COURT OF APPEALS
DECISION
DATED AND FILED

November 24, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP981 **Cir. Ct. No. 2006FO1138**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

MATT H. POEHNELT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Chippewa County: FREDERICK A. HENDERSON, Judge. *Reversed and cause remanded with directions.*

¶1 BRUNNER, J.[1] The State appeals from an order denying its request under WIS. STAT. § 30.298(5) for an order to restore waters that Matt Poehnelt was convicted of illegally altering. We conclude the circuit court erroneously exercised its discretion by placing the burden of proof on the State. In addition, we conclude the court erroneously considered inappropriate factors, and failed to consider appropriate ones, in denying the restoration request. We reverse and remand.

BACKGROUND

¶2 Poehnelt was cited for constructing an artificial waterway connecting with a navigable water of the state without a permit in violation of WIS. STAT. § 30.19(1g)(a). According to the citation, Poehnelt diverted a tributary of Cranberry Creek into a pond he constructed nearby. As a result, the tributary runs into Poehnelt's pond before flowing into Cranberry Creek and, eventually, the Holcombe Flowage. Poehnelt pled no contest to the citation, was found guilty, and was fined $249.

¶3 The State petitioned the circuit court for restoration of the affected area. A Department of Natural Resources report accompanying the restoration request noted that Poehnelt created the pond in a wetland, which he filled by spreading the excavated soil around the perimeter of the pond. In addition, Poehnelt diverted the tributary by blocking the channel at two locations. Poehnelt also constructed a dam at the pond outlet. The DNR report concluded that proper

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

restoration of the property would include removal of the dams blocking the flow of the tributary, removal of the wetland fill, and restoration of the original channel.

¶4 The circuit court held a hearing on May 16, 2008, to consider the State's request. DNR water management specialist Dan Koich testified Poehnelt called the DNR in the summer of 2004 and requested permits to construct a pond. When Koich visited Poehnelt's property, he informed Poehnelt the DNR was not likely to authorize a plan that included wetland fill, damming, and stream diversion. Koich provided Poehnelt with a permit application, but Poehnelt completed the project without submitting it. Poehnelt's refusal to obtain a permit prevented the DNR from conducting an environmental assessment of the project. When Poehnelt testified at the May 16 hearing, the circuit court accepted Poehnelt's invitation to view the affected property.

¶5 A second hearing commenced on October 13, 2008, immediately following the circuit court's view. At the beginning of the hearing, the court opined Poehnelt's was a "beautiful piece of property." The court also heard additional evidence about issues it raised during the off-the-record view. DNR wildlife supervisor John Dunn testified the diverted tributary had been deemed navigable under case law.[2] Relying on its observations during the view, the circuit court disagreed with Dunn's conclusion. The court expressed skepticism toward the definition of navigability, termed it "meaningless," and eventually stated "[i]f that is the definition it should be changed." The court concluded the State had not

[2] A body of water is navigable if it is "capable of floating any boat, skiff, or canoe, of the shallowest draft used for recreational purposes." ***State v. Kelley***, 2001 WI 84, ¶30, 244 Wis. 2d 777, 629 N.W.2d 601. "[T]he test is whether the stream has periods of navigable capacity which ordinarily recur from year to year, e.g., spring freshets, or has continued navigable long enough to make it useful as a highway for recreation or commerce." ***DeGayner & Co. v. DNR***, 70 Wis. 2d 936, 946, 236 N.W.2d 217 (1975).

met its burden of proving the navigability of the waterway. It also concluded the State failed to demonstrate the harmful effects of Poehnelt's violation. The State appeals the order denying its restoration request.

DISCUSSION

¶6 A circuit court's decision to grant or deny an injunction is a discretionary act. ***Nettesheim v. S.G. New Age Prods., Inc.***, 2005 WI App 169, ¶9, 285 Wis. 2d 663, 702 N.W.2d 449. When reviewing the circuit court's exercise of discretion, "we examine the record to determine whether the court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach." ***Id.*** A circuit court exercises its discretion erroneously in the context of an injunction when it fails to consider and make a record of the factors relevant to its decision, considers clearly irrelevant or improper factors, or clearly gives too much weight to one factor. ***Sunnyside Feed Co. v. City of Portage***, 222 Wis. 2d 461, 471, 588 N.W.2d 278 (Ct. App. 1998). We independently decide questions of law imbedded in the circuit court's exercise of discretion, but benefit from the circuit court's analysis. ***Kocken v. Wisconsin Council 40***, 2007 WI 72, ¶26, 301 Wis. 2d 266, 732 N.W.2d 828.

¶7 The State contends the circuit court erroneously denied its restoration request under WIS. STAT. § 30.298(5). That subsection provides that, in addition to forfeitures,

> the court may order the defendant to perform or refrain from performing such acts as may be necessary to fully protect and effectuate the public interest in navigable waters. The court may order abatement of a nuisance, restoration of a natural resource or other appropriate action designed to eliminate or minimize any environmental damage caused by the defendant.

As the State notes, the statute's use of the word "may" vests a circuit court with considerable discretion in deciding whether to order, and how to fashion, equitable relief. *See* ***Forest County v. Goode***, 219 Wis. 2d 654, 670, 684, 579 N.W.2d 715 (1998); ***State v. Camara***, 28 Wis. 2d 365, 371, 137 N.W.2d 1 (1965). The State argues, however, that ***Goode*** altered the method by which a court may exercise its discretion to grant or deny injunctive relief to restore the environment in an enforcement action.

¶8 In ***Goode***, our supreme court considered "whether a circuit court retains equitable power to deny injunctive relief after a zoning ordinance violation has been proven." ***Id.*** at 656. The court concluded that nothing in WIS. STAT. § 59.69(11) (1995-96), eliminates the circuit court's equitable power to deny injunctive relief. ***Id.*** Despite this conclusion, the supreme court affirmed the court of appeals' decision, which reversed the circuit court's order denying the injunction. ***Id.*** The court held the circuit court erroneously exercised its discretion by failing to take sufficient evidence and adequately address the public interest in obtaining full compliance with the ordinance. ***Id.*** at 683. The circuit court was ordered to take evidence and weigh any "equitable considerations," which included "the substantial [public] interest … in the vigilant protection of the state's shorelands, the extent of the violation, the good faith of other parties, any available equitable defenses … the degree of hardship compliance will create, and the role, if any, the government played in contributing to the violation." ***Id.*** at 684.

¶9 The supreme court also identified the methodology a circuit court should follow when considering whether equitable relief is warranted in an action to enforce shoreland zoning ordinances. ***Id.*** The methodology circumscribes the way in which a circuit court may exercise its discretion:

> Once a violation [of a shoreland zoning ordinance] is established, a circuit court should grant the injunction except, in those rare cases, when it concludes, after examining the totality of the circumstances, there are compelling equitable reasons why the court should deny the request for an injunction…. [T]he circuit court also possesses equitable power to fashion an injunction that does justice. If the court is inclined to deny an injunction, it should first explore alternatives to the requested full injunction to determine whether a more equitably crafted injunction might be appropriate.

Id. (citations omitted). The State argues, and we agree, that this methodology is appropriate in cases, like this one, in which a violation of the statutes protecting the public's interest in navigable waters has been established.[3]

¶10 Under this standard, we conclude the circuit court erroneously exercised its discretion in two distinct ways. First, the circuit court considered inappropriate factors, and failed to consider appropriate ones, in denying the restoration injunction. During the restoration hearing, the State argued Poehnelt's refusal to obtain a permit deprived it of the ability to fully assess the environmental harm caused by wetland destruction. In addition, the State noted Poehnelt's violation was intentional. The circuit court did not address either of these points in its decision, although both are relevant equitable considerations under ***Goode***. The court failed to consider other equitable factors, including whether a more limited injunction than full restoration could adequately protect

[3] Poehnelt correctly points out that the court's conclusion in ***Forest County v. Goode***, 219 Wis. 2d 654, 579 N.W.2d 715 (1998), is based on its interpretation of a statute different than the one at issue in this case. However, the State acknowledges it is reasoning by analogy and the analogy is persuasive in light of the "substantial public interest" underlying both shoreland zoning regulations and statutes designed to prevent unpermitted alteration of navigable public waters. *Compare* ***Goode***, 219 Wis. 2d at 684, *with* WIS. STAT. §§ 30.294, 30.298(5). The purpose of both the shoreland zoning ordinance and WIS. STAT. § 30.19 "is to protect navigable waters and the public rights therein from … degradation and deterioration." ***Goode***, 219 Wis. 2d at 677-78; *see* WIS. STAT. § 30.298(5).

the public interest. As the State points out, one alternative would have been to require Poehnelt to apply for an after-the-fact permit for the project. Further, the circuit court did not address the substantial interest of Wisconsin's citizens in the protection of the state's navigable waterways. Instead, the court focused on the irrelevant factor of whether the stream was navigable.[4] While ***Goode*** does not contain an exhaustive list of equitable considerations a circuit court may properly consider, the circuit court in this case failed to consider any factors ***Goode*** did identify and emphasized an irrelevant one.

¶11 Second, the circuit court erroneously placed the burden on the State to demonstrate the need for restoration. The court repeatedly stressed it was "up to the [S]tate to prove that [harm was done]." As we have explained, once a violation of a statute protecting navigable waters has been established, the presumption favors granting an injunction to restore the environment. *See* ***Goode***, 219 Wis. 2d at 684. The ***Goode*** court justified this rule by reference to the substantial public interest underlying enforcement of the shoreland zoning ordinances:

> [W]here a public entity is authorized to seek a statutory injunction enforcing a zoning ordinance, … the plaintiff does not have to show irreparable injury in order to obtain the injunction. A circuit court is one guardian of the protected shoreland, and should not deny injunctive relief lightly when a zoning ordinance violation is proven.

[4] "If the waterway is not navigable, no permit is required." ***Village of Menomonee Falls v. DNR***, 140 Wis. 2d 579, 586, 605, 412 N.W.2d 505 (Ct. App. 1987). The State correctly points out that by pleading no contest to a violation of WIS. STAT. § 30.19(1g)(a), Poehnelt pled to all elements of the offense, including that he connected his pond to a navigable waterway. Thus, the State argues whether the stream was navigable is irrelevant to restoration, and the circuit court erroneously exercised its discretion by denying restoration based on the stream's navigability. Poehnelt has conceded this point by failing to respond to it. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (unrefuted arguments are deemed conceded).

Id. at 682-83. The circuit court erroneously exercised its discretion when it required the State to demonstrate the necessity of the injunction.

¶12 On remand, the circuit court should determine whether restoration is appropriate and order any necessary restorative measures. The circuit court should grant the State's restoration motion unless Poehnelt presents "compelling equitable reasons why the court should deny the request for an injunction." ***Id.*** at 684. Neither the navigable quality of the stream nor the aesthetic appeal of Poehnelt's modifications are appropriate factors for the court to consider on remand.

By the Court.—Order reversed and cause remanded with directions.

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