COURT OF APPEALS DECISION DATED AND FILED

March 1, 2012

A. John Voelker
Acting 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. 2011AP2533

Cir. Ct. No. 2011CV303

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

VILLAGE OF DEFOREST,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER M. BUHLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 BLANCHARD, J.[1] Chris Buhler[2] appeals the judgment of the circuit court following the court's determination at a bench trial that he violated a Village of DeForest fire safety ordinance on 31 separate occasions in connection with an apartment building he owns. For the following reasons, this court sustains the court's findings of ordinance violations as to the first 12 of the citations, but reverses as to the remaining 19. Accordingly, this court remands with directions for entry of an amended judgment permitting recovery by the Village for each of the initial 12 citations, and dismissing the remaining 19.

BACKGROUND

¶2 Chris Buhler owns a four-unit rental apartment building in the Village of DeForest (the Village). On February 11, 2010, DeForest Area Fire Inspector John Wagner conducted a fire inspection of this building, and made the following comment on a DeForest Area Fire District Inspection Report: "Knox Box Key Vault Required per Ordinance 5.10(2m). Please see attached ordinance." Wagner noted on the report that the owner had 30 days to comply with this directive.[3]

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

[2] Buhler explains that his first name is Chris, not Christopher. However, there was apparently no motion in the circuit court to change the caption of the case.

[3] The one-page report form contained the following language at the bottom, providing context for citizens receiving such reports:

> SECTION 101.14 of the Wisconsin Statutes constitutes every Fire Chief a deputy of the Wisconsin Department of Commerce, and requires him or his appointed inspectors to make inspections periodically for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violation of

(continued)

¶3 It is undisputed that a Knox Box is a wall-mounted safe that holds building keys for first responders to retrieve, using master keys that open all such boxes in their response areas.

¶4 Village of DeForest Ordinance 5.10(2m) (the DeForest Ordinance), cited in the report, reads as follows:

> (2m) KEY BOX REQUIREMENTS.
>
> (a) When access to or within any place of employment or public building as defined in §101.01, *Wis. Stats*. is unduly difficult because of secured openings, the fire inspector shall require that a key box be installed in an accessible location on the outside of the structure at the expense of the property owner. The key box shall be a type approved by the fire department and shall contain those keys found by the fire inspector to be necessary to provide emergency access.
>
> (b) Property Owner Responsibility. The property owner is responsible to ensure that keys maintained with a key box are those of the current type. When the property owner directs changes of locks within the building, the property owner shall notify the fire department prior to changing the locks so that new keys may be placed in the key box.
>
> (c) Removal of Keys Prohibited. Removal of any key by other than fire department, police department or emergency medical service personnel shall subject the violator to a penalty as provided in sec. 20.04 of this Code.

¶5 On February 12, 2010, Wagner issued to Buhler a letter entitled "Violation Notification," notifying Buhler of the inspection of the day prior, reflected in the above referenced report, and of the following code violation: "Per Ordinance 5.10 (2M) Key Box is required when access to or within any place of

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any law or local ordinance relating to fire hazards or prevention of fires.

employment or public building is unduly difficult because of secured openings." This notification stated that, if Buhler failed to "comply with this notice" before a re-inspection planned for March 12, 2010, "you will be liable for the penalties provided by law for such violations." The notice invited questions, with contact information for Wagner. Buhler testified in the trial in this case that he was aware when he received the Violation Notification that the Village was giving him 30 days to install a Knox Box on his building.

¶6 On February 20, 2010, Buhler responded by letter to Wagner regarding the Violation Notification. Buhler stated in part, "The Village of DeForest Ordinance is in direct violation of the U.S. Constitution, Fourth Amendment, prohibition against unreasonable searches. The Supreme Court has affirmed this in many decisions[,] most notably Marshall v. Barlow['s, Inc.,] 436 U.S. 307, 98 S.Ct. [1816 (1978)]."

¶7 On February 26, 2010, Wagner replied to this response, citing various statutes in support of his authority to issue the Violation Notification.

¶8 As discussed in more detail in the discussion below, Buhler testified that on June 25, 2010, he removed the lock that secured the exterior door of the building.[4] However, there was also at least some evidence suggesting a later removal date.

[4] It appears from the record that one exterior door gives access to a common entrance way to all units in the building, and that Buhler asserted that he removed the only lock, or in any case all locks, from this exterior door.

¶9 On August 6, 2010, and on or about September 3, 2010,[5] Wagner issued Buhler a total of 32 citations for alleged violations of the DeForest Ordinance, with the first date of an alleged violation being July 21, 2010, and the last being September 3, 2010. More specifically, there were 12 citations issued on August 6, 2010, and 20 citations issued on September 3, 2010.

¶10 In a separate action from this one, on August 20, 2010, based on the allegation that Buhler violated the DeForest Ordinance following the February 12, 2010 Violation Notification, Buhler was found in violation of the ordinance, in Dane County Case 2010 CV 3741, following a bench trial before the Hon. Maryann Sumi. The trial before Judge Sumi constituted de novo review of a prior municipal court decision. Buhler did not appeal the judgment in the proceedings before Judge Sumi.

¶11 On June 20, 2011, based on the allegation that Buhler violated the DeForest Ordinance on 32 occasions between July 21, 2010, and September 3, 2010, Buhler was found to have committed 31 violations in this case, Dane County Case 2011 CV 303, following a bench trial before the Hon. Sarah O'Brien.[6] The trial before Judge O'Brien was also on de novo review from a municipal court proceeding. Buhler now appeals the judgment resulting from the proceedings before Judge O'Brien.

[5] Some of the citations in the record give only a month and not a day in the "Date Citation Issued" box, but it appears from the record that missing dates should all read September 3, 2010, and Buhler did not challenge any citation on this basis.

[6] The circuit court dismissed one of the 32 citations on grounds not relevant to this appeal. The dismissed citation, N539324, was one of the 20 citations issued on September 3, 2010.

¶12 Additional facts from the bench trial before Judge O'Brien, at which Buhler represented himself, are related as necessary below.

DISCUSSION

¶13 Buhler admitted at the trial that at no time relevant to this appeal did he install a Knox Box on the building. Moreover, for purposes of this appeal, Buhler does not dispute that the DeForest Ordinance applies to DeForest rental property such as his if its terms are met. With that background, Buhler primarily argues that he could not have been required by the ordinance to have a Knox Box on the building during the periods at issue because he demonstrated at trial that he had, by the time the first batch of citations was issued, removed the exterior door lock, defeating the following element of the DeForest Ordinance: "[A]ccess to or within [the building] … is unduly difficult because of secured openings."

¶14 As Buhler correctly notes, the Village was required to prove each violation by a preponderance of the evidence. *See* ***City of Cudahy v. DeLuca***, 49 Wis. 2d 90, 92-93, 181 N.W.2d 374 (1970) (in forfeiture actions for violation of municipal ordinance, where violation involves an ordinance which has no statutory counterpart, burden of proof is preponderance of the evidence).

¶15 On appeal, factual findings of a circuit court will be sustained unless they are contrary to the great weight and clear preponderance of the evidence. *See* ***Gerner v. Vasby***, 75 Wis. 2d 660, 662, 250 N.W.2d 319 (1977). The Village correctly notes that where "the circuit court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony." *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345 (citation omitted).

¶16 A disputed factual issue at the bench trial was when, if ever, Buhler removed the lock, an action that he asserts rendered the building not "secured" for purposes of enforcement of the DeForest Ordinance ("When access … is unduly difficult because of secured openings"). The pertinent evidence on this factual issue included the following.

¶17 Buhler testified that on June 25, 2010, at approximately 6:10 p.m., "the lock was removed." Buhler further testified as follows in an exchange with the court:

> Q. Did you notify the inspector that you had taken that lock off?
>
> A. I was not required to.
>
> Q. That's not my question.
>
> A. No, I did not.
>
> Q. When you started getting the tickets did you tell them?
>
> A. Officer Sturdevant, if he was here, he would testify—I think if we brought [former Chief David] Arnold back up here he'd tell you I made a bit of a ruckus that, you know, I'm trying to point out, here's the lock, lock's off the door. That's why I asked why did I receive the second batch of 20 tickets.
>
> Q. Okay. So the first time that you told them there wasn't a lock was August 6, 2010?
>
> A. Yeah, 6:30 in the morning.

¶18 David Arnold, then chief of the DeForest Area Fire and EMS Departments, testified that when he served citations on Buhler on August 6, 2010, there was "some type of conversation regarding the lock."

¶19 Inspector Wagner testified inconsistently on the topic of when the lock was removed, to his knowledge. He first testified that he conducted a physical inspection of the building on each day for which he issued a citation, and that he confirmed that the entry to the common areas of the building had a lock. However, Wagner later testified that he did not look to see whether Buhler "had removed the lock" during any of the 32 inspections he made that corresponded to the tickets issued to Buhler, because Wagner's focus was only on whether the Knox Box had been installed.

¶20 After the close of evidence, the court stated that there was "some corroboration that on August 6, 2010, the lock had been removed." The court also stated as follows:

> I don't know when the lock was removed from the door. I don't necessarily accept Mr. Buhler's testimony that it was removed *early on in the sequence*. There's no proof of that. I have no way of knowing when it was removed.
>
> What I do know is that Mr. Buhler made no move to bring that to the attention of Mr. Wagner. Had he brought it to the attention of Mr. Wagner, Mr. Wagner could have inspected and removed the requirement that he install a Knox-Box. But up until this time, Mr. Buhler had made it perfectly clear that he didn't intend to comply with this ordinance, that he thought it was unconstitutional, that he was going to take it to court….
>
> So Mr. Buhler stood his ground, I guess, at his own peril, and his peril is coming home to rest today. He was under a requirement by the fire department to install a Knox-Box. He didn't do so, and he didn't ask to be relieved from that responsibility by providing evidence of alternate means of access.

(Emphasis added.)

¶21 This court takes the circuit court to have made a factual finding, based in part on credibility determinations, that Buhler had the exterior door lock removed by August 6, 2010, but that there was insufficient credible evidence that he removed it before that date ("early on in the sequence"). The court also found that Buhler initially decided to resist putting up a Knox Box on constitutional grounds (not at issue in this appeal), and that if Buhler had in fact removed the lock, creating a defense to the citations, before August 6, 2010, he likely would have called that to the attention of Village officials, which the court found did not occur.

¶22 Buhler fails to persuade this court that the circuit court's factual findings as to the status of the lock before August 6, 2010, are contrary to the great weight and clear preponderance of the evidence, particularly where they depend on credibility determinations. He also fails to develop any additional argument undermining the court's findings of violations for the 12 citations issued on August 6, 2010. Therefore, this court affirms the circuit court's judgment as to the first 12 citations, because the dates of violation are in each instance before August 6, 2010.[7]

¶23 Buhler complains about the fact that the court prevented Gary Peck, a firefighter, from testifying at trial. However, this court concludes that this ruling of the circuit court could not have harmed Buhler. According to Buhler's proffer, Peck would have testified that he visited the building on August 6, 2010, and that on that date the entrance to the building would not have been difficult to breach.

[7] This affirms the judgment as to citations bearing the following numbers: N539392, N539393, N539394, N539395, N539396, N539397, N539398, N539399, N539400, N539302, N539303, and N539304.

The circuit court's ultimate finding, based on other evidence, that the lock was removed by that date gave Buhler all the benefit he could have received from Peck's testimony.

¶24 We now turn to the circuit court's finding that Buhler violated the DeForest Ordinance as alleged in 19 of the 20 citations issued on September 3, 2010, all of which are for violations alleged to have occurred on or after August 6, 2010. The court appears to have accepted the argument made by the Village below, which it renews on appeal, that beginning in February 2010, with the fire inspection report described above, Buhler was under a form of standing order from the inspector to install a Knox Box, regardless of the "secure" or "not secure" status of the building. Under this view, in the words of the circuit court, if Buhler was to avoid a potential violation of the DeForest Ordinance each and every day, he was required either to install a Knox Box or receive permission from Village officials "to be relieved from that responsibility by providing evidence of alternate means of access." This court rejects this view as an incorrect interpretation of the ordinance.

¶25 Under the DeForest Ordinance, failure to install a Knox Box could be a violation only when access to or within a building is "unduly difficult because of secured openings," because that is the only time when an inspector "shall require" installation. The Village has made no assertion regarding access "within" the building, so the question here is whether access "to" the interior of the building was unduly difficult because of secured openings. The Village has not suggested any meaning for "secured opening" that does not correspond to a lockable door, and none is evident to this court. Indeed, the ordinance is explicitly premised on the existence of doors with locks, for which the corresponding keys are to be placed in Knox Boxes.

¶26 The Village treats the February 2010 directive to install a Knox Box as if it were an administrative order untethered to the actual secured status of the building (i.e., whether it had a lockable exterior door) at the time of any alleged violation of the DeForest Ordinance. However, this is not how the ordinance is written. Under its terms, inspectors "shall require" Knox Boxes "*when* access" is at issue. (Emphasis added.) Buhler was cited for violation of the DeForest Ordinance, not for failing to obey an administrative order.

¶27 The Village cites wholly inapposite authority, namely, ***Nodell Investment Corp. v. City of Glendale***, 78 Wis. 2d 416, 424, 254 N.W.2d 310 (1977), regarding the exhaustion of administrative remedies. This is a doctrine of judicial restraint providing that judicial relief will be denied until parties to an administrative proceeding have completed that proceeding. ***Id.*** The instant case is a municipal citation case. The authority the Village cites does not establish that individuals who are cited by municipalities for ordinance violations must initiate administrative proceedings to challenge the citations.

¶28 We next turn to a claim preclusion argument the Village makes. It is not apparent that the circuit court's ultimate decision to find Buhler in violation of the ordinance after August 6, 2010, rested to any degree on the application of claim preclusion to reject Buhler's defense of lock removal. As referenced above, in rendering its decision the court addressed the factual dispute about whether and when the exterior door lock had been removed, thus suggesting that the court did not ultimately conclude that claim preclusion was a bar to Buhler's lock-removal defense.

¶29 However, this court addresses the issue because the Village argues that claim preclusion serves as an alternative basis to defeat the unsecured building

(lock-removal) defense. That is, the Village argues that Buhler had an opportunity to raise his lock-removal defense before Judge Sumi in the earlier litigation, and because he did not do so, he was precluded under the claim preclusion doctrine from raising the defense in the instant case. This is incorrect.

¶30 Under claim preclusion, formerly "res judicata," "a final judgment on the merits in one action bars parties from relitigating any claim that arises out of the same relevant facts, transactions, or occurrences." ***Kruckenberg v. Harvey***, 2005 WI 43, ¶19, 279 Wis. 2d 520, 694 N.W.2d 879. Claim preclusion has no application here, for at least the reason that the "same relevant facts, transactions, or occurrences" are not at issue.[8] Buhler's lock-removal defense at the trial before Judge O'Brien was based on the assertion that relevant facts had changed between the time of his alleged initial violation (tried before Judge Sumi) and the time of the violations at issue before Judge O'Brien. Buhler's position was that he could not have offered the lock-removal defense in the case before Judge Sumi, because he had not yet removed the lock at the time of the violation alleged in the earlier case.[9]

¶31 The Village fails to develop any additional, meritorious argument supporting the court's findings of violations on 19 of the 20 citations issued September 3, 2010. Therefore, this court reverses the circuit court's judgment as

[8] Given the changed facts between the two cases, this court need not address Buhler's additional argument that claim preclusion is not available here to defeat a defense, but instead prevents relitigation only of claims.

[9] Having concluded that claim preclusion is not available, there is no need for this court to address Buhler's additional argument that the circuit court lacked the judgment and transcript from the prior trial necessary to establish that there had been a final judgment on the merits relating to the same relevant facts, transactions, or occurrences.

to those 19 citations, because the court found that the lock was removed by August 6, 2010, the September 3 citations were based on violations allegedly occurring after August 6, and the presence of the lock was a required element of each violation.[10]

CONCLUSION

¶32 For these reasons, this court affirms in part and reverses in part and remands with directions for entry of an amended judgment permitting the Village recovery for each of the citations listed above in footnote 7 and denying recovery for and requiring dismissal of each of the citations listed above in footnote 10.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[10] This reverses the judgment as to and requires dismissal of citations bearing the following numbers: N539305, N539306, N539307, N539308, N539309, N539310, N539321, N539322, N539323, N539325, N539326, N539327, N539328, N539329, N539330, N539381, N539382, N539383, and N539384.