COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2098 **Cir. Ct. No. 96-TR-9624**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS J. TRINKO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: ROBERT A. HAWLEY, Judge. *Appeal dismissed.*

¶1 SNYDER, P.J.[1] Thomas J. Trinko appeals from the circuit court's denial of his motion to reconsider an order dismissing his motion to reopen and

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

vacate a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI). Trinko contends that the reconsideration motion presents a new issue not addressed by the circuit court in the prior order for dismissal. Because we must conclude that the reconsideration motion does not present an issue new or different than presented in the prior motion we are without jurisdiction and dismiss the appeal.

BACKGROUND

¶2 The factual and procedural background is not disputed. On October 5, 2004, Trinko filed a motion to vacate a February 10, 1997 judgment of conviction for OWI, contrary to WIS. STAT. § 346.63(1)(a). The OWI charge had been prosecuted by Winnebago County District Attorney Joseph Paulus. At the December 8, 2004 motion hearing, Trinko's counsel contended that, "[t]he basis of this motion, the genesis of this motion if you will, was that the chief prosecutor of this county has been found guilty and convicted and sentenced on a variety of [criminal offenses]." The crimes of former District Attorney Paulus have been memorialized in recent case law.

¶3 In ***State v. Maloney***, 2006 WI 15, ¶ 21, ___ Wis. 2d ___, 709 N.W.2d 436, our supreme court summarized the antics of Paulus as follows:

> [F]ormer Winnebago County District Attorney Joseph Paulus [who prosecuted Maloney for first-degree intentional homicide, arson, and mutilation of a corpse] accepted bribes in 22 cases in exchange for giving defendants more favorable treatment. As noted above, Paulus was convicted of misconduct in his capacity as District Attorney in 2004. ***United States v. Paulus***, 331 F. Supp. 2d 727 (E.D. Wis. 2004) [*aff'd*, 419 F.3d 693 (7th Cir. 2005)]. Paulus admitted accepting bribes in cases involving misdemeanor and traffic charges, and one felony charge. ***Id***. at 729-30. According to the federal district court, "[a]ll of the bribes were received from a single

> attorney who had agreed to pay one-half of his retainer to Paulus in return for the favorable treatment of his clients." ***Id***. at 730. His behavior was characterized by the federal court as "systematic or pervasive corruption … striking at the heart of the system of justice we have in this country." ***Id***. at 735.

¶4 In ***Maloney***, the issue posed was whether the supreme court had authority to remand the matter to the circuit court for postconviction relief in the interest of justice due to Paulus's involvement as prosecutor. ***Maloney***, 709 N.W.2d 436, ¶¶20-21. The ***Maloney*** court held that it had the authority to remand the case to the circuit court. ***Id.*** However, the ***Maloney*** court refused to do so, stating that:

> What Maloney has failed to establish, however, is how Paulus's misconduct had any impact on his trial. Paulus's corruption is only relevant if it affected the presentation of evidence, or lack thereof, during Maloney's trial.

Id., ¶22.

¶5 Here, at the December 8, 2004 motion hearing, the circuit court presented the same question to Trinko as was present in ***Maloney***: How did Paulus's misconduct have any impact on the trial?[2] Trinko responded that Paulus's misconduct is relevant to the Trinko judgment because WIS. STAT. § 806.07 allows a circuit court to reopen and vacate prior OWI judgments based on fairness and equity and that "the glaring issue here is that Mr. Trinko was prosecuted by an officer of the court who may have misled this court." When asked by the circuit court in what respect Paulus may have misled the court, Trinko's counsel conceded that he did not know and could not find out; however, he responded that "the question remains now is that Mr. Trinko is facing jail time

[2] Trinko's 1997 OWI judgment of guilty was the result of a jury trial and verdict.

on a new charge stemming from this year based on this conviction from 1996. The question then is is that fair." Trinko's counsel argued that Paulus "was in the position of throwing out cases fraudulently and therefore would need to prosecute cases to make up for the difference."

¶6 In response to Trinko's motion for relief from judgment, the circuit court held that Trinko had failed to present a nexus between his 1997 OWI judgment and Paulus, stating that, "I'm hearing nothing other than the fact that Paulus was involved in some cases that he's spending some time in federal prison for and it doesn't give me any basis, equitable basis to set aside this conviction." The court dismissed the motion for relief from judgment without further proceedings.

¶7 On May 13, 2005, Trinko filed a motion for reconsideration of the dismissal of his prior motion. The circuit court denied the motion for reconsideration on the basis that the motion contained no new facts or new case law and that the motion verged on the frivolous. Trinko appeals the denial of his reconsideration motion.

DISCUSSION

¶8 We address the appealability of the denial of the motion for reconsideration to determine if we have appellate jurisdiction. ***Harris v. Reivitz***, 142 Wis. 2d 82, 87, 417 N.W.2d 50 (Ct. App. 1987). Whether we have jurisdiction is a question of law that we review de novo. ***Socha v. Socha***, 183 Wis. 2d 390, 393, 515 N.W.2d 337 (Ct. App. 1994). When an appeal is taken from an order or judgment deciding a motion for reconsideration, we have jurisdiction to review only the new issues decided. ***La Crosse Trust Co. v. Bluske***, 99 Wis. 2d 427, 429, 299 N.W.2d 302 (Ct. App. 1980).

¶9 The general rule in ***La Crosse Trust Co.*** was explicitly articulated in ***Ver Hagen v. Gibbons***, 55 Wis. 2d 21, 25, 197 N.W.2d 752 (1972): "[I]t has frequently been held that an order entered on a motion to modify or vacate a judgment or order is not appealable where, as here, the only issues raised by the motion were disposed of by the original judgment or order." However, the ***Ver Hagen*** rule was liberalized by the ***Reivitz*** court, allowing the appeal of issues raised in a reconsideration motion if new arguments are made. ***Reivitz***, 142 Wis. 2d at 88-89.

¶10 We raised the issue of jurisdiction in an order dated September 23, 2005, and asked the parties to brief the issue. Trinko concedes that the time for a direct appeal of the December 8, 2004 order had expired by the time he filed this appeal. Trinko's initial jurisdictional response, however, is that this court is incorrect in determining that a first offense OWI is a traffic regulation matter under WIS. STAT. § 345.20(1)(b) and that we should not apply WIS. STAT. § 808.03(1)(c) to determine when a final order or judgment is entered.[3] Trinko argues that his reconsideration motion is a "special proceeding" rather than an "action" and, therefore, we have jurisdiction under § 808.03(1)(a) to review the reconsideration motion denial.

¶11 WISCONSIN STAT. § 808.03(1)(a) provides that a final order disposes of an entire matter in litigation whether rendered in an action or a special proceeding if the order is entered in accordance with WIS. STAT. §§ 806.06(1)(b)

[3] In our order we explained that "[I]n a first offense OWI matter, the docket entries 'trigger the appeal period' and 'a separate order or judgment is superfluous." *See also,* ***City of Sheboygan v. Flores***, 229 Wis. 2d 242, 248, 598 N.W.2d 307 (Ct. App. 1999). "The presence of a separate document in the record does not affect the requirement that an appeal be timely commenced from the docket entries." ***Id.***

or 807.11(2). Trinko neither cites to these provisions in his brief nor presents any rationale as to how the sections would apply to our jurisdiction order. We refuse to address that contention further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court need not address issues not fully briefed).

¶12 In the alternative, Trinko contends that the December 8, 2004 dismissal order lacks finality because the transcript indicates that the court was open to receiving new arguments and that this suggests that the circuit court's December 8, 2004 oral ruling was not a final order. This contradicts Trinko's earlier concession that the December 8, 2004 order was a final order and that the time for direct appeal of that order had lapsed. In addition, Trinko neither cites to any relevant authority[4] nor presents any valid argument that the initial issue before us is anything other than our jurisdiction to review the May 17, 2005 order denying the reconsideration motion, a question we review de novo.

¶13 Finally, Trinko contends that his reconsideration motion presented new issues that had not been presented at the December 8, 2004 motion hearing. Trinko concedes that the circuit court was not given the facts it wanted at the December 8 hearing to show a nexus between the 1997 OWI judgment and the Paulus misconduct. Trinko contends that in his reconsideration motion, additional documents in the Paulus federal case and additional documents in the Trinko OWI

[4] Trinko cites to ***State v. Wright***, 143 Wis. 2d 118, 123-24, 420 N.W.2d 395 (Ct. App 1988), in support of the proposition that this court may look to the circuit court's contemporaneous comments to determine the question of finality of an order. We are not persuaded that the circuit court's suggestion that it would reopen the case if new evidence was presented of a nexus between the Paulus misconduct and Trinko's OWI judgment was either inconsistent with the standard of review for review of reconsideration motion appeals or the court's final determination in the prior motion hearing that it was "dismissing the motion without further hearing."

case provide new facts showing a nexus between the OWI judgment and Paulus's misconduct. We cannot agree.

¶14 The "new facts" presented on reconsideration in support of a nexus between the Paulus misconduct and the Trinko OWI judgment include a signed plea agreement and several other federal court documents in the Paulus federal case. Our review of the additional documents discloses no support for Trinko's contention that the Paulus misconduct had any relationship to the OWI judgment. As in ***Maloney***, Trinko has failed to show any connection between his OWI judgment and the Paulus misconduct.

¶15 While Trinko presents some new arguments on appeal concerning his motion for relief from his OWI judgment, the arguments relate to the merits of the 1997 jury verdict and the "unique facts" that resulted in the OWI judgment. The issues concerning the 1997 judgment are not before us, nor can those issues be raised at this time as the basis for Trinko's December 8, 2004 motion or May 13, 2005 reconsideration motion for relief. Trinko has presented no new facts in support of his motion for reconsideration of the circuit court order.

¶16 Lastly, Trinko presents ***Bracy v. Gramley***, 520 U.S. 899 (1997), as new case law (new as in not previously presented and considered by the circuit court) applicable to appellate jurisdiction existing over the appeal of his reconsideration motion. In ***Bracy***, the trial judge took bribes in other felony cases around the time of Bracy's murder conviction. ***Id.*** at 900-01. Bracy brought a habeus petition, and the U.S. Supreme Court held that Bracy could conduct discovery in support of his compensatory bias or "prosecution oriented" bias theory petition. ***Id.*** at 902-03. Trinko concedes that ***Bracy*** involved a judge who took bribes rather than a prosecutor and that the ***Bracy*** court only ordered

discovery rather than any relief from judgment. We are satisfied that ***Bracy*** presents no support for Trinko's contention that this court has jurisdiction over this appeal.

CONCLUSION

¶17 In sum, we are satisfied that the circuit court was presented no new issues in the reconsideration motion that were not considered in the previous final order dismissing the initial motion for relief from judgment. Furthermore, Trinko made the same argument in both motions, that the judgment must be suspect because of the Paulus misconduct in other matters during the period when the judgment occurred. That issue has been addressed by our supreme court in ***Maloney***, and the ***Maloney*** reasoning would be applicable here. However, we conclude that we are not able to address Trinko's appeal further because under ***Ver Hagen***, we lack jurisdiction.

By the Court.—Appeal dismissed.

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