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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 11, 2023 Session

STATE OF TENNESSEE v. MICHAEL L. BAILEY

Appeal from the Chancery Court for Davidson County
No. 21-0694-III Ellen Hobbs Lyle, Chancellor

No. M2022-01386-COA-R3-CV

The State of Tennessee sought the enforcement of a prior administrative order against the Appellant related to the Appellant's violations of the Tennessee Water Quality Control Act of 1977, requesting civil penalties, damages, and injunctive relief. The State filed a motion for summary judgment, and the Appellant sought a continuance based on parallel criminal proceedings. The trial court denied the motion for a continuance and granted summary judgment to the State. On appeal, the Appellant asserts that the chancery court and administrative tribunal lacked personal jurisdiction and that the chancery court erred in denying his motion for a continuance. We conclude that any challenge to personal jurisdiction has been waived and that the chancery court did not abuse its discretion in denying the motion for a continuance. Accordingly, we affirm the judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

JEFFREY USMAN, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and W. NEAL MCBRAYER, J., joined.

George Todd East, Kingsport, Tennessee, for the appellant, Michael L. Bailey.

Jonathan Skrmetti, Attorney General and Reporter; Andrée Sophia Blumstein, Solicitor General; and Elizabeth P. McCarter, Senior Assistant Attorney General, for the appellee, State of Tennessee.

OPINION

I.

In the first of a continuing course of violations of the Tennessee Water Quality

Control Act of 1977 (WQCA), the Appellant, Michael L. Bailey, engaged in land-clearing activities without a permit on a tract of approximately 16.75 acres in Sullivan County in June 2017.¹ *See* Tenn. Code Ann. § 69-3-101 et seq. The owner of the property was given a notice of violation, and the City of Kingsport sent both the owner and Mr. Bailey cease-and-desist letters on August 11, 2017. Mr. Bailey subsequently acquired the property in September 2017.

In December 2019, the Tennessee Department of Environment and Conservation’s Division of Water Resources (the Division) discovered multiple violations of the WQCA on Mr. Bailey’s property, including clearing of land, absence of erosion prevention, stream buffer encroachment, and alteration of wetlands, all conducted without the necessary permits. The Division issued Mr. Bailey a detailed notice of violation, which outlined the violations, required corrective action, and gave notice that failure to comply could result in enforcement and penalties. Mr. Bailey did not respond.

Pursuant to a request for assistance with enforcement from the City of Kingsport, Division personnel inspected the property in April and June 2020 and observed and documented “mass grading work,” excavated hydric soils from wetlands, failure of erosion prevention, pollution, and stormwater discharge into Peaveler Branch, a body of water constituting “waters” and “streams” of the State under Tennessee Code Annotated section 69-3-103. In July, Division personnel attempted to give Mr. Bailey a notice of violation, but he refused the letter and “drove off.” Mr. Bailey denied Division personnel access to the site for inspection in August 2020, and they returned with the help of law enforcement to complete the inspection. The inspection documented further wetland impacts, including filling over a sewer access manhole. On November 10, 2020, Mr. Bailey was photographed engaged in further violations.

On November 16, 2020, the Division issued an Administrative Order that required Mr. Bailey to comply with permit requirements and pollution prevention measures, submit a restoration plan to the Division for approval, comply with the approved restoration plan, and record notice of land use restrictions to prevent further damage. The Administrative Order assessed Mr. Bailey with damages in the amount of \$4,173.38, a civil penalty of \$82,176, which included conditional damages based on a failure to abide by the order and natural resource damages of \$112,986. The Administrative Order noted the potential reduction of some penalties based on compliance, and it informed Mr. Bailey that failure to comply could lead to additional penalties and damages. It included a “Notice of Rights” which outlined the procedure for appealing the Administrative Order.

The Administrative Order recited that service of process could be made on Mr.

¹ We take the salient facts from the Administrative Order, the complaint, and declarations filed in support of the State’s motions.

Bailey at an address on Caintuck Road in Kingsport. The Affidavit of Service detailed numerous efforts at service, stated Mr. Bailey was evading service, and recited that the document was served at a different address on Pam Nunley, “who is over the age of 18 and living in the same residence as Respondent, Michael L. Bailey.”

On July 20, 2021, the Tennessee Department of Environment and Conservation brought an action in chancery court seeking the outstanding civil penalties and damages assessed in the Administrative Order, an injunction requiring Mr. Bailey to take the corrective actions listed in the order, a judgment for any appropriate additional penalties and damages, and a permanent injunction requiring Mr. Bailey to bring his property into compliance with the WQCA. Like the Administrative Order, the complaint was served on Ms. Nunley and not on Mr. Bailey at his address, with the affidavit detailing efforts at service and the conclusion Mr. Bailey was evading service.

Based on continued violations, the State filed a motion for a temporary injunction on July 27, 2021, attaching supporting declarations. A declaration from an Environmental Consultant with the Division documented continued violations in April 2021, including continuing work on-site, de-watering the wetland with a pump, and discharging sediment and stormwater into the creek. A declaration from Mr. Bailey’s neighbor meticulously documented Mr. Bailey’s violations continuing through July 23, 2021, including excavating around the creek, discharging water and materials into the creek, excavating near a sewer manhole on July 19, 2021, diverting the creek on July 21, 2021, placing culverts into the creek in order to drive over them, and breaking a sewer line and pumping raw sewage into the creek on July 22, 2021. Mr. Bailey’s neighbor also noted a dramatic decrease in wildlife and the continuous operation of heavy equipment on the site. The declaration of the Division’s Program Coordinator indicated that Mr. Bailey had not complied with the Administrative Order as of July 23, 2021, that Mr. Bailey had encapsulated and rerouted the creek, and that Mr. Bailey, on July 22, 2021, broke the City of Kingsport’s sewer line on the site. The State asserted that Mr. Bailey had failed to comply with any aspect of the Administrative Order and had continued to engage in further violations of the WQCA, including encapsulating and relocating Peaveler Branch and discharging sewage into the waterway. The order setting the hearing on the temporary injunction was likewise served on Ms. Nunley.

On August 6, 2021, counsel for Mr. Bailey filed a notice of appearance and participated in a virtual hearing on the motion for a temporary injunction. During the hearing, the court asked counsel if Mr. Bailey consented to the injunction, and after expressing some confusion regarding the scope of the injunction, counsel stated that Mr. Bailey opposed the injunction. Counsel for Mr. Bailey, his first counsel, referenced the service of process but specifically declined to raise it as an issue: “[O]bviously I didn’t represent him before the first order. And, you know, I did look at the service of process, and the service of process on this hearing, of course, isn’t an issue because I entered an appearance.”

The parties discussed the Administrative Order, and counsel agreed with the court's assessment that "at that administrative hearing, he had an opportunity to put on evidence" and that the order became a final order. The court explained that Mr. Bailey could no longer challenge the administrative determinations and that if he did not comply, the penalties would continue to increase, and counsel agreed that Mr. Bailey was "past almost everything.... except what we are going to do, you know, with the damage and how he's going to correct it." Counsel again noted that she had looked at "two service documents." Counsel observed that the documents "were both given to someone else, not him personally. And I'm not saying that that's bad service at all. I'm really not. I just wanted to make it clear that Mr. Bailey himself has never been served. . . ." The court asked if she meant "with respect to this injunction hearing," and counsel answered in the affirmative. The discussion continued, with the court stating, "Okay. So we don't have a defense for lack of service of process," and counsel agreeing, "I'm not saying we do." Regarding a restoration plan, counsel noted that she had a long history with Mr. Bailey's family and stated, "So I'm not saying that I can get him there, but I'm saying if anyone can, it will be me."

The trial court granted the temporary injunction on August 23, 2021. The court enjoined Mr. Bailey from taking any further action at the property without proper permits, required compliance with the provisions of the Administrative Order, and reserved the matter of civil penalties.

The State subsequently amended its complaint on November 10, 2021, to include the violations observed in April 2021, the relocation and encapsulation of 45 feet of the stream, and the sewer line break. The amended complaint sought the civil penalties and natural resources damages then due under the Administrative Order, damages related to enforcement of the statute, an additional Natural Resources Damages Assessment, and further civil penalties based on continued violations, as well as injunctions. The Natural Resources Damages Assessment attached to the complaint indicated that the duration of impact for some of the violations, including the encapsulation of a large section of the stream, was estimated to be over 100 years. The assessment concluded that some of the wetlands "will not return to original condition" due to the removal of mature vegetation and use of excavated shale fill from other locations.

Counsel for Mr. Bailey filed a motion to withdraw on January 19, 2022, noting that she believed the amended complaint would require her to expand beyond the initial limits of her representation. On January 25, 2022, the court entered an agreed order allowing counsel to withdraw and giving Mr. Bailey 30 days to find new counsel or to announce he would proceed pro se. He did neither.

On June 21, 2022, the State moved for summary judgment. The State attached the declaration of the Division's Program Coordinator, who had observed the numerous

violations and noted that violations were ongoing and that Mr. Bailey had still not complied with any aspect of the Administrative Order as of June 8, 2022. Also attached was the declaration of an environmental scientist for the Division, who included the methodology for calculating the additional civil penalties of \$636,480 for 51 violations between March and July 2021. The declaration of the Department of Environment and Conservation's Natural Resource Trustee Program Manager detailed the method of calculating the additional natural resource damages for enclosing and relocating the creek and for the additional wetland damages inflicted after the Administrative Order.

The State attached a statement of undisputed material facts, which included the terms of the Administrative Order, stated that Mr. Bailey was served with the Administrative Order in January 2021, and stated that Mr. Bailey did not appeal the order, which became final. The statement detailed the continued violations of the WQCA, including the sewer break and relocation and encapsulation of the stream, and the additional natural resource damages assessed. The statement of undisputed material facts asserted that Mr. Bailey continued to operate on the property in violation of the WQCA and Administrative Order.

On July 27, 2022, new counsel for Mr. Bailey filed a notice of appearance. The next day, counsel filed a motion to continue. According to the motion, Mr. Bailey retained counsel to represent him in a criminal case in Sullivan County "which appears to involve the same issues addressed by this civil case." Counsel was awaiting discovery in the criminal case, and he asserted he was reluctant to advise Mr. Bailey in the civil case due to the specter of criminal liability. The motion stated that Mr. Bailey "prays for a continuance in this case until his criminal court case is resolved." The State opposed the motion to continue, asserting it was moot because Mr. Bailey had failed to respond to the motion for summary judgment within the time allotted by the local rules, effectively ending the case, in which summary judgment would be granted without a hearing under the local rules. The State also argued that the factors in *Bell v. Todd*, 206 S.W.3d 86, 94 (Tenn. Ct. App. 2005), weighed against a continuance awaiting resolution of the criminal case.

The State's opposition to the continuance also included the declaration of Mr. Bailey's neighbor, who asserted that Mr. Bailey continued to discharge water and dig up the wetlands in July and August 2022, and the Division's Program Coordinator's declaration that Mr. Bailey was engaging in conduct violating the WQCA in contravention of the temporary injunction.

The court set the motion to continue to be argued on August 12, 2022, and it held in abeyance any action on the motion for summary judgment until the continuance was resolved. At the hearing, counsel for Mr. Bailey stated that he began representing Mr. Bailey on the criminal matter in June and that Mr. Bailey mentioned the civil matter first on July 11, 2022. He stated that because the letter enclosed with the motion for summary judgment was misdated as June 2021 rather than June 2022, he did not think the matter

was urgent. Counsel received discovery in the criminal matter on August 3, 2022, and it was currently under review by an expert witness. He noted that Mr. Bailey faced up to 42 years of imprisonment in the 21-count indictment. He argued for a continuance based on Fifth Amendment concerns and potential criminal liability attached to any statements Mr. Bailey could make in the civil matter. Counsel noted he was unsure of the degree to which the issues in the two cases overlapped: “The first [factor is] the extent of the overlap. And I’m in a posture — I don’t know the answer to that because I just received the documents from the State on the criminal prosecution.” Counsel acknowledged it was a “young” criminal case, but argued that the burden on the State would be slight, while Mr. Bailey faced a large potential criminal sentence. He argued that because the courts were in separate counties, there was no inconvenience. During argument, counsel noted,

And one of the things that I looked at, and I think it may even be res judicata, but in the initial order was, the finding of it was served on a Pam Nunley . . . , who is a friend or tenant of Mr. Bailey. And my understanding is that Mr. Bailey himself did not get a copy of it.

And so I know it may [be] res judicata that that’s an issue, but within the 30-day period of when that order was served, I don’t know that he had knowledge about it. But that’s collaterally attacking that particular issue that I’ve not even got to look into yet. So it — it puts this in a posture of a default judgment instead of a summary judgment issue. And we would ask the Court to allow this matter to be continued in time to give us — get our arms around this matter to get it resolved.

The State noted that the criminal matter was charged as occurring within the time period covered by the Administrative Order, which had already become final, and that there would be no overlap of issues. The State acknowledged that “arguably” there could be some overlap on the additional civil penalties based on more recent violations. The State argued that Mr. Bailey was “back at it” and had “ramped up” his destructive activities and that the public and third parties had a strong interest in immediate resolution.

Counsel for Mr. Bailey asked for “a little time to investigate and respond to this,” noting,

And I do — I do understand that the Court is intending that the order from the administrative was final but just on the pl[ain] — pl[ain] face of it, even best light is, there is — there was never good service until after 30 days run when they’re saying it’s too late to contest the administrative decision, but they’re treating it more as a default. But even a default has to have good service, and it does not appear that. I understand that’s collateral, but that’s — that’s due process to Mr. Bailey.

So we would ask that the Court just grant a continuance until we can make sure that we properly address all the issues on his behalf.

The chancery court denied the motion to continue. The court concluded that the *Bell* factors, particularly the interests of the public and the State's interest in expediting the proceedings, weighed against a continuance, stating, "The Court's ruling is that it denies the motion to continue this case until the criminal matter is resolved." Counsel for Mr. Bailey was asked if he had any questions in response to the ruling, and he responded that he did not. In its denial, the court noted that the proceedings before it were limited because the State was primarily seeking judicial enforcement of the Administrative Order, which had already become final. The court found that Mr. Bailey had notice of the administrative proceedings but failed to participate and that he mounted no defense and made no attempts at reparation in the civil matter. The chancery court noted that staying the civil proceedings until the resolution of the criminal matter would result in prejudice to the State consisting of unwarranted delay and continued harm to the environment. Likewise, the court found that the public interest weighed heavily in favor of resolution. The court found "virtually no" overlap of issues because most of the factual matters had been determined administratively. The court found that the criminal proceedings had just begun and that there was little potential burden for Mr. Bailey or the courts. The court granted the State's motion for summary judgment, awarding the State \$915,843.38 with post-judgment interest,² ordering Mr. Bailey to comply with the Administrative Order, and enjoining him from violating the WQCA with further unpermitted activities.

Mr. Bailey appeals. On appeal, Mr. Bailey raises two primary arguments: he asserts that the proceedings should be dismissed for lack of personal jurisdiction due to lack of service, and he asserts that the chancery court committed reversible error in denying his motion to continue. The State responds that he has waived any jurisdictional issue and that the chancery court did not abuse its discretion.

II.

Mr. Bailey asserts that the chancery court's order and the Administrative Order are void due to lack of personal jurisdiction. He notes that both the Administrative Order and the complaint were served on Ms. Nunley and not on Mr. Bailey or someone at his residence, and he asserts that the State failed to meet its burden to show that Mr. Bailey was evading service and that substitute service was appropriate. The State responds that any issue regarding personal jurisdiction was waived and that the record establishes that Mr. Bailey was evading service. We conclude that any defense of lack of personal jurisdiction was explicitly waived in front of the chancery court.

² The judgment consists of \$199,335.38 in damages and penalties assessed in the Administrative Order, \$80,028 in additional natural resources damages, and \$636,480 in additional civil penalties.

“A decision regarding the exercise of personal jurisdiction over a defendant involves a question of law.” *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d 635, 645 (Tenn. 2009). Accordingly, our review is de novo. *First Cmty. Bank, N.A. v. First Tenn. Bank, N.A.*, 489 S.W.3d 369, 382 (Tenn. 2015).

“The lawful authority of a court to adjudicate a controversy brought before it depends upon that court having jurisdiction of the subject matter and jurisdiction of the parties.” *Turner v. Turner*, 473 S.W.3d 257, 269 (Tenn. 2015). “A court ‘without personal jurisdiction of the defendant’ is wholly ‘without power to proceed to an adjudication’ binding on that defendant, regardless of the specific reason such jurisdiction is lacking.” *Id.* at 271 (quoting *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 381 (1937)). A court obtains personal jurisdiction by service of process. *Id.* A defendant’s actual knowledge of attempted service does not render the service effective if service was not accomplished in accordance with the rules. *Ramsay v. Custer*, 387 S.W.3d 566, 568 (Tenn. Ct. App. 2012).

Mr. Bailey focuses his argument on whether or not service was properly accomplished, citing Tennessee Rule of Civil Procedure 4.04, which mandates that service shall be made by “delivering a copy of the summons and of the complaint to the individual personally,” or if the individual is attempting to evade service, “by leaving copies thereof at the individual’s dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. . . .” Mr. Bailey argues that when service fails to comply with the Rule, any judgment based on that improper service is void or voidable. *See Turner*, 473 S.W.3d at 270-71. He asserts that the State failed to show that he was attempting to evade service or that leaving the documents with Ms. Nunley was proper. *But see* Tenn. R. Civ. P. 4.01(1) (providing that a process server “shall serve the summons, and the return endorsed thereon shall be proof of the time and manner of service”); *Watson v. Garza*, 316 S.W.3d 589, 595 (Tenn. Ct. App. 2008) (noting that in Tennessee, the return is prima facie evidence that the facts stated in the return are true (citing *Third Nat. Bank of Nashville v. Estes*, No. 85-142-II, 1986 WL 3155, at *5 (Tenn. Ct. App. Mar. 12, 1986))).

In any event, Mr. Bailey’s focus on whether service was proper misses the mark because the record demonstrates that a defense of lack of personal jurisdiction was explicitly waived. Mr. Bailey asserts that service was deficient for both the Administrative Order and for the complaint, and he accordingly argues that both are void. However, we conclude that a challenge to the service of either document was waived before the chancery court.

While subject matter jurisdiction concerns the boundaries of a court’s power to act and cannot be conferred by the parties, “[b]ecause the requirement of personal jurisdiction functions to protect an individual right, it can, like other such rights, be waived.” *Turner*, 473 S.W.3d at 270. Waiver occurs “when the defendant has recognized the proper pendency of the cause by making a motion that goes to the merits or by filing an answer,

without challenging personal jurisdiction.” *Landers v. Jones*, 872 S.W.2d 674, 675, 677 (Tenn. 1994) (observing Rule 12.02’s requirement to raise the defense by motion or pleading³ and noting the Rule “dispenses with the requirement of entering a special appearance to contest personal jurisdiction”); see *Turner*, 473 S.W.3d at 271 n.14 (“Additionally, Mother did not confer personal jurisdiction upon the trial court by voluntarily participating in the termination proceeding.”). A court may acquire personal jurisdiction from “acts from which it can reasonably be inferred that the party recognizes and submits itself to the jurisdiction of the court.” *Dixie Sav. Stores, Inc. v. Turner*, 767 S.W.2d 408, 410 (Tenn. Ct. App. 1988). Participation in a joint motion for continuance does not in itself constitute a waiver of the right to raise personal jurisdiction because it does not recognize that the cause is properly before the court and seeks no affirmative action from the court. *Landers*, 872 S.W.2d at 677 (citing *Patterson v. Rockwell Int’l*, 665 S.W.2d 96, 100 (Tenn. 1984)). On the other hand, “[a] defendant may . . . , by his conduct, be estopped to object that service was improper. ‘Such conduct may include participating in discovery, in addition to failing to raise the issue of insufficiency of service clearly or with the necessary specificity.’” *Watson*, 316 S.W.3d at 599 (quoting *Faulks v. Crowder*, 99 S.W.3d 116, 125 (Tenn. Ct. App. 2002)); see *Taylor v. McKinnie*, No. W2007-01468-COA-R3-JV, 2008 WL 2971767, at *3 (Tenn. Ct. App. Aug. 5, 2008) (a challenge to personal jurisdiction was waived when the party appeared at the hearing, testified, and did not challenge service, venue, or jurisdiction); *P.E.K. v. J.M.*, 52 S.W.3d 653, 660 (Tenn. Ct. App. 2001) (the court had personal jurisdiction when the defendants filed a motion to dismiss attacking subject matter jurisdiction but not challenging personal jurisdiction); *Guardsmark, Inc. v. Borg-Warner Protective Servs.*, No. 2A01-9409-CH-00207, 1998 WL 959664, at *6 (Tenn. Ct. App. Nov. 4, 1998) (challenge to personal jurisdiction was waived

³ Tennessee Rule of Civil Procedure 12.02 governs the raising of defenses:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion in writing: . . . (2) lack of jurisdiction over the person. . . .

The Rules also address waiver:

A party waives all defenses and objections which the party does not present either by motion as hereinbefore provided, or, if the party has made no motion, in the party’s answer or reply, or any amendments thereto, (provided, however, the defenses enumerated in 12.02(2), (3), (4) and (5) shall not be raised by amendment), except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, the defense of lack of capacity, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15 in the light of any evidence that may have been received.

Tenn. R. Civ. P. 12.08.

when, among numerous other acts relating to the merits of the action, the defendants signed a consent order for a temporary injunction); *but see Smith v. Smith*, No. E2017-01295-COA-R3-CV, 2019 WL 410702, at *11 (Tenn. Ct. App. Jan. 31, 2019) (responding in opposition to plaintiff’s motion to strike its response, seeking to withdraw, responding to request for admissions, and seeking to quash certain discovery requests were not actions that recognized the proper pendency of the conversion claim to waive objection to personal jurisdiction for lack of service).

Mr. Bailey argues that counsel’s notice of appearance was, in itself, insufficient to constitute a waiver of personal jurisdiction. *See Associates Asset Mgmt., LLC v. Smith*, No. M2019-02217-COA-R3-CV, 2020 WL 6445019, at *3 (Tenn. Ct. App. Nov. 3, 2020) (“[T]he mere filing of a notice of appearance by counsel does not constitute a general appearance for the purposes of waiver.”). However, he does not address the particulars of prior counsel’s participation in the hearing on the motion for a temporary injunction.

At that hearing, Mr. Bailey’s first counsel, after being informed of the contours of the proposed injunction, stated that Mr. Bailey opposed the motion. *See Patterson*, 665 S.W.2d at 99 (personal jurisdiction may be conferred by “making or resisting of any motion”). Counsel then unambiguously and explicitly waived the issue of lack of jurisdiction due to inadequate service of the complaint. Counsel referenced the service documents and told the court, “And I’m not saying that that’s bad service at all. I’m really not.” Counsel continued to reference and explicitly waive the issue, assuring the court she was “not saying” that Mr. Bailey was asserting a “defense for lack of service of process.” Counsel then told the court that service of process for the hearing “isn’t an issue.” Regarding service of the Administrative Order, counsel stated she did not represent Mr. Bailey during the time of the “first order,” but that she did “look at service of process.” She never asserted that service of the Administrative Order was insufficient. *See Watson*, 316 S.W.3d at 599 (noting that waiver includes “failing to raise the issue of insufficiency of service clearly or with the necessary specificity” (quoting *Faulks*, 99 S.W.3d at 125)). In fact, counsel agreed with the chancery court that Mr. Bailey had had an opportunity to defend the matter at the administrative level and that he was “past almost everything” except rectifying the damage.

Likewise, Mr. Bailey’s current counsel did not challenge the chancery court’s jurisdiction. Counsel never mentioned the word “jurisdiction” during the hearing on the continuance. He did make reference to improper service, apparently related to the Administrative Order, as he noted the issue “may be res judicata” or would be “collateral.” These references did not rise to the “necessary specificity” to raise before the chancery court a jurisdictional challenge based either on the service of the complaint or the service of the Administrative Order. *See Watson*, 316 S.W.3d at 599. We note that the unopposed statement of undisputed material facts states that Mr. Bailey was served with the Administrative Order. We conclude that Mr. Bailey has waived any challenge to personal jurisdiction.

In his reply brief, Mr. Bailey asks for plain error review, citing *State v. Vance*, but he does not address the factors relevant to plain error. *See State v. Vance*, 596 S.W.3d 229, 254 (Tenn. 2020) (noting that to establish plain error, (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error must be necessary to do substantial justice). This court has previously noted that, as indicated by the use of the term “accused” in the factors, this doctrine “is generally applicable to criminal cases rather than to civil cases, such as the one under consideration.” *Carman v. Kellon*, No. M2019-00857-COA-R3-CV, 2020 WL 7422071, at *3 (Tenn. Ct. App. Dec. 18, 2020). In any event, Mr. Bailey has not presented an argument regarding why he should be relieved of the explicit waiver of personal jurisdiction that he made before the chancery court, and we decline to address the matter for plain error. *See Waters v. Coker*, 229 S.W.3d 682, 690 (Tenn. 2007) (“There has been no specific allegation of plain error in this instance and no argument addressing the factors permitting its application.”); *Smith v. Benihana Nat’l Corp.*, 592 S.W.3d 864, 876 n.14 (Tenn. Ct. App. 2019) (“In the absence of any argument in support of plain error, we likewise decline to relieve Appellants from the waiver caused by their failure to file a motion for new trial.”). Accordingly, the challenge to personal jurisdiction has been waived.

III.

Mr. Bailey also challenges the chancery court’s denial of the motion to continue. On appeal, Mr. Bailey asserts he was only asking for a short continuance to allow counsel to investigate the criminal matter. He asserts that the court erred in its findings regarding the factors in *Bell v. Todd*, 206 S.W.3d 86, 94 (Tenn. Ct. App. 2005). The State disagrees with Mr. Bailey’s characterization of the length of his requested continuance and responds that the chancery court did not abuse its discretion.

Generally, the determination of whether to grant a motion to continue is a discretionary one. *Nagarajan v. Terry*, 151 S.W.3d 166, 172 (Tenn. Ct. App. 2003); *Sanjines v. Ortwein & Associates, P.C.*, 984 S.W.2d 907, 909 (Tenn. 1998) (reviewing for abuse of discretion when the appellant did not challenge the grant of summary judgment but only the denial of a continuance). More particularly, “[t]he decision whether or not to stay civil litigation in deference to parallel criminal proceedings is discretionary” and involves balancing the interest of the party seeking the continuance against prejudice to the party opposing it. *Bell*, 206 S.W.3d at 94. A court reviewing for abuse of discretion does so with “an awareness that the decision being reviewed involved a choice among several acceptable alternatives.” *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). The appellate court may not substitute its discretion for that of the court below. *Id.* Instead, the appellate court determines whether the trial court strayed beyond the applicable legal standards or failed to consider the requisite factors. *Id.* A trial court abuses its discretion

when it applies “incorrect legal standards, reaches an illogical conclusion, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party.” *West v. Schofield*, 460 S.W.3d 113, 120 (Tenn. 2015) (citing *State v. Banks*, 271 S.W.3d 90, 116 (Tenn. 2008)).

When a litigant faces parallel civil and criminal proceedings, the pendency of the related criminal matter may provide a basis to continue the civil proceeding. *Bell*, 206 S.W.3d at 94. However, litigants are not entitled to “blanket protection from the perils of contemporaneous civil and criminal proceedings” or “to a stay or continuance of civil litigation simply because criminal charges are pending against them.” *Id.* at 93-94. Instead, the *Bell* Court provided factors that should be considered in determining whether to grant a stay based on parallel criminal and civil proceedings.

Courts customarily consider the following factors, among others, in deciding whether to stay a civil proceeding pending the resolution of a criminal case: (1) the extent to which the issues in the civil and criminal proceedings overlap, (2) the status of the criminal proceeding, (3) the plaintiff’s interests in expeditious civil proceedings weighed against the prejudice to the plaintiff caused by the delay, (4) the hardship on the defendant, including the burden on the defendant if the cases go forward in tandem, (5) the convenience of both the criminal and the civil courts, and (6) the interests of third parties and the public.

Id. at 94.

With regard to the length of the continuance sought, though Mr. Bailey asserts that he “was not requesting a continuance of the civil case until resolution of the parallel criminal case,” the record runs counter to this assertion. Instead, Mr. Bailey filed a written motion that sought “a continuance in this case until his criminal court case is resolved.” In support of his contention that his continuance request was shorter than what he advanced in his written motion, Mr. Bailey points to statements he made in oral argument before the trial court asking “the Court to allow this matter to be continued in time to give us — get our arms around this matter to get it resolved” and “just grant a continuance until we can make sure that we properly address all the issues on his behalf” and for “a little time to investigate and respond to this.” However, Mr. Bailey never specified in front of the chancery court that he was no longer requesting a continuance for the duration of the criminal matter, nor did he specify the length of the requested continuance. The record reflects this, and Mr. Bailey’s counsel appropriately conceded as much in his oral argument before this court.⁴

⁴ Judge’s Question: Counsel, did you clarify at all for the trial court how long . . . I understand that orally you are saying I said I really only need until I can get my arms around this, my hands around this case. Did you clarify how long that was?

The chancery court's oral ruling made clear that the court was deciding on the basis of the written motion: "The Court's ruling is that it denies the motion to continue this case until the criminal matter is resolved." Mr. Bailey was specifically given an opportunity to respond to the court's oral decision, and instead of clarifying that he was seeking a different relief, he stated he had no questions. Moreover, he does not present on appeal any argument regarding what he could have accomplished by obtaining a shorter continuance or how the short continuance would have benefitted him given the procedural posture of the case. We conclude it was not error for the chancery court to render a judgment based on the written motion before it, which asked for a continuance until the resolution of the criminal case.

Turning to the application of the continuance factors set forth in *Bell*, in his appellate argument, Mr. Bailey asserts the trial court erred in its analysis. Initially, he argues the court erred in not considering as one of the "other" factors referenced by *Bell* the fact that he asked for a shorter continuance, but because the record shows that he requested a continuance for the duration of the criminal proceedings, we discern no error. Regarding factors (2) and (5), Mr. Bailey does not appear to challenge the chancery court's determination that the criminal case was at its early stages and that there was no inconvenience to any court from denying the continuance. *See id.* However, Mr. Bailey argues regarding factor (1) that the court erred in finding there was no overlap of the issues and erred in finding that the State presented evidence of, or that Mr. Bailey conceded, the absence of overlap. *See id.* However, the court's order accurately states that Mr. Bailey failed to present any argument that there was, in fact, overlap. It further accurately notes that the State argued that the date covered by the indictment, April 8, 2020, related only to actions adjudicated by the November 2020 Administrative Order, which had long become final. Because the chancery court was not at liberty to revisit the factual determinations of the Administrative Order, the court did not err in concluding there was no significant overlap.

Mr. Bailey also asserts regarding factor (3) that a denial of the continuance was prejudicial because it prevented him from raising the jurisdictional issue. *See id.* However, as we determined above, Mr. Bailey had explicitly waived any challenge to personal jurisdiction long before his second attorney became involved in the case. Accordingly, there was no prejudice to Mr. Bailey. Moreover, the court did not abuse its discretion in determining that the State, which had sought since 2017 to prevent Mr. Bailey from perpetuating further environmental harm in contravention of Tennessee law,⁵ would suffer prejudice from further delay, given Mr. Bailey's continuous history of noncompliance.

Counsel's Response: I did not. . . . I did not say I need a month or two months.

⁵ Tenn. Code Ann. § 69-3-101 et seq.

Regarding factor (4), Mr. Bailey asserts the chancery court also erred in finding that there was little potential for burden to Mr. Bailey from tandem proceedings, arguing instead that his large criminal exposure militated in favor of finding a burden. *See id.* However, the chancery court based this finding on the posture of the civil case, in which a motion for summary judgment had been filed and the time for opposing the motion had passed. Because the court's entering a judgment on an unopposed motion for summary judgment enforcing a prior final Administrative Order did not require any potentially incriminating response from Mr. Bailey or implicate Mr. Bailey in any criminal exposure, we conclude this was not an abuse of discretion.

The court placed the greatest emphasis on factor (6), the interests of the public and third persons. *See id.* Mr. Bailey asserts that the court's heavy reliance on this factor was "materially inaccurate" and not supported by the record because the temporary injunction was already in place to protect these interests. However, the chancery court relied in part on the declarations, submitted by the State and unopposed by Mr. Bailey, which established that not only had Mr. Bailey failed to submit the previously assessed penalties and damages and failed to submit or implement the required restoration plan, but he in fact continued to violate the WQCA by further destroying wetlands on which he, individually, had already had impacts which were irremediable or which would take over a century to erase. Given Mr. Bailey's flagrant and persistent violations of the temporary injunction, the court's conclusion that the public interest weighed heavily in favor of concluding the civil case was not a clearly erroneous assessment of the evidence.

At the time the court rendered its judgments, the civil case had been pending for approximately one year, during which time Mr. Bailey continued to violate the dictates of the Administrative Order. Mr. Bailey had been aware since January that he needed to obtain new counsel, but new counsel first filed a notice of appearance two days before the hearing on the motion for summary judgment was set and after the time allotted by local rule to respond to the motion. The chancery court applied the proper legal standards, examined the *Bell* factors, and the court exercised its discretion to deny the motion for a continuance, giving particular weight to the public's interest in preserving the wetlands in accordance with Tennessee law. Simply stated, the trial court did not abuse its discretion.

IV.

For the reasons discussed above, we affirm the judgment of the Chancery Court for Davidson County. Costs of the appeal are taxed to the Appellant, Michael L. Bailey, for which execution may issue if necessary.

JEFFREY USMAN, JUDGE