

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 14, 2002

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 Nos. 01-3471, 01-3472
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00-TR-3337, 00-TR-3338**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

VILLAGE OF TREMPLEAU,

PLAINTIFF-RESPONDENT,

V.

MIKE R. MIKRUT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Mike Mikrut appeals a judgment finding him guilty of violating VILLAGE OF TREMPEALEAU, WIS., ORDINANCES §§ 8-4-8, 9-1-1, and 10-1-28(d) (2000), relating to the storage of junk vehicles and operation of junk and salvage yards. The trial court imposed a forfeiture of \$153² for the violation of each ordinance resulting in forfeitures of \$459 per day. The trial court found that the violations were continuous from the date the citations were issued to the day of the trial for a total of 227 days. The total of the forfeitures assessed against Mikrut was \$104,193.

¶2 Mikrut makes numerous arguments on appeal. He argues that: (1) he did not need a conditional use permit to operate his business; (2) his use of the property is a valid nonconforming use; (3) the citations do not comply with the ordinance; (4) the evidence is insufficient to support a finding of guilt; (5) there is no basis for the assessment of the \$153 forfeiture for each violation; and (6) equitable estoppel should bar the Village from enforcing the ordinances. We disagree and affirm the judgment.

BACKGROUND

¶3 Mikrut's family has operated a salvage yard in the Village of Trempealeau for approximately fifty years.³ In 1996, he received a salvage yard permit. Nearby, Mikrut owns two other properties, one on 7th Street and another

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

² The \$153 for each violation included costs.

³ Mikrut's father died in 1966 and Mikrut has operated the salvage yard since then.

on 9th Street. At the 7th Street site, Mikrut stores approximately forty semi-trailers. At the 9th Street site, Mikrut stores wrecked vehicles.

¶4 Officer Gary Galewski issued Mikrut citations for violating three separate Village ordinances at these two locations. Mikrut was cited for violating: § 8-4-8 prohibiting junked vehicles on the property; § 9-1-1, which adopts WIS. STAT. § 175.25, storage of junked vehicles; and § 10-1-28 for failing to obtain a conditional use permit for operation of a junk and salvage yard in an industrial district.

¶5 At trial, Galewski testified that he personally viewed the locations of the violations. At the 7th Street site, he described the trailers as being rusted with some cracked doors; at least one trailer had tires missing. At the 9th Street site, Galewski observed a couple of pick-ups, a wrecker, a flatbed with steel stored on it, a Jeep International, and a couple of cars from an accident. In addition, Galewski testified that the only change he observed at the properties from the time he issued the citations until the time of the trial was the change in the seasons.

¶6 Mikrut also testified. At the 7th Street site, Mikrut explained that he has semi-trailers that are rented out or sold. Some of the trailers on this site have property stored in them and some are rented to go on the road. Mikrut described the business at the 7th Street site as being similar to a warehouse operation. He stated that “some have loads there, some have storage that I rent out, and some I deliver to people. Some use it for moving their furniture from house to house.” He further stated that some of the trailers are not licensed, but that “[e]veryone of them will go down the road.” He described the trailers as being usable with tires and said that at no time did he have junk vehicles on the 7th Street site.

¶7 At the 9th Street site, he stated that he operates a towing business. When he gets called by the police to accident scenes, he tows the vehicles back to this location “until they are processed.” He keeps the vehicles until a claim is settled with the insurance company. If the insurance company abandons a vehicle, Mikrut takes the vehicle to his salvage yard. Mikrut stated that the vehicles are not junk until they are taken to his salvage yard.

¶8 The trial court, after hearing the testimony and viewing the properties, found Mikrut guilty of each citation issued. The court further found that the violations were continuous from the date the citations were issued until the date of the trial, a total of 227 days. The court imposed a forfeiture of \$153 for the violation of each ordinance resulting in \$459 per day. The total for the 227 days was \$104,193.

DISCUSSION

I. CONDITIONAL USE

¶9 Mikrut argues that he does not need a conditional use permit under § 10-1-28 to operate at the 7th and 9th Street sites. As to the 7th Street site, he claims he was engaged in the permitted use of a warehouse. As to the 9th Street site, he claims he was engaged in the permitted use of processing. Alternatively, he contends § 10-1-28 is unconstitutionally vague.

¶10 In reviewing the sufficiency of the evidence to support a conviction, we may not substitute our judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt

beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

¶11 Section 10-1-28 sets forth permitted uses and conditional uses in an industrial district:

(b) **Permitted Uses.** Manufacturing, processing, repairing, or warehouse use, wholesale establishments, auctions sales.

....

(d) **Conditional Uses.** Dump; sanitary landfill; mineral extraction (Section 10-1-74); junk and salvage yards (Section 10-1-76); slaughter houses and rendering works; sewer plant; equipment parking; vehicle impound yard.

(e) **Prohibited Uses:** All uses not specifically permitted.

¶12 The trial court found that Mikrut was operating junk and salvage yards on the 7th and 9th Street sites. The trial court held:

I have to talk about, when I read earlier what junk is which is any unlicensed vehicle under – that was in 10-1-76, it says one or more unlicensed vehicles is prima facie evidence of the operation of a salvage yard or junk yard so even if – even though under your term of art you don't consider it a junk, if one unlicensed vehicle is being stored there, that would be a violation of the ordinance they found, and that would require a conditional use permit under 10-1-28. There isn't a conditional use permit filed for either one of those site, so I will find them that based on the testimony of Officer Galewski, which I find credible and my own view of the site and parts of the exhibits on file, these premises, both premises, that there is violations of [10-1-28] so I would find him guilty of those citations.

A. 7th Street Site

¶13 At the 7th Street site, Mikrut stores semi-trailers. He contends that doing so is a permitted warehouse use under § 10-1-28. We disagree. Galewski testified that the trailers were rusted and some of the doors were cracked and at least one had tires missing. Galewski testified that in his opinion, some of the trailers were not roadworthy because they were rusted and had holes in them. Mikrut's own testimony supports the court's finding that the trailers were junk. Mikrut stated:

As a matter of fact, last week I got a trailer with a bad floor in it which the normal person would call junk or whatever, you know, and a farmer wants that trailer to build a bridge across a creek to walk his cattle across, and so he's going to take the wheels off and put it across the creek.

Mikrut also stated that some of the trailers were not registered. Therefore, we conclude that the court's finding that Mikrut was operating a junk and salvage yard at the 7th Street site is supported by the record.

B. 9th Street Site

¶14 Mikrut argues that "processing" is ambiguous under the ordinance and that he was processing vehicles at the 9th Street site. We disagree.

¶15 Under any reasonable interpretation, Mikrut was not engaged in processing vehicles. If anything, he and the insurance companies were processing insurance claims on the wrecked vehicles. However, the actual vehicles were not processed. Mikrut's testimony at trial reinforces this conclusion:

- Q. If you were involved in an accident on a highway, the police department would call you.
- A. The police department would call me. I would go and haul it in, and immediately the village would call that junk. It isn't. It's not my vehicle.

Q. Okay. It's a vehicle that need to be-

A. Processed.

Q. Processed by?

A. By an insurance company. It is not settled yet.

¶16 Mikrut also admits that he collects and keeps wrecked vehicles at the 9th Street site for up to a year and that those vehicles may be unlicensed. The wrecked vehicles are then hauled to the salvage yard. According to Mikrut, the wrecked vehicles are not junked vehicles until they are taken to the salvage yard. However, he fails to explain why the wrecked vehicles become junked vehicles simply by changing location. We conclude that the trial court properly determined that Mikrut was operating a junk and salvage yard at the 9th Street site.

C. Unconstitutionally Vague

¶17 Mikrut also argues that § 10-1-28 is unconstitutionally vague. However, Mikrut does not cite any authority supporting his claim. Further, Mikrut failed to raise the issue with the trial court. Issues that are not preserved at trial, even alleged constitutional errors, generally will not be considered on appeal. *State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. We conclude that Mikrut has waived the argument.

II. NONCONFORMING USE

¶18 Mikrut argues that if his use of the property is not a permitted use under the ordinance, then it is a legal nonconforming use. In October 2000, less than a month before Mikrut was cited, the ordinance was amended to add other conditional uses: “equipment parking; vehicle impound yard.” Section 10-1-28(d). Mikrut contends that those conditional uses were the very businesses that

he was engaging in. As a result, Mikrut concludes that he had a prior nonconforming use.

¶19 Mikrut failed to raise this issue with the trial court. Generally, we will not decide issues that have not first been raised in the trial court. *Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974).

¶20 Even if we were to consider it, we would reject Mikrut's argument. WISCONSIN STAT. § 60.61(5) empowers local governments to enact zoning ordinances and also prohibits them from restricting valid nonconforming uses:

(a) An ordinance adopted under this section may not prohibit the continued use of any building or premises for any trade or industry for which the building or premises is used when the ordinance takes effect. An ordinance adopted under this section may prohibit the alteration of, or addition to, any existing building or structure used to carry on an otherwise prohibited trade or industry within the district. If a use that does not conform to an ordinance adopted under this section is discontinued for a period of 12 months, any future use of the land, building or premises shall conform to the ordinance.

A nonconforming use is a use of land for a purpose that is prohibited in the district where the land is situated. *Waukesha County v. Seitz*, 140 Wis. 2d 111, 114-15, 409 N.W.2d 403 (Ct. App. 1987). Land use qualifies as nonconforming if there is an active and actual use of the land and buildings that existed prior to the commencement of the zoning ordinances and has continued in the same or a related use until the present. *Walworth County v. Hartwell*, 62 Wis. 2d 57, 61, 214 N.W.2d 288 (1974).

¶21 Mikrut argues that the trial court should have found that his use of the property was for "equipment parking and vehicle impound yard." He contends

that since he used the property for equipment parking and vehicle impound prior to the ordinance being amended, he has a legal nonconforming use.

¶22 However, Mikrut is relying on his own testimony to establish his point. This was not the finding of the trial court. No matter how Mikrut characterizes his business at the 7th and 9th Street sites, the evidence at trial supports the court's finding that Mikrut was operating junk and salvage yards under § 10-1-28.

III. CITATION DEFICIENCIES

¶23 Mikrut argues that the citations do not conform with § 1-2-3 of the Village ordinances because they fail to describe the factual allegations forming the basis for the violations.⁴ He contends that the citations do not state which vehicles

⁴ VILLAGE OF TREMPPEALEAU, WIS., ORDINANCE § 1-2-3 (2000) states in part:

The form of the citation to be issued by the Village police officers or other designated Village officials is incorporated herein by reference and shall provide for the following information:

- (a) The name, address, date of birth and physical description of the alleged violator;
- (b) The factual allegations describing the alleged violation;
- (c) The date and place of the offense;
- (d) The Section of the Ordinance violated;
- (e) A designation of the offense in such manner as can be readily understood by a person making a reasonable effort to do so

are the subject of the citations or where they are located or how long they have been there.

¶24 Mikrut's argument is one of personal jurisdiction. We conclude that he waived any objection to personal jurisdiction by appearing in the action and participating in the proceedings. The term "appearance" is generally used to signify an overt act by which one against whom a suit has been commenced submits to the court's jurisdiction. *McLaughlin v. C., M., St. P. & Pa. Ry. Co.*, 23 Wis. 2d 592, 594, 127 N.W.2d 813 (1964). "[W]here an appearance is made and relief is sought on other matters, an objection of lack of personal jurisdiction is waived." *Lees v. DILHR*, 49 Wis. 2d 491, 499, 182 N.W.2d 245 (1971). Here, Mikrut's plea of not guilty to violating the ordinances waived any objection to personal jurisdiction. See *State v. Estrada*, 63 Wis. 2d 476, 492, 217 N.W.2d 359 (1974).

¶25 In addition to waiving any objection to personal jurisdiction, Mikrut raises this argument for the first time on appeal. Generally, matters of defense not called to the attention of the court and opposing parties during trial are waived and cannot be urged as grounds for a new trial or for reversal of the judgment on appeal. *State v. Conway*, 34 Wis. 2d 76, 82-83, 148 N.W.2d 721 (1967). The basis of this rule is that matters of defense should be raised at trial so that due consideration may be given to them by the trial court, forming a proper factual foundation for consideration on appeal. *Id.* at 83. Therefore, we do not address his argument.

IV. SUFFICIENCY OF THE EVIDENCE

¶26 Mikrut argues that the evidence presented at trial was insufficient to support the trial court's findings that he violated the ordinances. He again argues that he was processing and warehousing the vehicles, both permitted uses under § 10-1-28 of the Village ordinances.

¶27 Specifically, Mikrut contends that the trial court erred by using the presumption found in § 10-7-1. The court referred to the following ordinance language:

The ordinance I've been given though defines junk yard here, under 10-7-1. Well, it's fairly brief so why don't I just read it. It says "A junk or salvage yard shall be defined as any building or premises used for the buying, selling, gathering, delivering, shipping, storage or salvaging of old iron, bottles, paper, rags, farm machinery, vehicles or other material commonly included in the term junk without obtaining a license for the operation of a junk or salvage yard." Then it says "Storage of one or more unlicensed vehicle on the same premises, shall be prima facie evidence of the operation of a junk or salvage yard."

¶28 Even without the presumption, there was sufficient evidence to find that Mikrut was operating junk and salvage yards. Galewski testified that he personally viewed the sites before issuing the citations. At the 7th Street site, he observed rusted trailers with some of the doors cracked, at least one trailer without tires, and some without license plates. The only change in the sites from the time he issued the citations until the time of trial was the change in seasons. Further, he testified that since 1996, the number of vehicles has increased.

¶29 At the 9th Street site, Galewski testified that before issuing the citations he observed a couple of pickups, a wrecker, a flatbed with steel on it, a Jeep International, and a couple of cars from an accident. On the date of trial he observed some trucks and some cars there.

¶30 The trial court found Galewski's testimony to be credible. When the court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses. *Gehr v. City of Sheboygan*, 81 Wis. 2d 117, 122, 260 N.W.2d 30 (1977). The weight to be given to each witness's testimony is a matter for the court. *Milbauer v. Transport Employees' Mut. Benefit Soc'y*, 56 Wis. 2d 860, 865, 203 N.W.2d 135 (1973). When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact. *Id.*

¶31 Additionally, the trial court viewed the property. The purpose of a view is to aid the judge to better understand and weigh the evidence. *American Family Mut. Ins. Co. v. Shannon*, 120 Wis. 2d 560, 567-68, 356 N.W.2d 175 (1984). The scene should be approximately or substantially the same as at the time in issue, and if not, the changes should be made a part of the record. *Id.* at 568. Here, no changes were noted in the record.

¶32 In addition to Galewski's testimony and the trial court's viewing, Mikrut testified that wrecked vehicles were stored at the 9th Street location at all times. He said that a wrecked vehicle may be stored there for up to a year. We conclude that there is evidence in the record to support the court's decision.

V. PENALTY

¶33 Mikrut argues that he has no idea where the forfeiture amount of \$153 for each violation comes from and challenges the basis of the trial court's assessment of those forfeitures.

A. Basis for Forfeiture

¶34 Mikrut was found guilty of violating VILLAGE OF TREMPPEALEAU, WIS., ORDINANCES §§ 8-4-8, 9-1-1, and 10-1-28 (2000). Section 1-1-6 is the general penalty ordinance and provides that any “person who shall violate any provision of this Code shall, upon conviction thereof, forfeit not less than One Hundred Dollars (\$100.00), together with the costs of prosecution” It also provides that “Each violation and each day a violation continues or occurs shall constitute a separate offense.” This is the basis for the forfeitures imposed by the trial court.

B. Section 9-1-1

¶35 Mikrut argues that the trial court erred by assessing a \$153 forfeiture for violation of § 9-1-1. He contends that the forfeiture to be imposed must be \$10 per day. Mikrut reasons that because § 9-1-1 incorporates WIS. STAT. § 175.25 and § 175.25 provides for a fine of not less than \$10, he must be assessed a \$10 forfeiture.

¶36 Mikrut is correct when he states that § 9-1-1 adopts WIS. STAT. § 175.25 and that the penalty under § 175.25 provides “any person, firm, partnership, or corporation violating any of the provisions hereof shall upon conviction be fined not less than \$10.00, nor more than \$50 for each offense” However, the statutory penalty does not apply. The statutory penalty applies only to a state prosecution for violating the statute and constitutes a fine. Mikrut was not charged with violating the statute. He was charged with violating § 9-1-1. Local governments can only impose forfeitures, not fines. The penalty provision

for § 9-1-1 is found in § 1-1-6 which provides for a forfeiture of not less than \$100. The trial court properly imposed a forfeiture under the ordinance.

C. Penalty for Sections 8-4-8 and 9-1-1

¶37 Mikrut argues that before a forfeiture can be imposed for violating § 8-4-8, he must be found guilty of interfering with the enforcement of the ordinance. Since the trial court did not make that finding, he claims he could not be penalized.

¶38 Section 8-4-8(d) provides a specific enforcement mechanism for junked vehicles stored on private property.⁵ After giving notice of a violation, the Village officer must wait five days before issuing a citation. After twenty days,

⁵ VILLAGE OF TREMPLEAU, WIS., ORDINANCE § 8-4-8(d) provides:

(1) Whenever the Police Department shall find any vehicles or appliances, as described herein, placed or stored in the open upon private property within the Village, they shall notify the owner of said property on which said vehicle or appliance is stored of the violation of this Section. If said vehicles or appliances is not removed within five (5) days, the Police Department shall cause to be issued a citation to the property owner or tenant of the property upon which said vehicle or appliance is stored.

(2) If such vehicle or appliance is not removed within twenty (20) days after issuance of a citation, the Village Police Officer shall cause the vehicle or appliance to be removed and impounded, and it shall thereafter be disposed of as prescribed in Sections 8-4-3 through 8-4-6 by the Village Police Officer or his duly authorized representative. Any cost incurred in the removal and sale of said vehicle or appliance shall be recovered from the owner. However, if the owner of the vehicle or appliance cannot readily be found, the cost of such removal shall be charged to the property from which it is removed, which charges shall be entered as a special charge on the tax roll.

the officer shall impound and remove any vehicles and dispose of them. Section 8-4-8(e) provides a penalty:

Any person who shall interfere with the enforcement of any of the provisions of this Section and shall be found guilty thereof shall be subject to a penalty as provided in Section 1-1-6. Each motor vehicle or appliance involved shall constitute a separate offense.

Under subsection (e), a forfeiture can be imposed if the person has been found guilty of interfering with the enforcement of the provision.

¶39 However, Mikrut was not charged with interfering with enforcement under § 8-4-8(e). He was charged with violating the ordinance itself for storing junked or wrecked motor vehicles on his property. The interference in § 8-4-8(e) is a separate offense.

¶40 Mikrut makes a similar argument for § 9-1-1. Mikrut contends that § 9-3-5, like § 8-4-8(e), provides for the Village officer to have the premises put in compliance and assess the costs of doing so as a special tax against the property. Because this has not been done, he concludes that a forfeiture cannot be assessed for a violation of § 9-1-1. However, as with the penalty provision under § 8-4-8(e), Mikrut was not charged with a violation under § 9-3-5. Therefore his argument must fail.

D. Continuing Violation

¶41 Mikrut claims that the evidence is insufficient to establish a continuing violation. He argues that the Village did not prove that the same cars were present in the same location for the entire time the violations occurred.

¶42 The court heard testimony that junked cars were present on certain dates. As previously stated, Galewski testified that the 7th and 9th Street sites had not changed from the date the citations were issued until the date of the trial. Further, Mikrut testified that wrecked vehicles are stored on the 9th Street site at all times.

¶43 Mikrut cites no authority that the Village must prove that the same vehicles were present in the same locations for the entire time. Rather, the Village had to prove that the sites were junk or salvage yards. Presence of any junked vehicles, even different ones, throughout the relevant time, would be a continuing violation.

¶44 Here, the testimony suggested that the condition of the sites never changed. In fact, this was a longstanding business. Thus, it was reasonable to infer that the violation continued from the time the citations were issued.

VI. EQUITABLE ESTOPPEL

¶45 Mikrut argues that equitable estoppel bars the Village from enforcing the ordinances because he had moved the vehicles to the properties at the request of the Village. However, Mikrut did not argue equitable estoppel to the trial court. Issues that are not preserved at trial generally will not be considered on appeal. *Huebner*, 2000 WI 59, at ¶10. Mikrut has waived this argument.

By the Court.—Judgment and order affirmed.

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

