**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

July 20, 2000

**Cornelia G. Clark**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 00-0415**

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

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**CITY OF MADISON,**

**PLAINTIFF-RESPONDENT,**

**v.**

**RAY A. PETERSON D/B/A MASTER BUILDERS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed.*

¶1 ROGGENSACK, J.[1] Ray A. Peterson appeals his convictions for violating a city ordinance relating to the disconnection of electricity and heat for

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (1997-98). Additionally, all further references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

an occupied dwelling. He argues that we should reverse the circuit court because: (1) under WIS. STAT. § 704.17, the tenancies were terminated when he had provided five-day quit or pay rent notices to the tenants and therefore, he was under no obligation to continue to provide heat or electricity; and (2) he believed the writs of restitution had been executed against the tenants and therefore, the dwellings were no longer occupied when he shut off the heat and electricity. Because disconnecting heat and electricity is a constructive eviction that is not permitted by law and the circuit court's findings that the dwellings were occupied are not clearly erroneous, we affirm the judgment.

## BACKGROUND

¶2 The parties stipulated to most of the relevant facts. Peterson owns property on East Wilson Street in the City of Madison. He rented two units to Karen Koleske and Theresa Tucker. When Koleske and Tucker fell behind on their rent, Peterson obtained judgments of eviction and writs of restitution against both tenants. Judgment was entered against Koleske on February 22, 1999. Judgment was entered against Tucker on February 26, 1999.

¶3 The affidavits of service for the writs of restitution provided "I hereby certify and return that by virtue of the within writ I did on the 01 day of March, 1999, at the City of Madison and County of Dane enter upon the premises occupied by Teresa E. Tucker defendant herein and caused the said defendant to be removed therefrom and thereby restored Ray A. Peterson DBA Master Builders plaintiff, to peaceable possession of said premises."[2] The writs, however, were

[2] The affidavit of service for Koleske's writ of restitution was substantially similar to the one for Tucker except that the proposed date of execution of the writ was February 23, 1999.

never executed. Both writs were returned to Peterson with a mark next to the line "Writ expired; no action taken."[3]

¶4 The parties stipulated that on March 12, 1999, Peterson disconnected the heat and electricity for the two units. On that day, Dwight Vorhees, a code enforcement officer with the Madison Building Inspection Unit, and Officer Susan Armagost of the Madison police department inspected the two units and determined that there was no heat or electricity in the units. Vorhees testified that it was approximately fifty degrees inside the units. Vorhees issued two citations to Peterson for violating Madison General Ordinance (MGO) § 27.05(2)(m) (1999). Peterson contested the citations and a trial was held before the Madison Municipal Court. He was found guilty and sought a trial *de novo* in the circuit court. The circuit court also found him guilty and Peterson appeals.

## DISCUSSION

### Standard of Review.

¶5 Whether WIS. STAT. §§ 704.17 and 704.23 allow a landlord to remove a holdover tenant by disconnecting the dwelling's heat and electricity involve statutory construction and the application of statutes to undisputed facts, which are questions of law that we review *de novo*. *See* ***Truttschel v. Martin***, 208 Wis. 2d 361, 364-65, 560 N.W.2d 315, 317 (Ct. App. 1997). Additionally,

[3] The affidavit of service relating to Koleske's writ in which the "writ expired" line was marked was signed and dated March 8, 1999; Tucker's was signed and dated March 12, 1999. The line which indicates what mover the landlord is providing to move the holdover tenant's possessions was blank on both affidavits. Peterson admitted that he did not post the requisite bond with the sheriff's department to cover the cost of moving Tucker and Koleske out of the units before filing the writs of restitution, and thus, the writs were not executed by the sheriff's department.

findings of fact made by the circuit court will not be set aside on appeal unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2).

**Constructive Eviction.**

¶6 Peterson argues that under WIS. STAT. § 704.17, Tucker's and Koleske's tenancies were terminated and therefore, he was under no obligation to furnish heat or electricity to their units. Section 704.17(2)(a) provides:

> If a tenant under a lease for a term of one year or less, or a year-to-year tenant, fails to pay any installment of rent when due, the tenant's tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay rent or vacate on or before a date at least 5 days after the giving of the notice and if the tenant fails to pay accordingly.

While we agree with Peterson that § 704.17 describes the termination of a tenancy, that section does not indicate the process by which a landlord may remove a tenant.

¶7 WISCONSIN STAT. § 704.23 governs removal of a tenant after a tenancy has been terminated. It states "[i]f a tenant remains in possession without consent of the tenant's landlord after termination of the tenant's tenancy, the landlord may in every case proceed in any manner permitted by law to remove the tenant and recover damages for such holding over." Therefore, we must determine if disconnecting a tenant's utilities is a "manner permitted by law" for a landlord to remove a tenant. We conclude that it is not.

¶8 Under WIS. ADMIN. CODE § ATCP 134.09(7), no landlord "may exclude, forcibly evict or constructively evict a tenant from a dwelling unit, other than by an eviction procedure specified under ch. 799, Stats." We have previously determined that the failure of a landlord to furnish adequate heat constitutes a

constructive eviction. *See* ***Besinger v. McLoughlin***, 257 Wis. 56, 59-60, 42 N.W.2d 358, 360 (1950). Additionally, MGO § 27.05(2)(m) provides:

> No owner, operator or occupant shall cause any service, facility, equipment, or utility which is required under this ordinance to be removed from or shut off from or discontinued for any occupied dwelling, dwelling unit or lodging room let or occupied by him except for such temporary interruption as may be necessary while actual repairs are in process, or during temporary emergencies when discontinuance of service is approved by an authorized inspector.

Therefore, a landlord may not disconnect utilities in order to remove a tenant; it is not a "manner permitted by law" under WIS. STAT. § 704.23. Accordingly, Peterson's contention that he was permitted to do so under WIS. STAT. § 704.17 because the tenancy was terminated is without merit.

¶9 Peterson also argues that WIS. ADMIN. CODE § ATCP 134.09(7) does not apply in this case because it applies only to the removal of tenants. He claims that Tucker and Koleske were no longer tenants. However, tenants is defined in WIS. ADMIN. CODE § ATCP 134.02(12) to include any "person occupying, or entitled to present or future occupancy of a dwelling unit under a rental agreement" and it specifically includes "persons holding over after termination of tenancy until removed from the dwelling unit by sheriff's execution of a judicial writ of restitution issued under s. 799.44, Stats." Peterson argues that this section "incorrectly cites" WIS. STAT. § 799.44 as the statute under which a writ is executed. He also argues that the administrative code is in conflict with WIS. STAT. § 704.17 which provides for an unconditional termination of a tenancy when rent is not paid. Peterson's arguments are without merit for several reasons.

¶10 First, WIS. ADMIN. CODE § ATCP 134.02(12) cites the appropriate statute. WISCONSIN STAT. § 799.44 provides that upon entry of a judgment of

eviction, the court shall order a writ of restitution which may thereafter be delivered to the sheriff for execution. WISCONSIN STAT. § 799.45 then explains the process for executing a writ. It provides that upon receiving the writ and after payment of a bond to the sheriff, the writ shall be executed. Section ATCP 134.02(12) states that a holdover tenant is still a tenant until that tenant is removed "by sheriff's execution of a judicial writ of restitution issued under s. 799.44 …." Peterson seems to be arguing that because execution is described by § 799.45, not § 799.44, this section does not apply to Tucker and Koleske. However, Peterson is misreading § ATCP 134.02(12). It refers to a writ of restitution being issued under § 799.44, not one being executed under that section.

¶11 Additionally, even if we were to accept Peterson's argument that the administrative code does not apply, Peterson's actions would still be impermissible. WISCONSIN STAT. § 704.23 states that a tenant may only be removed in a manner permitted by law. In ***Harper v. McMahon***, 167 Wis. 388, 390, 167 N.W. 431, 431 (1918), the supreme court held that a tenant is "entitled to sufficient heat to make the apartment generally comfortable to dwell in for ordinary men, women, and children." And in ***Besinger***, 257 Wis. at 59-60, 42 N.W.2d at 360, the court held that failure to provide adequate heat constitutes a constructive eviction. Accordingly, discontinuing utilities is simply not a manner permitted by law to remove a holdover tenant.

¶12 Finally, we note that Peterson's argument that Tucker and Koleske were not tenants is immaterial to his violation of MGO § 27.05(2)(m). That ordinance makes no reference to tenants but only to dwellings that are occupied. This brings us to Peterson's second contention—that he was unaware that the units were still being occupied by Tucker and Koleske.

**Occupied Units.**

¶13 Peterson asserts that given the wording in the writs, he believed that the writs had been executed and the units were no longer occupied. Therefore, he contends that he should not be found guilty of violating MGO § 27.05(2)(m). We disagree. First, MGO § 27.05(2)(m) does not state that the landlord must be *aware* that the units were occupied but states only that a violation occurs if utilities are disconnected from occupied units. Second, the circuit court specifically found that Peterson's testimony was not credible. With regard to Peterson's assertion that he misunderstood what was meant by the mark indicating "writ expired; no action taken" and believed that the writs had been executed, Peterson admitted that he owned more than ten rental properties and had been involved in more than ten evictions within the past year. Additionally, Peterson admitted that he did not post the requisite bond when he delivered the writs to the sheriff's department and that he knew the sheriff's department would not execute the writs without the bond. And finally, Peterson admitted that when he shut off the utilities, Koleske and Tucker "[w]ere in the process of moving at that time." The court specifically asked Peterson to clarify whether he thought the tenants "[w]ere moving or had moved," to which Peterson responded that he believed they were moving. Given the testimony, the circuit court's findings that the units were occupied and that Peterson was aware of that fact were not clearly erroneous.[4]

[4] Peterson also makes some ancillary arguments regarding comments made by the circuit court. However, he does not develop those arguments by legal reasoning, and therefore, we do not address them. *See* ***Truttschel v. Martin***, 208 Wis. 2d 361, 369, 560 N.W.2d 315, 319 (Ct. App. 1997). Additionally, we do not address these arguments because the above issues are dispositive of his appeal.

## CONCLUSION

¶14 Because disconnecting heat and electricity is a constructive eviction that is not permitted by law and the circuit court's findings that the dwellings were occupied are not clearly erroneous, we affirm the judgment of the circuit court. Additionally, in light of our affirmation of the circuit court, we vacate the stay of the circuit court's judgment previously granted by this court on June 12, 2000.

*By the Court.*—Judgment affirmed.

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