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January 28, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP129

Tony Payano v. Patrick C. Brennan
(L.C. # 2010CV12757)

Before Curley, P.J., Fine and Kessler, JJ.

Tony Payano, *pro se*, appeals from a trial court order dismissing his civil case with prejudice “for want of prosecution” because the trial court determined that Payano “was not prepared to proceed to trial” on the scheduled jury trial date. We conclude that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2011–12).¹ We summarily reverse the order and remand for further proceedings.

¹ All references to the Wisconsin Statutes are to the 2011–12 version unless otherwise noted.

Payano filed a civil action against Patrick C. Brennan, Esq., who was retained to represent Payano in his criminal appeal. Payano seeks a refund of a portion of the attorney fees, as well as punitive damages. In April 2011, the trial court denied Brennan's motion for summary judgment in a written order.²

In December, 2011, the trial court conducted a hearing on Payano's motion for sanctions against Brennan for failing to comply with discovery requests.³ Payano, who is incarcerated, appeared by videoconference. At the hearing, the trial court established time deadlines and parameters for discovery. It also set a trial date after the following discussion:

THE COURT: How does November 5, 2012, Tony, and defense counsel, when do you get out of prison, Tony? What's your sentence[?]

TONY PAYANO: My sentence would be up 2018.... October 2018, that is my release date.

THE COURT: What are you in there for?

TONY PAYANO: For reckless injury. Reckless endangering.

THE COURT: If you're going to get released earlier --

TONY PAYANO: I'm in the process of appeal, so anything is possible.

THE COURT: If you were getting out earlier, I would wait [for] you [to] get out so you could be present.

So, we are looking at November ... 5. All right.

² The Honorable Timothy G. Dugan issued the written order denying the motion for summary judgment.

³ The Honorable Dominic Amato presided over the December, 2011 and November, 2012 proceedings and entered the order that is at issue in this appeal.

The trial court set November 5, 2012 as the trial date.⁴ There were no further in-court proceedings in the case until November 5, 2012, but on October 24, 2012, Payano sent the trial court a letter stating:

The following is inquire [sic] about the status of the case stated above and the subjects which will be responsible for my appearance at trial. Also, to verify to whom I have to give my clothes which I will use on trial and how early can I have my family deliver them. I would appreciate your information on these issues. Thanks for your time.

(Some capitalization omitted.)

On November 5, 2012, Payano appeared by videoconference for the afternoon jury trial. The trial court addressed Payano and the parties. It said that potential jurors were ready to be brought to the courtroom and it discussed with Payano the need for him to have an interpreter. The trial court also said that one of Payano's family members had come to the courtroom in the morning with civilian clothes for Payano and it noted that it did not see Payano's October 24, 2012 letter until the day of trial. The trial court then addressed the letter's question about Payano appearing in person:

This is a civil courtroom. It is not a secure courtroom. I do not have any secure area with regard to individuals brought into it, who have been convicted of a dangerous crime or a violent crime.

In addition to that, I do not have a bailiff to escort you or the jury.... At the December 20 hearing, when we set this up for a jury trial, the first thing I asked you was when you were going to be released, so you can be present.

⁴ Contrary to Brennan's assertion on appeal, there was no discussion at the December, 2011 hearing concerning whether Payano could file a motion to appear at the trial in person. There was also no discussion of whether Payano would wear civilian clothes at trial. Further, the written order memorializing the December, 2011 hearing did not address either of those issues.

And I believe you said your term ended like 2018, and I said well, I would try to wait if you were going to get out early, to be present, otherwise, I'm going to set a trial date.

So number one, if you wanted to be produced for this hearing for your trial you should have filed a motion a long, long time ago after we discussed this issue on December 20 of 2011....

....

Number two, to come and make a request [to be present in person] at the last minute is not only untimely, but there's no way I can accommodate your request even if I was in a secured courtroom.

Next, the trial court expressed concern about Payano being in "civilian clothing," which led to the following exchange and dismissal of the case:

THE COURT: ... My concern is, to get some finality here, that if you're not in civilian clothing, how long will it take you to get into civilian clothing, sir?

TONY PAYANO: I don't have clothes here. My street clothes is at home....

THE COURT: You haven't asked for the clothing to be brought and sent to the institution at Boscobel, instead of having your family member bring it in at the last minute.

TONY PAYANO: But the problem is, well th[is] is the first time that I ... became aware that I will be in court via video, I didn't know that. This was the first time I knew of that.

Every time I see it, people have been in prison, I thought I would be approved.

....

THE COURT: ... [A]t the December 20 hearing, I talked to you about when you would be able to get out and whether you could be present....

....

So you knew back then that it was going to be a video. And you're not ready to go to trial....

... [Y]ou knew you should have had civilian clothes on. You knew what was going on this very day, we advised you.

TONY PAYANO: I. --

THE COURT: We provided you with a transcript of everything, so you can't say you did not understand. And you're not ready to go.

And Mr. Brennan appeared many, many more days th[a]n the 13 days [criminal] trial he did. And because you're not ready to go, your case is dismissed.

You have a right to appeal. That's the judgment of the court.

The trial court subsequently signed a written order indicating that the case was dismissed with prejudice "for want of prosecution" because Payano "was not prepared to proceed to trial." The written order did not specify whether the trial court determined that the lack of civilian clothes, the lack of arrangements to appear in person, or both was the basis for the dismissal.

On appeal, the parties discuss both of the potential reasons for the dismissal. Having reviewed the transcript, we are unconvinced that Payano's failure to arrange to appear in person for the trial was part of the basis for the dismissal. While the trial court expressed frustration that Payano waited until October, 2012 to raise the issue of appearing in person, the trial court also indicated that it told Payano at the December, 2011 hearing that he would not be present in person. Further, the trial court said that it could not accommodate Payano in the civil courtroom. Thus, we conclude that the trial court dismissed Payano's case with prejudice "for want of prosecution" because he was not wearing civilian clothes and therefore was "not ready to go."

A trial court's decision "to dismiss for want of prosecution is addressed to the sound discretion of the trial court and will be affirmed unless it is clearly shown that there was an [erroneous exercise] of discretion." *Zeis v. Fruehauf Corp.*, 56 Wis. 2d 486, 489, 202 N.W.2d

225, 226 (1972). A trial “court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law and reaches a reasonable conclusion using a demonstrated rational process.” *Milwaukee Rescue Mission, Inc. v. Redevelopment Auth. of the City of Milwaukee*, 161 Wis. 2d 472, 490, 468 N.W.2d 663, 671 (1991).

We conclude that the trial court erroneously exercised its discretion when it dismissed Payano’s case with prejudice for failing to wear civilian clothes at trial. As Payano points out in his brief, “inasmuch as Payano has an interest in being in street clothes the interest is his and not the Defendant’s or the circuit court’s.” Payano did not say that he was unwilling to proceed in his prison clothes and, in fact, he was precluded from addressing the trial court’s concerns. Payano was also never told on the Record that failure to wear civilian clothes would result in dismissal of his case; indeed, his clothing was not even discussed at the December, 2011 hearing. Further, we note that Payano attempted to make arrangements to have civilian clothes when he wrote the trial court a letter twelve days before trial. Under these circumstances, the trial court’s decision to immediately dismiss the case with prejudice when Payano did not have civilian clothes available was an erroneous exercise of discretion. Therefore, we summarily reverse the order dismissing Payano’s case with prejudice and remand for further proceedings.

Upon the foregoing reasons,

IT IS ORDERED that the order is summarily reversed and the cause is remanded for further proceedings. *See* WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals