Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-563

JUNE TERM, 2004

Agency of Natural Resources	}	APPEALED FROM:
v.	}	Environmental Court
Walter Southworth	}	DOCKET No. 57-4-03 Vtec
	}	Trial Judge: Hon. Merideth Wright

In the above-entitled cause, the Clerk will enter:

Respondent Walter Southworth appeals from an environmental court decision that he violated 10 V.S.A. § 1021, by dredging gravel from a watercourse without a permit[1]. Respondent contends: (1) the evidence was insufficient to support several of the court' s findings; (2) the court erroneously admitted a photograph depicting the effect of the dredging; and (3) any violation was mitigated by the fact that the dredging was required to prevent flooding caused, in part, by work done by the local town. We affirm.

As found by the trial court, the facts may summarized as follows. Respondent' s house sits on a parcel of land adjacent to the Indian River in West Pawlet. The Sawmill Road crosses the river over a bridge just downstream from the property. In December 2000, the river flooded, inundating respondent' s land and home. The following summer or fall, respondent excavated gravel from the dry river bed and placed it along the river banks adjacent to his property, hoping to reinforce the banks and protect his property in the event of another flood.[2]

In October 2001, a local road commissioner reported the dredging to Frederick Nicholson, a environmental engineer with the Agency of Natural Resources (ANR), who in turn asked Donald Gallus, an ANR environmental enforcement officer, to inspect the property. Gallus observed that the excavation was approximately three feet deep, by twenty-five feet wide, by 100 feet long, resulting in the removal of about 278 cubic yards of gravel. Gallus returned about two weeks later with Nicholson to make further observations and photograph the area. Nicholson noted that the removal of gravel had broken through the gravel bottom of the river bed, the effect of which was to destabilize the river channel, threaten the bridge footings downstream, and destroy the spawning habitat of the river bed. Nicholson testified that he later offered respondent the opportunity to avoid a notice of violation by returning the gravel to the river bed, but respondent rejected the offer.

ANR issued a notice of violation in November 2001, alleging that respondent had violated 10 V.S.A. § 1021, by dredging gravel from the Indian River. The Secretary subsequently issued an administrative order, finding that respondent had committed the alleged violation, and imposing a penalty of $1500. Respondent appealed pro se to the environmental court, which held an evidentiary hearing in June 2003 and issued a written decision in December. The court found that respondent had committed the alleged violation by removing approximately 278 cubic yards of material from the river without a permit. The court reduced the $1500 penalty imposed by the Secretary to $1165, which reflected the actual costs of enforcement of $620, remedial costs of $440, and removal of economic benefit costs of $105. See 10 V.S.A. § 8010(b) (setting forth criteria for determination of penalty amount). This pro se appeal followed.

Respondent first contends the evidence fails to support the court' s finding that he violated the statute by removing approximately 278 cubic yards of gravel.[3] He claims, instead, that he removed only about 150 cubic yards of gravel over several years, and therefore was exempt from the permit requirement. Under 10 V.S.A. § 1021(d), a riparian owner is authorized to remove up to 50 cubic yards of gravel per year from a watercourse running through the owner' s property if it is removed for use on the owner' s property, removed from above the waterline, and the Secretary is notified at least 72 hours prior to the removal. The ANR officials who inspected respondent' s property testified that the excavation of gravel was extensive, amounting to about 278 cubic yards, and respondent acknowledged that he had removed the gravel to reinforce the river banks following the 2000 flood. There was no evidence that the removal was accomplished over several years, or was less than the amount estimated by Gallus and Nicholson. Indeed, respondent was the only witness other than Gallus and Nicholson to speak to the issue, and he conceded that he had no estimate of how much gravel he had removed. Accordingly, we discern no basis to disturb the court' s finding See Sec' y, Agency of Natural Res. v. Irish, 169 Vt. 407, 416 (1999) (findings of trial court will stand if there is any credible evidence to support them).

Respondent further contends the evidence fails to support the court' s finding that Nicholson had offered him the opportunity to avoid a notice of violation by returning the gravel to the river bed and agreeing not to remove any more. Although respondent disputes the assertion, Nicholson testified that he recalled speaking with respondent by telephone and making the offer, which respondent rejected, claiming that he had done nothing wrong. The trial court is in the best position to assess the credibility of witnesses and weigh the evidence, and its findings will not be disturbed on appeal if there is any credible evidence to support them, even where there is substantial conflicting evidence. MacDonough-Webster Lodge No. 26 v. Wells, 2003 VT 70, & 22, 834 A.2d 25. Accordingly, there is no basis to disturb the court' s finding.[4]

Respondent next contends that a photograph depicting an undermining of the bridge footings downstream from his property was irrelevant and prejudicial. Having failed to object to the admission of the photograph or raise any claim relating to its relevance or potential prejudicial effect at trial, respondent has waived the claim on appeal. In re White, 172 Vt. at 343.

Finally, respondent asserts that any violation was mitigated by the fact that the flooding of his property was exacerbated by work done to the road and bridge by the Town of Pawlet. In reducing the penalty imposed by the Secretary, the trial court expressly stated that it considered this possibility to be a mitigating circumstance, although it did not excuse the violation. We thus discern no error.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Paul L. Reiber, Associate Justice

Footnotes

1. The statute provides, in pertinent part, that "[a] person shall not change, alter or modify the course, current or cross-section of any watercourse within a drainage area greater than ten square miles at the location of the proposed change, alteration or modification . . . either by movement, fill, or by excavation of ten cubic yards or more in any year, unless authorized by the secretary." 10 V.S.A. § 1021(a).

2. Although the river bed periodically runs dry, the river continues to flow subsurface.

3. Although respondent has framed his argument as a challenge to the "accuracy" of information in trial exhibit 1B, the complaint investigation report prepared by Donald Gallus, which estimated that the amount of gravel removed from the river bed was 280 cubic yards, we treat it as a claim that the evidence was insufficient to support the court's finding. To the extent that respondent seeks to challenge the admission of the document, we note that he raised no objection at trial, and therefore waived any claim on appeal. In re White, 172 Vt. 335, 343 (2001).

4. Respondent also appears to assert in this regard that Nicholson's credibility is undermined by the affidavits of a neighboring farmer, Edward Lewis, and his farm manager, David Hosley, who both dispute Nicholson's testimony that he had made them a similar offer. The affidavits are not part of the record evidence, however, and therefore may not be considered on appeal. See V.R.A.P. 10(a); State v. Brown, 165 Vt. 79, 82 (1996). Moreover, Hosley actually testified that he had received such an offer from Nicholson, although it was communicated indirectly through Bruce Hudy, the local road commissioner.