

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 27, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP2924

Cir. Ct. No. 2008TR11329

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

VILLAGE OF HALES CORNERS,

PLAINTIFF-RESPONDENT,

v.

BRUCE E. LARSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ROBERT HAWLEY, Judge. *Affirmed.*

¶1 CURLEY, P.J.¹ Bruce E. Larson appeals the judgment finding him guilty of violating the traffic code prohibition against parking/standing in a parking space designated for a physically disabled person without the proper

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2007-08).

authorization, pursuant to WIS. STAT. § 346.505(2) (2007-08),² and the order denying his motion to reconsider. He argues that the circuit court erroneously exercised its discretion and violated his due process rights when it refused to allow him to present evidence and legal arguments. Larson also claims that he did not violate § 346.505(2), and finally, he submits that the Village of Hales Corners (the Village) selectively prosecuted him because he challenged the legality of the citation. This court affirms.

I. BACKGROUND.

¶2 The appellate record reflects that Larson was found guilty in the municipal court on March 19, 2008, of violating the traffic code prohibition against parking/standing in the space reserved for the physically disabled without the proper authorization, and he appealed this matter to the circuit court requesting a trial *de novo*.³

¶3 According to the testimony taken at trial, on August 28, 2008, in front of a reserve circuit court judge, an officer of the Hales Corners Police Department saw a car parked in a disabled parking space near a UPS store. The officer exited his vehicle to see whether the car might have had a disabled placard that fell down. After satisfying himself that the car in question did not have a disabled placard, the officer wrote out a citation and handed it to Larson after Larson exited the UPS store and approached his car. The citation reflected that the

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

³ Larson was required to post \$172, as well as \$138.50 as a jury deposit in order to appeal the matter.

fine was \$50.00. The record shows that Larson challenged the ticket and the original citation was dismissed. Larson was issued a new citation which bore a fine of \$172.00. On the back of the citation, the officer wrote: “I issued parking cit[ation] #2831[.] I was advised by the court to dismiss and re[-]issue citation on a U.T.C.” Presumably U.T.C stands for “uniform traffic citation.”

¶4 After the Village rested and it came time for Larson, acting *pro se*, to present his case in the circuit court, things did not go well for Larson. When the Village attorney concluded his questioning of the officer who gave Larson the ticket, Larson asked several questions of the officer. The questions and answers cover a little more than two pages of the transcript. At the end, Larson said, “Okay. That is all.” The court excused the officer. Larson then advised the court that he was planning on calling the same officer to “examine him in my own behalf.” The circuit court asked Larson to make an offer of proof as to why he wanted to recall him. Larson confessed he was not “familiar with that requirement.” When Larson was unable to respond to the circuit court’s request, the circuit court refused to permit the officer to testify again.

¶5 Larson then took the stand in his own defense. After complaining that the witness chair was very low and uncomfortable, he presented as an exhibit an aerial view of the parking lot and the disabled parking spaces. Shortly thereafter, he attempted to put into evidence exhibit two, a letter that contained questions that he proposed to ask his witness and her probable answers. A copy of the letter had previously been sent to the Village’s attorney. When the circuit court explained that the questions and answers were not relevant, the following colloquy took place:

[The Court:] ... [I]f she's here to testify, that's going to be the best evidence. So if you subpoenaed her and she's here to testify, that's fine. I don't want her answers to some questions in a letter. It's not under oath, it's not a deposition, it's not capable of being introduced into evidence, so that's denied.

[Larson:] I'm not introducing that, per se. I'm introducing the fact that these answers and testimony were forwarded to the opposing witness—

[The Court:] Yeah.

[Larson:] —eight weeks before this trial.

[The Court:] See, it's not testimony, though.

[Larson:] But it's relevant.

[The Court:] No, it's not. Have a seat. That's my decision. You can take that up at the Court of Appeals.

[Larson:] I will.

¶6 Larson then followed up by trying to have the original citation introduced. The Village attorney objected. The circuit court said, “I'll receive it as being not relevant.” Larson then attempted to have his original motion dismissing the first citation moved into evidence. When the court refused, Larson argued that the new citation should be dismissed because it contained a “three-and[-]one-half-fold, vindictive increase in the fine from my speaking out against the form of citation used.... It was not uniformly enforced.” This request was also denied. Following this exchange, Larson began reading from his notes concerning the events that led to the ticket.

¶7 According to Larson, who stated he is a chemist by trade, on the day he received the ticket he was under tight timelines to get products to customers. He went to the UPS store, arriving shortly before the store closed, with two heavy packages—one of which weighed fifty pounds. He had to mail these two

packages and then quickly return to wait for a truck that was picking up another package. After this explanation, he then testified concerning his aerial photograph of the parking lot, and said that the closest entrance to the parking lot was 200 feet from the disabled parking spots. Before launching into why that was relevant, Larson realized that he had failed to bring all his notes to the witness stand and the circuit court took a short break.

¶8 After the recess, Larson called the UPS employee who was working the night he received the citation. Larson elicited from her the fact that the store was busy the night he got the ticket and that she saw Larson unload his packages and say, “I’ll be right back. I’m going to move my car.” Upon the court’s questioning, the witness admitted that Larson was parked in the disabled parking space, and she said that, in response to a question posed by the circuit court, “You’re not supposed to park in [the disabled parking space] at all.” The circuit court then squelched testimony Larson attempted to solicit from the UPS employee concerning whether she had seen Larson park in the disabled parking space previously; the size of the doors to the UPS store; whether people in a wheelchair could open the door; and whether a loading zone was provided for UPS customers, finding the questions “not relevant.” Additionally, the circuit court would not permit any questioning concerning the time stamped on the receipts which were issued by the UPS employee; whether typical customers could carry a fifty-pound package; and whether the other disabled parking space was available when Larson was parked there.

¶9 After the witness was excused, Larson again testified. He again related to the court that he was under a deadline when he rushed to the UPS store, and he found the parking lot very congested. He explained to the court that he was sixty-three years old, weighed 130 pounds, and had had four hernia operations

and cannot walk more than a hundred feet carrying a hundred-pound carton without stopping, suggesting that: “[u]nder these conditions, [I] may be considered to meet the statutory guidelines for being disabled” pursuant to the relevant statutes. He admitted parking in the disabled parking space, but said his intention was to unload his packages and then move his car. He told the court that the store was busy and the door to it was narrow, so it took some time to get the packages into the store. When he came out, the officer had already written the citation. Larson said he was parked there for a very short time. Apparently wanting to prove that no one in a wheelchair would want to park in these particular disabled parking spaces, Larson described how the doors to the stores nearby are all regular sized and nonautomatic, and he did not think anyone in a wheelchair would be able to open them without assistance.

¶10 At the close of testimony, Larson ran into further trouble. After the circuit court announced that, “[I]t is the Village of Hales Corners’ duty to convince me by clear, satisfactory, and convincing evidence that you violated the [disabled parking] zone,” Larson responded: “Now, hold it one second there.” This comment was met by the circuit court announcing it would not entertain any closing arguments from either the Village or Larson. The circuit court then proceeded to make its findings that Larson was not disabled and had parked in the disabled parking space, and found Larson guilty, fining him \$172. A motion seeking reconsideration was denied and this appeal follows.

II. ANALYSIS.

A. *The circuit court neither erroneously exercised its discretion nor violated Larson's due process rights.*

¶11 A person charged with a traffic offense is entitled to procedural due process. *State v. Peterson*, 102 Wis. 2d 227, 229, 306 N.W.2d 263 (Ct. App. 1981), *rev'd on other grounds*, 104 Wis. 2d 616, 312 N.W.2d 784 (1981). “Due process requires that a person have notice of the offense and the opportunity to be heard at a meaningful time and in a meaningful manner.” *Town of East Troy v. Town & Country Waste Serv.*, 159 Wis. 2d 694, 704, 465 N.W.2d 510 (Ct. App. 1990).

¶12 Larson first complains that the circuit court did not allow him to question the officer who issued the citations during his case-in-chief. Larson did ask the officer several questions during cross-examination. However, when Larson sought to continue to question the officer during his case-in-chief after previously advising the court that he was finished with the officer, the circuit court asked for an offer of proof. In other words, the circuit court asked Larson what he expected to elicit from the officer that had not already been asked. Larson was unable to respond to the circuit court's request. This is understandable because it is difficult to imagine what relevant area of questioning Larson wanted to explore with the officer. The officer saw Larson's car parked in a space reserved for a physically disabled person and he gave him a ticket. The amount of time that the officer observed the car was not relevant, and the back of the officer's second citation explains why a second citation was written after the first one was dismissed.

¶13 Ordinarily, the admissibility of evidence lies within the circuit court's sound discretion. *See State v. Pepin*, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). It is axiomatic, however, that evidence must be relevant to be admissible. *See* WIS. STAT. § 904.02. A defendant thus does not have a constitutional right to present irrelevant evidence. *See State v. Pulizzano*, 155 Wis. 2d 633, 646, 456 N.W.2d 325 (1990). Here, the circuit court, apparently faced with a heavy calendar, had heard brief cross-examination of the officer and the circuit court was not advised what other relevant evidence could come from further questioning of the officer. Consequently, the circuit court properly exercised its discretion when it refused to permit Larson to recall the officer.

¶14 The circuit court also properly exercised its discretion in intervening in the questioning of the UPS employee. It is readily apparent from the type of questions posed by Larson to this witness that he believed he had several defenses to the traffic charge. Among them was his belief that he should be exonerated because he was in the parking space for a very brief period, and this could be proved by the introduction of the receipts from UPS to show the short time he was parked in the space. Through this witness, Larson also wanted to prove that there was no loading zone for UPS customers; few physically disabled people would use the spaces because the doors to the UPS store and adjacent stores could not be opened by anyone in a wheelchair; and, in any event, one of the disabled parking spaces was available during the time he was parked there. While these facts may have, in Larson's mind, justified his parking in the space, none of them are legal defenses to the ticket. Thus, the testimony was not relevant. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. The circuit court

was not required to listen to irrelevant evidence. To be sure, the circuit court appeared to be exasperated with Larson, but the circuit court was not under an obligation to listen to irrelevant testimony.

¶15 The circuit court did permit Larson to testify in his own defense. During his testimony, Larson admitted parking in the disabled parking space. After he explained his position and exclaimed that he was probably disabled, the circuit court dispensed with closing argument from both sides. Denial of the opportunity to participate in oral argument, following a party's full participation in the hearing and filing of briefs, does not deny procedural due process. *Union State Bank v. Galecki*, 142 Wis. 2d 118, 126, 417 N.W.2d 60 (Ct. App. 1987). It is well to remember that this trial concerned only a parking ticket. Such trials are ordinarily simple and require little time. Here, the circuit court heard testimony from the officer who wrote the ticket, from a witness for Larson, and from Larson himself. The issue was whether or not Larson parked in a disabled parking space. He admitted that he did. The circuit court was well aware of Larson's various claimed defenses. No closing argument was needed.

B. Larson was guilty of violating WIS. STAT. § 346.505(2).

¶16 Next, Larson claims he was unfairly found guilty of violating the statute concerning disabled parking spaces. He reasons that because the definition of parking found in WIS. STAT. § 340.01(42m) states that, "Park or parking' means the halting of a vehicle, whether occupied or not, *except temporarily for the purpose of and while actually engaged in loading or unloading property or passengers,*" he could stay in the disabled parking space while he was unloading his packages without running afoul of WIS. STAT. § 346.505(2). (Emphasis added.) This court disagrees.

¶17 WISCONSIN STAT. § 346.505(2)(a) reads:

346.505 Stopping, standing or parking prohibited in parking spaces reserved for vehicles displaying special registration plates or special identification cards.

....

(2) (a) Except for a motor vehicle used by a physically disabled person as defined under s. 346.503 (1), no person may *park, stop or leave standing any vehicle, whether attended or unattended and whether temporarily or otherwise, upon any portion of a street, highway or parking facility reserved, by official traffic signs indicating the restriction, for vehicles displaying special registration plates issued under s. 341.14 (1), (1a), (1e), (1m), (1q) or (1r) (a) or a special identification card issued under s. 343.51 or vehicles registered in another jurisdiction and displaying a registration plate, card or emblem issued by the other jurisdiction which designates the vehicle as a vehicle used by a physically disabled person.*

(Emphasis added.)

¶18 Larson fails to read the entire statute. Even if this court were to agree (and it does not) that somehow Larson was not actually parked because he was unloading packages, he was nevertheless stopped and had temporarily left his car unattended. Thus, his decision to park in the disabled parking space while unloading his packages was a violation of the statute. Further, although Larson believed himself to be a disabled person, as noted by the circuit court, he was obligated to obtain, apply and verify his physical limitations pursuant to WIS. STAT. § 341.14 before he could lawfully park in a disabled parking space.

C. Larson has not met his burden of establishing selective enforcement of the prohibition against parking/standing in a disabled parking space.

¶19 Larson argues that because the Village dismissed the original citation that reflected a \$50 fine and reissued it as a violation with a \$172 fine, the Village has been guilty of selective enforcement. He insists that the reissuance

was a direct result of his exercising his rights and questioning the original citation. This court is not persuaded.

¶20 A selective prosecution claim is not a defense on the merits to a criminal charge. Rather, it is an independent claim that the charge or charges have been brought for constitutionally forbidden reasons. *See, e.g., United States v. Armstrong*, 517 U.S. 456, 463 (1996). (This court will assume that the same rule applies to forfeiture actions.) In order to have the right to an evidentiary hearing on a selective prosecution claim, a defendant must meet the initial burden of establishing a *prima facie* showing of discriminatory or selective prosecution. *State v. Nowakowski*, 67 Wis. 2d 545, 565-67, 227 N.W.2d 697 (1975) (applying *United States v. Falk*, 479 F.2d 616, 620-23 (7th Cir. 1973)).

¶21 To establish a *prima facie* case of selective prosecution, a defendant must present evidence that the prosecution had both a discriminatory effect and a discriminatory purpose. *State v. Kramer*, 2001 WI 132, ¶18, 248 Wis. 2d 1009, 637 N.W.2d 35. The first prong is satisfied if the defendant can show he or she was singled out for prosecution while others similarly situated were not. *Id.* The second prong, discriminatory purpose, requires a showing that the choice to prosecute “was based on an impermissible consideration such as race, religion or other arbitrary classification.” *Id.* A solitary prosecution can meet the discriminatory purpose requirement if the defendant makes a “substantial showing” the 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 v. State*, 94 Wis. 2d 128, 135, 287 N.W.2d 785 (1980) (citations omitted).

¶22 Larson has not met the first prong. He has not shown that he has been singled out for prosecution while others similarly situated were not. He neither presented nor tried to present any evidence showing how others who park in disabled parking spaces in the village without proper licenses or signage are treated. In fact, the record supports a far more innocent version of what occurred here.

¶23 The officer who both wrote the original ticket and the reissued ticket wrote on the back of the reissued citation that: “I was advised by the court to dismiss and re[-]issue citation on a U.T.C.” This entry suggests that the officer wrote the original ticket as a parking ticket and not on a uniform traffic citation. Here, it was not the Village’s prosecutor who requested the change, but the municipal judge. The fact that the deposit amount was increased can be explained by the Village attorney’s comments in response to the circuit court’s question following the circuit court’s finding Larson guilty. The circuit court asked whether the \$172 included the fine and costs, and the Village attorney stated: “That is. That’s based off the standard bond schedule issued by the State of Wisconsin.” Thus, it would appear that the first officer erred in writing a ticket on something other than a uniform traffic citation and placed the wrong dollar amount on the ticket. When the ticket was reissued, the Village used the amount found in the standard bond schedule. No selective prosecution occurred here.

¶24 For the reasons stated, the judgment and order are affirmed.

By the Court.—Judgment and order affirmed.

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

⁴ Larson has asked that this opinion be published. WISCONSIN STAT. § 809.23(4)(b) prohibits the publication of one-judge opinions.

