COURT OF APPEALS
DECISION
DATED AND FILED

December 5, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP1438 **Cir. Ct. No. 2005TR10011**

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

CITY OF ALTOONA,

PLAINTIFF-RESPONDENT,

V.

STEVEN W. LIMPERT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: THOMAS H. BARLAND, Judge. *Reversed and cause remanded with directions.*

¶1 CANE, C.J.[1] Steven Limpert appeals a judgment denying his motion to enforce a prosecutorial agreement and finding him guilty of operating

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

while under the influence, first offense. Limpert argues the circuit court erred in denying his motion because the agreement to dismiss the OWI and prohibited alcohol content charges he entered into with the city attorney was binding under WIS. STAT. § 807.05.[2]

¶2 We conclude the agreement was binding under WIS. STAT. § 807.05. However, principles of contract law may apply in some cases under WIS. STAT. § 807.05. Therefore the court may, upon the request of the city attorney, hold an evidentiary hearing to determine if a contractual reason exists for invalidating the agreement. Further, the court has the final authority to accept or reject an agreement, even if the agreement is binding between the prosecution and the defendant. Therefore, we reverse and remand so the court may either hold an evidentiary hearing to determine whether the agreement may be invalidated or make a determination of whether to accept or reject the agreement.

BACKGROUND

¶3 On August 6, 2005, Altoona City Police Officer Mark Duce stopped Limpert for speeding. While speaking with Limpert, Duce noticed an odor of intoxicants coming from Limpert's vehicle. Limpert admitted he had been drinking earlier in the evening. Duce asked Limpert to perform field sobriety tests. A breath test indicated Limpert had a blood alcohol concentration of

[2] We note that while Limpert's guilty plea to the OWI charge could possibly waive his right to appeal this issue, the City failed to argue waiver. *See* ***County of Racine v. Smith***, 122 Wis. 2d 431, 437, 362 N.W.2d 439 (1984) (holding "a voluntary and understanding guilty or no contest plea in a civil case constitutes a waiver of the right to appeal …."). We therefore have no arguments regarding whether Limpert's guilty plea was voluntary and understanding and therefore do not address this issue.

0.107%. Limpert received three citations: a speeding citation for eleven miles per hour over the posted limit, an OWI citation and a PAC citation.

¶4 Limpert entered not guilty pleas for each of the citations and met with City Attorney John Behling on September 26 for a pretrial conference. During the course of the meeting, Limpert stated he submitted to a breath test prior to performing the field sobriety tests. Limpert also stated he was asked to stand on one leg and touch his finger to his nose.

¶5 Duce was on leave at the time of the pretrial conference. Behling found Limpert's account credible and therefore offered to dismiss the OWI and PAC citations in exchange for a guilty plea on the speeding citation. Behling sent a letter to Limpert on October 5 with this offer. Limpert called Behling on October 7 and accepted the plea offer. Limpert then received a letter dated October 7 confirming the agreement.

¶6 When Duce returned from leave, Behling questioned him about the Limpert stop. Duce stated the field sobriety tests were completed prior to the breath test and he did not have Limpert perform a finger to nose test. Behling sent a letter dated October 27 informing Limpert the City would not dismiss the OWI and PAC citations.

¶7 Limpert brought a motion asking the court to enforce the City's agreement and dismiss the OWI and PAC citations. The court heard Limpert's motion on April 10, 2006. The court determined the agreement was never consummated because the court had not approved the agreement before the City rescinded it. The court also based its decision on public policy, stating, "In the administration of traffic justice, there are … instances between the time of the pretrial conference and the agreement being resolved, the parties believe they have

discovered some facts that alter the basis for that agreement." The court then denied Limpert's motion and Limpert pled guilty to the OWI citation.

DISCUSSION

¶8 Whether a stipulation under WIS. STAT. § 807.05 is binding on the parties is a question of law we review without deference. ***Estate of Cavanaugh v. Andrade***, 191 Wis. 2d 244, 264, 528 N.W.2d 492 (Ct. App. 1995), *rev'd on other grounds*, 202 Wis. 2d 290, 550 N.W.2d 103 (1996).

¶9 WISCONSIN STAT. § 807.05 provides:

> No agreement, stipulation, or consent between the parties or their attorneys, in respect to the proceedings in an action or special proceeding shall be binding unless made in court or during a proceeding conducted under s. 807.13 or 967.08 and entered in the minutes or recorded by the reporter, *or made in writing and subscribed by the party to be bound thereby or the party's attorney.* (Emphasis added).

Limpert argues the circuit court erred in denying his motion because the agreement to dismiss the OWI and PAC charges he entered into with the city attorney was a binding agreement under § 807.05. The City responds "[t]he offer made to Limpert by the City was an unaccepted plea offer which is different than a stipulation controlled by § 807.05." The City further argues the "[d]efendant has no right to demand enforcement of a plea agreement with a prosecutor until the plea has been entered and approved by the court." The City cites a criminal case in support of this proposition. We can find no civil case in support of this proposition. Indeed, civil cases that deal with an agreement between two parties rely on § 807.05. *See* ***Kocinski v. Home Ins. Co.***, 154 Wis. 2d 56, 67-68, 452 N.W.2d 360 (1990); ***Phone Partners Ltd. P'ship v. C.F. Commc'ns Corp.***, 196 Wis. 2d 702, 709, 542 N.W.2d 159 (Ct. App. 1995).

¶10 In this case, the City sent Limpert a signed letter stating "the City of Altoona will dismiss the citation of driving while intoxicated with a prohibited blood alcohol content." Because this agreement was made in writing and signed by the city attorney, it is binding under WIS. STAT. § 807.05.

¶11 However, even though the City was bound by the agreement, the City may still have the right to withdraw from the agreement due to misrepresentation. Principles of contract law may be used by the court to determine whether a stipulation is enforceable. *See* ***Kocinski***, 154 Wis. 2d at 67-68; *see also* ***Phone Partners***, 196 Wis. 2d at 711 ("Principles of contract law may sometimes illumine a stipulation dispute even to the point of being dispositive."). Under contract law, a contract is voidable for misrepresentation if the recipient relies on the misrepresentation and that reliance is justifiable. ***First Nat'l Bank & Trust Co. v. Notte***, 97 Wis. 2d 207, 222, 293 N.W.2d 530 (1980). However, the court in this case did not make a determination of whether the City was justified in relying solely on Limpert's story without checking the police report or waiting to contact the police officer.

¶12 In addition, even though the City was bound by this agreement, the court was not necessarily bound. A circuit court has the right to accept or reject an agreement "presented by the parties for its approval." ***Phone Partners***, 196 Wis. 2d at 709. In addition, in cases where a city attorney seeks to dismiss an action, the court has a duty where public interest is involved to determine whether the action should be dismissed. ***Guinther v. City of Milwaukee***, 217 Wis. 334, 339, 258 N.W. 865 (1935). In cases where a prosecutor seeks to dismiss or amend a charge of OWI or PAC, the prosecutor must apply to the court and state the reasons for the proposed amendment or dismissal. WIS. STAT. § 967.055(2). "The court may approve the application only if the court finds that the proposed

amendment or dismissal is consistent with the public's interest in deterring the operation of motor vehicles by persons who are under the influence of an intoxicant…." ***Id.*** In this case, the agreement would have dismissed all alcohol related charges and allowed Limpert to instead plead guilty to speeding. Had the City abided by the agreement and submitted it to the court, the court would have had the duty to determine whether the agreement was in the public's interest before accepting or rejecting the agreement.

¶13 Therefore, we reverse and remand. The court may either hold an evidentiary hearing to determine whether the agreement should be invalidated, or it may proceed to determine whether to accept or reject the agreement in the public interest.

By the Court.—Judgment reversed and cause remanded with directions.

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