumption that Lewis's blood alcohol level establishes that he was

⁴ The County's brief does not comply with WIS. STAT. RULE 809.19(8)(bm), which addresses the pagination of appellate briefs. *See* RULE 809.19(8)(bm) (providing that, when paginating briefs, parties should use "Arabic numerals with sequential numbering starting at '1' on the cover"). This rule has recently been amended, *see* S. CT. ORDER 20-07, 2021 WI 37, 397 Wis. 2d xiii (eff. July 1, 2021), and the reason for the amendment is that briefs are now electronically filed in PDF format, and are electronically stamped with page numbers when they are accepted for efilng. As our supreme court explained when it amended the rule, the new pagination requirements ensure that the numbers on each page of a brief "will match ... the page header applied by the eFiling system, avoiding the confusion of having two different page numbers" on every page of a brief. S. CT. ORDER 20-07 cmt. at xl.

guilty of OWI. I therefore reverse the judgment of conviction and remand the case to the court for further proceedings consistent with this opinion.

In sum, I conclude that, because of Lewis's motion for judicial substitution, the original circuit court lacked competency to conduct a judicial review hearing. For this reason, I affirm the trial court's denial of Lewis's directed verdict and reconsideration motions and vacate the order issued by the original circuit court staying the suspension of Lewis's operating privileges. Additionally, I conclude that Lewis had due process rights at trial to cross-examine the arresting officer and to present arguments in support of a not guilty finding. Because Lewis was prevented from exercising these rights, I reverse Lewis's judgment of conviction for OWI and remand for further proceedings consistent with this opinion.

IT IS ORDERED that the judgment of conviction is summarily reversed and the cause is remanded for further proceedings pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals