

**State of Wisconsin
Court of Appeals
District 2
Appeal No. 2011AP002941 - CR**

State of Wisconsin,

Plaintiff-Respondent,

v.

Raymond R. Vogt, Jr.,

Defendant-Appellant.

**On appeal from a judgment of the Racine County Circuit
Court, The Honorable Gerald P. Ptacek, presiding**

Defendant-Appellant's Brief and Appendix

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Table of Authority

Cases

<i>State v. Bowden</i> , 306 Wis. 2d 393, 742 N.W.2d 332 (2007)	12
<i>State v. Peters</i> , 2003 WI 88 (Wis. 2003)	15
<i>State v. Poellinger</i> , 153 Wis. 2d 493, 451 N.W.2d 752 (1990)	12

Statutes

Sec. 30.19, Stats	7
Sec. 30.20, Stats	7
Sec. 785.01(1)(b), Stats	12

Table of Contents

Statement on Oral Argument and Publication	4
Statement of the Issue.....	4
Summary of the Argument	5
Statement of the Case	6
I. Procedural History	6
II. Factual Background	7
Argument	
11	
Conclusion	
20	
Certification as to Length and E-Filing	

Statement on Oral Argument and Publication

The issue presented by this appeal is factual in nature, and it is governed by well-settled law; however, the application of the law to the facts is complicated and, therefore, both oral argument and publication is recommended.

Statement of the Issue

Whether the evidence was sufficient, as a matter of law, to convict the appellant (Vogt) of criminal contempt of court where: (1) the court ordered Vogt to “refrain from any further soil removal from the banks” of a waterway, until a certain permit was obtained; (2) it was impossible for Vogt to obtain the permit specified by the order; and (3) there was a complete absence of evidence to establish what was the bank of the waterway; and, even when viewed in the light most favorable to the verdict, the evidence established only that Vogt “moved” soil on the sides of the waterway, but not that he had *removed* any soil.

Answered by the trial court: Yes, the evidence was sufficient.

Summary of the Argument

On appeal, Vogt challenges the sufficiency of the

evidence to support his conviction for contempt of court. In order to prove a contempt of court, the State was required to establish the following three elements beyond a reasonable doubt: (1) the existence of a court order proscribing Vogt from engaging in specific conduct; (2) evidence that Vogt knew of the order and had the ability to comply with the court's order; and (3) evidence that Vogt intentionally disobeyed the court's order. Wis JI-Criminal 2031

Here, there certainly was a court order that prohibited Vogt from engaging in very specific conduct. He was ordered not to *remove soil* from the *bank* of the waterway unless a certain permit was obtained first. The “bank” of a waterway has a very specific statutory meaning. However, due to an error in the court order, Vogt had utterly no ability to comply with the order. He could not possibly obtain the permit that was suggested by the order. More importantly, there was no evidence in the record that Vogt *removed soil* from the *bank* of the waterway as that term is defined in the statutes.

Statement of the Case

I. Procedural History

The defendant-appellant, Raymond R. Vogt, Jr., (hereinafter “Vogt”), was charged with criminal contempt of

court, a violation of Sec. 785.01(1)(b), Stats.¹ The criminal complaint alleged that Vogt had been ordered by the Racine County Circuit Court² to, “refrain from any further soil removal from the banks” of a waterway located on Vogt’s property; and that Vogt had violated the order. (R:1) Vogt entered a not guilty plea to the charge.

Vogt waived his right to counsel, and he also waived his right to a jury trial. The matter was tried to the court on September 7, 2011. At the conclusion of the evidence the court found Vogt guilty. (R:21-57)

The court sentenced Vogt to thirty days in jail, imposed and stayed, with one year probation. Thereafter, Vogt timely filed a notice of intent to pursue postconviction relief. There were no postconviction motions. Vogt timely filed a notice of appeal.

II. Factual Background

Vogt owns a tract of land in Racine County, and on this land is a farm drainage ditch that has been the topic of much litigation over the past several years, arising mainly out of

¹ (1) "Contempt of court" means intentional: . . . ;(b) Disobedience, resistance or obstruction of the authority, process or order of a court;

² The Court’s order was made in Racine County Case Nos. 2007-FO-0871 and 2007-FO-0872, which were ordinance prosecutions in which Vogt was found guilty of violations of Sec. 30.19, Stats. and 30.20, Stats., for enlarging a waterway, and for dredging a waterway without a permit. In addition to providing for forfeiture penalties, Sec. 30.298, Stats. authorizes the court to, “[o]rder the defendant to perform or refrain from performing such acts as may be necessary to fully protect and effectuate the public interest in navigable waters. The court may order abatement of a nuisance, restoration of a natural resource or other appropriate action designed to eliminate or minimize any environmental damage caused by the defendant.”

Vogt's efforts to modify the ditch in ways intended to avoid flooding on his land. Ultimately, Vogt was issued citations alleging violations of Sec. 30.19, Stats³. and 30.20⁴, Stats. The citations alleged that Vogt was modifying the banks of the ditch, and dredging it, without proper permits from the Department of Natural Resources. The citations were extensively litigated on numerous issues, including whether or not the ditch was a "navigable waterway" was required by the statute.

On January 10, 2008, by memorandum decision (Appendix B) the court found Vogt guilty, and in addition to ordering forfeitures, the judge entered the following order:

Also, the Defendant is ordered to refrain *from any further soil removal from the banks of the waterway* unless and until a permit is issued as required by Sec. 30.20, Stats., or the Defendant is declared exempt by the Department.

(emphasis added; Appendix B-7)⁵

At trial in the present case, the State called Vogt's neighbor, Lawrence Siegel, as a witness. On the issue of what work Vogt did on the waterway, Siegel's testimony was as follows:

Q In the summer of 2010 did you observe Mr. Vogt doing any work on that canal?

A He's-- I have observed him messing with the canal since he

³ Prohibiting one from modifying the banks of a navigable waterway without having first obtained a permit.

⁴ Prohibiting one from removing material from the bed of a navigable waterway

⁵ The trial court in the present case took judicial notice of the contents of the civil forfeiture file. (R:21-53) The relevant paragraph of the order was read into the record.

moved in there.

Q Okay

A Different times.

Q In the summer of 2010 was he moving soil around?

A I believe so, yes.

Q Did you personally observe him doing this?

A Yes.

Q And that was from the banks of the canal?

A That was-- When was that, July of--

Q Last summer.

A Yeah, yes, definitely.

(R:21-11, 12) There was no further testimony from Siegel as to any further “work” done by Vogt on the ditch.

Heidi Kennedy of the Department of Natural Resources, though, testified that in July, 2010, she went onto Siegel’s property to observe Vogt working on the ditch. She testified that, “Initially during the first site visit, I noticed that there was material that was graded and disturbed along the sides of the bank, and then I believe at that time he had put a steel plate into the waterway.” (R:21-20) The prosecutor then asked Kennedy whether she actually saw Vogt doing any work on the ditch, and Kennedy said, “The work that I saw him conducting was with a small bobcat, and he was pushing material from the sides of the waterway towards the center.” (R:21-21)

Kennedy also testified that Vogt had, in fact, applied for a permit in April, 2010 to do the work, but that the DNR had not acted on his request. (R:21-38)

The court found Vogt guilty, reasoning as follows:

THE COURT: All right. Then at issue is whether or not the Court should find that Mr. Vogt is guilty or not guilty of failing to comply with a court order and is in contempt of court. As was noted earlier in these proceedings, the Court has to be able to find by evidence which is proved beyond a reasonable doubt that, first, there was a court order. Second, that Mr. Vogt had the ability to comply with the court order, and then, third, that he intentionally disobeyed the court order. I understand where Mr. Vogt comes from, but you continue to want to relitigate issues that were litigated in these cases and in others that affect your decisions and your actions here. It's pretty clear to me at the outset here that you have in mind to do exactly what you want to do when you want to do it to your land without regard to what is being ordered to be complied with here. It's clear beyond a reasonable doubt that there was an order in place. That order is contained in file number O7~FO-871 where Judge Torhorst wrote a decision, and in the second to the last paragraph on Page 7 he wrote, quote, also, the defendant is ordered to refrain from any further soil removal from the banks of the waterway unless and until a permit is issued as required by Section 30.20 State or the defendant is declared exempt by the department, end of quote. It's clear that you did have-- The second element is the ability to comply. The ability is basically to follow those orders and to not do anything such as to remove soil from the banks and--or to get an exemption. It's clear you did remove soil from the banks. It's clear you did that by placing fill, including a steel plate, in the waterway that was described here, and it's also clear that you had the ability to comply by not doing those things, and it's clear that you did so intentionally. You used your machinery that you owned to move the soil. You used your hands and your physical ability to place that steel plate in the waterway, and it's clear that you were never given an exemption.

It's clear you asked for one, but it's also clear that you weren't given one, and you even stated in your own testimony-- in your statements that in order to protect your land, you had to do something even though you didn't have an exemption. So you acknowledge that you didn't have an exemption.

So I'm satisfied that your action here was intentional. That you had the purpose to disobey the order of the Court. You understood what it was. It said that you were to do nothing with that land until such time as you got either an exemption or the matter was resolved in some way, and you chose to do what you damn well wanted to do because it's your land, and you feel you can do what you want to do without regard to even a court order that said not to do anything until you took certain steps . So I 'm satisfied I am required to find you guilty of the charge beyond a reasonable doubt.

(R:21-55, et seq.; Appendix B)

Argument

I. The evidence was insufficient as a matter to law to convict Vogt of contempt of court.

In order to prove a contempt of court, the State was required to establish the following three elements beyond a reasonable doubt: (1) the existence of a court order proscribing Vogt from engaging in specific conduct; (2) evidence that Vogt knew of the order and had the ability to comply with the court's order; and (3) evidence that Vogt intentionally disobeyed the court's order. Wis JI-Criminal 2031

Here, there certainly was a court order that prohibited

Vogt from engaging in very specific conduct. He was ordered not to *remove soil* from the *bank* of the waterway unless a certain permit were obtained. The “bank” of a waterway has a very specific statutory meaning. However, due to an error in the court order, Vogt had utterly no ability to comply with the requirement of the order to obtain a permit to modify the bank of the waterway. More importantly, there was no evidence in the record that Vogt *removed soil* from the *bank* of the waterway, as that term is defined in the statutes..

A. Standard of Appellate Review

Vogt challenges the sufficiency of the evidence. The appellate court must give deference to the trier of fact when considering a criminal defendant's challenge to the sufficiency of the evidence supporting his conviction. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). In *Poellinger*, the court explained:

[I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

Id.

Furthermore, "[t]he credibility of the witnesses, the weight of the evidence, and resolving inconsistencies in a witness's testimony all are for the trier of fact." *State v. Bowden*, 2007 WI App 234, P14, 306 Wis. 2d 393, 742 N.W.2d 332 (2007)

B. There was no evidence that Vogt could have complied with the order.

Again, the order in question prohibited Vogt from "any further soil removal from the banks of the waterway *unless and until a permit is issued as required by Sec. 30.20 Stats . . .*"

As mentioned above, the statutory section governing removal of soil from the bank of a waterway is Sec. 30.19, Stats. Sec. 30.20, Stats. governs the removal of material from the bed of the waterway. Thus, under the court's order, it is literally impossible for Vogt to obtain the permit specified. That is, the Department has no authority to issue a permit under Sec. 30.20, Stats. to permit Vogt to work on the banks of the waterway. Such a permit must be obtained under Sec. 30.19, Stats. Kennedy, during her testimony, admitted that this was true. (R:21-24)

The judge, in his findings, recognized the error in the order, however, he said, "[T]he order said not to do anything. You had a way to comply, which was to not do anything at all,

to follow the judge's order until it was resolved in some way. Instead, you chose to go ahead and act . . ." (R:21-54)

The judge's logic, though, assumes that there was no immediate need for Vogt to work on the waterway. The terms of the court order recognized that there may be a need for Vogt to work on the waterway. That is, the judge who created the order did not create a blanket prohibition against all work on the waterway (as the criminal judge seemed to believe). The order contemplated that Vogt would, at some point, be permitted to work on the waterway. He simply had to get a permit first.

The order, though, made it impossible for Vogt to get the specified permit. If a need arose for Vogt to work on the waterway, it was impossible for him to comply with the order.

There was no evidence presented by the State that Vogt's work on the waterway was not necessary.

In order to find Vogt guilty of contempt of court, the criminal judge was forced to *change the intent of the underlying order*. He turned it into a blanket prohibition against all work on the waterway. In the judge's words, "You had a way to comply, which was to not do anything at all . . ."

Clearly, then, in order to find that Vogt had the ability to comply with the order, the trial court changed the intent of the order. This, more than anything else, establishes that the evidence was insufficient to establish that Vogt had the ability to comply with the order.

C. There was no evidence in the record that Vogt “removed” any soil from the “bank” of the ditch.

In the criminal case Vogt is accused of violating a court order rather than of violating a statute. Nonetheless, just like a statute, the words of the court order must be given their plain meaning unless the statutes provide a more specific meaning. In, *State v. Peters*, 2003 WI 88, P14 (Wis. 2003), the Supreme Court reiterated this well-established principle:

If the language of a statute is clear on its face, we need not look any further than the statutory text to determine the statute's meaning. See *Bruno v. Milwaukee Co.*, 2003 WI 28, PP18-22, 260 Wis. 2d 633, 660 N.W.2d 656. "When a statute unambiguously expresses the intent of the legislature, we apply that meaning without resorting to extrinsic sources" of legislative intent. *State ex rel. Cramer v. Wis. Ct. App.*, 2000 WI 86, P18, 236 Wis. 2d 473, 613 N.W.2d 591. Statutory language is given its common, ordinary and accepted meaning. *Bruno*, 2003 WI 28, 260 Wis. 2d 633, P20, 660 N.W.2d 656; *State v. Engler*, 80 Wis. 2d 402, 406, 259 N.W.2d 97 (1977). Rules of statutory construction are inapplicable if the language of the statute has a plain and reasonable meaning on its face. *Id.* at 406-09 (holding that canons of construction, including ejusdem generis, are inapplicable when the statute is clear on its face).

1. “Bank”, in this case, has a statutory meaning, and there was no evidence that either Seigel or Kennedy ever determined what constituted the “bank” of the waterway.

Here, the court ordered Vogt to, “refrain from any further soil removal from the banks” of the ditch. The first question, then, is, “Where are the banks of the waterway?”

Sec. 30.19(1b)(b), Stats., defines the “bank” of a waterway. It reads,

(b) "Bank" means either of the following:

1. Land area that is, in size, the greater of the following:

a. The portion of land surface that extends 75 feet landward from the ordinary high-water mark of any navigable waterway

b. The portion of land surface extending landward from the ordinary high-water mark of any navigable waterway to the point where the slope is less than 12 percent.

Plainly, the legal definition of the bank of a waterway is very different than the common meaning. In order to determine the “bank” of a waterway, one must first locate the ordinary high water mark of the waterway. The “bank” is that area 75 feet landward from that point.

It was never established that the State’s witness, Seigel, understood the legal meaning of “bank”. Thus, there is no way to determine from his testimony whether he was referring to the legal bank of the waterway when he was led by the prosecutor into admitting that he saw Vogt moving soil “around on the

bank.”

Kennedy, for her part, never said she saw Vogt moving soil on the bank. Rather, she said she saw Vogt moving material from the “side of the waterway.” She was, apparently, well aware of the legal definition of “bank.” She testified that:

We would have to determine first whether you are removing material below the ordinary high water mark of this waterway, which the ordinary watermark is up on the banks of the waterway, and would require a non-veg determination by the department . . .

(R:21-26).

In his decision, the trial judge made no findings at all as to what constituted the bank of this particular waterway. Without making such findings, it is literally impossible to find beyond a reasonable doubt that Vogt removed anything from the bank.

2. There was no testimony that Vogt “removed” any soil.

Unlike “bank”, the statutes do not define “remove.” “Removal”, then, is a common word with a common meaning. It means, “To move from a place or position; take *away or off*: *to remove the napkins from the table . . . to move or shift to another place or position; transfer: She removed the painting to another wall.*” www.dictionary.com. Thus, the plain meaning of remove requires that the item in question, in this case the soil

on the bank of the waterway, must be moved *from one place to another*.

There were two bits of testimony concerning the work that Vogt was doing on the ditch. Siegel, in response to the prosecutor's leading question, admitted that he saw Vogt "moving soil around" on the banks of the canal.

It is not hair-splitting to point out that there is nothing in Siegel's testimony that any of the soil from the banks *changed position* permanently. It is the *change of position* that transforms a move into a *removal*. Certainly, if Vogt were using a Bobcat to work on the bed of the ditch, he moved some of the soil from the bank around as he drove over it. There is no testimony from Siegel-- nor may any reasonable inference be drawn-- that Vogt's work on the bed of the ditch required him to change the position of any of the soil from the bank. That is, there was no evidence that, despite moving the soil around, that Vogt actually removed any of the soil.

Similarly, Kennedy testified that, on her first trip to the property, she, "[n]oticed that there was material that was graded and disturbed along the sides of the bank." Significantly, she did not testify that on this first visit she saw Vogt working there. More importantly, though, the court's order applies to "soil", not generically to "material", and grading or disturbing the *material* does not suggest that any soil was removed.

Kennedy also testified that during her second visit she

saw Vogt “pushing material from the sides of the waterway towards the center.” Again, “material” is not necessarily soil.⁶ The “side of the waterway” is not the “bank” of the waterway either.

Thus, there was no testimony at trial that Vogt ever removed soil from the bank of the waterway.

Interestingly, the trial judge seemed to acknowledge the absence of evidence, despite his conclusion that Vogt did “remove” soil from the banks. In his findings of fact, the judge said that, “It’s clear you did remove soil from the banks. It’s clear you did that by placing fill, including a steel plate, in the waterway that was described here.” The judge does not explain how placing fill in the bed of the ditch, including a steel plate, necessarily means that soil was removed from the bank of the waterway. Moreover, no reasonable inference permits such a conclusion. Thus, the judge’s finding of fact in this regard is not entitled to deference on appeal.

Conclusion

For these reasons, it is respectfully requested that the court vacate Vogt’s conviction for contempt of court, and order that a judgment of acquittal be entered.

⁶ Again, the author feels compelled to point out that this is not hair-splitting. There was testimony at trial that Vogt put a steel plate into the bed of the ditch, and that he also sought to put stones in the bed of the ditch. Thus, this testimony does not permit a reasonable inference that Vogt was pushing soil from the bank of the waterway into the bed of the waterway.

Dated at Milwaukee, Wisconsin, this _____ day of June,
2012.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 3586 words.

This brief was prepared using *Google Docs* word processing software. The length of the brief was obtained by use of the Word Count function of the software

I hereby certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this _____ day of _____, 2012:

Jeffrey W. Jensen

**State of Wisconsin
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Appeal No. 2011AP002941 - CR**

State of Wisconsin,

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Defendant-Appellant's Appendix

A. Record on Appeal

B. Decision and order in 2007-FO-0871

C. Court's bench decision in the present case

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of

an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ____ day of June, 2012.

Jeffrey W. Jensen