COURT OF APPEALS
DECISION
DATED AND RELEASED

April 17, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0677

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

CITY OF FORT ATKINSON

PLAINTIFF-RESPONDENT,

V.

RONALD A. LENDABARKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed.*

ROGGENSACK, J. Ronald A. Lendabarker appeals from a circuit court judgment affirming his municipal court traffic conviction for operating a motor vehicle while under the influence (OMVWI) and with a prohibited alcohol concentration (PAC). He claims that the circuit court violated his due process right to be heard when it affirmed his municipal conviction under the § 800.14(5), STATS., the transcript review provision, without holding a hearing or allowing him

to brief his arguments. However, because Lendabarker's claim is contrary to the holding of a recent and binding decision of this court, the judgment is affirmed.[1]

BACKGROUND

On the evening of September 18, 1994, Fort Atkinson Police Officer Jeff Hottman arrested Lendabarker for driving under the influence of an intoxicant, after Lendabarker failed several field sobriety tests and a preliminary breath test registered an alcohol concentration of .19%. Hottman transported Lendabarker to the police station, where an intoxilyzer test showed an alcohol concentration of .12%. Hottman then issued Lendabarker an additional PAC citation.

Lendabarker was charged with two counts of violating city ordinance 20.01, which adopted § 346.63(1)(a) and (b), STATS., by reference. He filed a motion to suppress the evidence of his sobriety tests and intoxilyzer result on the basis of an unlawful traffic stop.[2] The motion was denied. On October 2, 1995, after a stipulated trial, Lendabarker was convicted of both counts by the City of Fort Atkinson Municipal Court. However, he reserved the right to challenge the denial of his suppression motion on appeal.

Lendabarker then sought review of his conviction in the Jefferson County Court, pursuant to § 800.14(5), STATS. The circuit court reviewed the record and affirmed the judgment of the municipal court on January 24, 1996,

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

[2] Lendabarker had been stopped on suspicion of burglary, after the officer observed his vehicle parked near midnight by a loading dock on private commercial property which had been burglarized recently. We do not consider the constitutionality of the stop, because that issue has not been appealed.

without any additional arguments or briefing from the parties. Lendabarker now claims that he was denied due process of law because the transcript review procedure under § 800.14(5) failed to provide him an opportunity to be heard.

DISCUSSION

Standard of Review.

This court will independently determine whether a constitutional due process violation has occurred, without deference to the trial court. ***State v. Kimpel***, 153 Wis.2d 697, 702, 451 N.W.2d 790, 792 (Ct. App. 1989).

Due Process.

Once a right to appeal has been granted by a state, due process protections attach to that right under the Fourteenth Amendment of the United States Constitution. ***State v. Borrell***, 167 Wis.2d 749, 778, 482 N.W.2d 883, 894 (1992). Due process requires that the right to appeal not be rendered meaningless. ***Griffin v. Illinois***, 351 U.S. 12, 18 (1956). In order for an appeal to be considered meaningful, "the party seeking review must be afforded the right to be heard at a meaningful time and in a meaningful manner." ***City of Middleton v. Hennen***, 206 Wis.2d 346, 353, 557 N.W.2d 818, 820 (Ct. App. 1996).

In ***Hennen***, this court determined that a defendant was "neither statutorily nor constitutionally entitled to brief or argue orally before the circuit court when pursuing a transcript review appeal from a municipal court judgment under § 800.14(5), STATS." ***Id***. at 354, 557 N.W.2d at 821. We reasoned that a party appealing from an adverse municipal court judgment was in fact afforded a

meaningful opportunity to be heard, because § 814.14(4)[3] provided the party with the option of a *de novo* trial in the circuit court. The party could not claim a constitutional violation after choosing to forgo that opportunity in favor of a transcript review.

Lendabarker attempts to distinguish ***Hennen*** on the ground that that case did not fully consider certain constitutional implications, and therefore it should not be binding in this case. While we disagree that ***Hennen*** is not binding on the constitutional question at issue here, *see* ***Cook v. Cook,*** No. 95-1963, slip op. 23-24 (Wis. March 19, 1997) (recently confirming that a decision by the court of appeals is binding and must be followed as precedent by all other reviewing courts, even if wrongly decided), we nonetheless briefly address Lendabarker's argument for the purpose of clarification.

The new trial provision of § 800.14(4), STATS., does not act as a "substitute" for due process under § 800.14(5), as Lendabarker claims. Rather, the opportunity to have a *de novo* determination of the issues decided in a municipal judgment fully satisfies the Due Process Clause, in and of itself. However, the right to be heard at a new trial may be waived, just as any other constitutional right may be waived. The streamlined option of a transcript review may appeal to a defendant's interest in time, money or convenience.

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[3] Section 800.14(4), STATS., provides:

> Upon the request of either party within 20 days after notice of appeal under sub. (1), or on its own motion, the circuit court shall order that a new trial be held in circuit court. The new trial shall be conducted by the court without a jury unless the appellant requests a jury trial in the notice of appeal under sub. (1). The required fee for a jury is prescribed in s. 814.61(4).

Lendabarker objected to his municipal traffic court conviction. The Wisconsin statutes offered him the opportunity to vacate that conviction and argue his case anew in circuit court. Lendabarker chose to forgo that opportunity, and instead requested that the circuit court review his conviction, and in particular, the denial of his suppression motion, on the basis of the transcripts of the municipal court proceedings. The circuit court did as Lendabarker requested. Lendabarker received all the process he was due.

CONCLUSION

A defendant who seeks review of an adverse municipal court judgment may afford himself of the opportunity to be heard at a new trial under § 800.14(4), STATS., or he may waive that right and choose instead to simply have the transcript of the municipal proceedings reviewed by the trial court under § 800.14(5). Due process does not preclude a defendant from waiving the right to have an adverse judgment reconsidered in a new trial in favor of a simpler and less costly review that may not include briefing or oral argument.

By the Court.—Judgment affirmed.

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