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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Court Case No. 2019AP000491
Outagamie Circuit Court Case No. 2017FO0001430

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Darrin Stingle,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION ENTERED IN CIRCUIT COURT Case No. 2017FO0001430 FOR OUTAGAMIE COUNTY

The Honorable Mark J. McGinnis, Presiding

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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QUESTIONS PRESENTED

1. Did the State present sufficient evidence such that a reasonable trier of fact could find that there were wetlands on Darrin Stingle's property and that those wetlands were filled?
2. Did the Court demonstrate bias which prejudiced Darrin Stingle to the point that there was a due process violation of Darrin Stingle's right to a fair trial?

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not believe that oral argument is necessary as this case presents issues that have been clearly decided by the Wisconsin Appellate Courts, including sufficiency of evidence to submit a question of guilt to a jury and bias of a court. There are no new issues presented that require oral argument, as pursuant to sec. 809.22(2)(b), Wis. Stats., the briefs of the parties fully develop and explain the issues.

The Plaintiff-Respondent also believes that publication of this case is also unnecessary. Pursuant to

sec. 809.23(1)(b), Wis. Stats., this case involves the application of well-settled rules of law.

STATEMENT OF THE CASE

On or about July 7, 2017, Wisconsin Department of Natural Resources Warden Thomas Sturdivant issued a citation to Defendant/Appellant Darrin Stingle for a violation of Wis. Stats., 281.36(3b)(b), Discharge Dredged Material or Fill Material Into Wetland. The citation which was issued alleged of violation of that statute occurring on October 15, 2015. The matter was set for an Initial Appearance in Outagamie County Courts on September 6, 2017. Defendant/Appellant entered a Not Guilty plea to the citation on September 1, 2017, being represented by Attorney Gary R. Leistico.

The case proceeded to a Court Trial, which was held on February 27, 2019, with the Honorable Mark J. McGinnis, Outagamie County Circuit Court Judge, presiding. After testimony during the trial from five witnesses presented by the Plaintiff/Respondent and two witnesses presented by the Defendant/Appellant, including the Defendant/Appellant, the Court found the Defendant/Appellant Guilty of the citation

of violating Wis. Stats. 281.36(3b)(b). TR 303, 1.5-6. Defendant/Appellant now appeals that finding.

STANDARD OF REVIEW

The standard of review on appeal for sufficiency of evidence is a question of law that is reviewed independently.

The question of whether a judge was objectively not impartial is a question of law that is reviewed independently on appeal. State v. Pirtle, 334 Wis.2d 211, 235, ¶34, 799 N.W.2d 492 (2011).

ARGUMENT

I. The State Carried It's Burden Of Proof By Presenting Evidence Of Guilt Such That It Cannot Be Said That A Reasonable Trier Of Fact Could Not Have Drawn Appropriate Inferences From The Evidence Adduced At Trial To Find The Requisite Guilt

A defendant challenging the sufficiency of evidence must meet a high burden: a court may not overturn a conviction unless the evidence, viewed most favorably to sustain the conviction, is so insufficient in "probative

value and force that it can be said as a matter of law that no reasonable trier of fact could have found guilt beyond reasonable doubt." *State v. Poellinger,* 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). It is the province of the trier of fact to decide issues of credibility, weigh the evidence, and resolve conflicts in testimony. Simply put, if there is a 'possibility that a reasonable trier of fact could have drawn appropriate inferences from the evidence adduced at trial to find the requisite guilt, then the evidence is sufficient to support the conviction, and a defendant's motion must be denied.' *Id.* at 506-07. To determine whether a verdict is sufficiently supported by trial evidence, courts assess whether the evidence - circumstantial or direct, can support a reasonable inference finding all elements of the crimes of which the defendant has been convicted.

A trial court's finding of fact will not be set aside by an appellate court "…unless they are contrary to the great weight and clear preponderance of the evidence." State v. Coerper, 192 Wis. 2d 566, 571 (Ct. App. 1995), citing State v. Turner, 136 Wis. 2d 333, 343-44 (1987).

In Chapter 281, Wis. Stats, the chapter that Darrin Stingle was cited for violating, the definition of a

Wetland in Wisconsin is found in sec. 23.32(1), Wis. Stats. That section states …"wetland" means an area where water is at, near, or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions. Sec. 23.32(1), Wis. Stats.

The single element of the violation for which Darrin Stingle was cited that was contested was whether there were wetlands on the property.

Under the circumstances here, Judge McGinnis had a full opportunity to observe the conduct of the witnesses and assess their veracity. In doing so, he made a point to address the testimony of Michael Graham and Darrin Stingle. The Court expressly refused to give credence to the testimony of both.

Stingle argues that the Department of Natural Resources did not follow proper procedure in determining whether there were wetlands on the property in question, and in fact, he argues that there were not even wetlands present that were filled by him. The State presented significant and credible evidence that wetlands were present on the Stingle site and there were wetlands that had been filled.

Thomas Nedland testified that he is the Department of Natural Resources Wetland Mitigation Coordinator. He also testified that prior to that he was the State's Wetland Identification Program Coordinator. (R.25 at 29, 12-15). Mr. Nedland testified that among his duties as the Wetland ID Coordinator he reviewed wetland delineations, he helped landowners figure out if they had wetlands on their property, and he provided joint trainings with the US Army Corps of Engineers to teach people how to follow proper procedure for delineating wetlands. (R. 25 at 29-30)

During his testimony, Mr. Nedland discussed at length the factors and criteria used to determine whether a wetland is present on a site. He spoke of the 1987 Wetland Delineation Manual authored by the US Army Corps of Engineers, which is the federal guideline manual for wetland delineation. He also spoke of regional supplements that are used in this endeavor also. (R. 25 at 30) His testimony also included some of his biographical information regarding his schooling, experience and training in order to perform wetland delineations. (R. 25 at 30-31)

Thomas Nedland's testimony included testimony that the federal guidelines set out a three-parameter approach to

information needed to know in order to identify a wetland. Those include being able to identify the type of vegetation growing on a site, determine whether hydric soil field indicators are present, and then determine if wetland hydrology indicators are present. (R. 25 at 31, 13-21)

In his testimony, Thomas Nedland advised that he was on the Stingle property twice. He testified that he had found hydric soils, i.e. wetland soils on the property and also found wetland hydrology indicators present. (R. 25 at 34, 1-11) He also testified regarding the Frings Report being inadequate in that wetland soil indicators and wetland hydrology indicators were also in other locations on the site that were not identified by the Frings report. (R. 25 at 34, 11-15)

Thomas Nedland then went on to describe how a determination is made on whether a wetland is present. He spoke about what hydric soils are, factors that are taken into account when looking for hydric soils, regional soil tendencies for the Fox Valley area where the Stingle site is located, and effects of standing or ponding water on the soils and how those effects can be indicative of the presence of a wetland. (R. 25 at 35-36)

Witness Nedland testified both on direct examination, and cross examination that it is very important to note that the Stingle site was not under normal circumstances for a number of reasons. The first fact is that it was being farmed. The second fact is that fill material was brought in. Farming will affect what plant community is growing and fill material covers wetland soil indicators. He testified about how these facts impact a wetland determination. (R. 25 at 36-38) He also testified on direct that "So, you know, there's no size constraint to what makes a wetland. To be a wetland we just have to have those three parameters that I talked about or, you know, if you are in a significantly disturbed - There's lots of terms I'm going to throw out here. One is significantly disturbed setting like a farmed area. You don't necessarily have to have the vegetation present. You can have just hydric soils present and wetland hydrology present and still call it that. That comes right out of the federal guidance, the regional supplements to the Wetland Delineation Manual. They actually have a whole section. It's actually Chapter 5. It's called difficult to delineate wetlands, and they talk specifically about how

to handle farm settings and how to do wetland delineations in those settings." (R. 25 at 38, 3-19)

Thomas Nedland testified that his opinion that there were wetlands on the Stingle site and that there was fill placed in those wetlands. (R. 25 at 40-41).

Witness Travis Stuck testified that he is a professional wildlife scientist and the majority of his work constitutes delineating wetlands. He also spoke about his education, training, and experience to be able to delineate wetlands. (R. 25 at 61-62).

Witness Stuck testified about going to the Stingle site on three occasions and did so at the request of Darrin Stingle. (R. 25 at 62) He also spoke about his vast experience, having done thousands of delineations and determinations and also about how he had done federal wetland determinations for farm for Food Security Act purposes while he worked for NRCS USDA. (R. 25 at 64). He spoke about his experience in the Fox Valley area and his familiarity with the soils and hydrology in the area. (R. 25 at 65)

Travis Stuck explained to the Court the process he went through to make the determination and delineation of the Stingle site, including starting with off-site reviews

of aerial images for a 10 to 20 year period, including antecedent precipitation imagery. He then explained how he went to the site and verified those findings, taking care that he didn't miss any wetland sites. (R. 25 at 65). He then collected data by digging holes to get soil samples on site in order to check for indicators of wetland hydrology, hydric soils and wetland vegetation. He testified further that he had found wetland vegetation in some of the sites even though it isn't normal circumstances because of the farming practice. (R. 25 at 66). He also testified about delineating the wetlands using a sub-meter grade GPS unit, which is the standard acceptable level of precision; and then completed a report. (R. 25 at 66-67)

The conclusion of Travis Stuck was that there were wetlands on the property and he found that five of them had been filled. (R. 25 at 69-70) Upon cross-examination, Mr. Stuck was questioned regarding such issues as to whether tiling or ditching being present had an effect or was a factor in his wetland determination process as it applies to the Stingle site. In the end, there was no evidence or suggestion to demonstrate that his opinion that there were wetlands present and that there was fill in those wetlands, was incorrect.

Scott Koehnke testified regarding the factors he took into account when deciding whether there were wetlands present on Stingle's property. He testified regarding himself going to the property for a site review in October of 2015, and multiple other times. He also testified about other people being present during those times, including Thomas Nedland, another witness who had testified. He also testified about some of his observations of the property during his visits. (R. 25 at 161-165). Scott Koehnke testified regarding his qualifications, education, training and experience in the field of wetland identification. (R. 25 at 154) He testified about his communications with Defendant/Appellant and the explanations given for the placement of the fill material on the site by Defendant/Appellant. (R. 25 at 155-156).

Stingle suggested during questioning of various witnesses and in his own testimony that he relied on an NCRS determination that there were no wetlands present on the site at issue here. Scott Koehnke testified about how in 2014 he had put on an educational training for farmers, property owners, and businesses that run tiles and tiling equipment, to present on the DNR's rules and regulations as they relate to wetlands, tiling, waterways, dredging, and

related activities. It was also put on by the NRCS and the Corps of Engineers. (R. 25 at 158). Darrin Stingle was present at that program. (R. 25 at 158).

Scott Koehnke explained that the presentation included information regarding permits. He testified that information was provided at the presentation about overlays between DNR, Corps of Engineers and NCRS jurisdiction. He also explained that NCRS is a regulatory agency, looking at wetlands from a food security standpoint, and this is different from the purpose of what the DNR and the Corps of Engineers are looking at wetlands for. (R. 25 at 158). As a result, this training helps people understand that there are differences. Other things talked about included permitting, the differences between NRCS letters and what DNR authority is. They also talked about maintenance of ditches and dredging of ditches. Scott Koehnke summed up the training program as follows: "We talk about…, a whole myriad of concepts that somebody who is doing work in and around wetlands and waterways would want to know to keep themselves out of trouble." (R. 25 at 159). And he testified that Darrin Stingle was present. (R. 25 at 160, 8-9).

Mr. Koehnke also explained that the existence of a ditch does not remove the area of the ditch from being a wetland. (R. 25 at 170, 2-8). He went on to conclude that based on his observations of the site, his work with Mr. Nedland at the site, the samples that he was involved in obtaining, it was his professional opinion that "…there was a regulated discharge of fill material into a regulated wetland." (R. 25 at 172, 2-15). On cross-examination, he again testified that it was his professional judgment that there were wetlands present on the Stingle site. (R. 25 at 181, 18-19).

Scott Koehnke was re-called as a rebuttal witness. (R. 25 at 299-300). He addressed the issue regarding prior converted lands and wetlands. He explained that the DNR has a different set of regulatory rules than does the USDA, which are for Farm Service - Food Security Act Services purposes only. He pointed out that Darrin Stingle was advised that for Food Security Acts, he was in compliance. But Darrin Stingle was also advised that he needs to contact the DNR and Corps of Engineers to see if they have regulatory authority over his property. (R. 25 at 299, 10-21). The record demonstrates he contacted neither for purposes of filling the wetlands at the site.

It is the position of Stingle that the State did not follow appropriate guidelines in making a determination that wetlands were present on the Stingle property. That is a fact that does not exist in this case. Testimony from multiple witnesses, including testimony of Thomas Nedland and Travis Stuck, that the site was not under normal circumstances due to being farmed and fill material being place at the site. They testified about following the federal guidelines, the 1987 Wetland Delineation Manual authored by the US Army Corps of Engineers and took into account the proper criteria as a result of the site not being under normal circumstances. Contrary to the position of Stingle, there was evidence offered by the State that the DNR followed proper procedure in determining that there were wetlands present on the property and that wetlands present on the site had been filled.

Given the evidence submitted by the State during the course of the trial, there is sufficient evidence, that if believed by the trier of fact, that a trier of fact could find the defendant guilty of the citation. The State has met it's burden.

II. The Court's Questioning During Testimony And The Court's Statement At The End of Testimony Regarding Possible Consequences Do Not Demonstrate Bias and Prejudice

The Supreme Court of Wisconsin has noted the accepted legal proposition that "There is a presumption that a judge acted fairly, impartially, and without prejudice". State v. Herrmann, 364 Wis.2d 336, ¶3, 867 N.W.2d 772 (2015). In that same case the Court , in citing previous cases, stated "Whether a judge was objectively not impartial is a question of law that we review independently." Herrmann, 364 Wis.2d 336 at ¶23, citing State v. Pirtle, 2011 WI App 89, ¶34, 334 Wis.2d 211, 799 N.W.2d; see also Goodson, 320 Wis.2d 166, ¶7, 771 N.W.2d 348.

The presumption that a judge acted fairly, impartially, and without prejudice is a rebuttable presumption , "…placing the burden on the party asserting the bias to show that bias by a preponderance of the evidence. Herrmann, 364 Wis. 2d 336 at ¶24, citing State v. Gudgeon, 295 Wis.2d 189, ¶20, 720 N.W.2d 114 (Ct. App. 2006); State v. McBride, 187 Wis.2d 409 at 415, 523 N.W.2d 106 (Ct. App. 1994).

In this case, Stingle argues that the questioning by the Trial Court during the testimony of Scott Koehnke (R. 25 at 168-169) demonstrates bias. In the context of the testimony, it is a clarifying inquiry regarding what the actual issues are in the trial. The Court was advised during the exchange with Attorney Leistico that the contention of the parties was whether the areas that were filled are actually wetlands. (R. 25 at 168, 10-12). There were no opening statements to begin the trial to explain the issues and positions of the parties. The Court excercised discretion to ask such questions and make such inquiries to clarify the issues.

The Court did not express any opinion regarding a conclusion or decision about the issue in contention, that is, were there wetlands present on the Stingle site? The exchange does not demonstrate by a preponderance of the evidence that the Court was biased.

The Defendant/Appellant also argues that the comments by the Court at page 304 of the Court Trial Transcript, where the Court stated "I have been trying to focus on or think about the last 15 minutes or so, you know, what's the consequence?" are indicative that the Court was biased and that Darrin Stingle was in fact treated unfairly. In this

instance, if the time period referred to by the Court was accurate, the Court would have been referring to a point where Scott Koehnke began his rebuttal statement. In retrospect and review of the transcript, that offering had very little, if anything, to add to the evidence already offered by the parties. In fact, Mr. Koehnke was not asked any questions by either Attorney Sager or Attorney Leistico, and simply made a clarifying statement to the Court. (R. 25 at 299-300). Given the nature of the statement by Mr. Koehnke and the comment of the Court as to having begun to think about consequences at approximately the same time Mr. Koehnke began, there is no indication of prejudice or bias as it relates to the Court's ultimate decision. The record does not support the proposition that bias of the Court was present by a preponderance of the evidence.

CONCLUSION

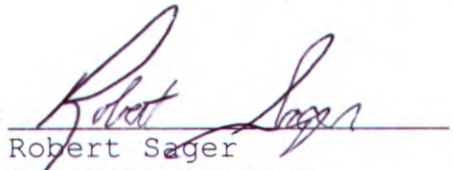
The State presented credible evidence from various parties who testified regarding their education, training, and experience. There were witnesses who, as the Court summarized, were prepared, knowledgeable, thoughtful and credible. (R. 25 at 302).

Based on the evidence presented by the State at trial, it cannot be said that when viewing the evidence most favorably to the State no reasonable trier of fact could have found Darrin Stingle Guilty.

Given the questions posed by the Court and the statements made by the Court during trial, bias has not been proven by Darrin Stingle by a preponderance of the evidence.

The State requests this Court to uphold the finding of guilt by the Trial Court on the citation for Discharge of Dredged or Fill Material Into A Wetland Without A Permit.

Respectfully submitted this 3rd day of September, 2019.

By: 

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CERTIFICATION

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 monospaced font. The length of this brief is 21 pages.

Dated: September 3rd, 2019

OUTAGAMIE COUNTY DISTRICT
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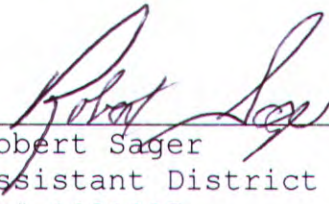
BY: 

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CERTIFICATION OF THIRD-PARTY COMMERICIAL DELIVERY

I certify that on September 3, 2019, this brief or appendix was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify that the brief or appendix was correctly addressed.

Date: September 3, 2019

Signature: _____
Robert Sager

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 3rd day of September, 2019.

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