COURT OF APPEALS
DECISION
DATED AND RELEASED

February 8, 1996

No. 95-1546

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

COUNTY OF LA CROSSE,

Plaintiff-Respondent,

v.

G. BRADFORD MERKL,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Reversed and cause remanded with directions*.

VERGERONT, J.[1] G. Bradford Merkl appeals from a judgment of conviction for disorderly conduct and resisting arrest in violation of §§ 9.947.01 and 9.946.41, LA CROSSE COUNTY ORDINANCES. The trial was to the court. The court imposed a forfeiture of $175 for the disorderly conduct and a forfeiture of $297 for resisting arrest. Merkl appeals on a number of grounds, one of which is that he was not notified of his right to a jury trial and of the procedure for

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

requesting a jury trial as required by statute. We conclude that Merkl is entitled to a new trial before a jury because he was not notified of his right to a jury trial and the procedure for requesting a jury trial as required by §§ 345.34(1), 345.425(1) and 345.43(1), STATS. We find it unnecessary to reach the other issues Merkl raises on appeal.

Merkl made an initial appearance on January 20, 1995, on a complaint issued alleging the two ordinance violations. While an assistant public defender appeared with Merkl, the court explained that because Merkl was charged with ordinance violations, the public defender's office could not represent him. The court also explained that the penalty for each ordinance violation is a forfeiture of not less than $5 nor more than $500. Merkl pled not guilty. The court stated that based on the pleas of not guilty, the matter would be set for a pretrial conference and Merkl would receive notice of that. Merkl was released on a $200 signature bond with conditions that he have no contact with the Hollywood Theatre, the location at which the incident giving rise to the charges occurred. The transcript of the initial appearance shows that there was no mention of a jury trial or how Merkl could obtain one.

A pretrial conference was held on February 21, 1995, at which time the matter was scheduled for trial on April 20. Merkl appeared, made a written demand for a jury trial and paid the applicable fees.

Merkl appeared unrepresented on April 20, 1995. When his case was called, he stated that he wished to have a trial before a jury because he had paid the fee. The court responded that the fee was not filed in time because it had to be filed within ten days. Merkl said he was not given notice of that time. The court denied the request for a jury trial, concluding that it did not have to advise Merkl of the law.

The construction of a statute in relation to a set of facts is a question of law. ***Tahtinen v. MSI Ins. Co.***, 122 Wis.2d 158, 166, 361 N.W.2d 673, 677 (1985).

Section 345.34(1), STATS., governing ordinance violations, provides:

> If the defendant appears in response to a citation, or is arrested and brought before a court with jurisdiction to try the case, the defendant shall be informed that he or she is entitled to a jury trial and then asked whether he or she wishes presently to plead, or whether he or she wishes a continuance. If the defendant wishes to plead, the defendant may plead guilty, not guilty or no contest.

Section 345.425, STATS., provides:

> (1) The defendant shall be informed of his or her right to a jury trial in circuit court on payment of fees required by s. 345.43(1).
>
> (2) If both parties, in a court of record, request a trial by the court or if neither demands a trial by jury, the right to a trial by jury is waived.

Section 345.43(1), STATS., provides in part:

> If a case has been transferred under s. 800.04(1)(d), or if in circuit court either party files a written demand for a jury trial within 10 days after the defendant enters a plea of not guilty under s. 345.34 and immediately pays the fee prescribed in s. 814.61(4), the court shall place the case on the jury calendar of the circuit court.... If no party demands a trial by a jury of 12, the right to trial by a jury of 12 is waived forever.

The State concedes that § 345.34(1), STATS., requires that a defendant in a forfeiture proceeding for an ordinance violation be informed that he or she has a right to a jury trial. The State apparently does not concede that these statutes require that the defendant also be informed that he or she must pay jury fees within ten days of entering a guilty plea in order to have a jury trial. However, the State does not explain how § 345.425, STATS., can be reasonably read otherwise, and we conclude it cannot be.

The phrase "on payment of fees required by s. 345.43(1)" must modify "right to a jury trial in circuit court." The only other phrase it could modify is "[t]he defendant shall be informed" because that is the only other phrase in the sentence. But that reading of the sentence produces an unreasonable result: "On payment of fees required by §§ 345.425 and 345.43(1), STATS., the defendant shall be informed of his or her right to a jury trial." It makes no sense to require that a defendant be informed of his or her right to a jury trial after the required jury fee has been paid. Since "on payment of fees required by s. 345.43(1)" modifies "right to a jury trial," it follows that the information that must be provided to the defendant is the information that the defendant has a right to a jury trial if the defendant files a written demand for a jury trial and pays the jury fees within ten days of entry of the not guilty plea, as required by § 345.43(1).

The State concedes that there is no evidence in the transcript of the initial appearance that Merkl was informed that he had a right to a jury trial provided he pay the applicable jury fee within ten days. There is no evidence elsewhere in the record indicating that he was so informed. Indeed, there is no evidence that Merkl was informed at the initial appearance that he was entitled to a jury trial, although the State agrees that § 345.34(1), STATS., requires that.

The State does not argue that, if there were an error in failing to inform Merkl of his right to a jury trial and how to obtain one, such an error is harmless. We conclude the error is not amenable to a harmless error analysis. *See* ***Sullivan v. Louisiana***, 508 U.S. 275, ___, 124 L.Ed.2d 182, 190 (1993) (structural defects in the constitution of the trial mechanism, as opposed to errors which occur during the presentation of the case to the jury and which may be assessed in the context of the evidence presented, defy analysis by harmless-error standards); ***Wold v. State***, 57 Wis.2d 344, 357, 204 N.W.2d 482, 491 (1973); ***Olympia Hotels Corp. v. Johnson Wax Dev. Corp.***, 908 F.2d 1363, 1369 (7th Cir. 1990) (issues of entitlement to a particular kind of tribunal are not subject to the harmless error rule). Merkl is therefore entitled to a new trial before a jury.[2]

[2] Merkl asks that if we order a new trial, we order a substitution of the trial judge. That is outside the scope of this appeal. Substitution of judges in this context is governed by § 801.58(7), STATS.

By the Court.—Judgment reversed and cause remanded with directions.

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