COURT OF APPEALS
DECISION
DATED AND FILED

September 12, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2941-CR **Cir. Ct. No. 2010CM2296**

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

STATE OF WISCONSIN

PLAINTIFF-RESPONDENT,

V.

RAYMOND R. VOGT, JR.

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

¶1 BROWN, C.J.[1] On January 10, 2008, the Racine county circuit court, Honorable Allan B. Torhorst presiding, ordered Raymond R. Vogt, Jr. to refrain from removing soil from the banks of the waterway abutting his property

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

unless or until a permit was issued or he was declared exempt by the DNR as required by WIS. STAT. § 30.20. On September 8, 2011, Vogt was found guilty of criminal contempt by the Hon. Gerald P. Ptacek after he did work on the waterway without a permit or an exemption. Vogt claims that the evidence was insufficient to prove two of the three elements of criminal contempt—that he had the ability to comply with the order and that he intentionally disobeyed it. His argument rests on the belief that Judge Torhorst referred to the wrong statute and should have used WIS. STAT. § 30.19. He asserts that this error made the order so ambiguous that he was unable to comply with it. As a result, he could not have intentionally disobeyed it. His argument will not fly. The order was simple enough to understand—he was not to dig up the soil that had been the subject matter of litigation with the DNR until the DNR gave him a permit to do it or declared him exempt. He dug without a permit or an exemption. The court properly held him in contempt. He also claims that the evidence was insufficient to prove that he "removed" soil; he only rearranged it. We reject that argument as well.

¶2 Vogt is the owner of a parcel of land in Racine county. In 2008, Vogt was clearing out the waterway abutting his property because he felt there was inadequate flowage during a high water or rainy season and, as a result, he was having septic problems. Vogt told a DNR officer that he believed cleaning and enlarging the waterway would relieve the adverse septic condition. Another officer investigated and issued two citations to Vogt. One was for grading in excess of 10,000 square feet along the waterway involved without a permit, contrary to WIS. STAT. § 30.19. The other was for illegal dredging to widen the bottom of the waterway, without a permit, contrary to WIS. STAT. § 30.20. The citations were contested before Judge Torhorst, who found Vogt guilty because both activities were conducted either without a permit or without applying for an

exemption from a permit. The court noted that § 30.19 had to do with the banks and § 30.20 had to do with the bed. The court then ordered Vogt to refrain from any further removal of the *banks* unless a permit was issued as required by "Sec. 30.20" or Vogt was declared exempt by the DNR.

¶3 Of course, the court had just indicated that it was WIS. STAT. § 30.19 that had to do with the banks. So, presumably, when the court ordered Vogt not to do any work on the banks until getting a permit or an exemption, the court should have said "as required by Sec. 30.19" instead of WIS. STAT. § 30.20. And the court presumably should also have ordered that he not do any soil removal concerning the bed until he got a permit or exemption pursuant to § 30.20.

¶4 Seizing on this seemingly inadvertent mistake,[2] Vogt now says that it would be impossible for him to get a permit for removing soil from the *banks* under WIS. STAT. § 30.20 and, therefore, the order was so ambiguous that, as a matter of law, he was unable to comply with it.

¶5 Seeing as how the whole hearing before Judge Torhorst involved removing soil from both the bank and the bed, seeing as how both statutes were cited and discussed at length by Judge Torhorst and seeing as how Vogt could

[2] A water management specialist testified that the order was not necessarily mistaken as to the correct statute. At the contempt hearing, Vogt asked her, "You cannot get a permit under [WIS. STAT. §] 30.20 to grade on the banks, is that correct?" To which she replied:

> We would have to determine first whether you are removing material below the ordinary high watermark of this waterway, which the ordinary watermark is up the banks of the waterway and would require a non-veg determination by the department. I do not— I do not think it's confusing ….

Whether or not the specialist's view is correct, we operate under the assumption that the wrong statute was used by the court.

have immediately asked for clarification had he been confused as he claims, we are having a lot of trouble believing that he did not know which permit to seek before removing soil from the banks of the waterway, even if that permit was mistakenly said to be a WIS. STAT. § 30.20 permit instead of a WIS. STAT. § 30.19 permit. He did actually apply for a permit exemption. So, he did do what the court wanted him to do—apply for a permit or an exemption. This shows that he knew exactly what was expected of him.

¶6 And whether the court said WIS. STAT. § "30.20" instead of WIS. STAT. § "30.19," we fail to see what difference it made after reviewing the DNR's standard WIS. STAT. "Chapter 30 Exemption Determination Request" document, which is in the record. The document applies to ch. 30 generally and is not specific to any section in ch. 30, such as § 30.19 or § 30.20. Vogt used this generic form to apply for an exemption on April 22, 2010. So, even though the order said "30.20," the form he filled out was good for either statutory section. On the state of this record, if he was "confused," it certainly had no relevance to what he actually did. He would have gone through the same procedure had the order said "30.19." We reject, therefore, his argument that it was impossible for him to know what behavior was prohibited and that he did not intentionally violate the court's order. He followed the court's order by filing the generic request form. His argument about the exact statute cited by Judge Torhorst is a hypertechnical argument at best, having nothing to do with what actually happened following Judge Torhorst's order.

¶7 And here is what actually happened. Vogt wanted to install riprap on the bed of his waterway. He discussed his exemption request with a DNR water management specialist on April 23. On May 3, Vogt was informed that there was no exemption for the placement of rock in the bed of the waterway and

that approval under WIS. STAT. § 31.33 would be required. Acting without a permit or an exemption, Vogt installed a plate across the waterway and hauled dirt on or before July 14. This was documented by DNR officials on July 25.

¶8 Perhaps Vogt is arguing that, since the DNR informed him that his riprap installation is actually covered under a different chapter of the statutes, WIS. STAT. ch. 31 rather than WIS. STAT. ch. 30, his installation was not in violation of Judge Torhorst's order because it would be impossible for him to do what he did with either a WIS. STAT. § 30.19 or a WIS. STAT. § 30.20 permit. In 2008, he was dredging and grading the bank and the bed. Now, he was inserting riprap into the waterway to reverse the flow of the water. As the DNR put it, now he was trying to put up a dam to reverse the flow rather than dredging the bank and bed to increase the flow during high water events to relieve pressure on his septic system. Now, he was doing something different than he did before and we suppose he would argue that his present act is not covered by the 2008 order of Judge Torhorst. If this is his argument, he has not made that clear in his brief. Nonetheless, his argument still fails. Vogt wanted to tinker with the water flow and Judge Torhorst told him point-blank that he was not to try to do that without DNR approval. That is how we read Judge Torhorst's decision regardless of the court's reference to § 30.20.

¶9 Vogt claims that Judge Torhorst's order was not intended as a blanket prohibition against doing any work on the ditch, but rather, the judge contemplated that there would be certain circumstances under which Vogt could work on the ditch. We agree with this assessment, but the argument is basically a nonsequitor. As pointed out above, the court prohibited work unless or until Vogt got a permit or an exemption. He tried to get an exemption. He did not get an exemption. He proceeded anyway.

¶10 In our view, his action is the consummate example of a person who defies a court order and decides, after the fact, on a way to excuse his or her actions. We hold that the order was clear and that Vogt had the ability to comply with it by obtaining a permit or exemption before doing the work. He knew that and applied for an exemption. The application was denied. At that point, it should have been the end of the story unless he proceeded under WIS. STAT. ch. 31.

¶11 Vogt alternatively contends that the evidence was insufficient to show that he intentionally disobeyed Judge Torhorst's order because the order informs him not to remove any soil from the banks of the waterway and there was no evidence in the record that he "removed" soil from the "banks." We reject this. A neighbor testified that he observed Vogt "moving soil around … from the banks of the canal" in the summer of 2010. An inference can be made that moving soil *from* the banks of the canal occurred. The water management specialist from the DNR personally went out to the property and noticed that there was material graded and disturbed along the sides of the bank. She saw Vogt using a small bobcat and "pushing material from the sides of the waterway towards the center." A reasonable person understands that when a bobcat is used to grade, the dirt or soil underneath is moved (i.e. disturbed). There was sufficient evidence.

By the Court.—Judgment affirmed.

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