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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 2018AP2340-CR

TROY R. LASECKI,

Defendant-Appellant.

On Appeal from Judgment of Conviction entered in
Circuit Court for Outagamie County, Case No. 2017CM721
The Honorable Mark J. McGinnis, Presiding

AMICUS BRIEF FILED ON BEHALF OF THE APARTMENT ASSOCIATION OF SOUTHEASTERN WISCONSIN, INC.

Robert S. Driscoll
WI State Bar ID No. 1071461
rdriscoll@reinhartlaw.com
Malinda J. Eskra
WI State Bar ID No. 1064353
meskra@reinhartlaw.com
Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 1700
Milwaukee, WI 53202

Attorneys for Apartment Association
of Southeastern Wisconsin, Inc.

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The Court has asked the Apartment Association of Southeastern Wisconsin, Inc. ("the Association") to submit an amicus curiae brief regarding the State's authority to pursue a criminal prosecution against a landlord for failing to abide by Wis. Admin. Code ATCP § 134.06. The Association is an apartment owner trade association that provides education, legislative support, and networking opportunities for rental property owners in southeastern Wisconsin.[1] The Association joins Defendant-Appellant Troy R. Lasecki, who is not a member of the Association, in asking the Court to vacate the judgment of conviction against him, because criminally prosecuting a landlord for an unintentional violation of ATCP § 134.06 violates due process,[2] and even if it did not, there can be no criminal liability under ATCP § 134.06 because the portions of ATCP § 134.06 relevant to this case have been superseded by Wis. Stat § 704.28(4). The circuit court's decision to the contrary leaves ordinary individuals—particularly small "mom and pop" landlords—vulnerable to criminal penalties, including imprisonment, for failing to perform clerical tasks that they could not reasonably expect to result in criminal punishment.

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[1] *See* Apartment Association of Southeastern Wisconsin, Inc. (AASEW), https://www.aasew.org/

[2] It is unclear from the jury instructions and the verdicts whether the jury found Mr. Lasecki guilty of intentionally or unintentionally violating Wis. Admin. Code ATCP § 134.06. (R. 77:167-68, 192-93.)

ARGUMENT

I. Criminally prosecuting a landlord for an unintentional violation of Wis. Admin. Code ATCP § 134.06 violates due process because a landlord of ordinary intelligence would not know that he was subject to criminal penalties.

The Due Process Clause requires the State, when defining a crime, to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. *Stepniewski v. Gagnon*, 732 F.2d 567, 572 (7th Cir. 1984). "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be prescribed." *United States v. Harriss*, 347 U.S. 612, 617 (1954). To that end, the United States Supreme Court has struck down criminal statutes under the Due Process Clause where the statutes were not "sufficiently explicit to inform those who are subject to [them] what conduct on their part will render them liable to … penalties." *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (citation omitted). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Id.* (citation omitted).

Here, the complex statutory scheme assembled by the legislature and the Department of Agriculture does not provide landlords of ordinary intelligence with fair notice that they could be subject to criminal penalties pursuant to Wis. Stat. § 100.26(3) for unintentional violations of Wis. Admin. Code ATCP § 134.06. In particular, a landlord of ordinary intelligence would not know that he could be

held criminally responsible for rightfully withholding a former tenant's security deposit if he forgets to provide the tenant with a written statement of accounting.[3] *See* Wis. Admin. Code ATCP § 134.06(3)-(4).

The complex statutory scheme begins at chapter 704 of the Wisconsin Statutes. The chapter is aptly entitled "Landlord and Tenant" and sets forth a landlord's rights and responsibilities. Wisconsin Stat. § 704.28(4), addresses security deposits, and directs as follows:

> TIMING FOR RETURN. A landlord shall deliver or mail to a tenant the full amount of any security deposit paid by the tenant less any amounts that may be withheld under subs. (1) and (2), within 21 days after [the tenant vacates the premises or is evicted].

Section 704.28 does not require a landlord to provide the tenant with a written statement of accounting for all amounts withheld. Nor does the statute make any reference to the possibility of criminal penalties for failure to comply with the statute, regardless of whether a violation of the statute is intentional or unintentional.

Wisconsin Stat. § 100.20(2)(a) of the Trade Practices Act grants the Wisconsin Department of Agriculture authority to "issue general orders forbidding … trade practices in business which are determined by the department to be unfair." Section 100.20 sets forth a number of civil penalties for individuals who

[3] While the jury found Mr. Lasecki guilty of two counts of "failure to return a security deposit," (R. 77:192-93), the regulations permit a landlord to withhold all or some of a security deposit under certain circumstances and if a statement of accounting is provided to the tenant. *See* Wis. Admin. Code ATCP § 134.06(3)-(4). It is not clear from the jury instructions and verdicts whether the jury found Mr. Lasecki guilty of retaining the security deposits for an improper purpose or for properly retaining the security deposits but failing to provide a statement of accounting. (R. 77:167-68, 192-93.)

violate the regulations promulgated under the statute, but does not indicate that individuals who violate the regulations may be subject to criminal penalties.

Wisconsin Admin. Code ATCP ch. 134, issued pursuant to Wis. Stat. § 100.20(2), sets forth a landlord's rights and responsibilities, like Wis. Stat. ch. 704. As relevant here, Wis. Admin. Code ATCP § 134.06(3), like Wis. Stat. § 704.28(3), requires a landlord to return a security deposit to a tenant after the tenant vacates the premises, but allows a landlord to withhold amounts under certain circumstances. However, unlike § 704.28(3), ATCP § 134.06(4) also requires a landlord to provide the tenant a statement of accounting for any amounts withheld from the security deposit, stating:

> If any portion of a security deposit is withheld by a landlord, the landlord shall, within the time period and in the manner specified under sub. (2), *deliver or mail to the tenant a written statement accounting for all amounts withheld*. The statement shall describe each item of physical damages or other claim made against the security deposit, and the amount withheld as reasonable compensation for each item or claim.

ATCP § 134.06(4) (emphasis added). Notably, Wis. Admin. Code ATCP ch. 134 makes no mention of potential criminal penalties for violating any of its regulations.

Wisconsin Stat. § 100.26(3)—which is not mentioned anywhere in the statutory chapter addressing landlord-tenant law (Wis. Stat. ch. 704) and is mentioned only in the introductory notes in the regulations addressing landlord-tenant law (Wis. Admin. Code ATCP ch. 134)—makes a violation of Wis. Admin. Code ATCP § 134.06 a strict liability crime, stating in relevant part:

> [a]ny person … who intentionally refuses, neglects, or fails to obey any regulation made under section … 100.20 shall, for each offense, be punished by a fine of not less than twenty-five nor more than five thousand dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment.

Id. In other words, § 100.26(3) expressly permits criminal prosecution of individuals who simply "fail[] to obey a regulation," and does not require a finding of criminal intent. *See Stepniewski*, 732 F.2d at 569 (explaining that the Wisconsin Supreme Court has concluded that a mere "failure to obey a regulation can result in a conviction" under § 100.26(3), without a finding of criminal intent, and determining that the statute creates a "strict liability crime").

Given the complex nature of the statutes and regulations, a landlord of ordinary intelligence—particularly a small "mom and pop" landlord—does not have fair notice that unintentionally violating Wis. Admin. Code ATCP § 134.06 would subject him to criminal penalties. A landlord of ordinary intelligence reviewing the landlord-tenant statutes in Wis. Stat. ch. 704 would see that he was required to return the full amount of the security deposit paid by the tenant, less any amounts he was legally permitted to withhold, 21 days after the tenant vacated the property. *See* Wis. Stat. § 704.28(4). But Wis. Stat. ch. 704 does not tell the landlord that he must provide a statement of accounting for money withheld from a security deposit, nor does it indicate that the landlord may be subject to criminal penalties for failing to do so.

A landlord of ordinary intelligence would then turn to the landlord-tenant regulations set forth in Wis. Admin. Code ATCP § 134.06 and would see

conflicting requirements. In the regulations, the landlord would see that he was also required to provide a statement of accounting when withholding some or all of a security deposit, even though the statement of accounting is not required by the statutes. But again, the landlord would see no criminal penalties set forth in the regulations.

If a landlord of ordinary intelligence were to review Wis. Stat. § 100.20, which is referenced in Wis. Admin. Code ATCP § 134.01 as the authority for the regulations, the landlord would find only robust civil penalties set forth for violations of ATCP § 134.06. *See* § 100.20(2)-(6). The inclusion of hefty civil penalties in the statute, and the conspicuous absence of criminal penalties, would lead a landlord of ordinary intelligence to believe that only civil penalties existed. A landlord of ordinary intelligence would have no reason to believe that criminal penalties might exist elsewhere.

The landlord of ordinary intelligence would have to stumble upon Wis. Stat. § 100.26(3) to discover that he could face criminal penalties for unintentionally violating the landlord-tenant regulations, even though neither the statutes (Wis. Stat. ch. 704) nor the regulations (Wis. Admin. Code ATCP § 134) reference criminal penalties, and even though Wis. Stat. § 100.20, which created the regulations, sets forth only substantial civil penalties.

Nor would common sense lead a landlord of ordinary intelligence to believe that a failure to comply with the regulations set forth in Wis. Admin. Code ATCP ch. 134 could result in substantial criminal fines or potential incarceration

because a strict liability statute criminalizing violations of the regulations leads to absurd results. Well-meaning landlords could be fined up to $5000 or incarcerated for up to a year for mere oversights. For instance, landlords could face such criminal penalties for:

- Forgetting to provide a tenant with a copy of the rental agreement, ATCP § 134.03(1);
- Forgetting to tell a tenant the name of the individual who collects rent or maintains the premises, ATCP § 134.04(1);
- Forgetting to provide a tenant with a written receipt upon acceptance of a security deposit, earnest money, or cash rent, ATCP § 134.03(2)(a)-(b);
- Forgetting to provide a tenant with a written date and time by which the landlord intends to clean a carpet or paint a room after promising to do the same, ATCP § 134.07(1);
- Utilizing a rental agreement purchased off the internet that, unbeknownst to the landlord, violates ATCP § 134.08; or
- Applying a tenant's recent payment to the oldest overdue amounts and late fees, which is the default for most property management and accounting software, rather than to the current month's rent, ATCP § 134.09(8)(b).

As applied here, a landlord could rightfully withhold a tenant's security deposit, pursuant to ATCP § 134.06(3), but forget to issue the tenant a statement of accounting, setting forth why the money was not returned, and as a result, the landlord could face criminal penalties under Wis. Stat. § 100.26(3). This is true even if the tenant has failed to pay rent for months or has otherwise been verbally informed by the landlord why the security deposit will not be returned, and even if the failure to return is uncontested. This simply cannot be.

In short, reading this complex statutory scheme in the draconian way the State suggests is illogical and does not provide a landlord of ordinary intelligence with fair notice that unintentional violations of Wis. Admin. Code § 134.06(4) could result in criminal prosecution. While full-time landlords and professional property managers have processes in place to avoid errors of omission in records, small "mom and pop" shops often do not. Because the statutes and regulations do not provide property owners of average intelligence with fair notice that their omissions could be criminal, the State's attempt to criminally convict Mr. Lasecki for violations of those regulations violates due process.

II. There can be no criminal liability under Wis. Admin. Code ATCP § 134.06 because that regulation has been superseded by Wis. Stat. § 704.28(4).

Even if criminal prosecutions for unintentional violations of Wis. Admin. Code ch. 134 were constitutional, Wis. Admin. Code § 134.06 cannot be enforced because it is superseded by Wis. Stat. § 704.28(4).

Wisconsin Stat. § 704.95 states that "the department of agriculture, trade and consumer protection may not issue an order or promulgate a rule under s. 100.20 that changes any right or duty arising under this chapter." Yet despite the dictates of § 704.95, Wis. Admin. Code ATCP § 134.06 does just that. While Wis. Stat. § 704.28(4) permits a landlord to withhold money that the tenant owes from the security deposit, ATCP § 134.06 impermissibly modifies that right by prohibiting the landlord from withholding the money *unless the landlord provides the tenant with a written statement of accounting for all amounts withheld*. Under § 704.95, ATCP § 134.06 cannot place additional burdens on a landlord's right to withhold all or some of a security deposit as § 704.28(4) gives the landlord a right to do.

Moreover, the criminal penalties attached to a violation of Wis. Admin. Code ATCP § 134.06 for failing to provide a statement of accounting also substantially change a landlord's right to retain a security deposit under § 704.28(4). If a landlord attempts to exercise his right to withhold some or all of a security deposit consistent with Wis. Stat. § 704.28(4), he could face criminal fines and incarceration pursuant to ATCP § 134.06(4) and Wis. Stat. § 100.26(3)

for failing to abide by the additional requirements imposed by the regulations—requirements that Wis. Stat. § 704.95 rejects. Such penalties for violations of the regulations change a landlord's rights under § 704.28(4) and are therefore impermissible under § 704.95.

The absence of the statement-of-accounting requirement in Wis. Stat. § 704.28(4) is notable because the original draft of the statute included a provision requiring a statement of accounting, but that clause was omitted before the statute was passed into law.[4] In other words, it is undisputable that the legislature purposefully decided to omit the statement-of-accounting requirement from the statute, thereby ensuring that a failure to provide the statement would not be a criminal act. *See Mack v. Joint Sch. Dist. No. 3*, 92 Wis. 2d 476, 489, 285 N.W.2d 604 (1979) ("[w]hen the legislature enacts a statute, it is presumed to act with full knowledge of existing laws …"). The Department of Agriculture should not be permitted to declare a failure to provide a statement of accounting criminal in the face of the legislature's refusal to do so.

CONCLUSION

In sum, criminal prosecution for a violation of Wis. Admin. Code ATCP § 134.06 violates due process because a landlord of ordinary intelligence would not have fair notice that he could be criminally prosecuted for unknowingly failing

[4] *See* Drafting file re: Senate Substitute Amendment 1 (available in drafting file for 2011 Wis. Act 143, Wis. Legis. Reference Bureau, Madison, Wis., https://docs.legis.wisconsin.gov/2011/related/drafting_files/wisconsin_acts/2011_act_143_sb_466/03_ssa1_sb466/11s0335df_pt01of03.pdf); (AASEW App. 1).

to perform clerical tasks required by the regulations. Moreover, even if ATCP § 134.06 were constitutional, it is superseded by the legislature's passage of Wis. Stat. § 704.28(4). As such, the Association joins Mr. Lasecki in asking this Court to vacate the judgment of conviction against him.

Dated this 24th day of February, 2020.

Malinda Eskra

Robert S. Driscoll
WI State Bar ID No. 1071461
rdriscoll@reinhartlaw.com
Malinda J. Eskra
WI State Bar ID No. 1064353
meskra@reinhartlaw.com
Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 1700
Milwaukee, WI 53202

Mailing Address:
P.O. Box 2965
Milwaukee, WI 53201-2965
Telephone: 414-298-1000
Facsimile: 414-298-8097

Attorneys for Apartment Association of Southeastern Wisconsin, Inc.

FORM AND LENGTH CERTIFICATION

Pursuant to Wis. Stat. § 809.19(8)(d), I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a document produced with a proportional serif font. The length of this brief is 2563 words.

Dated this 24th day of February, 2020.



Robert S. Driscoll
WI State Bar ID No. 1071461
rdriscoll@reinhartlaw.com
Malinda J. Eskra
WI State Bar ID No. 1064353
meskra@reinhartlaw.com
Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 1700
Milwaukee, WI 53202

Mailing Address:
P.O. Box 2965
Milwaukee, WI 53201-2965
Telephone: 414-298-1000
Facsimile: 414-298-8097

Attorneys for Apartment Association of Southeastern Wisconsin, Inc.

CERTIFICATION REGARDING ELECTRONIC BRIEFS PURSUANT TO SECTION 809.19(12)(f), STATS.

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of section 809.19(12), Stats.

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th day of February, 2020.

Malinda Eskra

Robert S. Driscoll
WI State Bar ID No. 1071461
rdriscoll@reinhartlaw.com
Malinda J. Eskra
WI State Bar ID No. 1064353
meskra@reinhartlaw.com
Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 1700
Milwaukee, WI 53202

Mailing Address:
P.O. Box 2965
Milwaukee, WI 53201-2965
Telephone: 414-298-1000
Facsimile: 414-298-8097

Attorneys for Apartment Association of Southeastern Wisconsin, Inc.

BRIEF APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;

(2) the findings or opinion of the circuit court;

(3) a copy of any unpublished opinion cited under Wis. Stat.§ 809.23(3)(a) or (b); and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 24th day of February, 2020.

Robert S. Driscoll
WI State Bar ID No. 1071461
rdriscoll@reinhartlaw.com
Malinda J. Eskra
WI State Bar ID No. 1064353
meskra@reinhartlaw.com
Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 1700
Milwaukee, WI 53202

Mailing Address:
P.O. Box 2965
Milwaukee, WI 53201-2965
Telephone: 414-298-1000
Facsimile: 414-298-8097

Attorneys for Apartment Association
of Southeastern Wisconsin, Inc.

43030594