

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 26, 2008

David R. Schanker
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 No. 2008AP737

STATE OF WISCONSIN

Cir. Ct. Nos. 2007TR553
2007TR554

**IN COURT OF APPEALS
DISTRICT II**

COUNTY OF WAUKESHA,

PLAINTIFF-RESPONDENT,

V.

JOHN MICHAEL DUCHEK,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Waukesha County:
JOHN FIORENZA, Reserve Judge. *Reversed and cause remanded.*

¶1 NEUBAUER, J.¹ John M. Duchek appeals from a judgment of conviction for operating under the influence (OWI), first offense, contrary to WIS.

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

STAT. § 346.63(1)(a), and a default judgment for driving in excess of the speed limit, contrary to WIS. STAT. § 346.57(5). Duchek argues that the circuit court erred in entering the judgments against him for failing to appear in a traffic forfeiture action when his counsel appeared on his behalf. We agree. We reverse the judgments and remand for further proceedings.

¶2 The record reflects that Duchek was issued two citations on January 10, 2007, one for speeding and another for OWI. On January 26, 2007, Attorney Andrew Mishlove filed a notice of retainer in each civil action indicating that he had been retained by and would appear for Duchek, whose place of residence is listed as Aurora, Illinois. Mishlove additionally filed an authorization to appear on Duchek's behalf.² That same day, Duchek, by his attorney, filed written pleas of not guilty to both citations and additionally demanded a jury trial in the OWI case pursuant to WIS. STAT. § 800.04(1)(d).

¶3 On January 29, 2008, Mishlove, appearing for Duchek, and the County appeared for trial. The County brought Duchek's absence to the court's attention. Citing to Waukesha County Circuit Court Rule 3.1 and WIS. STAT. § 806.02, the County argued that Duchek's failure to appear in person should result in a default judgment. Mishlove opposed the County's request citing to WIS. CONST. art. I, § 21, which permits a defendant to defend a suit by an

² The authorization to appear pursuant to WIS. STAT. § 971.04 is not contained in the appellate record. However, it was specifically noted and referenced by the circuit court at the default hearing in support of its finding that Mishlove had the authorization to appear. While the County suggests the authorization does not excuse defendant's appearance at trial or as the court mandates, we note that § 971.04 governs the presence of defendants in criminal proceedings, and thus is not applicable in this civil forfeiture matter.

attorney.³ The circuit court entered default judgment against Duchek, who now appeals.

¶4 The County argues on appeal, as it did before the circuit court, that it is entitled to a default judgment against Duchek pursuant to Waukesha County Circuit Court Rule 3.1 and WIS. STAT. § 806.02(5). Rule 3.1 provides in part: “Where no deposit of money was made, a default judgment shall be entered against a defendant who fails to appear at any scheduled proceeding.” Section 806.02(5) permits default against a defendant in a civil matter who “fails to appear at trial.” Relying on the use of the word “defendant,” the County argues that Duchek failed to appear. However, the County’s argument begs the question of whether an appearance by Duchek’s attorney in this noncriminal forfeiture matter qualifies as appearance by the “defendant.” We conclude that it does.

¶5 Wisconsin Supreme Court Rule 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.” SCR 11.02(1). 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) (circuit judge should not grant default judgment under WIS. STAT. § 806.02(5) when a

³ Duchek again argues on appeal that he is entitled to appear by counsel in a civil matter pursuant to WIS. CONST. art. I, §21, which governs the rights of suitors. It 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.” *Id.*, §21(2). This provision gives the right, in a civil trial, to choose whether to defend oneself or to have an attorney. *City of Sun Prairie v. Davis*, 217 Wis. 2d 268, 278, 579 N.W.2d 753 (Ct. App. 1998), *rev’d on other grounds*, 226 Wis. 2d 738, 595 N.W.2d 635 (1999).

person appears through an attorney based on WIS. STAT. § 757.27, the statutory predecessor to SCR 11.02).⁴

¶6 A first offense OWI results in a noncriminal forfeiture, WIS. STAT. § 346.65(2)(am)1., and therefore is a civil matter tried in circuit court. As such, we conclude that the circuit court erred in its determination that Duchek failed to appear at trial even though his attorney was present and prepared to proceed. We therefore reverse the default judgment and the judgment of conviction.

By the Court.—Judgments reversed and cause remanded.

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

⁴ Supreme Court Rule 11.02(1) (2002), which permits an attorney to appear on behalf of a client in nonfelony matters, is consistent with statutory law governing appearances in traffic forfeiture actions. WISCONSIN STAT. §§ 345.43 to 345.47 govern the procedure in traffic forfeiture actions for six-person jury trials transferred from municipal court under WIS. STAT. § 800.04(1). “Where no specific procedure is provided in [WIS. STAT.] ss. 345.21 to 345.53, [WIS. STAT.] ch. 799 shall apply” to traffic forfeiture actions in circuit court. WIS. STAT. § 345.20(2).

Finding no specific procedure in WIS. STAT. ch. 345 governing appearances, we look to WIS. STAT. § 799.06(2) which provides: “A person may commence and prosecute or defend an action or proceeding under this chapter and may appear in his, her or its own proper person *or by an attorney regularly authorized to practice in the courts of this state.*” (Emphasis added.) Furthermore, under WIS. STAT. § 799.21(4), the appearance requirements for a jury trial under ch. 799 are specifically governed by WIS. STAT. § 799.06(2) which, again, permits appearance by an attorney.

