

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 4, 2011

A. John Voelker
Acting Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP829

Cir. Ct. No. 2006FO1138

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATT H. POEHNELT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Chippewa County:
JAMES M. ISAACSON, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Matt Poehnelts appeals an order requiring him to restore waters that he was convicted of illegally altering. This is the second appeal relating to the restoration order. See *State v. Poehnelts (Poehnelts I)*,

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

No. 2009AP981, unpublished slip op. (WI App Nov. 24, 2009), *review denied* (WI Feb. 23, 2010). Poehnelt asserts the scope of the restoration order is too broad and violates the statute of limitations. He also contends the circuit court considered inaccurate information in the “weighing of equities” and improperly required Poehnelt to present his case first. We affirm.

BACKGROUND

¶2 Poehnelt constructed five ponds on his property without a permit. Ponds one, two, and three are landlocked, and ponds four and five are connected to and divert a Cranberry Creek tributary. Pond five was developed in 1985. Pond four was constructed in 2004, after the department of natural resources told Poehnelt he needed, but was unlikely to obtain, a permit for construction. In 2006, Poehnelt was cited for constructing an artificial waterway connecting to navigable water without a permit, contrary to WIS. STAT. § 30.19(1g)(a). Poehnelt pled no contest to the citation, was found guilty, and paid a forfeiture. The State petitioned the court for restoration of the affected area. The court denied the State’s restoration request, and the State appealed.

¶3 In *Poehnelt I*, No. 2009AP981, ¶8, we applied our supreme court’s methodology from *Forest County v. Goode*, 219 Wis. 2d 654, 684, 579 N.W.2d 715 (1998), and concluded that once a violation of the statutes protecting the public’s interest in navigable waters has been established, “a circuit court should grant the injunction except, in those rare cases, when it concludes, after examining the totality of the circumstances, there are compelling equitable reasons why the court should deny the request for an injunction.” *Id.*, ¶9 (quoting *Goode*, 219 Wis. 2d at 684). We determined the State had established “a violation of the statutes protecting the public’s interest in navigable waters” and therefore

remanded with directions that “the circuit court should grant the State’s restoration motion unless Poehnelt presents ‘compelling equitable reasons why the court should deny the request for an injunction.’” *Id.*, ¶¶9, 12 (citations omitted).

¶4 At the restoration hearing, the circuit court determined our remand directions placed the burden on Poehnelt and required Poehnelt to present his case first. During closing arguments, Poehnelt argued WIS. STAT. § 893.87, a ten-year statute of limitation, prevented the State from seeking restoration of pond five. Poehnelt also asserted his age and income made it economically unfeasible for him to restore the area.

¶5 The court ordered restoration. The court reasoned Poehnelt was aware he needed a permit for pond four but nevertheless constructed it without a permit. The court determined the cost of restoration was not a compelling reason to deny the injunction.

¶6 Poehnelt filed a motion for reconsideration, arguing, in part, WIS. STAT. § 893.87 prohibited the State from seeking restoration.² The court denied his motion.

DISCUSSION

¶7 Poehnelt raises four arguments on appeal: (1) the restoration order violates the statute of limitations; (2) the scope of the restoration order exceeds

² Specifically, Poehnelt argued that WIS. STAT. § 893.87’s ten-year statute of limitation prohibited the State from requesting restoration for anything that occurred prior to December 2, 1994. Because the court found pond four was built in 2004 and ponds one, two, and three were built in the months prior to pond four’s construction, we observe that only pond five would be potentially impacted by Poehnelt’s statute of limitation argument.

Poehnelt's cited violation; (3) the court considered erroneous information in the weighing of equities; and (4) the court improperly shifted the order of proof.

¶8 Poehnelt first asserts the restoration order violates the statute of limitations and, consequently, he cannot be required to restore pond five. However, our remand directions limited Poehnelt to presenting “compelling *equitable* reasons why the court should deny the request for an injunction.” *Poehnelt I*, No. 2009AP981, ¶12 (emphasis added; citation omitted). The statute of limitations is an affirmative *legal* defense that must be raised or it is deemed waived. *See* WIS. STAT. § 802.02(3); *see also Milwaukee Cnty. v. LIRC*, 113 Wis. 2d 199, 206, 335 N.W.2d 412 (Ct. App. 1983). The time for Poehnelt to raise this legal defense to the State's restoration request was during the 2008 restoration hearings, prior to his first appeal. By failing to raise it earlier, Poehnelt has waived this defense. *See Milwaukee Cnty.*, 113 Wis. 2d at 206. Additionally, consideration of a statute of limitations defense would have exceeded the scope of our remand mandate. *See* WIS. STAT. § 808.09; *State ex rel. J.H. Findorff & Son, Inc. v. Circuit Court for Milwaukee Cnty.*, 2000 WI 30, ¶25, 233 Wis. 2d 428, 608 N.W.2d 679 (circuit court must act in a manner not inconsistent with the mandate on remand). The circuit court did not have authority to consider this defense.

¶9 Poehnelt next argues he cannot be required to restore pond five because a specific violation is needed to trigger a restoration order and, here, he never received a separate citation for a pond five violation. The State asserts that Poehnelt waived this argument by failing to raise it before the circuit court. Poehnelt concedes this specific argument was not made before the circuit court, but contends it is part of his statute of limitations defense.

¶10 Assuming this argument is part of Poehnelt’s statute of limitations defense, Poehnelt waived this defense by failing to raise it during the 2008 restoration hearings. *See Milwaukee Cnty.*, 113 Wis. 2d at 206. If, however, this is a separate argument regarding the scope of the restoration order as compared to the underlying citation, Poehnelt, by his own admission, failed to raise it before the circuit court. We will not consider it. *See State v. Huebner*, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727 (We need not address arguments raised for the first time on appeal.).

¶11 Poehnelt next contends that, in the weighing of equities, the circuit court improperly determined he knowingly constructed all ponds without a permit. We disagree with Poehnelt’s characterization of the court’s determination. In its decision, the court observed that “it appears to me all five ponds have been created without proper permitting.” The court then admonished Poehnelt for his actions in regard to his last pond (pond four), noting Poehnelt installed pond four after the department of natural resources explained he needed, but was unlikely to obtain, a permit for the pond. The court determined the cost to restore the area was not compelling and ordered restoration. The court never determined Poehnelt knowingly constructed all the ponds without a permit.

¶12 Finally, Poehnelt argues he is entitled to a new restoration hearing because, on remand, the circuit court, relying on our directive, required him to present his case first. Specifically, Poehnelt contends that because it was the State’s motion for restoration, the State was required to first show a violation warranting restoration occurred, and, only after the State made this prima facie case could he be required to present compelling equitable reasons why the injunction should be denied. He asserts he was prejudiced by the order of proof because he was put in “the untenable position of having to explain the State’s case

to the judge, thereby giving it credence or giving the appearance he had conceded that [pond five] was a violation appropriately before the court for consideration of injunctive relief.”

¶13 Poehnelt’s arguments ignore this case’s procedural history. In 2008, the State presented its restoration proposal and supporting witnesses. We determined in *Poehnelt I*, No. 2009AP981, ¶9, the State had established that “a violation of the statutes protecting the public’s interest in navigable waters” had occurred. Consequently, we directed Poehnelt on remand to present “compelling equitable reasons why the court should deny the request for an injunction.” The State therefore made its prima facie case in 2008, and Poehnelt was not prejudiced by having to present his compelling reasons on remand. Moreover, Poehnelt has not identified any way in which the State’s case was different on remand.

¶14 Further, although Poehnelt asserts the State only established a violation in reference to pond four and, consequently, needed to establish a violation in reference to pond five before he was required to present his equitable reasons for why the injunction should be denied, Poehnelt never made this argument before the circuit court. When the court asked Poehnelt if he agreed our remand required him to go first, Poehnelt only responded “I am not going to agree, Your Honor, but if that’s the way you want to proceed, I will do that.” *See* WIS. STAT. § 805.11(1)-(2) (Objections must be made in order to avoid waiver and “[a] party raising an objection must specify the grounds on which the party predicates the objection.”); *see also Huebner*, 235 Wis. 2d 486, ¶¶10-12 (arguments raised for the first time on appeal need not be considered).

By the Court.—Order affirmed.

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

