

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 4, 2003

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 Nos. 02-1153 & 02-1154

STATE OF WISCONSIN

Cir. Ct. No. 01TR33673 & 01TR33676

**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:
PATRICIA D. MCMAHON, Judge. *Affirmed in part and cause remanded with directions.*

¶1 CURLEY, J.¹ Michael Hendricks appeals the trial court's failure to decide his motion to reopen his operating while intoxicated case. He also appeals, in his operating after suspension case, the trial court's denial of his motion based

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

on the court's refusal to permit his father to act as his attorney at his motion to reopen.² In both cases he appeals the orders denying his motions seeking an indigency hearing pursuant to WIS. STAT. § 800.095 (1999-2000).³ This court affirms in part and remands with directions.

I. BACKGROUND.

¶2 On August 3, 2001, Hendricks was arrested for operating while intoxicated, driving with a prohibited alcohol concentration, operating after suspension, and lane deviation. On October 3, 2001, with his lawyer present, he pled guilty to operating while intoxicated first offense and operating after suspension first offense, and the other two matters were dismissed. The trial court fined him \$150 plus costs, penalties and surcharges on the operating while intoxicated conviction and \$152.50 plus costs, penalties and surcharges on the operating after suspension conviction. The trial court also ordered that if Hendricks failed to pay the fines he would be required to serve ten days in the House of Correction for the operating while intoxicated conviction, and five days in the House of Correction for the operating after suspension conviction.

¶3 The judgment roll for the operating after suspension charge (Case No. 02-1154), reflects that on December 4, 2001, Hendricks appeared in front of a court commissioner seeking to reopen his case. Hendricks was told that his motion had to be addressed to the trial court. The judgment roll also reflects that a date of December 6, 2001, was scheduled for Hendricks' motion in front of Judge

² Case Nos. 02-1154 and 02-1153 were consolidated for appellate purposes.

³ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

McMahon. On that date, Hendricks called the court stating he was unable to appear and the trial court denied his motion. The same judgment roll has an entry for December 11, 2001, which reads that Hendricks filed another motion to reopen his case in front of the court commissioner. Again he was advised that this request had to be heard by the trial court and he was given a date of January 21, 2002, in Judge McMahon's court for his motion.⁴ On January 23, 2002, Hendricks did not appear in court, but his father did. His father wanted to represent Hendricks based on a power of attorney that Hendricks signed permitting his father to act on his behalf. The trial court denied the motion.

¶4 The judgment roll in the operating while intoxicated case does not show that any postconviction motion was filed until February 25, 2002, when Hendricks filed a motion in both cases seeking to have an indigency hearing conducted pursuant to WIS. STAT. § 800.095. In a written order, the trial court denied this request, finding that WIS. STAT. § 800.095(4) was applicable only in municipal court.

II. ANALYSIS.

¶5 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

⁴ This date was changed to January 23, 2001, and Hendricks was notified of the change by mail.

Criminal Division of October 23, 2001, and an office of the District Attorney file stamp date of the 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.

¶6 Hendricks also claims his motion to reopen his conviction for operating after suspension was wrongfully denied. Unfortunately, it is difficult to ascertain exactly what Hendricks is maintaining. He writes:

On January 23, 2002, a hearing was held on Defendant/Appellant's above-referenced Motion of October 23, 2001; at which it was determined that, except for valid (standard form utilized) WI Power-of-Attorney presented by Defendant/Appellant's father, in lieu of Defendant's (excusable) absence, it might have been appropriate given proof provided by Defendant/Appellant's father, at said hearing, that Citation be amended to; No License on Person.

It would appear that Hendricks faults the trial court for failing to permit his father to appear for him and to argue his request to reopen the operating after suspension judgment and to permit him to substitute a guilty plea to a charge of not having a license on his person in lieu of the operating after suspension. He asserts that because he signed a power of attorney as found in WIS. STAT. § 243.10 in favor of

his father, that his father became his designated attorney. Hendricks misunderstands the law.⁵

¶7 Hendricks reads too much into his “Power of Attorney.” WISCONSIN STAT. § 243.10 specifically notes that the power of attorney form set forth in the statutes is confined for use in “finances and property.”⁶ Indeed, the statute cautions that “some transactions may not permit use of this document.” One such prohibited use is representing another as that person’s attorney. As the County points out, only attorneys admitted to the State Bar of Wisconsin are allowed to practice law in this state. *See* Chapters SCR 21.15(2), SCR 22.001(1) and SCR 40. While Hendricks could represent himself, he could not designate another person to represent him in court. To permit Hendricks’ father to represent him in court would be tantamount to conferring attorney status on anyone named in a power of attorney. Thus, the trial court correctly found that Hendricks’ father was not authorized to represent Hendricks in court.

⁵ Hendricks’ father told the trial court that a lawyer who serves as a municipal judge in a local suburb advised him that he could appear for his son in the circuit court if his son filed out a power of attorney. If true, it appears this lawyer misunderstands the law as well.

⁶ WISCONSIN STAT. § 243.10 states, in relevant part:

Wisconsin basic power of attorney for finances and property.

....

(4) Durable power of attorney. A Wisconsin basic power of attorney for finances and property that is legally sufficient under this section is durable to the extent that durable powers are permitted under s. 243.07 and the basic power of attorney for finances and property contains language provided under s. 243.07 (1) (a) showing the intent of the principal that the power granted may be exercised notwithstanding later disability or incapacity.

¶8 Moreover, although in an abbreviated fashion, after noting the County's objection to granting the motion, the trial court did permit Hendricks' father to state his arguments, and the trial court explained its reasons for denying the motion:

There are certain requirements. You have to show excusable neglect. Nothing you've said shows excusable neglect even after I left [sic] you appear, so I'm not going to grant the petition to reopen. Judgment is entered. It stays.

Otherwise, I think you can see we have over 100 cases here today; if we had to do every case over again --

The trial court indicated it might have permitted a reduction in the charge had Hendricks been present, but because he was not, it would not reduce the charge.

¶9 Finally, Hendricks argues that the trial court erred in not granting his motion to hold an indigency hearing pursuant to WIS. STAT. § 800.095(4).⁷

⁷ WISCONSIN STAT. § 800.095(4) provides:

Nonpayment of judgment or noncompliance with work order; further proceedings.

....

(4) Hearing; court order.

(a) If the defendant appears before the court pursuant to a warrant or summons issued under sub. (1) or the defendant otherwise notifies the court that he or she is unable to comply with the judgment or community service work order, the court shall conduct a hearing. If the defendant failed to pay the forfeiture, make restitution or comply with the work order, the court shall determine if the defendant is unable to comply with the judgment for good cause or because of the defendant's indigence or is unable to comply with the work order for good cause.

(continued)

(b) If the defendant fails to appear before the court for a hearing conducted under par. (a) or if the court determines at a hearing under par. (a) that the failure of the defendant to comply with the judgment is not for good cause or because of the defendant's indigence or that the failure of the defendant to comply with the work order is not for good cause, the court shall order one of the following:

1. That the defendant be imprisoned until the forfeiture, assessments, surcharge and costs are paid, except that the defendant reduces the amount owed at a rate of at least \$25 for each day of imprisonment, including imprisonment following an arrest but prior to the findings under this subsection, and the maximum period of imprisonment is 90 days.

2. That the payment schedule or judgment be modified, suspended or permanently stayed.

3. That the defendant perform community service work for a public agency or a nonprofit charitable organization designated by the court, except that the court may not order the defendant to perform community service work unless the defendant agrees to perform community service work and, if the community service work is in lieu of restitution, unless the person to whom the restitution is owed agrees. The court may utilize any available resources, including any community service work program, in ordering the defendant to perform community service work. The number of hours of community service work required may not exceed the number determined by dividing the amount owed on the forfeiture or restitution, or both, by the minimum wage established under ch. 104 for adults in nonagriculture, nontipped employment. The court shall ensure that the defendant is provided a written statement of the terms of the community service order and that the community service order is monitored.

4. That the defendant's operating privilege, as defined in s. 340.01 (40), be suspended until the judgment is complied with, except that the suspension period may not exceed 2 years. This subdivision does not apply if the forfeiture is assessed for violation of an ordinance that is unrelated to the violator's operation of a motor vehicle.

(c) If the court determines that the failure of the defendant to comply with the judgment is for good cause or because of the defendant's indigence or that the failure of the defendant to comply with the work order is for good cause, the court may enter an order under par. (b) 2. or 3.

Hendricks, apparently believing himself to be indigent, filed a motion with the trial court in the hopes of having his fines either modified, suspended, or permanently stayed as permitted under WIS. STAT. § 800.095(4)(b)2, or having the opportunity to perform community service work in lieu of paying the fines as authorized under WIS. STAT. § 800.095(4)(b)3. The trial court correctly ruled that this statute is only available in municipal court, not in the circuit court. The preamble to Chapter 800 states that it deals with ordinances, not state statutes, *see* WIS. STAT. § 800.001, and Hendricks was convicted of violating state statutes. In the citations he received it notes that by operating while intoxicated he violated WIS. STAT. § 346.63(1)(a), and by operating after suspension he violated WIS. STAT. § 343.44(1)(a). Consequently, he was not eligible for an indigency hearing under WIS. STAT. § 800.095(4).⁸ Thus, this court affirms in part and remands with directions.

By the Court.—Orders affirmed in part and cause remanded with directions.

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

⁸ This court observes that WIS. STAT. § 973.05(3) does permit the option of a court's ordering community service for all or part of an imposed fine; however, Hendricks did not seek relief pursuant to that statute. In any event, the trial court has discretion to decide whether such an option should be given.

