

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 99-0555

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN

PLAINTIFF-RESPONDENT,

v.

LARRY F. HURLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County:
PATRICK TAGGART, Judge. *Affirmed.*

VERGERONT, J.¹ Larry Hurley appeals a judgment of conviction for obstructing navigable water contrary to §§ 30.12 and 30.15, STATS., after being issued a citation for placing a concrete pad on the bed of Lake Redstone without a permit. He contends that § 30.12 does not apply to the structure, and the materials

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

he placed did not obstruct navigable waters. He also contends the trial court improperly ordered partial removal of the structure because it did not allow him to attempt to obtain a permit first, and it delegated judicial power to a representative of the Department of Natural Resources (DNR). We reject each of these contentions and affirm the judgment of conviction, including the order for partial removal.

BACKGROUND

Hurley owns a lot with frontage on Lake Redstone, an artificial lake created by damming Big Creek, a navigable stream. The lake reached its current approximate level in 1968, and the level has remained relatively constant. Hurley purchased his property in 1982. At the trial to the court, Hurley testified that, beginning in 1984, he began placing rocks on a small point of land jutting into the water to stop erosion. Then, because the rocks kept falling into the water, in 1996, he encased the rocks in concrete. He then constructed a wooden structure on top of the concrete. DNR issued him a citation for violating § 30.12, STATS., which prohibits depositing material or placing structures upon the bed of any navigable water beyond a lawfully established bulkhead line (shoreline established pursuant to § 30.11, STATS.) or where no bulkhead line has been established without a permit.²

² Section 30.12(1) and (2), STATS., provides:

Structures and deposits in navigable waters prohibited; exceptions; penalty. (1) GENERAL PROHIBITION. Except as provided under sub. (4), unless a permit has been granted by the department pursuant to statute or the legislature has otherwise authorized structures or deposits in navigable waters, it is unlawful:

(continued)

The court determined that Lake Redstone is navigable water and considered public water under § 30.10, STATS.,³ and no evidence had been

(a) To deposit any material or to place any structure upon the bed of any navigable water where no bulkhead line has been established; or

(b) To deposit any material or to place any structure upon the bed of any navigable water beyond a lawfully established bulkhead line.

(2) PERMITS TO PLACE STRUCTURES OR DEPOSITS IN NAVIGABLE WATERS; GENERALLY. The department, upon application and after proceeding in accordance with s. 30.02 (3) and (4), may grant to any riparian owner a permit to build or maintain for the owner's use a structure otherwise prohibited under sub. (1), if the structure does not materially obstruct navigation or reduce the effective flood flow capacity of a stream and is not detrimental to the public interest. The procedures in this subsection do not apply to permits issued under sub. (3).

Section 30.15, STATS., provides:

Penalty for unlawful obstruction of navigable waters. (1) OBSTRUCTIONS PENALIZED. Any person who does any of the following shall forfeit not less than \$10 nor more than \$500 for each offense:

(a) Unlawfully obstructs any navigable waters and thereby impairs the free navigation thereof.

(b) Unlawfully places in navigable waters or in any tributary thereof any substance that may float into and obstruct any such waters or impede their free navigation.

(c) Constructs or maintains in navigable waters, or aids in the construction or maintenance therein, of any boom not authorized by law.

(d) Constructs or places any structure or deposits any material in navigable waters in violation of s. 30.12 or 30.13.

(3) EACH DAY A SEPARATE VIOLATION. Each day during which an obstruction, deposit or structure exists in violation of sub. (1) is a separate offense.

³ Section 30.10(1), STATS., provides:

Declarations of navigability. (1) LAKES. All lakes wholly or partly within this state which are navigable in fact are declared to

(continued)

submitted that it was a private lake. The court found the concrete pad was located on the navigable water, below the ordinary high-water mark, on the bed of the lake and that it obstructed navigation. The court ordered a forfeiture of \$147.50 and ordered partial removal, “as recommended by [Ronald] Grasshoff [management specialist for the DNR], leaving a remnant subject to the permitting process under the direction of the Department of Natural Resources.”

DISCUSSION

In our appellate review of the judgement of conviction, we accept the trial court’s findings of fact unless they are clearly erroneous. *See* § 805.17(2), STATS. The application of statutory or case law standards to a set of facts presents a question of law, which we review de novo. *See Butzlaff v. DHFS*, 223 Wis.2d 673, 679, 590 N.W.2d 9, 11 (Ct. App. 1998). The court’s order to partially remove the structure involves a discretionary decision, which we affirm if the court applied the correct legal standards, considered the relevant facts of record, and reached a reasonable result. *See Jorgensen v. Waterworks, Inc.*, 218 Wis.2d 761, 772, 582 N.W.2d 98, 102-03 (Ct. App. 1998).

We consider first Hurley’s argument that § 30.12, STATS., is inapplicable. He contends the statute does not apply to the structure because it was placed on his property, that is, on top of land that he owned that has since eroded. He points out that § 30.12(3)(a)1, 3 and 5 permits DNR to grant permits to place material “adjacent to the owner’s property,” thus indicating that permits are not necessary if material is placed “on the owner’s property.” Hurley did

be navigable and public waters, and all persons have the same rights therein and thereto as they have in and to any other navigable or public waters.

present evidence at trial, in addition to his own testimony, that the location of the concrete was formerly land that was part of his property. However, Grasshoff testified that, based on his investigation, it was his professional opinion that the structure was built below the ordinary high-water mark, and not on adjacent upland or dry land; it was his opinion that it was extremely unlikely that former upland had subsided to a point below the ordinary high water mark. The court chose to rely on Grasshoff's testimony rather than on any contrary testimony presented by Hurley. This it was entitled to do. *See Fidelity & Deposit Co. v. First Nat'l Bank*, 98 Wis.2d 474, 485, 297 N.W.2d 46, 51 (Ct. App. 1980) (trial court is ultimate arbiter of the credibility of witnesses).

Hurley contends the statute does not apply for a second reason: DNR lacks jurisdiction because the lake is an artificial lake and he owns the lake bed extending at least twenty feet from the concrete structure in all directions in which there is lake bed. Hurley relies on *State v. Bleck*, 114 Wis.2d 454, 338 N.W.2d 492 (1983), for the proposition that DNR does not have jurisdiction if the property owner proves that the lake is an artificial lake and the lake bed is privately owned. We disagree with Hurley's reading of *Bleck* and are persuaded that, under *Bleck* and other relevant case law, DNR does have jurisdiction.

Bleck holds that once the State has proved that a body of water is navigable in fact, it is considered to be "navigable" and "public" within the meaning of § 30.10, STATS., unless the other party proves that the body of water was artificially created on private land. *Bleck*, 114 Wis.2d at 459-60, 338 N.W.2d at 495. This does not mean, however, that if any part of the bed of an artificial lake is privately owned, the body of water is private and not subject to DNR regulation. Rather, *Mayer v. Grueber*, 29 Wis.2d 168, 138 N.W.2d 197 (1965),

the case *Bleck* relies on, *see Bleck*, 114 Wis.2d at 462, 338 N.W.2d at 496, explains:

In the case of artificial bodies of water, all of the incidents of ownership are vested in the owner of the land. An artificial lake located wholly on the property of a single owner is his to use as he sees fit, provided, of course, that the use is lawful. He may if he wishes reserve to himself or his assigns the exclusive use of the lake or water rights.

Mayer, 29 Wis.2d at 176, 138 N.W.2d at 204.

Grasshoff testified that Lake Redstone is a navigable waterway, meaning that it is capable of supporting at least light water craft, such as canoes, at some time during the year, *see DeGayner & Co. v. DNR*, 70 Wis.2d 936, 945-46, 236 N.W.2d 217, 221-22 (1975), and the court so found. Hurley did not prove that Lake Redstone was created on private land, or is now wholly located on private property. The fact that Hurley owns a portion of the lake bed adjacent to his lake frontage, and other private owners of lake frontage property may also own a portion of the lake bed, does not establish that the lake was created on or is now located wholly on private property. There is, as the court found, a public park, public beach and public boat launch area on the lake.

In any event, because Lake Redstone was created by damming Big Creek, a navigable water, under *Klingeisen v. DNR*, 163 Wis.2d 921, 927-28, 472 N.W.2d 603, 605-06 (Ct. App. 1991), the waters of Lake Redstone are subject to DNR regulation even if all the land on which Lake Redstone was created was private land. In *Klingeisen*, the court held that DNR had the authority to regulate the repair of a boathouse on private property fronting an artificially created channel, even though the bed of the channel was in private ownership, because

that channel had been created from navigable waters. *Id.* at 928-29, 472 N.W.2d at 606.

Hurley next contends the structure does not unlawfully obstruct navigable waters because the State does not have a “right to maintain navigable waters over ... [a] privately owned [lake bed].” This contention is based on the premise we have just rejected. Private ownership of the portion of the lake bed in which the structure is placed does not deprive DNR of jurisdiction over Lake Redstone as a navigable and public waterway. The 1961 law review article on which Hurley relies, Richard S. Harnsberger, *Prescriptive Water Rights in Wisconsin*, 1961 Wis. L. Rev. 48, predates *Mayer, Bleck* and *Klingeisen*. The case on which Hurley also relies, *Haase v. Kingston Co-operative*, 212 Wis. 585, 587, 250 N.W. 444, 444 (1933), concerns damming a non-navigable stream to create a pond that is entirely on private property, and therefore has no applicability to this case. Because § 30.12, STATS., applies, and because the evidence supports the court’s findings that Hurley placed a structure on the lake bed of navigable water where no bulkhead line was established, Hurley violated § 30.12. Whether the structure materially impairs navigation is relevant to whether DNR issues a permit, since DNR may disapprove an application for a permit to place a structure on the lake bed of navigable waters for the purposes specified in § 30.12(3)(a) if it will “materially impair navigation or be detrimental to the public interest.” Section 30.12(3)(b). However, since Hurley never applied for a permit, his argument that the structure does not materially impair navigation is not a defense to the violation with which he is charged.

Finally, Hurley challenges the court’s order for partial removal, arguing that in doing so, the court denied him his “due process right to seek a permit for the structure under statutes which grant [him] that right”; and

impermissibly delegates judicial power to a DNR representative. We conclude both these arguments are without merit. Grasshoff testified that the structure as now constructed prevents shallow draft boats from getting next to the shoreline. He testified that under § 30.13, STATS., Hurley could have a certain type of pier or wharf without a permit, and that a portion of the concrete pad would be permitted with a permit, but a portion would not be. His testimony and the exhibits show that he informed Hurley of this before the trial and proposed this as a means of resolving the citation.

In the post-trial briefs, the State asked that the court order abatement in addition to imposing a fine, and provided three alternatives for abatement: complete removal, partial removal of everything that did not need a permit (that is, everything but the non-permit wharf), and partial removal only of that portion for which DNR would not grant a permit. Hurley argued that a separate hearing on abatement should be held if the court determined there was a violation, but the State contended that was not necessary. After considering these arguments, as well as the evidence at trial, the court selected the proposed abatement alternative most favorable to Hurley, and one supported by the record.

Since the court found a violation of § 30.12, STATS., it has the authority to order abatement as well as to impose a fine. *See* §§ 30.03(2) and 30.298(5), STATS. As we understand the court's order, it does, in essence, allow Hurley to seek a permit in that it requires him to remove only that portion for which the DNR will not grant a permit, not the entire portion for which a permit is required. If this impairs any constitutional or statutory right of Hurley's, we do not understand what that might be from his brief argument. The court's order is not an improper delegation of judicial authority because DNR has the statutory authority to issue permits under § 30.12, and the court, as we understand its order,

is simply ordering Hurley to remove that portion of the structure which is subject to the permit requirements but which DNR has determined does not meet the statutory conditions for a permit.

By the Court.—Judgment affirmed.

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

