

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 23, 2009

David R. Schanker
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. 2008AP1459

Cir. Ct. No. 2007TR5714

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALTHEA M. PATTERSON,

DEFENDANT-APPELLANT.

APPEAL from an judgment of the circuit court for Jefferson County:
RANDY R. KOSCHNICK, Judge. *Reversed and cause remanded for further
proceedings consistent with this opinion.*

¶1 DYKMAN, J.¹ Althea Patterson appeals from a default judgment of conviction for a traffic violation. Patterson argues that the trial court erroneously

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

exercised its discretion in denying her motion to reopen the default judgment.² See WIS. STAT. § 345.36(2)(b). Additionally, Patterson requests that we assign a substitute judge to her case upon remand, pursuant to WIS. STAT. § 801.58(1)-(2) and (7).³ We conclude that the trial court erroneously exercised its discretion in

² Because Patterson is appealing pro se, we liberally construe her complaint. See *bin-Rilla v. Israel*, 113 Wis. 2d 514, 520, 335 N.W.2d 384 (1983). This case involves a traffic violation, and thus we construe Patterson’s appeal as arguing that the trial court erred in its application of WIS. STAT. § 345.36, which delineates court procedure for traffic violations. Section 345.36 provides, in pertinent part:

(2) If a defendant fails to appear at the date set under sub. (1), the court shall either:

....

(b) Deem the nonappearance a plea of no contest and enter judgment accordingly.... If the defendant moves to open the judgment within 20 days after the date set for trial, and shows to the satisfaction of the court that the failure to appear was due to mistake, inadvertence, surprise, or excusable neglect, the court shall open the judgment, reinstate the not guilty plea, and set a new trial date.

³ WISCONSIN STAT. § 801.58 provides, in pertinent part:

(1) Any party to a civil action or proceeding may file a written request, signed personally or by his or her attorney, with the clerk of courts for a substitution of a new judge for the judge assigned to the case....

(2) When the clerk receives a request for substitution, the clerk shall immediately contact the judge whose substitution has been requested for a determination of whether the request was made timely and in proper form. If the request is found to be timely and in proper form, the judge named in the request has no further jurisdiction and the clerk shall request the assignment of another judge under sec. 751.03....

....

(7) If upon appeal from a judgment ... the appellate court orders a new trial or reverses or modifies the judgment or order as to any or all of the parties in a manner such that further proceedings in the trial court are necessary, any party may file a request under sub. (1) within 20 days after the filing of the

(continued)

denying Patterson's motion, but that this court is not the proper forum in which to make a request for a substitute trial court judge. Accordingly, we reverse and remand to the trial court for the court to properly exercise its discretion in determining whether to grant Patterson's motion.

BACKGROUND

¶2 The following facts are taken from court documents and communications between Patterson and the trial court. On July 19, 2007, Patterson received a citation for violating WIS. STAT. § 346.57(4)(gm)⁴ for traveling eleven miles per hour over the speed limit on a freeway in Jefferson County. Patterson claims that no one pulled her over for speeding on the date of the citation and that the citation probably resulted from her sister using her name during a traffic stop. Patterson missed the initial trial on the issue and the trial court entered a default judgment against her. However, at Patterson's request, the trial court reopened the default judgment and granted her a new trial, scheduled for April 24, 2008. On April 21, Patterson received news that an opening had become

remittitur in the trial court whether or not another request was filed prior to the time the appeal ... was taken.

⁴ WISCONSIN STAT. § 346.57 provides, in pertinent part:

(4) FIXED LIMITS. In addition to complying with the speed restrictions imposed by subs. (2) and (3), no person shall drive a vehicle at a speed in excess of the following limits unless different limits are indicated by official traffic signs:

....

(gm) Sixty-five miles per hour on any freeway or expressway.

available on April 22 for her to undergo a major surgery that she needed. Patterson chose to have the surgery on April 22.

¶3 On April 23, Patterson called the clerk of courts to request that her trial be rescheduled. The clerk of courts told her that she could not reschedule the trial over the phone. Patterson then decided to try to make the court appearance despite her doctor's orders to rest. Patterson was heavily medicated at the time and had difficulties getting to the courthouse. She therefore did not arrive in time for her trial. When Patterson arrived, the trial court had already entered a second default judgment against her.

¶4 On April 30, Patterson sent a written request to the judge presiding over her trial to have the second default judgment reopened, proffering her recent surgical procedure and unexpected difficulties in reaching the courthouse on time as legitimate excuses for missing her trial. On May 1, the judge denied her request, stating:

I would have gladly considered an adjournment request if made 48 [hours] prior to the court date, as stated on the notice. Witnesses were present on your trial date ready to go. I waited at least 10 minutes as I always do. Courts need to run on schedule to prevent chaos. This request is denied.

Patterson appeals.

STANDARD OF REVIEW

¶5 We agree with the State that the proper standard for our review of Patterson's motion to reopen under WIS. STAT. § 345.36(2)(b) is the standard we have set for review of motions to open judgments under WIS. STAT.

§ 806.07(1)(a), which is similar in language and purpose to § 345.36(2)(b).⁵ “Rulings on motions under § 806.07 are reviewed under an erroneous exercise of discretion standard.” *Edland v. Wisconsin Physicians Serv. Ins. Corp.*, 210 Wis. 2d 638, 643, 563 N.W.2d 519 (1997). Under this standard, we will affirm the trial court’s discretionary holding so long as the trial court “examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach.” *Bank Mut. v. S.J. Boyer Const., Inc.*, 2009 WI App 14, ¶7, ___ Wis. 2d ___, 762 N.W.2d 826 (Ct. App. 2008).

¶6 We will find an erroneous exercise of discretion if: (1) the trial court did not exercise its discretion, (2) an examination of the facts of record does not support the conclusion that the trial court reached, or (3) the trial court applied an improper legal standard to come to its conclusion. *Finley v. Culligan*, 201 Wis. 2d 611, 626-27, 548 N.W.2d 854 (Ct. App. 1996). Within our review of the trial court’s exercise of discretion, we review the trial court’s application of law to undisputed facts de novo. *Theuer v. Labor & Indus. Review Comm’n*, 2001 WI 26, ¶5, 242 Wis. 2d 29, 624 N.W.2d 110.

⁵ WISCONSIN STAT. § 806.07 provides, in pertinent part:

(1) On motion and upon such terms as are just, the court ... may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:

(a) Mistake, inadvertence, surprise, or excusable neglect[.]

DISCUSSION

A. Motion to Reopen the Default Judgment

¶7 The first issue is whether the trial court erroneously exercised its discretion in denying Patterson’s motion to reopen the default judgment against her pursuant to WIS. STAT. § 345.36(2)(b). Patterson argues that the trial court erred in denying her motion to reopen the default judgment because she had a valid reason for missing her trial. The State claims that the trial court properly exercised its discretion in denying Patterson’s motion because it was not satisfied with Patterson’s reasons for missing her trial.

¶8 We first address the trial court’s on-the-record explanation of why it denied Patterson’s motion. In denying Patterson’s motion for post-judgment relief, the trial court cited a notice of hearing sent to Patterson. That notice states:

FAILURE TO APPEAR MAY RESULT IN ASSESSMENT OF WITNESS AND/OR OFFICER FEES. A WRITTEN CHANGE OF PLEA MUST BE RECEIVED BY THE CLERK OF COURTS OFFICE AT LEAST 48 HOURS (2 BUSINESS DAYS) PRIOR TO THE COURT TRIAL DATE FOR ADDITIONAL FEES NOT TO BE ASSESSED. IN ANY EVENT, FAILURE TO APPEAR WILL RESULT IN ENTRY OF A DEFAULT JUDGMENT.⁶

¶9 The trial court applied an incorrect legal standard in denying Patterson’s motion. In its analysis, it cited the part of the notice regarding plea

⁶ The notice sent to Patterson explains the possible consequences of failing to appear for trial, citing to WIS. STAT. §§ 802.10(7) and 805.03. Section 802.10 gives the trial courts the authority to schedule court trials and subsec. (7) states that “[v]iolations of a scheduling or pretrial order are subject to ... [§] 805.03.” Section 805.03 provides the sanctions that a trial court may impose on parties who fail to prosecute a case or fail to comply with procedure statutes.

changes prior to trial. Patterson’s WIS. STAT. § 345.36(2)(b) motion, however, requested the court to grant her relief *after* the trial court entered default judgment because she missed her trial. Thus, the notice she received as to changing a plea prior to trial was not the correct legal standard in evaluating whether to reopen the default judgment. *See State v. Hutnik*, 39 Wis. 2d 754, 764-65, 159 N.W.2d 733 (1968) (reversing a discretionary decision of the trial court where it was clear the court made the decision as an error of law).

B. Request for a Substitute Judge

¶10 Patterson requests that we substitute the trial court judge assigned to her case upon remand. WISCONSIN STAT. § 801.58(7) gives any party involved in a case that has been remanded to the trial court for further proceedings an unqualified right to request a substitute trial court judge. *State ex rel. J.H. Findorff & Son, Inc. v. Circuit Court for Milwaukee County*, 2000 WI 30, ¶13, 233 Wis. 2d 428, 608 N.W.2d 679. As defined by the Wisconsin Supreme Court, “further proceedings” refers to those actions on remand that allow the trial court to exercise discretion. *Id.*, ¶21. Because we remand Patterson’s case for the court to exercise its discretion, Patterson has an unqualified right to request that her case be heard by a substitute trial court judge. However, we know of no statute allowing an appellate court to substitute the trial court judge assigned to a remanded case. For this reason, we deny Patterson’s request to assign a substitute trial court judge to her case.

¶11 If she wishes to do so, Patterson may obtain a substitute trial court judge by properly filing her request. WISCONSIN STAT. § 801.58(1) requires a party who desires a substitute judge to file a written request with the clerk of courts. Because we remand Patterson’s case to the trial court for further

proceedings, should she wish to do so, Patterson must file a request for a substitute trial court judge within twenty days of the remittitur of this case in the trial court.⁷ *See* WIS. STAT. § 801.58(7).

¶12 Accordingly, we reverse the trial court's denial of Patterson's motion to reopen the default judgment against her and remand this case to the trial court for Jefferson County for consideration of the motion under the proper legal standard. Additionally, we deny Patterson's request for a substitute trial court judge.

By the Court.—Judgment reversed and cause remanded for further proceedings consistent with this opinion.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

⁷ Remittitur refers to the filing of the remanded case with the trial court. Delayed remittitur allows a party dissatisfied with the holding of the court of appeals the chance to petition the supreme court to review the court of appeals decision or to move for reconsideration in the court of appeals. Pursuant to WIS. STAT. § 809.26(1), unless a party files a petition for review or a motion for reconsideration, remittitur should occur thirty-one days after the filing of the court of appeals decision. Therefore, a party seeking to have a substitute trial court judge assigned should wait thirty-one days after the date of a court of appeals decision and then file a request with the trial court within the subsequent twenty days.

