COURT OF APPEALS DECISION DATED AND FILED

November 14, 2012

Diane M. Fremgen
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. 2012AP995
2012AP996
2012AP997

Cir. Ct. Nos. 2011FO528
2011FO529
2011FO530

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

COUNTY OF SHAWANO,

PLAINTIFF-RESPONDENT,

V.

JUSTIN R. BUNTROCK,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Shawano County: WILLIAM F. KUSSEL, JR., Judge. *Reversed and cause remanded for further proceedings.*

¶1 MANGERSON, J.[1] Justin Buntrock appeals three default judgments entered against him after he failed to personally appear at his forfeiture court trial. Buntrock, who appeared at trial by his attorney, argues the circuit court erred by entering the default judgments. We agree. We therefore reverse and remand for further proceedings.

BACKGROUND

¶2 Shawano County issued three forfeiture citations to Buntrock for failing to prevent the illegal consumption of alcoholic beverages by an underage person, contrary to SHAWANO COUNTY WI ORDINANCE § 3-84 1D. Buntrock contested the citations, and a court trial was scheduled. Buntrock appeared by his attorney at trial but did not personally appear. The County moved to default Buntrock pursuant to local Circuit Court Rule 8. That rule requires defendants to personally appear at forfeiture trials.[2] Buntrock's attorney objected and argued the court could not default a civil forfeiture defendant when he or she appeared by attorney. The circuit court defaulted Buntrock pursuant to the local court rule.

DISCUSSION

¶3 Buntrock argues the circuit court erroneously exercised its discretion by defaulting him on the forfeiture citations. We review a circuit court's decision

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] Shawano County Circuit Court Rule 8 provides: "Appearance for Traffic/Forfeiture Trial. The Court requires, that in all traffic/forfeiture matters, the defendant must be present in person on the date of trial. Failure of the defendant's personal appearance will result in a default judgment being rendered, even if represented by counsel." *See* Shawano County Circuit Court Rules, Rule 8 (2000), http://www.wisbar.org/AM/Template.cfm?Section=Shawano_County1 (last visited Nov. 1, 2012).

to enter a default judgment for an erroneous exercise of discretion. ***Smith v. Golde***, 224 Wis. 2d 518, 525, 592 N.W.2d 287 (Ct. App. 1999). The erroneous exercise of discretion occurs in many forms, and one of them is a discretionary choice based on an error of law. ***Rohde-Giovanni v. Baumgart***, 2004 WI 27, ¶18, 269 Wis. 2d 598, 676 N.W.2d 452.

¶4 Buntrock first contends the circuit court erroneously relied on an outdated circuit court rule when entering its default judgments against him. Specifically, Buntrock asserts the court relied on the 2000 version of local Rule 8 instead of the current, 2003 version, which does not require forfeiture defendants to personally appear.

¶5 The County does not address Buntrock's assertion that the court erroneously relied on an outdated local rule. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). Although a circuit court's reliance on an outdated rule amounts to an erroneous exercise of discretion and the County's failure to respond to that argument would normally serve as a concession that the rule is in fact outdated, we decline to reverse on that basis. The State Bar of Wisconsin, which pursuant to WIS. STAT. § 753.35 serves as a repository for the circuit court rules, provides that both rules are currently in effect. *See* Shawano County Circuit Court Rules, http://www.wisbar.org/AM/Template.cfm?Section=Shawano_County1 (last visited Nov. 1, 2012). The 2000 version is listed as Circuit Court Rule 8, and the rule that Buntrock contends is the revised, 2003 version of Rule 8 is listed as Circuit Court Rule 12. *See* ***id.*** Therefore, we assume without deciding that Shawano County Circuit Court Rule 8 required Buntrock's personal appearance at the forfeiture trial.

¶6 Buntrock next argues that, even if the 2000 version of Circuit Court Rule 8 was in effect, the rule is inconsistent with art. I, § 21(2) of the Wisconsin Constitution, Wisconsin SCR 11.02(1), and case law. A circuit court may adopt rules governing court practice in that court, as long as the rules are "consistent with rules adopted under s. 751.12 [supreme court rules] and statutes relating to pleading, practice, and procedure." WIS. STAT. § 753.35(1). "The clear implication of [§ 753.35(1)] is that *local rules may not be inconsistent with state rules or statutes*." ***Hefty v. Strickhouser***, 2008 WI 96, ¶59, 312 Wis. 2d 530, 752 N.W.2d 820 (emphasis in original). Thus, circuit court rules may supplement, but not supersede, state statutes and rules. ***Id.***

¶7 WISCONSIN CONST. art. I, § 21(2) provides: "In any court of this state, any suitor may prosecute or defend his suit either in his own proper person or by an attorney of the suitor's choice." Wisconsin SCR 11.02 (2002), governs appearances by attorneys on behalf of their clients. It provides:

> (1) Authorized. Every person of full age and sound mind may appear by attorney in every action or proceeding by or against the person in any court except felony actions, or may prosecute or defend the action or proceeding in person.

Under SCR 11.02, a party in a civil action does "'appear' at trial by the fact that … counsel appeared." ***Sherman v. Heiser***, 85 Wis. 2d 246, 254-55, 270 N.W.2d 397 (1978) (discussing WIS. STAT. § 757.27, which is the statutory predecessor to SCR 11.02). In ***Sherman***, the court held a circuit court may not default a defendant for failing to personally appear at a civil trial if the defendant appears by his or her attorney. ***Id.*** at 255.

¶8 In its brief, the County neither responds to Buntrock's assertion that the local court rule is inconsistent with established legal authority nor cites

Sherman, SCR 11.02, or the Wisconsin Constitution in its brief. Instead, the County argues circuit courts are permitted to adopt local rules and the local rule in this case can be "likened to a subpoena," which is an order of the court. The County urges us to affirm based on "the holding of the Wisconsin Supreme Court in ***City of Sun Prairie v. Davis*** [,226 Wis. 2d 738, 595 N.W.2d 635 (1999)] and the authority of the court to issue subpoenas and adopt local court rules."

¶9 In ***Davis***, a municipal court relied on its inherent authority to order an out-of-state defendant's personal appearance at a civil forfeiture trial. ***Id.*** at 746-47. The municipal court used its inherent authority because it lacked statutory authority to order the defendant's presence. ***Id.***; *see also* WIS. STAT. § 885.04 (municipal courts only have in-state subpoena powers). Our supreme court held the municipal court lacked inherent authority to order the defendant's personal presence at the civil forfeiture trial because "the existence of the municipal court and the orderly and efficient exercise of its jurisdiction is not dependent upon the personal presence of the defendant." ***Davis***, 226 Wis. 2d at 760.

¶10 In this case, the County appears to assume that, because the ***Davis*** court determined a municipal court lacked inherent authority to order an out-of-state defendant to appear at a forfeiture trial, it follows that a circuit court has inherent authority to order an in-state defendant to appear at a forfeiture trial. To the extent this is the County's argument, we reject it. When reaching its decision, the ***Davis*** court spoke more generally of whether any court had inherent authority to order a noncriminal defendant's personal presence. ***Id.*** at 759. The court stated:

> [T]he City has cited to no case in this state nor any other jurisdiction in which a court has recognized the judiciary's power to order a defendant to personally appear based *solely* on inherent authority, and we have found none ....

> In fact, this court has previously stated that a defendant who failed to personally appear in a civil action nonetheless appeared "'since he was entitled to and did appear by his attorney.'" ***Sherman v. Heiser***, 85 Wis. 2d 246, 255, 270 N.W.2d 397 (1978) (citations omitted). The defendant in ***Sherman*** appeared by the fact that his counsel appeared on his behalf. ***Id.*** at 254, 270 N.W.2d 397. "The most generous interpretation that could be given to Sherman's action [failure to personally appear] is that he was willing to let his attorney try the case without him. This he had a right to do." ***Id.*** at 256, 270 N.W.2d 397.

Id. at 759-60 (emphasis added).

¶11 Therefore, the County's reliance on ***Davis*** to assert the circuit court had inherent authority to order Buntrock's personal presence appears to be foreclosed by ***Davis*** itself. The County has offered no other legal authority in support of its "inherent authority" argument. We therefore will not consider it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶12 We also reject the County's assertion that the circuit court rule in this case "can be likened to a subpoena." Although a circuit court has statutory authority to issue subpoenas, *see* WIS. STAT. § 885.01, the issuance of a subpoena has various requirements that are not satisfied by the circuit court rule. *See, e.g.*, WIS. STAT. § 885.03 (service requirements). Buntrock was not "subpoenaed" by

the local rule,[3] and the record shows that he was never subpoenaed pursuant to § 885.01.

¶13 Finally, the County's assertion that we should affirm because the circuit court has authority to enact local rules is a nonstarter. That the circuit court has authority to adopt local court rules does not mean the court may adopt rules that are in contravention to established law. ***Hefty***, 312 Wis. 2d 530, ¶59. The County has presented no argument in response to Buntrock's assertion that the local rule conflicts with established law. *Compare* Shawano County Circuit Court Rule 8 (2000) (forfeiture defendant will be defaulted for failing to personally appear even if represented by attorney) *with* ***Sherman***, 85 Wis. 2d at 254-55 (defendant may not be defaulted for nonappearance if attorney appears on defendant's behalf), *and* SCR 11.02(2) (defendant is permitted to appear by attorney in noncriminal matters). We therefore presume the County has conceded that the local rule conflicts with established law and is therefore invalid. *See* ***Charolais***, 90 Wis. 2d at 97. Because the circuit court cannot default a defendant based on an invalid rule, we therefore reverse the circuit court's judgments and remand for further proceedings.

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[3] It appears the local rule was most likely enacted to prevent a defendant's attorney from making the government prove identity without the defendant's courtroom presence. However, the law has evolved to manage this defense tactic. *See* ***United States v. Morrow***, 925 F.2d 779, 781 (4th Cir. 1991) (a courtroom identification is unnecessary if other evidence reasonably allows the inference that the defendant on trial is the person who committed the charged acts); *see also* ***State v. Hill***, 520 P.2d 618, 619 (Wash. 1974) (identity involves a question of fact and "any relevant fact, either direct or circumstantial, which would convince or tend to convince a person of ordinary judgment … of the identity of a person, should be received and evaluated"). Additionally, if identity is not disputed, nothing prohibits the parties from stipulating to it.

By the Court.—Judgments reversed and cause remanded for further proceedings.

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