COURT OF APPEALS DECISION DATED AND FILED

October 23, 2007

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. 2006AP1231-CR

Cir. Ct. No. 2004CT466

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRY M. MCANULTY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Jerry McAnulty appeals an order denying his request for the appointment of counsel. McAnulty argues he is indigent and therefore entitled to court-appointed counsel. Because we conclude McAnulty has

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

not shown any reason why he failed to present the appropriate information to the trial court in his first petition, we affirm.

¶2 McAnulty received citations for operating while intoxicated, fourth offense, and operating a motor vehicle while revoked, second offense. He requested and received court-appointed counsel. However, counsel withdrew and McAnulty's second request for court-appointed counsel was denied, as was his motion for reconsideration. On June 8, 2006, McAnulty was convicted on the citations.

¶3 McAnulty filed a notice of intent to pursue postconviction relief and requested court-appointed counsel for the appeal. On June 27, 2006, the circuit court conducted a hearing on McAnulty's request for counsel. The court denied McAnulty's request, finding "no material change of income circumstances. Defendant reports a change inasmuch as a divorce has been filed and sharing of marital assets and earnings is problematic but also reports some new income by his own initiative that was unavailable before." McAnulty appealed the order, and we affirmed the circuit court. *See* ***State v. McAnulty***, No. 2006AP1231-CR, unpublished slip op. (Wis. Ct. App. Jan. 23, 2007). McAnulty then requested "a hearing for the redetermination of indigency." The trial court again denied McAnulty's request for counsel.

¶4 McAnulty argues he is indigent and entitled to appellate counsel because he is unemployed, has court-ordered obligations, owes state and federal taxes, and has a host of difficulties stemming from his pending divorce. McAnulty has not included a transcript of the circuit court's first hearing on his request for indigency. McAnulty also has not alleged that his current circumstances are in any way different then they were when he filed his petition

after counsel withdrew. If the facts McAnulty currently alleges existed at the time of his earlier petition, then it was his duty to bring them to the attention of the circuit court so that the court could make a determination based on all of the facts.

> The judgments of courts must be based on the facts as they are presented. No doubt, if the truth could always be fully and accurately known, many decisions would appear erroneous; but it is for the public interest that there should be an end of litigation, and parties and privies who have once had day in court cannot, by mere proof or offer of proof that the judgment was founded on error in fact, renew the controversy.

Van Valkenburgh v. City of Milwaukee, 43 Wis. 574, 580 (1878) (quoting ***Chamberlain v. Preble***, 11 Allen 370 (Mass. 1865)). This principle has been more succinctly summed up by the phrase "No one is entitled to more than one kick at the cat." ***Conway v. Division of Conservation***, 50 Wis. 2d 152, 161, 183 N.W.2d 77 (1971) (quoting Hon. Lewis J. Charles, *Res Adjudicata & Estoppel by Judgment*, WISCONSIN BAR BULLETIN 25 (June 1959)). McAnulty cannot simply make sequential requests for relief when there has been no proof of change in circumstances. McAnulty had his "kick at the cat" on this issue and has failed to demonstrate any reason why he was entitled to another circuit court hearing, let alone another appeal.

By the Court.—Order affirmed.

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