COURT OF APPEALS
DECISION
DATED AND FILED

October 3, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 01-2657 and 01-2658

Cir. Ct. Nos. 01-FO-18
01-FO-19

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD G. FEDLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Affirmed*.

¶1 ROGGENSACK, J.[1] Ronald G. Fedler appeals the circuit court's judgment that he violated WIS. STAT. § 30.19(1)(a) because he did not obtain a

[1] This case is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (1999-2000). Additionally, all further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

permit from the Department of Natural Resources (DNR) prior to dredging a pond on his land, and he also appeals the court's order that he fill in the pond or obtain a permit for its construction. Because we conclude that a permit from the DNR is required prior to the dredging that occurred here, and because the circuit court did not erroneously exercise its discretion in ordering restoration of the land to its pre-dredged condition, we affirm the judgment of the circuit court in all respects.

BACKGROUND

¶2 A small, unnamed creek, but one we shall call "Fedler's creek" for purposes of this opinion, meanders through Ronald Fedler's property. In 1963, a prior owner of the property constructed two ponds.[2] The upper pond is fed by a nearby spring and existed when Fedler purchased the property. When initially constructed, that pond drained into the lower pond, into which Fedler's creek's upstream course also flowed. The lower pond then flowed downstream through a culvert under Fedler's driveway. At some point in time prior to the 1999 dredging that resulted in the citations issued in this case, the lower pond had reverted into a secondary wetland, through which Fedler's creek passed before flowing through the culvert under Fedler's driveway. Fedler's creek flows downstream until it is joined by Faye's creek. The confluence of the two creeks, which is then known as Hunter's Hollow Creek, continues further until it is joined by Spring Valley Creek, a Class-II trout stream.

[2] At trial, photographs, exhibits 8 through 10, were received. They were taken in 1993 and show no pond in the area now occupied by the lower pond on Fedler's property. However, it was undisputed that a prior owner had built two ponds in 1963.

¶3 In June of 1998, Fedler filed an application to "dredge existing ponds." The proposed lower pond site was in an area designated as a secondary wetland. The application was not completed, but a water management specialist informed Fedler that the application would most likely be denied. When Fedler was told that the permit would most likely be denied, he asked how much it would cost if he dug the pond without a permit. He was advised that the DNR would issue citations and require restoration of the site. In July of 1998, Fedler's request to build the lower pond was also discussed in a letter advising him that the creation of a pond at the site proposed would raise the water temperatures above the legal limits allowed by the administrative code, thereby endangering fish downstream.

¶4 In the summer of 2000, the DNR was notified that Fedler had created a new pond on his property in the location where he had originally sought a permit to dredge. When contacted, Fedler responded that it was not a new pond, but rather, he had merely cleaned out a pond that a prior owner had constructed in 1963. In December of 2000, Fedler was cited for two violations[3] of WIS. STAT. § 30.19(1)(a) for the enlargement of a waterway without a permit. Fedler pled not guilty to both citations and a trial to the court was held. Fedler was found guilty and ordered to pay civil forfeitures and to either remove the lower pond or obtain a permit for its construction. Fedler appeals.

[3] Because Fedler had work done in July and September of 1999 by two different contractors, he was cited for two statutory violations. Fedler does not contest the number of citations, claiming that no citation is due under WIS. STAT. § 30.19 for the dredging.

DISCUSSION

Standard of Review.

¶5 We review a circuit court's finding of historic fact under the clearly erroneous standard. WIS. STAT. § 805.17(2). However, the construction of a statute or its application to the facts as found by the circuit court is a question of law which we review *de novo*. ***Capoun Revocable Trust v. Ansari***, 2000 WI App 83, ¶6, 234 Wis. 2d 335, 610 N.W.2d 129.

¶6 When a statute is one that the agency is charged by the legislature with administering, has some experience and employed its expertise or specialized knowledge in forming its interpretation and that interpretation is one which will provide uniformity and consistency in the application of the statute, we accord at least due weight deference to the agency's interpretation. ***Harnischfeger Corp. v. LIRC***, 196 Wis. 2d 650, 660, 539 N.W.2d 98, 102 (1995). Here, there is no evidence in the record about whether the DNR has consistently interpreted WIS. STAT. § 30.19(1)(a) as requiring a permit under facts similar to this case, but there is ample case law showing that the DNR is authorized and expected by the legislature to interpret and administer § 30.19, when the dredging of an artificial waterway is involved. *See, e.g.,* ***Ansari***, *supra*; ***State v. City of Oak Creek***, 2000 WI 9, 232 Wis. 2d 612, 605 N.W.2d 526; ***Klingeisen v. DNR***, 163 Wis. 2d 921, 472 N.W.2d 603 (Ct. App. 1991).

¶7 Fedler contends that the DNR was "determining jurisdiction" when it ticketed him, and therefore, no deference is due. *See* ***Ansari***, 2000 WI App 83 at ¶6. However, we conclude that the DNR was merely interpreting the provisions of § 30.19(1)(a) and applying its interpretation to Fedler's conduct. Therefore, we accord due weight deference to the DNR's decision to require a permit. *See*

Ansari, 2000 WI App 83 at ¶6 n.8. Accordingly, if we conclude that the DNR's decision is reasonable under the facts found by the circuit court, unless we are persuaded that Fedler's interpretation of the statute is more reasonable under the same findings, we will affirm the issuance of the citations.

¶8 When reviewing the remedy chosen by the circuit court, we apply the erroneous exercise of discretion standard. *See* WIS. STAT. § 30.298(5).

Statutory Interpretation.

¶9 Because Fedler was convicted of violating WIS. STAT. § 30.19(1)(a), the outcome in this case depends upon the statute's interpretation. Section 30.19(1)(a) provides in relevant part:

> **Enlargement and protection of waterways. (1)** PERMITS REQUIRED. Unless a permit has been granted by the department or authorization has been granted by the legislature, it is unlawful:
>
> (a) To construct, dredge or enlarge any artificial waterway, canal, channel, ditch, lagoon, pond, lake or similar waterway where the purpose is ultimate connection with an existing navigable stream, lake or other navigable waters, or where any part of the artificial waterway is located within 500 feet of the ordinary high-water mark of an existing navigable stream, lake or other navigable waters.

¶10 The circuit court found that the lower pond was artificially created by a former owner in 1963, but that it was allowed to "silt-in" over the years such that by at least 1993, it was only a wetland. It found that although Fedler's creek was not itself navigable, it ultimately connected to navigable water. It also found that the DNR did not give approval to dredge the lower pond, that Fedler was "on notice" that it was the DNR's position that a permit was required to dredge the area in which he created the lower pond and that a purpose to ultimately connect

with a navigable waterway is shown by the work he undertook. There is no dispute that the lower pond was artificially constructed. Because these findings are intertwined with issues of statutory interpretation, we examine the statute before commenting further on the findings of the circuit court.

¶11 To avoid the effect of the statute, Fedler contends that his conduct in dredging the lower pond does not come within the phrase, "the purpose is ultimate connection with an existing navigable stream." He maintains that the pond connects only with another portion of Fedler's creek, which is not navigable, and that his purpose was beautification of his property, not making an ultimate connection with a navigable stream.[4]

¶12 The DNR has adopted rules for the construction of WIS. STAT. § 30.19(1) in the WIS. ADMIN. CODE § NR 340.02. Of significance here are the definitions for "to connect," found in § NR 340.02(18), and "ultimate connection," found in § NR 340.02(20). Section NR 340.02(18) states: "'To connect' means the direct physical joining of a waterway to an existing navigable waterway below the elevation of the latter's ordinary high watermark where the joining is by means of an open channel having a bed and banks." By contrast, subsec. (20) defines "ultimate connection" as "the joining of a waterway to an existing navigable waterway by means of a natural drainage course or an open or closed conduit,

[4] This case presents in a somewhat peculiar posture because it is not a ch. 227 review of the denial of a permit. It would be in a contested case hearing that Fedler could have made all of the arguments he makes in his brief, such as his dispute about the rise in water temperature that he claims the DNR incorrectly asserted as one of the reasons for telling him it would deny the requested permit. Because Fedler chose to avoid that statutory permitting process and its subsequent reviews, he is left with the sole argument of whether dredging or constructing of the lower pond violates WIS. STAT. § 30.19(1)(a). He may not maintain arguments here that bear on whether the DNR should have issued him a permit in the first instance.

either of which tend to confine and direct flow into the existing navigable waterway." Contrasting the two definitions shows that an "ultimate connection" does not require a direct connection to a navigable waterway.

¶13 Fedler was cited under WIS. STAT. § 30.19(1)(a) which requires only an "ultimate connection" to a navigable waterway. Fedler's own testimony established the ultimate connection. He testified that, "Exhibit 28 (a site photograph) shows the lower pond from the east side, which is … where the water — or the little rivulet that comes into it runs into the pond, and you can see the exit culvert, the 4'2" on the other side." He goes on to identify, in other photos received into evidence, the course of Fedler's creek after it leaves the lower pond, passes through the culvert under his driveway, joins with Faye's creek, becomes Hunters Hollow creek and then joins Spring Valley creek, a navigable waterway.

¶14 Fedler's testimony also shows that part of the proposed construction involved the culvert's repair where the water from the lower pond flows out of the pond and into the path we have reviewed above. Therefore, Fedler had as a purpose the continued movement of the water from the lower pond to Fedler's creek, which ultimately flows into a navigable body of water. There is no evidence in the record to support Fedler's claim that his sole purpose was to beautify his property without ultimately connecting his enlargement of the waterway with an existing navigable stream, nor is there anything in the statute or administrative regulations interpreting them that precludes more than one purpose for the acts proscribed. Accordingly, we conclude that the DNR's interpretation of WIS. STAT. § 30.19(1)(a) is reasonable, that Fedler's interpretation of his conduct is not more reasonable and that the circuit court's finding of fact are not clearly erroneous.

¶15 Fedler also contends that because the lower pond was originally dug in 1963 and WIS. STAT. § 30.19(1)(a) as presently constructed did not become effective until after 1963, his conduct was "grandfathered" under the previous statute so he did not need a permit to reconstruct it. We are not persuaded by Fedler's argument. The statutory changes to § 30.19 occurred long before Fedler purchased the property. Additionally, the 1993 photographs of the site Fedler dredged show no pond in the area now occupied by the lower pond. And finally, Fedler has cited no authority for the proposition that the State cannot enact laws modifying the regulation of property under its police powers simply because a prior owner once used the property in a way now proscribed, and we could find no such authority. *See* ***Turkow v. DNR***, 216 Wis. 2d 273, 280, 576 N.W.2d 288, 290 (Ct. App. 1998). Accordingly, we affirm the circuit court's judgment that Fedler is guilty of violating § 30.19(1)(a).

Remedy.

¶16 We next examine the remedy of remediation ordered by the circuit court. WISCONSIN STAT. § 30.298(5) permits, but does not require, a court to order remediation. We review the remedy in light of our past decisions that have examined the need for permits when landowners attempt to adjust natural waters flowing through their property.

¶17 In ***State v. Dwyer***, 91 Wis. 2d 440, 283 N.W.2d 448 (Ct. App. 1979), we reviewed WIS. STAT. § 30.20(1)(b) (1979-80) and the policies that underlie its permit requirements. We considered the interests of the individual landowner and those of the public. We noted that the legislature has determined that, "'The department of natural resources shall serve as the central unit of state government to protect, maintain and improve the quality and management of the waters of the

state, ground and surface, public and private.'" ***Dwyer***, 91 Wis. 2d at 444, 283 N.W.2d at 450 (citation omitted). We concluded that the permit process was protective of both interests. ***Id.*** at 445, 283 N.W.2d at 450. We also reasoned that if we were to permit another statute that gave certain protections to the landowner as he tried to protect his own property to operate independently of the permit requirements, "serious foreseeable harms" could result from an owner's dredging a waterway without DNR review of the proposed plans. ***Id.***

¶18 Furthermore, if the only sanction for violating WIS. STAT. § 30.19(1) twice was a $200 fine, as was levied here, no one would ever complete the permitting process which requires a $400 application fee. Additionally, remediation of the unauthorized dredging is the only way to repair harm done to the downstream waters. As the supreme court noted in ***Just v. Marinette County***, 56 Wis. 2d 7, 24 n.6, 201 N.W.2d 761, 771 n.6 (1972) (citation omitted), "'The land belongs to the people … a little of it to those dead … some to those living … but most of it belongs to those yet to be born…." Without remediation the harm the DNR sought to prevent here will continue unabated. Accordingly, we affirm the circuit court's judgment in all respects.

CONCLUSION

¶19 Because we conclude that a permit from the DNR is required prior to the dredging operation that occurred here, and because the circuit court did not erroneously exercise its discretion in ordering restoration of the land to its pre-dredged condition, we affirm the judgment of the circuit court in all respects.

By the Court.—Judgment affirmed.

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