COURT OF APPEALS
DECISION
DATED AND FILED

November 23, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP430 **Cir. Ct. No. 2010TR1134**

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

COUNTY OF WASHINGTON,

PLAINTIFF-RESPONDENT,

V.

BENJAMIN GORDON WALKER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Washington County: JAMES G. POUROS, Judge. *Affirmed*.

¶1 NEUBAUER, P.J.[1] Benjamin Gordon Walker appeals from a circuit court order denying his motion to reopen a default forfeiture judgment

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

entered on a traffic citation. We conclude that the circuit court properly exercised its discretion. We affirm the order.

¶2 Walker was cited for operating a motor vehicle at an unreasonable and imprudent speed on March 8, 2010. The citation noted a circuit court date of May 6, 2010. Walker wrote to the court on May 4, 2010, that he was aware of the May 6 hearing date but would not be entering a plea. Walker explained, "I am not entering a plea because it wouldn't be in my best interest to do so…." He further explained that because he did not have the resources to pay the fine, he had obtained and enclosed a notarized affidavit of indigency. Walker additionally returned the standard form, which informed him of his plea options and provided a space for his signature if pleading not guilty. Walker filled out the informational portion of the form but did not sign in the space provided if pleading not guilty. In his letter, Walker advised the court:

> I did not sign the line that is reserved for those who wish to enter pleas of "not guilty" because doing so would waive my right to challenge the court's jurisdiction over my person. If the court should choose to enter such a plea on my behalf, that is within its discretion; but I have the right to stand mute if I choose.

The form clearly states: "**Failure to make a plea in writing or to appear in court** by the scheduled court date will result in a conviction and forfeiture being entered against you."

¶3 The clerk of court's office responded to Walker on May 11, 2010, notifying him that the affidavit of indigency "is only appropriate for filing and service fees" and enclosed a default judgment which included wording which would allow him to set up payment arrangements. The court informed Walker that

he would need to contact the district attorney's office if he wanted to reopen the case.

¶4 Walker subsequently moved for reconsideration on May 27, 2010, under WIS. STAT. § 805.18. In response to Walker's motion for reconsideration, the circuit court, Judge Patrick J. Faragher presiding, determined that Walker failed to appear at his return date on the citation, failed to provide an explanation for his failure to appear, and that § 805.18 does not authorize reconsideration. The court suggested that Walker contact the district attorney's office to determine if it would be willing to support reopening the case.

¶5 Walker subsequently moved to reopen the judgment on November 11, 2010. The circuit court, Judge James G. Pouros now presiding, responded that it had reviewed Walker's file, that Walker had failed to appear, had failed to receive the support of the district attorney's office to reopen and that there was no basis to reopen. The court denied Walker's motion without a hearing. Walker appeals.

¶6 Whether to reopen a default judgment is a decision that lies within the sound discretion of the circuit court. *See* ***Dugenske v. Dugenske***, 80 Wis. 2d 64, 68, 257 N.W.2d 865 (1977). We will not overturn a discretionary determination if the court considered the relevant facts, applied the proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *See* ***Rodak v. Rodak***, 150 Wis. 2d 624, 631, 442 N.W.2d 489 (Ct. App. 1989).

¶7 In a forfeiture action for a traffic citation, a party may be entitled to relief from a default judgment if he or she demonstrates to the satisfaction of the court that the failure to appear was due to mistake, inadvertence, surprise or

excusable neglect. WIS. STAT. § 345.37(1)(b). The burden is on the defendant to show that excusable neglect exists. *See* ***Hansher v. Kaishian***, 79 Wis. 2d 374, 389, 255 N.W.2d 564 (1977).

¶8 Walker contends that his motion was made in accordance with WIS. STAT. § 345.37(1)(b) and alleged that he had mistakenly thought that his May 4, 2010 letter constituted an appearance. Walker contends that the court's determination that the "ambiguous letter" was not an appearance does not adequately address the issue of whether his failure to appear was due to mistake. We disagree. We begin with Judge Faragher's letter.

¶9 Judge Faragher's letter addressed Walker's motion for reconsideration and correctly noted that Walker's motion did not "explain why [he] failed to appear in person." While Walker's motion asserts that his May 4 letter should have arrived by the date of the scheduled hearing and therefore constituted an appearance, it does not make an assertion of mistake under WIS. STAT. § 345.37(1)(b). Walker acknowledges that he refused to enter a plea, instead choosing to remain mute. This is not one of the options set forth on the form Walker filled out and returned to the court. That form instructs that if you fail to make a plea in writing or to appear in court, you will be convicted and a forfeiture judgment will be entered against you. When returning that form, Walker stated to the court that he was choosing not to enter a plea. Walker both refused to enter a plea in writing and also failed to appear in person. Thus, the circuit court did not err in its determination that Walker's excuse for nonappearance—that he believed he was appearing by not pleading *or* appearing—was not a mistake.

¶10 Judge Pouros then responded to Walker's motion to reopen which alleged that Walker "mistakenly thought that his letter indicating his intent to stand mute effectuated an appearance and would set the matter on for trial as the court would have to enter a not guilty plea for him." The circuit court determined, "As stated by Judge Faragher in his June 4, 2010 letter to you—you failed to appear on your case. 'Your ambiguous letter (of May 4, 2010) is not an appearance.'" We recognize that Judge Pouros' statement does not directly address Walker's argument. However, implicit in the court's decision is its lack of satisfaction as to Walker's showing of mistake, inadvertence, surprise or excusable neglect. Judge Pouros indicated that he reviewed Walker's file and there was no basis to reopen. In light of Walker's initial correspondence to the court, we see no error in the court's determination.

¶11 We conclude that the circuit court properly exercised its discretion when it denied Walker's motion to reopen the default judgment in a civil forfeiture action.[2] We affirm the order.

By the Court.—Order affirmed.

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

[2] In light of our decision, we need not address the parties' arguments as to the timeliness of Walker's motion and whether the court's letter constitutes a final order. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the "narrowest possible ground").