COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1467 **Cir. Ct. No. 88 CV 6919**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VENTUREDYNE, LTD.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Venturedyne, Ltd. appeals from an order finding it in contempt for violation of its obligation under a stipulation to construct an impermeable cap for a large industrial waste disposal site. Venturedyne claims: (1) the trial court erred in making the contempt finding because Venturedyne's

actions were not "intentional"; and (2) the trial court's remedial sanctions were inappropriate. Because the record supports the trial court's rulings, we affirm.

I. BACKGROUND

¶2 In 1988, the State of Wisconsin filed an environmental enforcement action against Venturedyne and a corporate predecessor charging them with the unlawful, unlicensed operation of a thirty-two-acre solid waste facility, and with the failure to close the site. The case was settled in May 1991, with a stipulation that required Venturedyne to "close" Parcel B by November 1996. According to the stipulation, the closure deadline could be extended by the Wisconsin Department of Natural Resources (DNR).

¶3 In May 2000, the State moved to have Venturedyne held in contempt for failing to close Parcel B as required by the stipulation. The trial court conducted a two-part proceeding—the first to determine whether Venturedyne was in contempt, and the second to determine the appropriate remedial sanction pursuant to WIS. STAT. § 785.04(1) (1999-2000).[1]

¶4 During the "contempt" phase of the proceeding, the testimony focused on whether or not the DNR orally gave Venturedyne an extension of the capping deadline. When testimony was completed, the trial court ruled that the State had proven Venturedyne's contempt, and rejected Venturedyne's contentions that the DNR had agreed to extend the capping deadline or, alternatively, that Venturedyne understood it had such an extension.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶5 When the remedial phase of the proceeding was completed, the trial court entered "Interim Findings and [an] Order." This order required Venturedyne to conduct a round of groundwater testing at the site to determine whether the groundwater had been contaminated. On May 3, 2001, the trial court issued its final order in the contempt proceeding. The trial court found that Venturedyne had "willfully failed to comply with the stipulation requirement that Parcel B be capped or developed within the time frame set forth in the stipulation." The trial court also found that the 2001 groundwater tests indicated that there had not been "a significant improvement of the conditions at Parcel B, and in some areas there has been deterioration." The trial court's order included two remedial sanctions: (1) Venturedyne had to pay a forfeiture of $2,000 a day until Parcel B was closed; and (2) the CEO of Venturedyne, Brian Nahey, was to be imprisoned for five days. The remedial sanctions were stayed, however, and could have been purged if Venturedyne closed the site by December 1, 2001. Venturedyne appeals from this order.

I. DISCUSSION

A. Contempt Finding.

¶6 Venturedyne claims the trial court erred when it found Venturedyne in contempt without making a finding that Venturedyne "intentionally" violated the stipulation. We are not persuaded.

¶7 Venturedyne is correct that under WIS. STAT. § 785.01(1) "'Contempt of court' means intentional: … (b) Disobedience, resistance or obstruction of the authority, process or order of a court." Venturedyne, however, dismisses the trial court's finding in the final order that Venturedyne "willfully failed to comply with the stipulation requirement that Parcel B be capped or

developed within the time frame set forth in the stipulation." It argues that this single reference does not alter the trial court's earlier failure to address the intent element. We cannot, however, simply disregard the "willful" finding in the final order. The final order is where the focus of our review begins. We look to the findings made and then determine whether the record supports the trial court's findings.

¶8 As the State points out, "willful" is an even higher standard of proof of a defendant's mental state than "intentional." ***Shepard v. Outagamie County Circuit Court***, 189 Wis. 2d 279, 287 n.4, 525 N.W.2d 764 (Ct. App. 1994). Thus, by specifically finding that Venturedyne acted "willfully," the trial court implicitly found that Venturedyne acted "intentionally." The only question remaining then is whether or not the trial court's finding was clearly erroneous. WIS. STAT. § 805.17(2).

¶9 Here, there is evidence to support the trial court's finding. The contempt phase of this proceeding focused on whether or not Venturedyne received an extension, which would have given it legitimate reason not to comply with the original capping deadline. The trial court found that Venturedyne made two written requests for extension of the capping deadline and received two written denials from the DNR. The trial court found, citing a variety of testimony, that an oral agreement to extend the capping deadline did not occur. The testimony referred to by the trial court, and the previous written denials, support the trial court's ultimate finding that Venturedyne willfully disregarded the

deadline. Thus, we cannot conclude that the trial court's finding was clearly erroneous.[2]

B. Remedial Sanctions.

¶10 Venturedyne argues that the trial court's purging requirements were punitive and exceeded the trial court's authority. We cannot agree.

¶11 As the State points out, Venturedyne repeatedly requested that it be given until the close of the construction season of 2001 to cap the site. These requests were made repeatedly in response to the State's request that capping be done immediately. The trial court gave Venturedyne exactly what it asked for—seven months, until the end of the construction season of 2001 to cap the site.

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[2] Venturedyne also argues that the trial court erroneously exercised its discretion by excluding certain evidence relevant to whether or not its violation of the stipulation was intentional. We disagree. An appellate court reviews a trial court's evidentiary rulings according to the erroneous exercise of discretion standard. *See* ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983); ***State v. Alsteen***, 108 Wis. 2d 723, 727, 324 N.W.2d 426 (1982). If a trial court applies the proper law to the established facts, we will not find a misuse of discretion if there is any reasonable basis for the trial court's ruling. ***Id.***

First, Venturedyne claims that the trial court should not have sustained the State's objection to the question posed to Venturedyne's CFO as to whether or not he believed the DNR had granted an oral extension of the deadline. Immediately after sustaining this objection, however, the trial court allowed the CFO to answer the following question: "Did the DNR grant an extension?" The CFO answered "Yes." Thus, even if the trial court should have allowed an answer to the previous question, the exclusion was harmless because of the subsequent testimony that was allowed into evidence.

Second, Venturedyne claims the trial court should have allowed certain hearsay evidence: the testimony of Brian Nahey, who would have recounted what a community official said regarding the DNR's comments about closing the site. At trial, Venturedyne argued that the statements should have been admitted under the "admission against interest" exception. On appeal, Venturedyne argues that the statements were not being offered for the truth of the matter, and therefore do not constitute hearsay. We will not consider the new argument for the first time on appeal. ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974). Accordingly, we cannot conclude that the trial court erroneously exercised its discretion in either instance.

¶12 On appeal, Venturedyne has changed its strategy and argues that it cannot do in seven months what it was originally allotted five years to do. We reject this argument. Having received exactly what it asked for at the trial court level, Venturedyne has waived its right to challenge the "propriety" of that deadline on appeal. *See* ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).

¶13 Venturedyne also contends that the trial court erroneously exercised its discretion when it refused to hear expert testimony on the results of the groundwater tests. We disagree. The issue in this case is whether or not Venturedyne acted in contempt of court. The groundwater tests were conducted to determine whether, as a result of Venturedyne's delay in capping the site, capping was no longer a sufficient remedy. The tests were conducted to determine whether "remediation," rather than capping, was required. The State indicated that based on the results of the groundwater tests, capping still would have been sufficient. Thus, the trial court did not need expert analysis on this issue, and its decision was therefore reasonable. Having concluded that contempt was proven, the trial court acted within its authority when it ordered capping of the site.

By the Court.—Order affirmed.

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