

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 21, 2005

Cornelia G. Clark
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. 2004AP348
STATE OF WISCONSIN**

Cir. Ct. No. 2001TR33673

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL V. HENDRICKS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
LOUIS R. BUTLER, Judge. *Affirmed.*

¶1 KESSLER, J.¹ On October 3, 2001, Michael V. Hendricks pled guilty and was convicted of operating while intoxicated, first offense, and operating after suspension, first offense. Since that time, Hendricks has filed tens

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

of *pro se* motions related to his case. In this, his second appeal, Hendricks appeals from: (1) an order denying his motion to reopen the judgment for operating while intoxicated, first offense; (2) an order denying his motion for relief from forfeitures due to indigency and dismissing other pending motions; and (3) an order denying his motion to stay an order committing him to the House of Correction, pending the outcome of this appeal.² This court rejects his arguments and affirms the orders.

BACKGROUND

¶2 On February 4, 2003, this court issued an opinion that addressed three trial court orders, including an order denying Hendricks' motion to reopen his operating while intoxicated case. *See State v. Hendricks*, Nos. 2002AP1153 and 2002AP1154, unpublished slip. op. (WI App Feb. 4, 2003). This court affirmed the orders, with one exception. This court explained:

With regard to his conviction for operating while intoxicated (Case No. 02-1153), Hendricks submits that he filed a motion to reopen the judgment on October 23, 2001 in this case, and the trial court refused to hear it. The County argues that Hendricks failed to file his motion timely and that he failed to present an argument as to what "mistake" he claims occurred when he pled guilty. His original motion to reopen bears a file stamp of the clerk of the Circuit Court Criminal Division of October 23, 2001, and an office of the District Attorney file stamp date of the

² Hendricks' supplemental notice of appeal specifically refers to an April 5, 2004, order denying his motion to stay the commitment order, but also alludes to an earlier decision denying Hendricks' pending motions, including his request for relief from the forfeitures based on indigency. It was this earlier order, dated February 18, 2004, that cleared the way for the commitment order to be entered, and Hendricks presents argument with respect to the February 18, 2004, order. This court concludes that Hendricks is appealing not only from the order denying his motion to stay the commitment order, but also from the underlying order denying his pending motions, including the motion to be relieved of his obligation to pay forfeitures due to indigency.

same date. Inasmuch as his motion was apparently never forwarded to the trial court (assuming through no fault of Hendricks), this court will remand this matter to the trial court to decide the motion *nunc pro tunc*, provided that Hendricks files an affidavit with the trial court verifying that he did not contribute to the trial court's failure to hear the motion; *e.g.*, that he did not withdraw the motion for the trial court's consideration.

Id. at ¶5.

¶3 On May 20, 2003, Hendricks filed an affidavit stating that he at no time contributed to the trial court's failure to hear his motion. A status conference on Hendricks' motion to reopen the October 3, 2001, judgment was scheduled for November 18, 2003.³ On October 13, 2003, Hendricks filed a motion seeking permission to attend the status conference by telephone so that he could avoid being arrested at that hearing pursuant to arrest warrants that Hendricks termed "unjustified." The trial court did not grant Hendricks' motion to appear by phone.

¶4 On November 18, 2003, Hendricks failed to appear, although his father attempted to appear on his behalf. The trial court reviewed Hendricks' May 20, 2003, affidavit concerning the trial court's failure to hear Hendricks' October 23, 2001, motion to reopen his operating while intoxicated judgment. The trial court then reviewed Hendricks' October 23, 2001, motion. The trial court denied the motion to reopen, concluding: "I don't see anything in this motion that would allege that the plea was not knowing[ly], intelligent[] and voluntary and that he was not apprised that his license was suspended.... I don't see a basis for allowing the matter to reopen[.]" The trial court indicated that it

³ Although entitled a "motion to reopen," it appears that it was actually a motion to withdraw his guilty plea, based on what he claims was erroneous advice offered by his trial counsel.

was also denying the motion based on Hendricks' failure to prosecute the motion personally or through counsel.

¶5 On December 23, 2003, Hendricks filed a motion to defer enforcement of the case's disposition pending a trial court ruling on his previously filed motion for relief from the imposed forfeitures based on alleged indigency. On January 20, 2004, he filed a notice of appeal from the November 18, 2003, decision.

¶6 On January 30, 2004, the trial court scheduled an indigency hearing for February 18, 2004. Hendricks filed a motion to adjourn the hearing and appear by telephone. That motion was denied on February 12, 2004. On February 18, 2004, Hendricks did not appear for the hearing. He provided no explanation for his absence. The trial court denied Hendricks' indigency motion and other pending motions, for want of prosecution.

¶7 On March 19, 2004, the Honorable Patricia D. McMahon ordered Hendricks committed to the county jail for failure to pay the forfeitures associated with this case. Hendricks filed a motion to stay that order for commitment pending the completion of his appeal of the trial court's order denying his motion to reopen and so that he could attend proceedings "without fear of ... being incarcerated." The trial court denied this motion on April 5, 2004.

¶8 Hendricks filed a supplemental notice of appeal on April 14, 2004, indicating that in addition to appealing the trial court's November 18, 2003, ruling,

he was also appealing the trial court's April 5, 2004, order denying his motion to stay the commitment. This appeal followed.⁴

DISCUSSION

¶9 The State urges this court to reject Hendricks' appeal on grounds that it is moot because he has already satisfied the forfeitures. If Hendricks were to successfully reopen the judgment, it could affect his record and potentially have other consequences. Thus, this court declines to decide this case on mootness grounds.

¶10 The State also argues that because Hendricks' brief is incoherent and does not comply with the Rules of Appellate Procedure, it should be dismissed. This court agrees that the brief is difficult to follow, but concludes that it can infer Hendricks' arguments sufficiently to address the issues.

¶11 We begin with the trial court's order denying Hendricks' motion to withdraw his guilty plea (which he termed a motion to "reopen the judgment"). Hendricks asserts that when the notice scheduling the November 18, 2003, court date was sent to the parties on September 30, 2003, it was erroneously mailed to Hendricks' previous attorney, rather than Hendricks himself. Even if the notice should have been sent directly to Hendricks, he was not prejudiced. It is undisputed that Hendricks ultimately received notice of the hearing, as evidenced by the fact that he filed a motion on October 13, 2003, seeking to appear by telephone at the November 18, 2003, court date.

⁴ Subsequent to filing the supplemental notice of appeal, Hendricks filed another motion to stay the commitment order and to review his indigency status. The trial court's orders denying those motions are not part of this appeal and will not be addressed.

¶12 The trial court denied Hendricks' motion based on Hendricks' failure to prosecute and failure to allege an adequate basis for plea withdrawal. Dismissal of a case for failure to prosecute is addressed to the sound discretion of the trial court, and we will affirm the trial court's action unless it is clearly shown that there was an erroneous exercise of discretion. *Zeis v. Fruchauf Corp.*, 56 Wis. 2d 486, 489, 202 N.W.2d 225 (1972). To the extent Hendricks is arguing that his motion should not have been decided in his absence, this court rejects his argument because Hendricks knew about the court date and failed to appear. Hendricks offered no reason for his non-appearance, either prior to the hearing or afterward, except to assert in his motion to appear by phone that he feared the execution of arrest warrants. This is not a reason that justifies non-appearance. The trial court did not erroneously exercise its discretion in denying the motion on this ground.

¶13 In addition, Hendricks offers no argument that the trial court's decision to deny Hendricks' motion on the merits was erroneous. Based on the lack of argument on that issue, this court sees no reason to disturb the trial court's order denying Hendricks' motion to withdraw his guilty plea. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court need not address issues not fully briefed).

¶14 Next, Hendricks offers argument concerning the trial court's February 18, 2004, order denying his request for relief based on indigency and denying his other pending motions. Hendricks seeks a reconsideration of his continuous state of indigency regarding the forfeitures he was ordered to pay. Hendricks argues that even though he did not appear at the hearing, the trial court had before it "necessary sufficient evidence" to decide the motion in Hendricks' favor without the need for a hearing.

¶15 Once again, Hendricks has offered no reason for his failure to appear at the hearing on February 18, 2003. He was aware of the hearing, having filed a motion to adjourn the hearing and appear by telephone. That motion was denied on February 12, 2004. Hendricks' failure to appear, without explanation provided either before or after the hearing, justified the trial court's exercise of discretion denying Hendricks' pending motions. The fact that Hendricks may have believed that the hearing was unnecessary does not justify his non-appearance. This court concludes that the trial court did not erroneously exercise its discretion when it dismissed Hendricks' pending motions on February 18, 2004.

¶16 Finally, we turn to Hendricks' argument that the trial court erroneously denied his motion to stay a March 19, 2004, order to commit him to the House of Correction. The Honorable Patricia D. McMahon issued the March 19 order after the trial court denied Hendricks' motion for relief from costs based on indigency on February 18, 2004. In his motion to stay the order for commitment, Hendricks asserted that he should be allowed to complete his pending appeal on the denial of his motion to reopen the judgment, and that he should be able to attend the proceedings without fear of being incarcerated. This court concludes that the trial court did not erroneously exercise its discretion when it denied this motion. Hendricks offered no legal authority at the trial court or on appeal that would justify staying the commitment for the reasons he asserted.

By the Court.—Orders affirmed.

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

