**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**February 6, 2008**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2007AP390-CR** **Cir. Ct. No. 2005CT801**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JONATHON M. MARK,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Fond du Lac County: RICHARD J. NUSS, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] Jonathon M. Mark appeals an order denying relief from having to repay Fond du Lac County for fees of appointed counsel relating to an operating while intoxicated—fourth offense prosecution. He alleges

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

impecuniosity by reason of a burglar who stole his money, a theft and general hardship. There was a hearing which resulted in a reduction of payment schedule but we do not have a transcript. The law has long been clear that when this court does not have a copy of the transcript, the record is incomplete and when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling. *See* ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986). Too, we have no way of knowing whether his claims of burglary, theft and hardship are true since we do not know if his assertions of fact were tested by a fact-finder at the circuit court level. We cannot consider them. Based on the record before us, the circuit court's discretionary decision to deny the requested relief is affirmed.

¶2 The pertinent facts are as follows: Mark was arrested for operating a vehicle while intoxicated and driving with a prohibited blood alcohol concentration as repeat offenses. He petitioned for appointment of counsel, providing an affidavit of indigency. The circuit court granted the request with the proviso that he repay the county at a rate of $50 per month until the total sum was paid. The repayment condition was obviously ordered because Mark reported that he received a $900-per-month per capita payment from Ho-Chunk Nation. The circuit court later amended the order to a rate of $25 per month. Mark later pled to operating while intoxicated—fourth offense. Mark sought relief from the order that he repay attorney fees and that was denied. He did not pay as ordered and the circuit court ordered that he pay $851.85 or be committed for 17 days, consecutive to time being spent on another charge. He then sought relief from this order and this was also denied. He appeals that order.

¶3 Mark makes various claims in his brief. He asserts that, upon being released from prison on an earlier occasion, he found that his friend of ten years had stolen property worth $5500. He makes a further claim for loss of $2000 based on a burglary. He also alleges that he did not have a job even though he tried to get one, that he had very little food, that he has few clothes and no winter clothing such that he could not go out and look for jobs in the winter, that he is now incarcerated as a result of pending charges and that he therefore cannot possibly pay attorney fees.

¶4 He notes that the statute governing the imposition of attorney fees requires fees to be imposed only upon those with foreseeable ability to meet the obligation, ***State v. Helsper***, 2006 WI App 243, ¶7, 297 Wis. 2d 377, 724 N.W.2d 414, and tell us that he "does not remember if the court assessed his ability to pay, or not." He claims that he "did not know that he could request a hearing to establish his inability to pay for said fees. And he *does not now request one*." (Emphasis added). He reasons that "[i]t will be futile and an unnecessary waste of tax-payer money and judicial time in transporting and holding an additional hearing, when Mark already raised his issues before the circuit court judge and making the same argument he is now making."

¶5 But the appellate record before us, wisely amended by the State before the cause was submitted for consideration by this court, shows that in a letter filed in the circuit court on February 2, 2006, Mark acknowledged his obligation to pay $50 a month toward attorney fees and indicated that he could not pay. Thereafter, the minutes of a court hearing, filed on February 14, shows that the court reduced the obligation so that Mark only had to pay $25 per month. It is obvious to this court that the circuit court heard Mark's claim of hardship at that time and reduced the monthly payment as a result. Since we do not have a

transcript, we have to assume so, since the law requires us to assume that all facts necessary to the circuit court's order were before that court.

¶6 Thus, when Mark writes that he is not sure whether the circuit court heard his hardship explanation, the lack of a transcript requires us to assume that it did. And, further, when Mark says that if he did not receive such a hearing, he does not now ask for one, all this court can say is that it was his obligation, as moving party, to ask for such a hearing assuming, just for the sake of argument, that there was no such hearing.

¶7 For all the above reasons, this court affirms the order.

*By the Court.*—Order affirmed.

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