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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2019AP001491, 2019AP001492, 2019AP001493, 2019AP001494, 2019AP001495, 2019AP001496

COUNTY OF WALWORTH,

Plaintiff-Respondent,

-vs-

JOHN NEIGHBORS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT AND ORDER
OF THE CIRCUIT COURT OF WALWORTH COUNTY
THE HONORABLE KRISTINE DRETTWAN PRESIDING

BRIEF OF DEFENDANT-APPELLANT JOHN NEIGHBORS

Daniel A. Necci
Horlacher Necci, LLC

Attorney for Defendant-Appellant
State Bar No. 1055151

P.O. ADDRESS:
327 Lake Street
Mukwonago, WI 53149
(855) 210-2050

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Statement on Oral Argument and Publication

The Court should not require oral argument of the parties. As to publication, the Court should consider the same as it is Mr. Neighbor's position that this case applies an established rule to a factual situation different from other published opinions pursuant to 809.23(1)(a)2.

Statement of the Case

Mr. Neighbor invited guests to his property at W3936 County Highway ES, Elkhorn, Walworth County, Wisconsin, on the dates of June 21-23, 2018, for a private party, and some of his invited guests slept on his property in tents and campers and the like. It should be noted that Mr. Neighbors property is a tree farm with no buildings, facilities or accoutrements commonly found at established commercial campgrounds. Mr. Neighbors has never before, nor does he now, operate a commercial campground.

Mr. Neighbors was cited by Senior Zoning Officer Nicholas Sigmund of Walworth County Land Use and Resource Management (hereinafter LURM) for operating a campground on property zoned A-2, and for not having the requisite conditional use permit to operate a campground on property zoned A-2 in violation of the Walworth County Code of

Ordinances. Mr. Neighbors received two citations per day for a total of six (6) citations. At no time during the hearings of May 6, 2019, and July 22, 2019, did Mr. Neighbors deny allowing individuals to camp on his private property, in fact he openly admitted it.

On the dates of June 21-23, 2018 John Neighbors had a private party on his private property located in Walworth County, Wisconsin, in conjunction with the Grateful Dead concert being held at Alpine Valley Music Theater, also in Walworth County. (Trans 158-159). He was contacted by Senior Zoning Officer Nicholas Sigmund of the Walworth County Department of Land use and Resource Management by telephone on Friday, June 22, 2018, and told he could not have his party. (R25:159-160). Mr. Neighbors described Mr. Sigmund's nature as aggressive and testified that Mr. Sigmund threatened him with fines of up to $30,000.00. (R25:160).

Mr. Neighbors then called Walworth County Deputy Sheriff Alex Torres and Walworth County Circuit Court Judge Phillip Koss on the telephone for guidance. (R25:161-162). Mr. Neighbors testified that Judge Koss stated to him that he didn't understand why he was potentially receiving citations, and that he (Mr. Neighbors) should contact the Walworth County Sheriff's Office to let them know about his

party. (R25:162). Mr. Neighbors testified that he received a similar answer from Deputy Sheriff Torres and so he did as they had suggested. (R25:162).

Mr. Neighbors testified that, after receiving his citations the week following his private party, he investigated camping on private property in Walworth County and found many instances, including an open Craigslist advertisement for camping in conjunction with another upcoming Alpine Valley concert. (R25:163-164).

Mr. Neighbors testified that he is African American based upon his family lineage. (R25:166). He testified that he has had numerous contacts with Mr. Sigmund prior to his party, including face-to-face contacts, as he has been a resident of Walworth County for twenty (20) years and owns rental properties, two coffee shops, an asphalt company, a tree nursery, and that he previously owned a heating and cooling business. (R25:167-168). The Court took judicial notice of the fact that Walworth County's population as of the 2010 U.S. Census was 1.3% African American. (R25:191).

At the evidentiary hearing conducted in the Circuit Court, Mr. Neighbors called numerous law enforcement officers, both current and former, who served in Walworth County over period of time in question. The first of these

was former City of Whitewater Detective Tina Winger who testified that she had been in law enforcement in Walworth County for twenty-three (23) years and that she also lived in Walworth County her entire life. (R25:23). Winger testified that, in the course of her career, she had seen camping, on private property, "throughout the county." (R25:23-24). She testified that she had seen such camping usually in conjunction with concerts at Alpine Valley Music Theater, and that she guessed "upwards of fifty" times. Winger testified she also seen instances of camping on privet property in her personal life outside of law enforcement also "upwards of fifty," times, further stating that, "[i]t was a pretty regular occurrence when there was Alpine Valley events occurring. (R25:25-26). Winger additionally testified that law enforcement officers generally knew that camping occurred regularly on private property in conjunction with concerts at Alpine Valley. (R25:28).

Mr. Neighbors also called United States Drug Enforcement Administration Special Agent James Langnes. Langnes testified that he worked in law enforcement in Walworth County from 1996-to approximately 2001, and again from approximately 2011 to 2018. (R25:36). Langnes testified that, in the course of his professional duties, he has seen

camping on private property in conjunction with concerts at Alpine Valley. (R25:37). Langnes also testified to having seen camping on private property in Walworth County in his personal life outside of law enforcement, including at his own home and on his own property. (R25:37-38). Langnes testified that as a law enforcement officer who allowed people to camp on his own property, he was unaware, "that it was something you could be cited for until this matter." (R25:38).

Robyn Smith, a local food truck operator, also testified during the presentation of Mr. Neighbors' case. Ms. Smith testified that she had operated her food truck at "probably over fifteen or twenty," camping parties on private property in Walworth County in the six (6) years she was in business including Mr. Neighbors' camping party of June 21-23, 2018. She testified that at the events in Walworth County she had witnessed camping occurred and some had attendances of 250-500 people and live music. (R25:41-43). Ms. Smith testified that she saw nothing at Mr. Neighbors' private party that was any different from the other similar events she had operated her food truck at in Walworth County over the pervious six (6) years. (R25:43-44).

Ms. Smith further testified about an event called "Wise Fest" that she operated her food truck at in Walworth County, only weeks after Mr. Neighbors' event, that had similar attendance, live music and camping as Mr. Neighbors' event. (R25:45, 54-55). Ms. Smith also identified photographs of stages, temporary facilities and camping at the site of "Wise Fest," in Walworth County. (R25:48-54).

Ms. Smith further testified that she had made contact with a Walworth County Deputy Sheriff while operating her food truck at Mr. Neighbors' event, and discussed the event with the Deputy and that said Deputy left without incident and without issuing any citations or warnings. (R25:56-57).

Mr. Neighbors also called Town of Linn Chief of Police James Bushey who testified that he has been in law enforcement in Walworth County since 2006 and has lived in Walworth County since 1983. (R 25:59). Chief Bushey testified that he was not only aware of "large scale" events where camping occurred on private property in Walworth County n his professional capacity, but that he and his fellow officers often operated as private security for such events. (R25:61). He described one particular annual event that he was present for that occurred in Walworth County with camping, catering, alcohol, portable toilet facilities and

attendance in excess of 100 people that lasts 3-4 days. (R25:61). When questioned as to whether he knew if camping on private property was a "zoning issue," Chief Bushey testified he "had never heard of that before," and that, in his personal capacity he had seen and personally participated in camping on private property in Walworth County (R25:64).

At the evidentiary hearing of May 6, 2019, Nicholas Sigmund, Senior Zoning Officer for Walworth County for seventeen (17) years prior, testified that in his position they both receive complaints of ordinance violations and seek them out themselves. (R25:69-70). Outside of seven (years) Mr. Sigmund testified that he had lived in Walworth County, Wisconsin his entire life. (R25:70). He testified that, in that time, he had seen camping on private property and even done so himself. (R25:70-71). Sigmund testified that he visited Mr. Neighbors' property on Friday, June 21, 2018. (R25:71). Sigmund testified that he never actually saw camping going on when he visited Mr. Neighbor's property on June 21, 2018. (R25:72) Sigmund knew Mr. Neighbors previously but refused to admit that he knew Mr. Neighbors to be African American.

> Attorney Necci: Do you know my client John Neighbors?
>
> Sigmund: Yes.

> Attorney Necci: Have you had any experiences before June 21 through the 23rd with him?
>
> Sigmund: Yes.
>
> Attorney Necci: Have you ever seen him in person before that?
>
> Sigmund: Yes.
>
> Attorney Necci: How many times?
>
> Sigmund: I have seen him six.
>
> Attorney Necci: Are you aware that my client is African American?
>
> Sigmund: Yes.
>
> Attorney Necci: Were you aware when you met him?
>
> Sigmund: No.
>
> Attorney Necci: You could tell he wasn't Caucasian though, right?
>
> Sigmund: I'm not sure I gave it any thought.
>
> Attorney Necci: I'm not saying you gave it any thought. He's certainly not a white person, would you agree?
>
> Sigmund: I would agree he has a dark complexion.

(R25:72-73).

Sigmund went on to testify that, in the ten years prior to June of 2018, LURM has not issued any citations to any other individuals for camping on private property. (R25:74). Sigmund noted that he disagreed with the testimony of long-time law enforcement officers, Special Agent Langnes, former Detective Winger and Chief Bushey, and that in his entire seventeen (17) year career as a senior zoning officer, he

has only issued two (2) citations for camping on private property (R25:75), however, at no time during the course of the proceedings at the circuit court level did the County produce those citations (R:in passim).

Sigmund went on to testify at length about other reported potential violations of camping on private property in Walworth County over the prior decade. (R25:84-115). Sigmund testified that all but one were not cited, some were not even investigated or Sigmund had no records to indicate they were or were not investigated, many were merely given warning letters, and that the one that was cited was a commercial campground that had exceeded its limits allowed by conditional use permit (R25:87-88) and therefore not similar to Mr. Neighbors.

Sigmund testified that LURM has no system of record keeping regarding complaints, investigations and citations for camping on private property (R25:102). He testified that and the record shows that records were scratched on paper and post-it notes. (R25:97-113, 137-139). Despite this, he testified that in the ten years of records requested by Mr. Neighbors, that no one had ever even complained of a camping party, music festival, loud music and/or camping (R25:113-115).

Sigmund further testified that in seventeen (17) years as a Code Enforcement Officer he has never participated in or been asked to participate in any training or received any official policy of LURM regarding avoiding discrimination on the basis of race, creed, color, country of origin, religion or other protected classes. (R25:115-116). He testified that LURM does not keep track of the race, creed, color, country of origin, religion or other protected classes when keeping track of complaints, investigations and/or citations, in fact, he testified they have no system of keeping track of complaints, investigations, and/or citations at all other than the court's records. (R25:117-118, 137-139). He went on to testify that it was possible that complaints had come in and investigations had occurred for which there were no records over the course of the last seventeen (17) years. (R25:138-139).

Sigmund testified that he went to the Mr. Neighbors' property at approximately 2:30 p.m. on Friday June 22, 2018. (R25:139). It was there that he spoke with Mr. Neighbors only on the telephone. (R25:139). Sigmund testified that he told Mr. Neighbors he was in violation of the ordinances. (R25:140). He testified he stayed on the property for only ten (10) minutes and that he did not feel the need to acquire

evidence of overnight camping as a "Rebecca Cooper," told him that camping was going on. (R25:141). No "Rebecca Cooper," was ever produced during the Circuit Court proceedings. (R:in passim). Mr. Sigmund then testified about the facts of the two citations he allegedly issued in 2002 to campers on private property. (R25:141-143). He could recall few details and, again, the County produced no record that said citations ever existed. (R25:141-143).

Sigmund testified that the reason he decided to issue citations to Mr. Neighbors was because he was concerned about the safety of the campers on his property. (R25:143). However, when pressed as to how issuing citations made that campers on Mr. Neighbors' property safer, he was unable to provide an answer beyond, "hopefully it won't happen again." (R25:144). Sigmund also testified that he found out about a similar party where people camped on private property that occurred only weeks after citing Mr. Neighbors called "Wise Fest." (R25:145). He testified that he found out about its existence after its occurrence, but also admitted that, some investigation could have led to the issuance of citations.

> Attorney Necci: You said you couldn't cite anyone for Wise Fest because it had already happened, correct?
>
> Mr. Sigmund: Correct.

> Mr. Necci: Couldn't you have interviewed people who had been at Wise Fest like, say, Robin Smith who testified earlier today?
>
> Mr. Sigmund: I suppose I could.
>
> Attorney Necci: And that's how police do things, right? They're not present for everything they write citations and make arrests for, right?
>
> Mr. Sigmund: I'm not sure.
>
> (Trans 147).
>
> Attorney Necci: After reading our brief and becoming aware of Wise Fest you could have gone back and interviewed people who were present at Wise Fest?
>
> Mr. Sigmund: I could have requested interviews.
>
> Attorney Necci: [C]ould you have asked for interviews from food vendors, anyone who might have been there?
>
> Mr. Sigmund: I could have asked, sure.
>
> (R25:148-149).
>
> Attorney Necci: If you had found sufficient evidence from interviews of people who were at Wise Fest would you have issued a citation?
>
> Mr. Sigmund: It would be - - its so nontraditional of how we typically handle things that I don't know if I would have or not.
>
> (R25:149).

At the conclusion of the arguments of counsel, held at the later date of July 22, 2019, Judge Drettwan found that Mr. Neighbors had not met his burden and established a prima facie case for selective prosecution and denied the motion (R27:46-59). She then

asked the parties to seek reconciliation prior to conducting the scheduled jury trial. (R27:59). Mr. Neighbors rejected any plea agreement and plead guilty to all six (6) citations as, following the evidence presented and his own admissions a trial on the matter of whether he had camped on private property or not was silly and superfluous. (R27:59-60)

Statement of the Issues

1. Is Mr. Neighbors barred from appeal based upon his plea of guilty at the trial court level to all six (6) citations?

   Answered: No.

2. Did the Circuit Court apply the correct legal standard when determining if the Appellant had made a prima facie case for selective prosecution, and, if it had, was the evidence sufficient to support Mr. Neighbors' claim of selective prosecution?

   Answered: No.

ARGUMENT

Standard of Review

The circuit court's decision on whether the defendant has established a prima facie case on selective prosecution under both prongs should be reviewed under the clearly

erroneous standard. *State v. McCollum,* 159 Wis.2d 184, 193–94, 201–02, 464 N.W.2d 44 (Ct.App.1990); *United States v. Gutierrez,* 990 F.2d 472, 475 (9th Cir.1993).

However, this Court should review whether the circuit court applied the correct legal standard de novo. *McCollum,* 159 Wis.2d at 194, 464 N.W.2d 44.

1. Is Mr. Neighbors barred from appeal based upon his plea of guilty at the trial court level to all six (6) citations?

This Court, in its communication to the parties of November 14, 2019, requested that the parties address the above question. The Court's letter notes that "waiver or forfeiture issues is not a jurisdictional bar to an appeal, but rather a principle of judicial administration. citing *Schill v. Wisconsin Rapids School District,* 2010 WI ¶45 n. 21, 327 Wis. 2d 572, 786 N.W. 2d 177.

The Court further cited in its communication *County of Ozaukee v. Quelle,* 198 Wis.2d 269, 275-76, 542 N.W.2d 196 (Ct. App. 1995) for the factors the Court may consider when allowing appeal after a guilty plea.

In the present case, as was the case in *Quelle,* Mr. Neighbors was scheduled to proceed directly to a jury trial following the conclusion of the hearing on his Motion to

Dismiss for Selective Prosecution on July 22, 2019. At the hearing on his motion, all relevant facts necessary to potentially prove Mr. Neighbors guilty of the citations with which he was charged were entered into evidence, *and* Mr. Neighbors admitted fully during testimony to having people camp on his property in open court.

The question of Mr. Neighbor's guilt under the ordinances was never at issue as, "a selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *United States v. Armstrong,* 517 U.S. 456, 463, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). As such, just as was the case in *Quelle* in fact, perhaps more so based on Mr. Neighbors' admissions in open court, a jury trial following the Motion hearing would have been unnecessary and nothing short of a complete waste of time.

Additionally, just as in *Quelle*, all available evidence was taken at the time of the Motion hearings of May 6 and July 22, 2018, so a clear record of the issues raised by Mr. Neighbors in this Appeal has been made.

At the conclusion of the motion hearing, Mr. Neighbors did not accept any plea offer or agreement and plead guilty

to the full amount of all six (6) citations which he was issued. Therefore, just as in *Quelle,* there can be no argument he "took a chance on a more lenient sentence." See *Quelle* at 276. (R27:59-60).

Finally, the nature of the issue Mr. Neighbors presents to the Court is of grave importance going forward. Wisconsin law provides little in guidance as to the legal standards regarding a claim of selective prosecution. *State v. Kramer,* 248 Wis.2d 1009, 637 N.W.2d 35 (2001) provides a unique set of factual circumstances and is difficult to apply to other factual circumstances. A decision in this case will provide necessary further clarity for potential Appellants and for prosecuting agencies. Therefore, this Court should hear Mr. Neighbors' Appeal.

2. Did the Circuit Court apply the correct legal standard when determining if the Appellant had made a prima facie case for selective prosecution?

"A prosecutor has great discretion in deciding whether to prosecute in a particular case." *County of Kenosha v. C & S Mgmt.,* 223 Wis.2d 373, 400, 588 N.W.2d 236 (1999) (citing *Sears v. State,* 94 Wis.2d 128, 133, 287 N.W.2d 785 (1980)). "Exercise of this discretion necessarily involves a degree of selectivity." *Sears,* 94

Wis.2d at 134, 287 N.W.2d 785. For this reason, a prosecutor's conscious exercise of some selectivity in enforcement does not in itself create a constitutional violation. *Id.* (quoting *Oyler v. Boles,* 368 U.S. 448, 456, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962)). A violation of the Fourteenth Amendment of the United States Constitution will occur, however, when a defendant can show "persistent selective and intentional discrimination in the enforcement of the statute in the absence of valid exercise of prosecutorial discretion." *State v. Johnson,* 74 Wis.2d 169, 172, 246 N.W.2d 503 (1976).

"A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *United States v. Armstrong,* 517 U.S. 456, 463, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). An allegation that the defendant was selectively prosecuted is judged under ordinary equal protection standards. *C & S,* 223 Wis.2d at 401, 588 N.W.2d 236 (citing *Wayte v. United States,* 470 U.S. 598, 608, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985)). A defendant has the initial burden to present a prima facie showing of discriminatory prosecution before he or she is entitled to an evidentiary hearing on the claim. *Id.* (citing

Nowakowski, 67 Wis.2d 545, 565–66, 227 N.W.2d 697 (1975)). If the defendant succeeds, the burden then shifts to the state to show that the charging decision reflects a valid exercise of prosecutorial discretion. *Johnson,* 74 Wis.2d at 175, 246 N.W.2d 503. A defendant establishes a prima facie case when the facts presented are sufficient to raise a reasonable doubt as to the prosecution's purpose. *See Nowakowski,* 67 Wis.2d at 567–68, 227 N.W.2d 697 (applying *United States v. Falk,* 479 F.2d 616, 620–23 (7th Cir.1973)). More specifically, a prima facie case requires the defendant to submit evidence which, if credited, is sufficient to establish a fact or facts which it is adduced to prove. *See Thomas v. City of West Haven,* 249 Conn. 385, 734 A.2d 535, 540 (1999). In other words, it is evidence that is sufficient to raise an issue to go to the trier of fact. *Id.* (citing 9 Wigmore *Evidence* § 2494 (4th ed.1974)).

To establish a prima facie showing on a selective prosecution claim, a defendant must show that the prosecution had a discriminatory effect and that it was motivated by a discriminatory purpose. *C & S,* 223 Wis.2d at 401, 588 N.W.2d 236 (citing *Wayte,*470 U.S. at 608, 105 S.Ct. 1524). That is, a defendant must show that he or she has been singled out for prosecution while others similarly

situated have not (discriminatory effect) and that the prosecutor's discriminatory selection was based on an impermissible consideration such as race, religion or another arbitrary classification (discriminatory purpose). *Id.* (citing *United States v. Kerley,* 787 F.2d 1147, 1148 (7th Cir.1986)); *Sears,* 94 Wis.2d at 134, 287 N.W.2d 785 (citing *Oyler,* 368 U.S. at 456, 82 S.Ct. 501). Under the discriminatory purpose prong, a defendant is not limited to proving his or her case through proof of discriminatory selection based on suspect or arbitrary classifications. In cases involving solitary prosecutions, a defendant may also show that "the government's discriminatory selection for prosecution is based on a desire to prevent the exercise of constitutional rights or motivated by personal vindictiveness on the part of a prosecutor or the responsible member of the administrative agency recommending prosecution." *Id.* at 135, 287 N.W.2d 785 (citations omitted).

> Of course, a prosecutor's discretion is "subject to constitutional constraints." United States v. Batchelder, 442 U.S. 114, 125 (1979). One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment, Bolling v. Sharpe, 347 U.S. 497,500 (1954), is that the decision whether to prosecute may not be based on "an unjustifiable standard such as race, religion, or other

> arbitrary classification," Oyler v. Boles, 368 U.S. 448, 456 (1962). A defendant may demonstrate that the administration of a criminal law is "directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive" that the system of prosecution amounts to "a practical denial" of equal protection of the law.

United States v. Armstrong, 517 U.S. 456 (1996).

In *State v. Kramer*, Kramer owned the Dog House Saloon in the Village of North Fond du Lac. *Id.* at ¶3. On July 12, 1996, and under cover officer was paid cash for credits he had acquired playing a video slot machine at the Dog House. *Id.* The Fond du Lac District Attorney was not actively enforcing commercial gambling at the time, and only actively changed its policy based upon the Supreme Court's ruling in *State v. Hahn. Id.* at ¶3-4. Following that change in policy, the Fond du Lac District Attorney sent a letter to tavern owners in the County informing them of the change, however, that letter was not sent to Kramer or to any tavern owners in North Fond du Lac. *Id.* at ¶5. On December 4, 1996, and undercover officer was paid cash for credits he had acquired playing a video slot machine at the Dog House. *Id.* at ¶6. Kramer was charged with Party to the Crime of Commercial Gambling in Violation of s.939.05 Wisconsin Statutes. *Id.* at ¶7.

Kramer moved to have the charges dismissed on the basis of selective prosecution evidenced by the fact that he and other owners of taverns in North Fond du Lac were the only ones charged and they had never received the letter advising them of the D.A,'s change in enforcement policy. *Id.* at 8. Kramer argued that the unfairness was exacerbated by the fact that he had reached out to North Fond du Lac Police Chief Larry Wodack who had assured Kramer and other tavern owners that their video slot machines were legal. *Id.* at ¶8.

The Circuit Court found that Kramer had failed to make a prima facie case of selective prosecution. *Id.* at ¶11. In a published decision, the Wisconsin Court of Appeals reversed the Circuit Court, holding that Kramer had made his case based upon the evidence presented and that the State had failed to rebut the presumption, and reversed Kramer's convictions. *Id.*

The Supreme Court found that Kramer had made his prima facie case for selective prosecution, but remanded the case back to Circuit Court to give the State an opportunity to rebut the presumption. *Id.* at ¶27.

In the present case, the Appellant is the only person who has been cited for camping on private property in, at

least, ten (10) years, as many as seventeen (17) years, and, perhaps longer given the fact that the only citations issued in that seventeen(17) year period were simply referred to in testimony and never actually produced by the County.

The discriminatory effect prong requires that Mr. Neighbors show that he has been singled out for prosecution whiles others, similarly situated, have not. Mr. Neighbors produced ample witnesses with long time both personal and professional connections to the county. Each of them testified to the fact that they had witnessed camping on private property in Walworth County both in their personal and professional lives, and, in some cases, that they had participated in it themselves. Some even testified that they, as long-time law enforcement officers, had no idea that one could not camp on one's own property in Walworth County. In fact, Robin Smith testified that a Deputy Sheriff had visited the site of the party and left without incident or even making contact with the property owner at all. While, the examples provided by the witnesses for Mr. Neighbors included testimony about larger, live music-centered parties where camping occurred, such details are irrelevant. Mr. Neighbors was cited for camping on private property in violation of zoning and without a conditional

use permit. He was not cited for noise, crowds, gatherings in excess of a specific population or the like. The ordinance under which he was cited makes no distinction with regard to such matters.

The County would have this Court believe, that in seventeen (17) years of code enforcement that they have not seen or been aware of such camping, that they have net received complaints of such camping, and that they have not enforced their ordinances regarding such camping in a discriminatory manner. However, as the testimony of Mr. Sigmund demonstrated, the County does not look for camping, it does not seek camping, it does not follow up on investigations of camping, its records over the last ten years consist of hand-written scribbles and post-it notes, and it has no system of recording investigations nor does it have any policies or procedures in place regarding the enforcement of camping ordinances nor the avoidance of discriminatory enforcement.

The County will undoubtedly argue that, even if Mr. Neighbors demonstrated the necessary discriminatory effect, it fails to demonstrate discriminatory purpose. The Appellant is African American. Of this there can be no doubt. The County was indignant and insulting in its

position regarding Mr. Neighbors' race in that Mr. Sigmund testified he didn't know that Mr. Neighbors was African American. The Circuit Court was equally insulting when it said in its decision, "you know, in looking at Mr. Neighbors he's darker complected [sic]. Whether or not that leads someone to believe that he is African American or whether he is a *deeply tanned* person or not, I don't know." (R27:57). It is precisely such commentary and such attitudes that allows racial discrimination to continue in the present day. How many times has law enforcement or the courts of this county simply said, "Well, we didn't know he was a minority, we didn't see any *other* violations of the law, only the *alleged* minority?" The *Kramer* court and others that have found selective prosecution knew full well the ability of law enforcement and the courts to simply say "See No Evil, Hear No Evil, Speak No Evil," and look the other way.

Mr. Neighbors is an African American in a county where his race makes up 1.3% of the population. In short, there are very African American people like Mr. Neighbors in Walworth County. He had had numerous contacts with LURM and Mr. Sigmund by virtue of having multiple business and property interests in the county. He is then the only individual in nearly two decades to be cited for the

offense of camping on private property. The Circuit Court found this to be incredulous evidence of discriminatory purpose. In effect, the Circuit Court deemed it necessary to show an overt act of racism to show discriminatory effect. Such is not the standard set forth in *Kramer*.

The Circuit Court's ruling begs the question, what would be necessary here for it to have found discriminatory purpose? An office wide email at LURM specifically demanding solely the prosecution of African Americans? A Confederate Flag hung in Mr. Sigmund's office? What would be enough if nearly two decades pass, with rampant camping on private property occurring in Walworth County as was the testimony at the evidentiary hearing, and the sole recipient of citations was the Appellant? The prongs of selective prosecution require a finding of a prima facie case on behalf of the Defendant, then it is the State's burden to defeat. *C & S,* 223 Wis.2d at 401, 588 N.W.2d 236 (citing *Wayte v. United States,* 470 U.S. 598, 608, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985), *State v. Nowakowski,* 67 Wis.2d 545, 565–66, 227 N.W.2d 697 (1975)), *Johnson,* 74 Wis.2d at 175, 246 N.W.2d 503. In the present case, had the Circuit Court applied the proper standard to the facts, it would have found a prima facie case for discrimination

The meaning of "prima facie" when used in a legal context is "sufficient to establish a fact or raise a presumption unless disproved or rebutted." BLACK'S LAW DICTIONARY 1228 (8th ed.2004), and the County, would have been unable to counter the same. We know this because given every opportunity to call witnesses and to provide evidence against the same, it provided no other citations and it provided no testimony to contradict that which was elicited by the Appellant. Even one citation, just one, to a similarly situated individual in the last twenty (20), ten (10), perhaps even five (5) years would have perhaps been enough to counter the allegation. Even a citation issued after the Appellant's party, in the nearly year before evidence was heard, may have been evidence of a "new policy" regarding enforcement. Sadly, none of this occurred, and it is not as if meeting the elements of the ordinances in question was difficult. Mr. Sigmund testified that he believed the language of the ordinance would make it a citable offense for a father to camp in the backyard with his children. (R25:83). No, the County merely rested on the fact that it didn't know about any other violations for nearly twenty (20) years and that it was mere coincidence that the Appellant is of a protected class with

an extensive history of discrimination in a County that is overwhelmingly white.

For example, the Circuit Court interrupted Attorney Horlacher's summation with the following question:

> Judge Drettwan: Where in the record is your proof that he [Sigmund] personally had it out for Mr. Neighbors? What can you point to me in the record that shows – because what you're arguing I need to know what evidence is in the record that you're arguing from.
>
> Mr. Horlacher: The previous seventeen years worth of working with landowners The property - -
>
> Judge Drettwan: But that's a generalization. I'm looking for – your making assertions that he personally had it out for Mr. Neighbors. Where is your evidence in the record that that's true that supports that assertion?

(R27:26-27).

The Court in its decision first found that Mr. Neighbors was not "singled out."

> Judge Drettwan: First the Court looks at the words "singled out." Given the record that we have here, I don't think there's any proof in the record, at least not that rises to the level of beyond a mere hunch I guess I would say that he was singled out for prosecution here…I guess the implication here is that because other persons in the county who have had camping on their property in the past have not been given any kind of citation then that therefore must mean that Mr. Neighbors was singled out. So in analyzing it under that perspective and in determining whether others have been similarly situated to him and have not been given citations, I'll analyze it from that way.
>
> (R27:46-49).

The Court then took into account the size and scope of Mr. Neighbor's event despite the fact that then citations he received merely punished camping on private property without the proper government approvals. (R27:49,54). The Court then also justifies the position of the County that they "didn't know" about other violations in the County and, therefore, could not act on any others. (R27:50). Such a position is akin to an officer on traffic patrol saying, "I ran my radar gun and the only people ever speeding were black," or a drug unit making the claim that, "We only ever got controlled purchases on Hispanic people, that's whose selling the drugs and that's why we're arresting them." Such a position is *almost* defensible in an area or region where minorities make up the majority of the population, but not in a county in Wisconsin where even finding an African-American much less finding one camping on private property is akin to finding a needle in a haystack.

Nearly two decades (or more) of non-enforcement in a rural county where, according to witnesses who would know, camping on private property occurs with regularity, and, the only person cited is a successful African American business owner. It is an impossible coincidence that the Circuit Court, apparently, required nothing less that incriminating testimony from hundreds of landowners that

the same occurred on their property (which is precisely the testimony that was given by Special Agent Langnes)! It begs the question, how many witnesses or how much testimony would have been enough?

In investigating the discriminatory purpose prong, the Court required far more than the law on the matter.

> Judge Drettwan: There is no evidence of any name calling. There is no evidence of any racial motivation on the part of LURM or its officers. There is no pattern of behavior here showing targeting of racial minorities or other sort of arbitrary classification of a person.

(R27:55-56).

The Circuit Court was clearly looking for the proverbial "white hood in the room," but *Kramer* and a defense of selective prosecution does not require that. A defendant establishes a prima facie case when the facts presented are sufficient to raise a reasonable doubt as to the prosecution's purpose. *Kramer citing Nowakowski*, 67 Wis.2d at 567–68, 227 N.W.2d 697. The Circuit Court, here, in contrast, wanted nothing less than proof beyond a reasonable doubt that Mr. Neighbors citation was racially motivated.

Not to belabor the point, but Mr. Neighbors was one of approximately 1,400 African Americans in a county, at the

time, of 105,000 people. He is, without any doubt, the first person to be cited for camping on private property in nearly twenty (20) years and perhaps longer. It is not a far stretch to say that nearly every other human who has, had a camping party, has camped, has been talked to by LURM and given warning letters instead of citations (see R25:84-114) in the last twenty (20) years has been Caucasian simply based upon mathematical probability. And yet, the Circuit Court categorized this as "no evidence." Under the standard imposed by the Circuit Court, racial discrimination would be allowed to run rampant so long as no one ever utters the "N" word in public when someone is recording.

It is beyond the pale that, given the demographic make-up of the county, that Mr. Neighbors' race is not the factor that sets him apart, be even if it isn't, under the discriminatory purpose prong, a defendant is not limited to proving his or her case through proof of discriminatory selection based on suspect or arbitrary classifications. In cases involving solitary prosecutions, a defendant may also show that "the government's discriminatory selection for prosecution is based on a desire to prevent the exercise of constitutional rights or motivated by personal vindictiveness on the part of a prosecutor or the

responsible member of the administrative agency recommending prosecution." *Sears,* 94 Wis.2d at 135, 287 N.W.2d 785. Mr. Neighbors' prosecution is so far removed from any previous prosecution, at least seventeen (17) years, that it is, for all intents and purposes, a solitary prosecution. The Circuit Court stated that it found Mr. Neighbors' witnesses credible (R25:55), and the County provided no witnesses to contradict Mr. Neighbors' witnesses' positions regarding the scope of camping on private property in Walworth County over the years. As such, Mr. Neighbors, based on the evidence placed into the record, could possibly have been the only person similarly situated, that is camping on private property, to be cited for the offense in the recorded history of Walworth County, Wisconsin.

Conclusion

Institutional, subconscious racism is a cultural force in our society. It did not disappear with the Emancipation Proclamation, the Civil Rights Act, or even the first African American President. The Circuit Court in its decision found no evidence Mr. Neighbors had been singled out for prosecution and that there was no evidence his race was a factor in the decision to cite him despite the

incredible circumstances. The Circuit Court explained the fact that the only person cited in the last nearly two decades for camping on private property was an African American was a matter of a "hit or miss situation," where, "rather, you [the Appellant] were just in the wrong place at the wrong time." (R27:59). Mr. Neighbors met his *proper* burden at the Circuit Court level and established a reasonable doubt as to the prosecutor's purpose. The County was, perhaps improperly, given every opportunity to present rebuttal evidence at the hearing, and provided none relying solely on scoffing, empty, after-the-fact denials and the standard responses of those whose policies and procedures required the existence of such a defense as selective prosecution in the first place. Therefore, because Mr. Neighbors has far surpassed the level of evidence shown in *Kramer,* he requests that this Court find that the Circuit Court applied the incorrect legal standard, that had it applied the proper legal standard Mr. Neighbors would have made his prima facie case, and that the County has provided no evidence to rebut his position.

Dated this 30th day of January, 2020.

HORLACHER NECCI, LLC

By: /s/Daniel A. Necci
Daniel A. Necci
State Bar No. 1055151

327 Lake Street
Mukwonago, WI 53149
Telephone: (855) 210-2050

CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of this brief is 35 pages.

Dated this 30th day of January, 2020.

/s/Daniel A. Necci
Daniel A. Necci
SBN: 1055151

CERTIFICATION 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 s. 809.19(12). 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 30th day of January, 2020.

HORLACHER NECCI, LLC

By: /s/Daniel A. Necci
Daniel A. Necci
State Bar No. 1055151

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I hereby certify that the electronic copy of this brief and appendix is identical to the content of the paper copy.

/s/Daniel A. Necci
Attorney for Defendant-Appellant
State Bar No. 1055151