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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP2340-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
TROY R. LASECKI,
Defendant-Appellant.

On Notice of Appeal to Review the Judgment of Conviction and the Order Denying Motion for Postconviction Relief in the Circuit Court for Outagamie County, the Honorable Mark J. McGinnis Presiding.

DEFENDANT-APPELLANT'S BRIEF IN REPLY TO AMICI

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ARGUMENT IN REPLY TO AMICI

I. THE CIRCUIT COURT LACKED SUBJECT MATTER JURISDICTION BECAUSE THE CRIME OF WHICH LASECKI WAS CONVICTED IS NOT KNOWN TO LAW. IF THE CRIME DOES EXIST, AN ORDINARY PERSON HAD INSUFFICIENT NOTICE THAT THE CONDUCT AT ISSUE CONSTITUTES A CRIME.

A. Applying the criminal penalties in Wis. Stat. § 100.26(3) to a violation of Wis. Admin. Code § ATCP 134.06 disconnects at Wis. Stat. § 100.20(2)

As Lasecki argued previously, the State attached the criminal penalties of Wis. Stat. § 100.26(3) to a violation of the administrative code via the essential connecting point: Wis. Stat. § 100.20. (Lasecki's Opening Brief at 8-12). While Wis. Stat. § 100.20(2) gives the department authority to issue an "order," Lasecki was convicted of violating a rule or regulation. (*Id.* 11-12). In response, the Attorney General and the University of Wisconsin Law School ("UWLS") cite to Wis. Stat. § 227.01(13), which defines the broad category of a "rule" to include the subset category of "general order." (Attorney General's Brief at 5 n. 1; UWLS' Brief at 6 n. 3).

Wis. Stat. § 227.01(13) provides no guidance because Lasecki is challenging the inverse of this definition: that the term "order" does not give authority to promulgate a "rule." While the statute defines "rule" as including the subcategory "order," it does not define "order" to include "rule" or otherwise

indicate that the terms are synonymous. *See* Wis. Stat. § 227.01(13). Thus, Wis. Stat. § 100.20(2) gave the department the authority to issue only orders, not the rules or regulations of Wisconsin Admin. Code § 134.06. (Lasecki's Opening Brief at 10-12).

Even if this Court concludes that the terms "order" and "rule" are synonymous, Wis. Stat § 227.01(13) adds another layer to the already complex maze of obscure and illogically connected provisions through which one must navigate to conclude that a crime exists. As previously developed, a person of ordinary intelligence did not have adequate notice of this strict liability crime. (Lasecki's Opening Brief at 19-23).

B. Wis. Admin. Code § ATCP 134.06(4) was rendered invalid by the enactment of Wis. Stat. § 704.28

The Attorney General asserts that the written statement requirement under Wis. Admin. Code § ATCP 134.06(4) remains valid, despite Wis. Stat. § 704.95 prohibiting the department from issuing an order or promulgating a rule that changes any right or duty arising under chapter 704 because 1) Wis. Stat. § 704.95 applies prospectively and 2) the duty to provide a statement of withholdings does not "arise" under chapter 704. (Attorney General's Brief at 4-6). Though clever, these arguments are unpersuasive.

The legislature did not need to explicitly state that existing code provisions that conflict with the statutes are invalid. That principle is well-established by case law. *Wis. Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40, ¶ 14, 270 Wis. 2d 318, 677 N.W.2d 612 (stating, "if an administrative rule conflicts with an unambiguous statute or a clear expression of legislative intent, the rule is invalid.")

In the examples cited by the Attorney General and UWLS where the legislature did explicitly renounce ordinances inconsistent with the statute, the legislation was specifically targeted at restricting the ordinance-making authority of municipalities.[1] (Attorney General's Brief at 7-8; UWLS' Brief at 12-13). Also, when this Court questioned the validity of Wis. Admin. Code § ATCP 134.06 in *Wenger*, it did not interpret Wis. Stat. § 704.95 as applying prospectively only. *Wenger v. Swaine*, No. 2017 AP985, ¶ 10, slip. op. (Wis. Ct. App. issued February 8, 2018).[2] This Court questioned "whether the *current version* of Wis. Admin. Code § ATCP 134.06 'changes any right or duty arising under' ch. 704." *Id.* (emphasis added).

Finally, the Attorney General misses the mark in relying on *Black* for the proposition that implied repeal is not favored in statutory construction.

[1] Wis. Stat. § 66.0104 (prohibiting ordinances that place certain limits or requirements on a landlord); Wis. Stat. § 66.1010 (prohibiting ordinances that impose a moratorium on evictions proceedings).

[2] This case was previously included in Lasecki's appendix.

(Attorney General's Brief at 6). *Black* dealt with whether the legislature impliedly intended to repeal its *own* legislation; it did not involve rules promulgated by another branch of government. *State v. Black*, 188 Wis. 2d 639, 645, 526 N.W.2d 132 (1994); *see also Cranes & Doves*, 270 Wis. 2d 318, ¶ 14 (administrative agencies are part of the executive branch).

As to the source from which a landlord's duties are derived, the legislature usurped the DATCP's authority to regulate a landlord's rights and duties with regard to withholding and returning security deposits by enacting Wis. Stat. § 704.28. (Lasecki's Opening Brief at 12-13). The statute makes clear that a landlord may withhold a security deposit, for qualifying reasons, and it does condition such withholding on performing additional duties. Wis. Stat. § 704.28(1), (4). Wis. Admin. Code § ATCP 134.06(4) changes a landlord's right to withhold under Wis. Stat. § 704.28 by conditioning the withholding on the landlord performing additional duties: providing a statement of the withholdings.

The Attorney General relies on drafting records to determine the legislature's intent. (Attorney General's Brief at 8-10). However, in construing a statute, the Court reaches the step of consulting extrinsic sources only if it finds that the statute is ambiguous, that is, where "well-informed persons should have become confused." *State ex. rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶¶ 44-47, 271 Wis. 2d 633, 681 N.W.2d 110 (emphasis

omitted)(internal quotation marks and citation omitted). To the extent the statute is confusing, a person of ordinary intelligence does not have sufficient notice that his passive conduct is criminal, and the rule of lenity requires the Court to resolve this confusion in favor of the accused. *State v. Cole*, 2003 WI 59, ¶ 13, 262 Wis. 2d 167, 663 N.W.2d 700.

Even if this Court reaches the step of consulting extrinsic materials, it must give consideration to the fact that the legislature, as noted by the Apartment Association of Southeastern Wisconsin, Inc. ("AASW"), plainly rejected language requiring a landlord to provide a statement of withholdings. (AASW's Brief at 10); *Brauneis v. LIRC*, 2000 WI 69, ¶ 27, 236 Wis. 2d 27, 612 N.W.2d 635 (the court cannot ignore that the legislature considered, but rejected, a draft amendment).

C. Lasecki's conviction cannot stand

The Attorney General and UWLS make compelling policy arguments underlying the rule requiring landlords to provide a statement of withholdings and the rule's impact on *private* enforcement actions. (Attorney General's Brief at 10-11; UWLS' Brief at 7-10). But the plain language of the statute, as it currently stands, allows a landlord to withhold a deposit without giving such notice, so long as the withholding is for an authorized reason. Wis. Stat. § 704.28(1), (4). In addition, the policy reasons underlying *private* enforcement do not exist with the *public* enforcement at issue here.

This Court has engaged some of our state's top legal scholars in the area of landlord/tenant law, and these scholars disagree as to whether a crime exists in this case. Even if a crime does exist, there is enough confusion between the conflicting and obscure statutes and code regulations that a person of ordinary intelligence would not have adequate notice that a passive failure to act constitutes a crime. (Lasecki's Opening Brief at 22-23).

The Attorney General urges the Court to affirm the conviction "insofar as Lasecki was otherwise validly convicted of [the written notice requirement under Wis. Admin. Code. ATCP § 134.06(4)(a)] offense[.]" (Attorney General's Brief at 12). Even if this Court concludes that a failure to provide a statement of withholdings is a crime and that landlords have adequate notice of this crime, the State never charged Lasecki with such an offense. R. 2. Lasecki was charged with "returning security deposits," and the complaint referenced only subsection (2) of Wis. Admin. Code § ATCP 134.06. *Id.* The complaint made no reference to subsection (4), the provision requiring the statement of withholdings. *See id.*

Along these lines, the UWLS argues that any error in this case was harmless because Lasecki was guilty of theft under Wis. Stat. § 943.20(1)(b). (UWLS' Brief at 14). As an initial matter, UWLS does not develop its argument that Lasecki lacked authority to retain the security deposits, and it does not otherwise refute Lasecki's argument that he lawfully retained

the security deposits. (*Id.*; Lasecki's Opening Brief at 16 n. 11). Of greater concern, the State never charged Lasecki with theft; instead, it haphazardly charged him under this bizarre scheme. Lasecki is aware of no authority holding an error harmless if the evidence supported conviction of "some" crime, especially where the uncharged crime has entirely different elements, mens rea, and penalties.

Lasecki recognizes the impact that invalidating Wis. Admin. § ATCP 134.06(4) could have on *civil* landlord/tenant law and submits that this Court can reverse on narrower grounds. As Lasecki argued in his reply brief, the State has yet to define the "crime" in this case. (Lasecki's Reply Brief at 1-2, 6-8). To the extent a landlord is criminally liable for his handling of security deposits, the "crimes" of which Lasecki was convicted do not exist. *Id.*

CONCLUSION

Lasecki requests that this Court vacate the judgment of conviction and dismiss the case with prejudice. In the alternative, Lasecki requests that the Court reduce the restitution amount by $1,570.

Dated this 4th day of March, 2020

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,555 words.

Dated this 4th day of March, 2020

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CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 4th day of March, 2020

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