

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 17, 2005**

Cornelia G. Clark  
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. 04-1484  
STATE OF WISCONSIN**

**Cir. Ct. No. 03TR001021**

**IN COURT OF APPEALS  
DISTRICT IV**

---

**CLARK COUNTY,**

**PLAINTIFF-RESPONDENT,**

**v.**

**MICHAEL C. COLLINS,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment of the circuit court for Clark County:  
JON M. COUNSELL, Judge. *Affirmed.*

¶1 LUNDSTEN, J.<sup>1</sup> Michael C. Collins appeals a circuit court judgment convicting him of operating an all-terrain vehicle (ATV) in violation of

---

<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

WIS. STAT. § 23.33.<sup>2</sup> He argues that the circuit court erred in denying him a jury trial. He also argues that the court erred in making evidentiary rulings based on a misunderstanding of the statutory exceptions to the offense for which he was convicted. We reject Collins' arguments and affirm the circuit court's judgment.

### ***Background***

¶2 Collins received a citation after a deputy sheriff stopped him for operating an ATV on Hay Creek Road in Clark County. The citation, prepared by the deputy, referenced WIS. STAT. § 23.33(4)(a), which prohibits operation of an ATV “upon any part of any freeway which is a part of the federal system of interstate and defense highways.”

¶3 Collins pled not guilty, then filed a motion to dismiss. In the motion, Collins asserted that the citation failed to set forth essential facts constituting the offense cited because Hay Creek Road is not a freeway.

¶4 During preliminary proceedings on the day scheduled for Collins' trial, the County explained that the statutory reference that should have appeared on Collins' citation was WIS. STAT. § 23.33(4)(b), not § 23.33(4)(a). Subsection (4)(b) of the statute prohibits operation of an ATV on a “highway” with certain exceptions.<sup>3</sup>

---

<sup>2</sup> Collins was convicted under the statutes in effect at the time of his offense, the 2001-02 statutes. However, since the relevant portion of the statute has not changed, we will refer to and cite from the current version.

<sup>3</sup> Collins does not argue that Hay Creek Road is not a “highway” within the meaning of WIS. STAT. § 23.33.

¶5 The County asked the circuit court to amend Collins' citation in order to correct the statutory reference on the citation. In response, Collins argued that if the citation was amended, he would have the right to enter a new plea and to request a jury trial on the amended citation.

¶6 The circuit court rejected Collins' argument and allowed the County to amend the citation. The court reasoned that the descriptive narrative on the citation was sufficient to put Collins on notice of the factual nature of the charge against him. The court then proceeded to hold a bench trial on the amended citation and found Collins guilty of violating WIS. STAT. § 23.33(4)(b). Collins appeals the judgment of conviction.<sup>4</sup>

### *Discussion*

#### *Collins' Right to a Jury Trial*

¶7 Collins concedes that he missed the deadline to request a jury trial on the citation as issued. He argues, instead, that his failure to timely request a jury trial on the initial citation does not settle the question of whether he should have had another opportunity to request a jury trial when the citation was amended. He explains that, based on the citation issued, he chose not to make a request for a jury trial because he knew the County would not be able to prove the elements of the offense charged. Collins asserts that his rights were, therefore, substantially affected when the court would not allow him a jury trial on the

---

<sup>4</sup> The judgment of conviction, like the citation, lists Collins' offense as a violation of WIS. STAT. § 23.33(4)(a). However, it is apparent from the trial transcript and the parties' arguments that Collins was tried for and found guilty of a violation of § 23.33(4)(b). Collins is not challenging the technical defect in the judgment or suggesting that the defect in the judgment is pertinent to his arguments on appeal.

amended citation because the amendment changed the elements of the offense with which he was charged.<sup>5</sup>

¶8 Collins points to WIS. STAT. § 23.77(1), which sets forth the applicable procedure for a jury trial demand or waiver. Section 23.77(1) provides, in part:

**Jury trial. (1)** If in circuit court either party files a written demand for a jury trial within 20 days after the court appearance date and immediately pays the fee prescribed in s. 814.61(4), the court shall place the case on the jury calendar.... If no party demands a trial by jury, the right to trial by jury is permanently waived.

¶9 The interpretation of statutes is a question of law, which we review *de novo*. *Evers v. Sullivan*, 2000 WI App 144, ¶5, 237 Wis. 2d 759, 615 N.W.2d 680. Whether a litigant has been improperly deprived of a jury trial also presents a question of law for our *de novo* review. *See State v. Cloud*, 133 Wis. 2d 58, 61, 393 N.W.2d 123 (Ct. App. 1986).

¶10 Collins does not point to any express language in WIS. STAT. § 23.77(1) or any other statute that gives a defendant under WIS. STAT. ch. 23 the right to request a jury trial if a citation is amended when the deadline has otherwise passed. Nonetheless, we will assume, without deciding, that there are instances in which a defendant would be unfairly deprived of his or her ch. 23 jury trial right if the 20-day time period under § 23.77(1) served as an absolute bar to a

---

<sup>5</sup> Collins also asserts that he was never informed of his right to a jury trial as required by WIS. STAT. §§ 23.70(1) and 23.74(1). We conclude that Collins waived any assertion of error based on an argument that he was not informed of his statutory right to a jury trial under WIS. STAT. ch. 23. He failed to preserve this notice issue in the circuit court because he did not raise it either in his motion to dismiss or during argument on the motion. *See Zeller v. Northrup King Co.*, 125 Wis. 2d 31, 35, 370 N.W.2d 809 (Ct. App. 1985) (“Generally, this court will not consider issues raised for the first time on appeal.”).

demand for a jury trial when a citation is amended after the 20-day period has expired. We conclude, even under this assumption, that Collins' rights were not substantially affected.

¶11 As the circuit court recognized, Collins' citation plainly put him on notice of the factual nature of the allegations against him. Although the citation referenced subsec. (4)(a) of WIS. STAT. § 23.33, the citation specifically alleged the nature of the violation against Collins in accordance with subsec. (4)(b) of the same statute. Subsection (4)(b) prohibits operation of an ATV on a "highway" with certain exceptions. For example, a person may operate an ATV "[o]n roadways which are designated as all-terrain vehicle routes" or "[o]n roadways of highways that are all-terrain vehicle trails." WIS. STAT. § 23.33(4)(d)4. and 7. Here, the "Violation" section of the citation states: "OPERATE ATV ON ROADWAY." In addition, the citation contains the following factual explanation: "WAS OPERATING ATV ON HAY CREEK RD. ROAD IS NOT DESIGNATED AS AN ATV ROUTE NORTH OF ATV CROSSING." Because the citation plainly put Collins on notice that the factual nature of the charge against him corresponded to a violation of subsec. (4)(b) of § 23.33, his substantial rights were not affected by the absence of a second opportunity to request a jury trial after the County's technical amendment to his citation.

¶12 Collins' hope of victory rested on his discovery that the issuing officer listed the wrong subsection in the citation. If Collins actually chose not to request a jury trial in the time allotted under WIS. STAT. § 23.77(1) based on this discovery, it follows that before the deadline Collins surmised that the correct subsection was (4)(b). Collins was represented by counsel, and counsel would have known, as the circuit court pointed out, that the citation was subject to

amendment to conform to the proof. Like the circuit court, we conclude that the citation gave Collins actual notice of the charged violation.

¶13 Collins relies on *Tesky v. Tesky*, 110 Wis. 2d 205, 327 N.W.2d 706 (1983), an insurance case in which the supreme court determined that a litigant who had waived a jury trial was entitled to have his case decided by a jury on retrial because an intervening change in the law introduced a significant new factual question into the case. *Id.* at 206-07, 213. This case, however, does not involve the sort of “significant new factual question” contemplated by the court in *Tesky*. The only intervening circumstance here is that the County sought to correct a technical defect in a civil forfeiture action. As we have already observed, the citation issued to Collins was sufficient to put him on notice of the likely factual issues in his case.

¶14 In sum, Collins brings nothing to our attention that persuades us that he should have had another opportunity to request a jury trial after the technical amendment to his citation.<sup>6</sup>

#### *Circuit Court’s Evidentiary Rulings*

¶15 Collins next argues that the circuit court repeatedly barred him from putting in evidence that would have demonstrated one or more of the statutory

---

<sup>6</sup> We also reject Collins’ assertion that the circuit court was required to make an express finding that Collins waived his jury trial right. Actions to recover forfeitures under WIS. STAT. ch. 23 are civil actions, *see* WIS. STAT. § 23.50, and Collins cites no authority for the proposition that WIS. STAT. § 23.77 requires the circuit court to make an express finding of waiver. In fact, the only authority Collins cites for this proposition is *Village of Oregon v. Waldofsky*, 177 Wis. 2d 412, 501 N.W.2d 912 (Ct. App. 1993). The *Waldofsky* case involved municipal court procedure under WIS. STAT. ch. 800, *see generally id.*, and contains no such proposition with respect to ch. 800 or ch. 23.

exceptions to the prohibition against operating an ATV on a “highway” under WIS. STAT. § 23.33(4)(d). We review a circuit court’s decision to admit or exclude evidence under an erroneous exercise of discretion standard. *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. A proper exercise of discretion requires that the circuit court apply the correct legal standard in making its evidentiary ruling. *See id.*

¶16 Collins relies on the following exceptions in WIS. STAT. § 23.33(4):

(d) *Operation on roadway.* A person may operate an all-terrain vehicle on the roadway portion of any highway only in the following situations:

....

2. On any roadway which is seasonally not maintained for motor vehicle traffic. Operation of an all-terrain vehicle on this type of roadway is authorized only during the seasons when no maintenance occurs and only if the roadway is not officially closed to all-terrain vehicle traffic.

....

4. On roadways which are designated as all-terrain vehicle routes....

....

7. On roadways of highways that are all-terrain vehicle trails.

Also relevant here are the definitions of “all-terrain vehicle route” and “all-terrain vehicle trail” set forth in § 23.33(1):

(c) “All-terrain vehicle route” means a highway or sidewalk designated for use by all-terrain vehicle operators by the governmental agency having jurisdiction ....

(d) “All-terrain vehicle trail” means a marked corridor ... designated for use by all-terrain vehicle operators by the governmental agency having jurisdiction, but excluding roadways of highways except those

roadways that are seasonally not maintained for motor vehicle traffic.

¶17 We first note that Collins never made an argument or offer of proof before the circuit court suggesting a defense under subd. (d)2. or 7. That is, he did not argue that he was operating an ATV on a roadway that was seasonally not maintained for motor vehicle traffic. Consequently, Collins has waived this argument. See *Zeller v. Northrup King Co.*, 125 Wis. 2d 31, 35, 370 N.W.2d 809 (Ct. App. 1985) (“Generally, this court will not consider issues raised for the first time on appeal.”).

¶18 Collins asserts that the circuit court made evidentiary rulings that reflect the court’s mistaken belief that the only defense available to Collins was that he was operating on an ATV route. Collins also contends that statements in the circuit court’s final decision demonstrate the court’s improper focus on whether Collins was operating on a route. We are not persuaded. It is hardly surprising that the court focused on whether Collins was traveling on an ATV route, given that Collins failed to make an argument or offer of proof sufficient to apprise the court of how Collins might establish a defense under some other exception to WIS. STAT. § 23.33(4)(b). In any event, the circuit court did not exclude any significant evidence or otherwise misapply the law.

¶19 Before addressing Collins’ remaining arguments, additional background is helpful. Collins characterizes the circumstances that led to his stop as follows:

Collins ... was traveling Southwest on an ATV trail and came to the intersection of Hay Creek Road. At this intersection, Hay Creek Road runs Northwest and Southeast. The trail on which Collins’ group was riding intersects off Hay Creek Road to the Northeast. There is also a trail that intersects off of Hay Creek Road to the Southwest. It is the intended use of the trail to the



Southwest that has been a part of the dispute in this matter. However, it is undisputed that the Collins group turned right at the Hay Creek Road intersection and rode Northwest on Hay Creek Road.

(Record citation omitted.) The County agrees with this characterization.

¶20 We interpret Collins' remaining arguments as having two prongs. First, he contends he could not tell which way he was supposed to go at the intersection of Hay Creek Road and the ATV trail because the intersection signs were inadequate and failed to conform with standards in DNR handbooks. Second, Collins relies on the existence of signs in other areas that state "ATV 10 MPH ON ALL TOWN ROADS," apparently under the theory that these signs authorize the operation of ATVs on all portions of all highways in the town. Collins asserts that the circuit court excluded evidence relevant to these arguments.

¶21 As to the first prong of Collins' argument, we return to the statutory language for the exception for operating on an ATV route. In order for a highway to meet the ATV "route" exception, it must be "designated for use" as an ATV route "by the governmental agency having jurisdiction." *See* WIS. STAT. § 23.33(1)(c) and (4)(d)4. Even assuming that signs alone could be sufficient to "designate" a route, the County's trial exhibits establish that there were *no* signs at the intersection indicating that Hay Creek Road was such a route. If anything, the signs at the intersection suggested that the proper way to proceed was not *on* Hay Creek Road but *across* Hay Creek Road. Thus, evidence of insufficient signage, regardless of DNR handbook standards, would not have tended to show that Hay Creek Road was an ATV route. The circuit court, therefore, did not err in excluding such evidence.

¶22 The second prong of Collins’ argument—that Hay Creek Road may have been an ATV route based on town signs reading “ATV 10 MPH ON ALL TOWN ROADS” posted in other areas of the town—wrongly assumes that the circuit court excluded evidence. The record shows that the circuit court considered the signs, but concluded that a town ordinance made clear that town roads were *not* all designated as ATV routes. Although the town signs may arguably have been ambiguous or misleading, the ordinance, which Collins did not challenge, overcomes any suggestion that the town signs could establish that he was operating on an ATV route when he drove on Hay Creek Road. We discern no circuit court error in this regard.

¶23 Having rejected Collins’ arguments, we affirm the judgment of the circuit court.

*By the Court.*—Judgment affirmed.

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

