COURT OF APPEALS
DECISION
DATED AND FILED

December 19, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1399-FT **Cir. Ct. No. 2006CV3126**

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

TOWN OF WAUKESHA,

PLAINTIFF-RESPONDENT,

V.

ROBERT HIEKKANEN AND CHOR HIEKKANEN,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed.*

¶1 BROWN, C.J.[1] The Waukesha municipal court found Robert and Chor Hiekkanen out of compliance with a town ordinance and imposed a fine or jail time, but then stayed that judgment for one year. The Town of Waukesha

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

appealed to the circuit court, challenging only the stay. The circuit court reversed, holding that the municipal judge did not have authority to stay the judgment. The Hiekkanens appeal. They do not challenge the substance of the circuit court's decision—that the municipal court had no authority to issue a stay. Rather, they claim that, since this was a WIS. STAT. § 800.14(5) transcript review, the circuit court was therefore obliged to obtain and review a transcript to see if the evidence supported the finding that there were ordinance violations. We hold that this issue was waived because it was not raised until a motion for reconsideration to the circuit court.

¶2 By way of their reply brief, seeming to acknowledge their plight, they alternatively argue that the circuit court had no subject matter jurisdiction to even make the decision since a proceeding under WIS. STAT. § 800.14(5) requires that a transcript be furnished to the circuit court for review, no transcript was provided by the Town and, therefore, a condition precedent to jurisdiction was lacking. They appear to acknowledge that they raise the issue of subject matter jurisdiction for the first time in the reply brief, but impliedly rely on the law that subject matter jurisdiction is not subject to waiver. The failure to provide a transcript, however, goes to the competency to proceed rather than subject matter jurisdiction and a competency to proceed issue is subject to waiver. We hold that this issue was also waived.

¶3 On August 2, 2006, a municipal court found the Hiekkanens in noncompliance with Town Ordinance No. 13-2-5(c). The court imposed a fine of either $2500 or thirty days in jail but stayed this judgment for one year. On August 17, 2006, the Town appealed to the circuit court arguing that the municipal court lacked the authority to stay judgment for a year. On February 7, 2007, both the Town and the Hiekkanens attended a status conference, during which the

circuit court learned that the sole issue on appeal would be the legal question of whether the municipal court had the authority to stay judgment for a year. Further, both parties agreed to write letter briefs to resolve this issue. On February 16, 2007, the Hiekkanens filed a pro se letter objecting to the Town's appeal. By April 10, 2007, the Hiekkanens had obtained counsel and filed a letter brief asking for a reversal on the merits or a de novo trial.

¶4 The circuit court filed its decision on April 17. It rejected the Hiekkanens' request for a reversal on the merits and a new trial as not properly preserved and untimely, since they had neither appealed the municipal court's decision nor requested de novo review within twenty days of the Town's notice of appeal. *See* WIS. STAT. § 800.14(4). The circuit court noted that no transcript had been prepared for the appeal. The circuit court reversed the municipal court's stay of judgment, holding that the municipal court had no authority to assess less than the minimum forfeiture required by law.[2] *See* ***Village of Sister Bay v. Hockers***, 106 Wis. 2d 474, 479, 317 N.W.2d 505 (Ct. App. 1982). Subsequently, the Hiekkanens filed a motion for reconsideration contending that the circuit court was required to review the municipal court's transcript. The circuit court rejected this motion and determined that review of the transcript was unnecessary because there was "no need of it since only stated legal issues were to be reviewed." Then, this appeal was filed.

¶5 There are two ways to proceed in an appeal of a municipal court's decision. First, at the request of either party or on its own motion, "the circuit

[2] The circuit court also reversed the municipal court's failure to award costs to the Town. This portion of the circuit court's decision has not been appealed.

court shall order that a new trial be held in circuit court." WIS. STAT. § 800.14(4). In the alternative, the appeal must be based on a review of the transcript of the municipal trial. Sec. 800.14(5). The Hiekkanens argue that the Town did not request, and the circuit court did not order, a de novo trial under § 800.14(4), and so the court was required to review the municipal court transcript under § 800.14(5).[3]

¶6 In denying the Hiekkanens' motion for reconsideration, the circuit court noted that "the Defendants agreed (or acquiesced) to this court proceeding on legal issues without any transcript. Any error was waived. Any complaint is estopped. Both waiver and estoppel occurred twice." The court referred to the Hiekkanens' agreement to this mode of proceeding at the February status conference and in their counsel's April letter brief, which did not argue that the transcript had to be considered.[4]

¶7 We note that, at the status conference, the circuit court determined that only a pure question of law was presented: whether the municipal court had the authority to stay a judgment. There is no indication that the Hiekkanens

[3] The record shows that the Town alternatively filed a request for a de novo trial and a transcript review. So, the Hiekkanens' assertion is wrong. However, because this does not go to the merits of the argument before this court, we will discuss it no further.

[4] The Hiekkanens dispute the circuit court's statement that they did not argue that a transcript had to be prepared, pointing to one sentence in the section of the April letter brief discussing the circuit court's standard of review: "Therefore, before this court can enforce the municipal court imposition of forfeiture, this Court is required to examine the transcript to determine whether the evidence supports the municipal court decision." However, the brief then goes on to argue that the Hiekkanens did not violate the ordinance at issue and to (untimely) request a de novo review on this issue. Even if this one sentence were considered to raise the issue the Hiekkanens now advance, it would not remedy their earlier waiver, at the scheduling conference. Further, the Hiekkanens' earlier letter "objecting" to the appeal says nothing whatsoever about the need for a transcript.

disputed this conclusion at this time (though their April letter brief completely ignored the issue, and instead attacked the judgment itself). We agree with the circuit court that, based on representations of the parties, there was no need for a transcript to be prepared since there were no disputed facts relevant to the issue. The Hiekkanens' about-face later was too late. Therefore, we hold that the issue of whether the court was duty-bound to read a transcript so as to review for sufficiency of the evidence was waived.

¶8 Nevertheless, the Hiekkanens assert in their reply brief that because the circuit court did not obtain or review the municipal court transcript, it never had jurisdiction over their appeal and, impliedly, that this may not be waived. They are wrong. Subject matter jurisdiction, in general, is the power of the tribunal to treat a certain subject matter in general, while competency is a narrower concept relating to the statutory conditions imposed on the exercise of subject matter jurisdiction. *See* ***Association of Career Employees v. Klauser***, 195 Wis. 2d 602, 608-09 n.7, 536 N.W.2d 478 (Ct. App. 1995) (citations omitted); *see also* ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶7, 273 Wis. 2d 76, 681 N.W.2d 190. When the concepts of subject matter jurisdiction and competency are applied to the circuit courts, the distinction is that subject matter jurisdiction is plenary and constitutionally based and is not affected by the statutes, whereas statutory requirements may affect a court's competency, depending on the nature of the requirement. *See* ***id.*** Under the Wisconsin Constitution, circuit courts in Wisconsin have general original subject matter jurisdiction over "all matters civil and criminal. WIS. CONST. art. VII, § 8; ***Eberhardy v. Circuit Court for Wood County***, 102 Wis. 2d 539, 550, 307 N.W.2d 881 (1981) (citations omitted). Statutory requirements that pertain to the invocation of that jurisdiction go to competency of the tribunal to proceed.

¶9 It is true that a WIS. STAT. § 800.14(5) appeal to the circuit court is based on a review of the transcript of the municipal trial. Thus, a circuit court may be deprived of competency, in other words, its authority to exercise its subject matter jurisdiction, if the required statutory procedure for invoking the court's jurisdiction—in this case, the need for a transcript, is not followed. Therefore, the lack of a transcript is a species of competency to proceed. The issue is not one of subject matter jurisdiction.

¶10 The remaining question is whether an issue raising competency to proceed may be waived. The answer is "yes." So said our supreme court in ***Trempealeau***:

> [T]he following principles are sound and should be maintained: the common-law waiver rule applies to challenges to the circuit court's competency, such that a challenge to the court's competency will be deemed waived if not raised in the circuit court, subject to the inherent authority of the reviewing court to disregard the waiver and address the merits of the unpreserved argument or to engage in discretionary review under WIS. STAT. §§ 751.06 or 752.35. Because competency does not equate with subject matter jurisdiction, we see no reason not to apply the rule of waiver to these challenges as a general matter. A judgment rendered where competency is lacking is not void for lack of subject matter jurisdiction.

Trempealeau, 273 Wis. 2d 76, ¶27.

¶11 There are two narrow exceptions to this rule, neither of which are applicable here. *See* ***Green County Dep't of Human Servs. v. H.N.***, 162 Wis. 2d 635, 658, 469 N.W.2d 845 (1991), *and* ***Michael S. v. Michael S., Jr.***, 2005 WI 82, ¶75, 282 Wis. 2d 1, 698 N.W.2d 673. We conclude that the competency to proceed issue was not only waived, it was never even recognized as such by the Hiekkanens.

¶12 The final question is whether we should exercise our discretionary authority to ignore waiver on either of the two issues raised. There is no reason to do so. We may ignore waiver if we feel that the administration of justice demands it. As the circuit court noted, the Hiekkanens agreed that the only issue to be addressed was the authority to issue a stay. It was not until a decision adverse to their interests that they crystallized a different position to the circuit court and not until their reply brief to this court that they crystallized yet a different issue to this court. The circumstances convince us that no administration of justice problem persists.

By the Court.—Order affirmed.

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