STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1027

State of Minnesota,
Respondent,

vs.

Larry Anthony Cozzi,
Appellant.

Filed April 13, 2010
Affirmed
Schellhas, Judge

St. Louis County District Court
File No. 69DU-CR-07-3649

Lori Swanson, Attorney General, St. Paul, Minnesota; and

James T. Nephew, Assistant St. Louis County Attorney, Duluth, Minnesota (for respondent)

Paul R. Haik, Krebsbach & Haik, Minneapolis, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Schellhas, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges his misdemeanor conviction of failing to follow the terms of a restoration order under Minn. Stat. § 103G.2372, subd. 2 (2006), arguing that the district court (1) erred in denying his request for an evidentiary hearing as untimely,

(2) violated his confrontation-clause rights by admitting the restoration order, (3) abused its discretion by "ignoring compelling evidence showing a complete lack of foundational reliability" in the restoration order, and (4) abused its discretion by not allowing him to challenge the propriety of the restoration order. Appellant also argues that the state failed to prove an element of the offense. We affirm.

FACTS

On December 8, 2006, on behalf of the Minnesota Commissioner of Natural Resources, Conservation Officer Kipp Duncan issued appellant Larry A. Cozzi a Minnesota Wetland Conservation Act Restoration Order, pursuant to Minn. Stat. § 103G.2372, subd. 1 (2006), and Minn. R. 8420.0290 (2005). Cozzi does not contest that he received the order, which was sent to him by certified mail. The order required Cozzi to either carry out the restoration contemplated by the order or submit a wetland replacement plan application by January 30, 2007. The state subsequently extended Cozzi's deadline to May 31, 2007. The order notified Cozzi that he had 30 days to appeal the order to the Executive Director of the Board of Water and Soil Resources (BWSR) and that a violation of the order was a misdemeanor.

Cozzi appealed the restoration order in a letter, dated January 9, 2007, and stamped "received" by BWSR on January 24, 2007. BWSR denied the appeal in an order dated February 7, 2007. BWSR found that although Cozzi's letter of appeal was dated January 9, 2007, it was sent on January 23, 2007, and was therefore untimely. Cozzi did not seek judicial review of BWSR's decision nor did he comply with the restoration order.

On July 17, 2007, Duncan issued Cozzi a citation pursuant to Minn. Stat. § 103G.2372, subd. 2 (2006), which provides that "[a] violation of an order issued under subdivision 1 is a misdemeanor." After several continuances, the case was set for trial on January 13, 2009. Twelve days prior to trial, Cozzi filed a demand for a misdemeanor evidentiary hearing pursuant to Minn. R. Crim. P. 12.04, ostensibly to contest the admissibility of evidence disclosed by the state pursuant to Minn. R. Crim. P. 7.01, including "[c]onfessions, admissions or statements in the nature of confessions made by [appellant]" and "[e]vidence against [appellant] discovered as the result of confessions, admissions or statements in the nature of confessions made by [appellant]." But, in substance, Cozzi sought to challenge admission of the restoration order itself on the basis that "the State of Minnesota violated specific, numerous standards and written protocols essential to establishing foundational reliability." The district court denied Cozzi's motion because it was untimely and because the proper avenue for challenging the restoration order was through the administrative appeal process. Cozzi then waived his right to a jury, and a court trial commenced.

At the conclusion of the trial, the district court found that the state had issued a valid restoration order, that Cozzi had not complied with the order, and that Cozzi was guilty of a misdemeanor. This appeal follows.

D E C I S I O N

I

Cozzi first argues that the district court erred by denying his motion for an evidentiary hearing under rule 12.04. The district court noted that Cozzi filed his motion

17 months after he was charged and should have filed the motion at least a year before he did. The court denied the motion as untimely. We review a district court's interpretation of the Rules of Criminal Procedure de novo. *Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005).

The Minnesota Rules of Criminal Procedure require the prosecution to notify the defense of: (1) any evidence against the defendant obtained as a result of a search; (2) any confessions by the defendant; (3) any evidence against the defendant discovered as a result of a confession; and (4) identification procedures such as lineups and photo lineups. Minn. R. Crim. P. 7.01; *see also State ex rel. Rasmussen v. Tahash*, 272 Minn. 539, 553–55, 141 N.W.2d 3, 13–14 (1966). "If the defendant or the prosecution has demanded a hearing on the issue specified by Rule 7.01, the court shall hear and determine the issue upon such evidence as may be offered by the prosecutor or the defense." Minn. R. Crim. P. 12.04, subd. 1. The request for a hearing under rule 12.04 must be made "at the first court appearance after the [rule 7.01] notice has been given by the prosecution." Minn. R. Crim. P. 5.04, subd. 4.

Here, the state filed its rule 7.01 notice on June 9, 2008. Court records reflect that the next court appearance occurred on June 10, 2008. Both the prosecutor and Cozzi's counsel were present. Another hearing occurred on July 24, 2008; the prosecutor, Cozzi, and his counsel were present. The plain language of the rules of criminal procedure required Cozzi to make his request for an evidentiary hearing at the June 10 hearing or, at the latest, at the July 24 hearing. But Cozzi did not file his rule 12.04 motion for an evidentiary hearing until January 2, 2009, more than five months after the July 24 hearing

and only 12 days before trial. Because Cozzi failed to timely request an evidentiary hearing as required by rule 5.04, subdivision 4, the district court did not err by denying his motion as untimely.

II

Cozzi's primary argument on appeal is that the district court abused its discretion by admitting the restoration order and excluding evidence that allegedly would have shown that the restoration order should not have been issued. Cozzi argues that admission of the restoration order and exclusion of his proffered evidence violated his right under the Confrontation Clauses of the United States and Minnesota Constitutions.

"Generally, evidentiary rulings . . . are within the discretion of the district court and will not be reversed absent a clear abuse of discretion." *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006). "But whether the admission of evidence violates a criminal defendant's rights under the Confrontation Clause is a question of law this court reviews de novo." *Id.*

The state argues that because Cozzi did not object to the admission of the restoration order at the time of trial, this court is limited to reviewing the district court's decision for plain error. The state is correct that Cozzi's counsel initially did not object to the admission of the restoration order. But, a few moments later, Cozzi's counsel said, "Your honor, just for purposes of the record, my understanding is this is admitted subject to the contest or issues determined by the Court previously." The court responded, "Right. So you're reserving or maintaining your objection, but it's based upon a ruling

earlier, so I will note that for the record." We therefore are not limited to reviewing the district court's decision for plain error.

Cozzi first argues that admission of the restoration order was unconstitutional because it contains testimonial out-of-court statements and he was not afforded a prior opportunity to cross-examine the declarants. The Confrontation Clauses of the United States and Minnesota Constitutions guarantee defendants the right to be confronted with the witnesses against them. U.S. Const. amend. VI; Minn. Const. art. I, § 6. The clauses bar "the admission of testimonial statements made by a declarant out of court, unless the declarant is unavailable to testify at trial, and the defendant has had a prior opportunity for cross-examination." *State v. Jackson*, 764 N.W.2d 612, 616 (Minn. App. 2009) (quoting *Crawford v. Washington*, 541 U.S. 36, 53–54, 124 S. Ct. 1354, 1365 (2004)) (quotation marks omitted), *review denied* (Minn. July 22, 2009).

Cozzi's argument lacks merit. "[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S. at 50, 124 S. Ct. at 1363. The Confrontation Clause generally is not implicated where out-of-court statements are offered for a non-hearsay purpose. *Tennessee v. Street*, 471 U.S. 409, 413–14, 105 S. Ct. 2078, 2081 (1985). Here, the restoration order was offered and admitted not for the truth of the statements contained in the order about the condition of Cozzi's property but, rather, to prove that an order had been issued and what the order required Cozzi to do. The fundamental role of the Confrontation Clause—to protect and ensure the right of cross-examination, *see Douglas v. Alabama*, 380 U.S. 415, 418, 85

S. Ct. 1074, 1076 (1965)—was satisfied at trial on these two points by the presence at trial and availability for cross-examination of R.C. Boheim, who made the factual determinations underlying the order and prepared it for issuance, and Duncan, who issued the order. The district court's admission of the restoration order, for the purposes of proving that the order had been issued and what it required Cozzi to do, did not violate Cozzi's Confrontation-Clause rights.

III

Cozzi next argues that the district court "abused its discretion by ignoring compelling evidence showing a complete lack of foundational reliability to the restoration order." Cozzi contends that: (1) the contents of the restoration order constitute scientific opinion evidence; (2) the state "did not comply with mandated and appropriate standards for conducting tests to determine the location, size, and type of wetlands, non-wetlands, and wetland boundaries in preparing the restoration order"; and (3) the contents of the restoration order therefore do not comply with the "foundational reliability" requirement of Minn. R. Evid. 702. But the state did not prosecute Cozzi for damaging wetlands; it prosecuted him for failing to comply with the restoration order. The elements of the offense for which the state prosecuted Cozzi are that (1) a restoration order was issued to the defendant, and (2) the defendant did not comply with the order. Minn. Stat. § 103G.2372, subd. 2. The district court admitted the order because it was relevant evidence regarding the elements of the charged offense, not as proof that Cozzi damaged wetlands on his property. Whether Cozzi damaged wetlands on his property

was not an issue in the case. The "foundational reliability" of the factual assertions in the order was irrelevant.

Moreover, Cozzi's attempt to discredit the order by challenging the factual assertions contained in it constitutes an impermissible collateral attack on the order. The restoration order became final when no appeal was sought within 30 days. Minn. Stat. § 103G.2242, subd. 9(a) (2006). Once the order became final, it was not subject to collateral attack in a subsequent proceeding. *See State, Dep't of Conservation v. Sheriff*, 296 Minn. 177, 179–80, 207 N.W.2d 358, 360 (1973) (holding department's denial of permit to fill lake, from which appeal was not timely taken, could not be contested at later proceeding); *State v. Cook*, 275 Minn. 571, 571–72, 148 N.W.2d 368, 369 (1967) (holding suspension of driver's license could not be collaterally attacked in prosecution for driving with suspended license); *State v. Romine*, 757 N.W.2d 884, 889–90 (Minn. App. 2008) (holding party's failure to appeal issuance of order for protection precludes collateral attack on order in subsequent proceeding); *State v. Harrington*, 504 N.W.2d 500, 503 (Minn. App. 1993) (holding defendant who had not appealed from issuance of restraining order precluded from challenging constitutionality of order in subsequent criminal prosecution for violation of order), *review denied* (Minn. Sept. 30, 1993).

The proper remedy for Cozzi was to appeal to BWSR within 30 days under section 103G.2242, subdivision 9(a). And from a decision by BWSR, Cozzi was entitled to appeal to this court under Minn. Stat. §§ 14.63–.69 (2006). Minn. R. 8420.0280 (2005); *Drum v. Minn. Bd. of Water & Soil Res.*, 574 N.W.2d 71, 74 (Minn. App. 1998); *see also* Minn. Stat. § 103G.2242, subd. 9(d) (2006) ("[A] decision on the merits of an appeal

must be considered the decision of an agency in a contested case for purposes of judicial review under sections 14.63 to 14.69."). Although Cozzi filed an administrative appeal of the restoration order, his appeal was denied as untimely. And Cozzi did not appeal the decision to this court. The restoration order therefore became final when the period for appeal to this court expired. We conclude that the district court did not abuse its discretion or "ignor[e] compelling evidence" showing that the findings of fact in the order lacked foundational reliability.

IV

Cozzi argues that he was entitled to collaterally attack the validity of the restoration order in his criminal case because the existing administrative- and judicial-review procedures did not afford him the right to exclude incompetent evidence, the right to cross-examination, or the right to "contest any facts for which an agency seeks official notice to be taken."

Due process requires that "where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceeding." *United States v. Mendoza-Lopez*, 481 U.S. 828, 837–38, 107 S. Ct. 2148, 2155 (1987). "This principle means at the very least that where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense." *Id.* at 838, 107 S. Ct. at 2155. The availability of judicial review, even when not exercised, satisfies the requirements of *Mendoza-Lopez*.

State v. Coleman, 661 N.W.2d 296, 301 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003).

Here, Cozzi had the opportunity for a meaningful judicial review required by *Mendoza-Lopez*. If Cozzi believed that the administrative-review procedures available to him were inadequate, he could have appealed the administrative decision to this court. He did not do so. Due process did not require allowing appellant to collaterally attack the restoration order during his criminal prosecution.

V

Cozzi briefly argues that the state was required to prove "where the wetland or public waters [were] located," and that it failed to do so. Cozzi argues that the "only proffered evidence" was the restoration order, which was not competent evidence to prove the location of the wetlands because the statements it contained on the subject were hearsay. But Cozzi did not raise this issue before the district court, and therefore he waived it. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Furthermore, Cozzi's argument lacks merit. Section 103G.2372, subdivision 2, reads in its entirety: "A violation of an order issued under subdivision 1 is a misdemeanor and must be prosecuted by the county attorney where the wetland or public waters are located or the illegal activity occurred." This language does not require that the state prove "where the wetland or public waters are located," as Cozzi contends; rather, the language requires that the county attorney with jurisdiction over the property at issue prosecute the offense.

Here, the restoration order pertained to property located at 4742 5th Avenue South, Rice Lake Township, St. Louis County, Minnesota. Both Boheim and Duncan

testified that they were familiar with this property and that it is located in St. Louis County. And, as previously discussed, the truth of the statements in the order relating to the existence or condition of wetlands on this property is irrelevant. Appellant's argument lacks merit and does not entitle him to relief.

Affirmed.