COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0176

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

CITY OF WAUWATOSA,

PLAINTIFF-RESPONDENT,

V.

WILLIAM J. MORGAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Reversed.*

SCHUDSON, J.[1] William J. Morgan, *pro se*, appeals from the trial court judgment finding him guilty of performing electrical work without a license or permit. Morgan argues that the trial court lacked personal jurisdiction because

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

the citation to which he pled no contest contained no statement of personal service. This court agrees and, therefore, reverses the conviction.

The facts are undisputed. The City of Wauwatosa issued a series of citations to Morgan for performing electrical and plumbing work without a license or permit. Ultimately, two citations came before the circuit court: D 53585 for the electrical violation, and M 313535 for the plumbing violation. Morgan challenged both alleging two jurisdictional defects under § 800.01(2)(b), STATS.: that the citations did not contain a statement of personal service, and that the issuing officer's block-printed name did not constitute the required signature.[2]

Section 800.01, STATS., in relevant part, provides:

> **Commencement of action.** (1) In municipal court, personal jurisdiction in municipal ordinance violation cases … is obtained over a defendant when the defendant:
>
> (a) Is served with a … citation and such documents are filed with or transmitted to the court;
>
> ….
>
> (2) (b) If a … citation is personally served, the law enforcement officer … serving the … citation shall sign a statement of personal service on the … citation.

The trial court rejected Morgan's theories. Regarding the former, the trial court stated:

> Contrary to the Defendant's argument, at least, I find it interesting the citation that I have in the Court file itself, the box for method of service is properly marked on Citation 313535. However, the copy the Defendant files as an exhibit in his motion does not have that. Even if such box were not marked, … [Officer Buchanan's] signature on

[2] Morgan also vigorously argues that his no contest plea did not waive any objection or appellate challenge to personal jurisdiction. The City agrees.

> the citation bearing the date of service fulfills the purpose of the statute.
>
> There is no language in the statute prescribing a specific manner or form in which the statement of service must be made other than for purposes of personal service. There is no reason any police officer would have written on the citation issued. Therefore, it can reasonably be said that the officer's signature at the bottom of the citation with a date represents a valid statement of personal service under the statute, informs the Defendant of the action against him and confers jurisdiction.

Thus, this court notes that although the trial court's comments, in some respects, could have been applicable to both citations, they most specifically referred to M 313535, the plumbing citation ultimately dismissed as part of the agreement leading to Morgan's no contest plea to the electrical citation. The difference between the two citations is of some significance to this court's analysis.

According to the parties, citation M 313535, the dismissed plumbing citation, was issued on an updated citation form developed in compliance with § 800.01(2)(b), STATS. Accordingly, it contained a pre-printed section stating, "Citation Served," followed by three boxes: "Personally," "Mailed to defendant's last known address," and "Left with person residing at defendant's residence: Name _____ Age _____." Citation D 53585, however, was issued on an older form containing no comparable section or reference to service.

Having examined these two citations in the record, this court appreciates Morgan's suggestion that while the updated citation may contain a "statement of service" section, the older citation does not. The trial court, however, focused primarily, if not exclusively, on the updated version that, ultimately, was not the citation to which Morgan pled no contest. This court must focus on citation D 53585.

With apparent reference to both citations, the City argues that "when the officer prints his name, police department badge number and the date of service when personally serving a non-traffic municipal ordinance citation, this is a sufficient statement of personal service" under the statute. (Capitalization omitted.) Although this is a close call, the case law leads this court to reject the City's argument or, at the very least, to conclude that the City failed to carry its burden, under ***American Family Mutual Insurance Co. v. Royal Insurance Co.***, 167 Wis.2d 524, 481 N.W.2d 629 (1992), to demonstrate that the defect in citation D 53585 was technical rather than fundamental.

At least as early as 1870, in the context of the service of a summons (a context which, the parties agree, is applicable to the issue in this appeal), the supreme court intimated that a statement of service is more than a mere technicality:

> The statute … prescribing that in all cases of service of summons, "the officer or person making such service shall indorse on such copy, over his signature, the date of such service, and that the same is a true copy of the original," is mandatory and not directory in its terms, and the service, to be effectual for any purpose, must be in accordance with it, unless the requirement is waived by the defendant. *The indorsement is one step in the service, and a necessary part of it*, as much so as the delivery of the copy. This must be the effect of the statute, or else it can have no effect, and it is not admissible to construe it so that it shall be wholly inoperative.

Wendel v. Durbin, 26 Wis. 390, 391-92 (1870) (emphasis added). Moreover, although the City makes much of the fact that Morgan concedes actual service in this case, the supreme court has clarified that actual service does not confer personal jurisdiction where the statutory requirements have not been satisfied:

> Although State Farm acknowledges actual receipt of the papers and had actual notice of plaintiffs' action, it

> correctly argues that actual notice alone does not settle the question. This court has held that *when a statute prescribes how service is to be made, compliance with the statute is required for personal jurisdiction even where the defendant has actual notice* of the summons and complaint.

Horrigan v. State Farm Ins. Co., 106 Wis.2d 675, 681, 317 N.W.2d 474, 477 (1982) (emphasis added).

These authorities, however, do not end the analysis. As the City points out, the case law also emphasizes factors favoring its position. Indeed, recently, in ***American Family***, the supreme court, examining "whether service of an unauthenticated photocopy of an authenticated Summons and Complaint is sufficient to meet the requirement of service of an authenticated Summons and Complaint necessary to commence an action under ch. 801," ***American Family***, 167 Wis.2d at 527, 481 N.W.2d at 630, commented:

> Several Wisconsin cases have addressed whether defects in a Summons and Complaint are fatal to jurisdiction. Two lines of analyses emerge; one stressing strict statutory compliance, the other allowing for non-prejudicial technical errors.
>
> ….
>
> We cannot reconcile these analyses.

Id. at 530 and 533, 481 N.W.2d at 631 and 632. Fortunately, however, the supreme court did go on to provide a helpful framework for further analysis:

> [L]ike the court of appeals in this case, we recognize the logic of ***Bulik***'s [***v. Arrow Realty, Inc.***, 148 Wis.2d 441, 434 N.W.2d 853 (Ct. App. 1988)] distinction between "fundamental" and "technical" defects. However, we depart from the court of appeal's [sic] opinion in two ways.
>
> First, we formulate the test as follows: Defects are either technical or fundamental – where the defect is technical, the court has personal jurisdiction only if the complainant can show the defendant was not prejudiced, and, where the defect is fundamental, no personal jurisdiction attaches regardless of prejudice or lack thereof.

> The burden is on the complainant, *i.e.*, the one alleged to have served the defective pleading, to show there was no defect, or, if there was a defect, that it was not fundamental but technical and did not prejudice the defendant. This differs from the court of appeals' test in that it places the burden on the complainant, … rather than the "complaining party," ….
>
> Secondly, we reject the court of appeals' conclusion that a defect is not fundamental where the complainant has "substantially complied with" … the authentication statute.
>
> ….
>
> It must be stressed that the complainant cannot prove a defect was not fundamental by showing the defendant was not prejudiced by complainant's error. For example, where complainant fails to name the defendant, fails to present the clerk with the Summons and Complaint to be authenticated, or fails to serve the Summons and Complaint within 60 days of filing, it will not suffice for the complainant to show the defendant had actual notice.

Id. at 533-34, 481 N.W.2d at 632-33 (citation omitted).

Building on this framework, this court notes that the City does not argue that the lack of a statement of service was a mere technical defect. Rather, the City contends that the officer's signature, badge number, and date of service satisfy the requirement of § 800.01(2)(b), STATS. While arguably that is so on the updated citation that included the service section, this court sees no plausible basis for the City's contention with reference to the old citation form. Thus, the City has failed to carry its burden, under ***American Family***, to establish that there was no defect, and makes no attempt to carry its burden, under ***American Family***, to demonstrate that any possible defect was technical rather than fundamental.

Thus, this court concludes that citation D53585 did not contain "a statement of personal service" required by § 800.01(2)(b), STATS., and that the City failed to carry its burden to establish that the defect was technical rather than fundamental. Therefore, Morgan has correctly argued that the circuit court lacked

personal jurisdiction over the citation to which he entered his no contest plea and, accordingly, his conviction is reversed.[3]

By the Court.—Judgment reversed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[3] Resolution of Morgan's appeal on this basis obviates the need to examine his contention that the officer's block-printed name does not constitute the required signature. See ***Gross v. Hoffman***, 227 Wis. 269, 300, 277 N.W. 633, 665 (1936) (if a decision on one point disposes of an appeal, the appellate court will not decide the other issues raised).