COURT OF APPEALS
DECISION
DATED AND RELEASED

April 22, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 97-0544-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SALLY ANN MINNIECHESKE,

DEFENDANT-PETITIONER.

APPEAL from a judgment of the circuit court for Shawano County: EARL W. SCHMIDT, Judge. *Reversed and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. This appeal follows Sally Minniescheske's conviction for disorderly conduct, resisting, and fleeing an officer. Minniescheske filed a petition for leave to appeal the denial of her release on bail pending appeal of her conviction for fleeing an officer.[1] Because the reasons for

[1] We granted leave to appeal the judgment denying bail pending appeal.

the trial court's decision are not supported by the evidence and the decision reflects that discretion was not exercised, we reverse the judgment and remand for further proceedings.

After a jury returned a verdict of guilty, the trial court ordered a presentence investigation and sentenced Minniescheske to jail for thirty days for disorderly conduct, sixty days for resisting and six months for fleeing, to be served consecutively. To put the issue raised on appeal in context, we first review the background leading to the charges.

Minniescheske is a sixty-two-year-old woman with health problems. The charges arose out of a confrontation between Minniescheske and the chief of police for the Village of Tigerton, Charles Gehrman. At trial, Gehrman testified to the following facts, which were in dispute. Some of Minniescheske's cattle were found grazing on village property bordering the village limits. Gehrman requested the village clerk, Tammie Jo Berg, to call the Minniescheske family and request that they remove the cattle. Berg made the call and spoke to Minniescheske and her husband, who both disputed that the land belonged to the village.

Although not in uniform because of the nature of his work that day, Gehrman was in a fully marked squad car at the site of the property at the request of surveyors, who asked for security while working on the property. Gehrman testified he has known the Minniescheskes his whole life. He testified that Minniescheske pulled up in her car, and began screaming at him that he was trespassing. After the yelling continued for a number of minutes, Gehrman reached into Minniecheske's car, turned off the ignition and told her she was under arrest. Gehrman testified that Minniescheske began to back up, bumping him with

her open car door, and drove off. Gehrman pursued her in his squad car with red lights and siren activated. He testified that she ignored him and he eventually pulled in front of her, stopped her car and informed her once again she was under arrest. He testified that she refused to exit her car, or put down her purse, and he placed handcuffs on her wrists. Gehrman testified that although he placed the handcuffs on normally, they caused her wrist to bleed.

Minniescheske filed a motion for release on bail pending appeal. At the sentencing hearing on January 28, 1997, the trial court granted bail with respect to the disorderly and resisting counts, but denied it as to the fleeing conviction. The court's reasons were stated as follows:

> [S]he is eligible for bond on misdemeanors, discretionary on the felony. Because of her character here, the court is not going to grant the motion on the relief here with regard to the felony. The Court has absolutely no idea what Ms. Minniescheske is capable of in terms of violating the laws of the State of Wisconsin, to what end she might go. All her history would indicate that she will be opposed to the implication or imposition of any law on her for the rest of her life, and I think for that reason the Court cannot entertain a stay with regard to the felony.

The State first objects to this court's jurisdiction over the appeal, contending that there is no written order denying bail. It argues that the minimal statement on the judgment of conviction cannot be construed as a written order denying bail from which an appeal can be taken. We reject the State's argument.

An order by a trial court denying a motion for bail is not appealable as of right within the meaning of § 808.03(1), STATS., because it is not a final order. "It does not determine the action." ***State v. Whitty***, 86 Wis.2d 380, 386, 272 N.W.2d 842, 845 (1978). The procedure to be followed to appeal the order

denying bail is to file a petition for review pursuant to § 809.50, STATS. *See* ***id.*** at 387-88, 272 N.W.2d at 845; § 809.31(5), STATS.

In any event, to be appealable either by right or by permission under § 809.50, STATS., the order or judgment must be in writing and entered. *See* ***Ramsthal Advertising Agency v. Energy Miser, Inc.***, 90 Wis.2d 74, 75, 279 N.W.2d 491, 492 (Ct. App. 1979). An order is entered when it is filed with the clerk's office. Section 807.11(2), STATS. Although oral rulings may be effective between the parties, ***Barbian v. Linder Bros. Trucking Co***., 106 Wis.2d 291, 298-99, 316 N.W.2d 371, 375 (1982), oral rulings are not appealable. ***Helmrick v. Helmrick***, 95 Wis. 2d 554, 556, 291 N.W.2d 582, 583 (Ct. App. 1980). "[A]n appellate court has no jurisdiction to review the denial of a postconviction motion if there is no final written order denying that motion on file in the office of the clerk of court." ***State v. Malone,*** 136 Wis.2d 250, 252, 401 N.W.2d 563, 564 (1987).

Here, after orally delivering its opinion from the bench, the trial court entered a written judgment dated February 7, 1997, bearing the notations as to each count:

> Ct. 1: Stayed pending appeal, $250 cash bond set, only applicable at the end of the 6 months jail on the felony conviction. …
> Ct. 2.: Consecutive to Count 1. Stayed pending appeal, $250 cash bond set, only applicable at the end of the 6 months jail on the felony conviction. …
> Ct. 3: Consecutive to Counts 1 & 2. … THIS COUNT NOT STAYED

Because the trial court's oral decision was reduced to writing in the form of a written notation on the judgment and was entered, we conclude that the order is appealable pursuant to § 809.50, STATS. The State argues: "Ms.

Minniescheske's judgment of conviction cannot serve both as the documentary basis for the present permissive appeal and, at some later time, the basis for an appeal of right." The State suggests that we dismiss the present appeal and remand for "an appropriate order in the trial court" and order an expedited filing of a new petition for leave to appeal. We decline the State's suggestion to require the trial court to file its order on a separate piece of paper. Because the order denying bail is in written form and entered, it is sufficient for the purposes of filing a petition for leave to appeal under § 809.50.

Next, the State alternatively argues that the trial court properly exercised its discretion by denying Minniescheske release on bail pending appeal. We disagree. A defendant convicted of a felony who is seeking relief from a sentence pending the determination of an appeal may file a motion with the trial court seeking relief. Section 809.31, STATS. "Release may be granted if the court finds that:"

> (a) There is no substantial risk the appellant will not appear to answer the judgment following the conclusion of postconviction proceedings;
>
> (b) The defendant is not likely to commit a serious crime, intimidate witnesses, or otherwise interfere with the administration of justice;
>
> (c) The defendant will promptly prosecute postconviction proceedings; and
>
> (d) The postconviction proceedings are not taken for purposes of delay.

Section 809.31(3), STATS. The court "shall" also consider the nature of the crime, the length of the sentence, and other factors relevant to pretrial release. Section 809.31(4), STATS.

The motion for release on bail pending appeal is addressed to trial court discretion. ***State v. Salmon***, 163 Wis.2d 369, 373, 471 N.W.2d 286, 287 (Ct. App. 1991). A discretionary determination, to be sustained, must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law. "Additionally, and most importantly, a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981). While we view a discretionary decision with great deference, the exercise of discretion is not the equivalent of unfettered decision-making, but the record must reflect the trial 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, 732 (1982).

Whether discretion was properly exercised is a question of law. ***Seep v. State Personnel Comm'n,*** 140 Wis.2d 32, 38, 409 N.W.2d 142, 144 (Ct. App. 1987). A appellate court first looks for evidence that discretion was in fact exercised. ***McCleary v. State,*** 49 Wis.2d 263, 277, 182 N.W.2d 512, 519 (1971). A decision which on its face shows no consideration of the proper factors is an erroneous exercise of discretion. ***Id.*** at 273, 182 N.W.2d at 517.

Here, a review of the trial court's decision fails to disclose a reasoned consideration of the applicable statutory factors, or any reference to statutory factors. The court referred only to Minnieschеske's character and that the "Court has absolutely no idea what Ms. Minnieschеske is capable of in terms of violating the laws of the State of Wisconsin, to what end she might go." The

court also noted that "[a]ll of her history" indicates that she will be opposed to imposition of "any law on her for the rest of her life."

The State argues that because Minniescheske supplied only portions of the transcript dealing with the motion to deny bail pending appeal, we must assume that the record supports every fact necessary to sustain the trial court's decision. *See* ***Suburban State Bank v. Squires,*** 145 Wis.2d 445, 451, 427 N.W.2d 393, 395 (Ct. App. 1988). We agree that it is the appellant's responsibility to provide a complete record and the lack of a complete record may greatly hamper our review. ***State v. Smith***, 55 Wis.2d 451, 459, 198 N.W.2d 588, 593 (1972). Any failure to incorporate evidentiary material in the record risks summary dismissal. ***Id.*** We urge Minniescheske, who is representing herself pro se, to obtain a complete record of trial court proceedings for appellate review.

Here, however, the State never exercised its right to supplement what it now complains is a defective record. Section 809.15(3), STATS. It never requested additional portions of the record be transcribed. Section 809.16(1), STATS. It fails to suggest what, if any, critical facts are missing. In view of the State's failure to object to the status of the record, and in view of the portions of the transcripts included in the record, we conclude that record is sufficiently complete to review the limited issue now before us.

The issue before us is whether the trial court reasonably exercised its discretion. The trial court made no specific factual findings and no reasoned consideration of the relevant statutory factors. In addition, the partial transcripts establish that Minniecheske is a sixty-two-year-old life-long resident of Shawano County with no prior criminal record. The State argues that her 1983 traffic citation for operating while intoxicated constitutes a prior criminal record. We

disagree. Minniescheske's first offense OWI fails to support the court's decision. There is no evidence to support the court's determination that Minniescheske is a lawless individual opposed to the imposition of "any law on her for the rest of her life."

Further, the State suggests no facts to support a determination that Minniescheske will not appear, commit a serious crime, interfere with the administration of justice, intimidate witnesses, not promptly prosecute the appeal or that the appeal is taken only for delay. The nature of the crime, the length of the sentence and Minniecheske's lack of a prior criminal record all point to a release on bond pending appeal. However, because the trial court's analysis is incomplete, and because we are prohibited from exercising the trial court's discretion, ***Wisconsin Ass'n of Food Dealers v. Madison***, 97 Wis.2d 426, 434-35, 293 N.W.2d 540, 545 (1980), we reverse and remand to the trial court for de novo consideration of Minniescheske's motion.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.