COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1189-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

EAU CLAIRE COUNTY,

PLAINTIFF-RESPONDENT,

V.

TAMARA J. KNUTH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: GREGORY A. PETERSON, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Tamara Knuth appeals a judgment convicting her of operating a motor vehicle while under the influence of an intoxicant (OMVWI). She claims that the trial court erred in denying her motion to suppress evidence on

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS., and expedited under RULE 809.17, STATS.

the grounds that the arresting officer did not have probable cause to arrest her for OMVWI. We conclude, however, that Knuth forfeited the right to appeal the denial of her suppression motion when she entered a guilty plea to the charge of first-offense OMVWI under the Eau Claire County traffic ordinance. Accordingly, we affirm the judgment.

BACKGROUND

¶2 An Eau Claire County sheriff's deputy stopped Knuth for speeding. The deputy detected a "slight" odor of intoxicants on or about Knuth's person, and also observed that her speech was "slightly slurred," her face was flushed and she avoided direct eye contact with him during conversation. Knuth admitted to the deputy that she had consumed alcohol prior to the stop, and she agreed to submit to field sobriety testing.

¶3 The deputy then administered the "finger dexterity" test, during which Knuth did not recite a proper numbering sequence. On the "walk and turn" test, Knuth did not count her steps, did not place her feet in the proper "heel to toe" pattern as she was directed, and she made an improper turning maneuver. The deputy then administered a preliminary breath test (PBT), which yielded a result of .121. The deputy then arrested Knuth for OMVWI, first-offense, under the Eau Claire County traffic ordinance.

¶4 Knuth moved to suppress all evidence gathered after the deputy stopped and arrested her, claiming that the deputy lacked probable cause to arrest her for OMVWI. After hearing the deputy's testimony, the trial court concluded that "the results of the field tests aren't overwhelming," but that those tests, together with the result of the PBT, established "more than enough probable cause to authorize the taking of Ms. Knuth into custody." The court thus denied Knuth's

motion to suppress. A month later, Knuth entered a guilty plea and was convicted of OMVWI. She appeals the judgment of conviction.

ANALYSIS

¶5 The County argues that Knuth forfeited her right to appeal the denial of her motion to suppress evidence when she pled guilty to first offense OMVWI in this civil forfeiture action. The County is correct. *See* ***County of Racine v. Smith***, 122 Wis.2d 431, 434-37, 362 N.W.2d 439, 441-42 (Ct. App. 1984). We held in ***Smith*** that the "guilty plea waiver rule" applies to both civil and criminal cases, and that the statutory exception for criminal cases, § 971.31(10), STATS., does not apply in civil forfeiture actions, such as the one before us. *See* ***id.*** at 438, 362 N.W.2d at 442-43. We suggested in ***Smith*** that the legislature might wish to create an exception similar to that set forth in § 971.31(10) for civil forfeiture cases, *see* ***id***. at 437-38, 362 N.W.2d at 442, but the legislature has not chosen to do so.

¶6 Knuth responds, correctly, that the forfeiture rule, or waiver rule as it is most-often called, is a rule of administration, not a rule of jurisdiction. That is, this court may review a nonjurisdictional issue in spite of the entry of a guilty or no contest plea, although we are under no obligation to do so. *See* ***County of Ozaukee v. Quelle***, 198 Wis.2d 269, 275-76, 542 N.W.2d 196, 198 (Ct. App. 1995). Knuth asserts that the same reasons which led us to not apply the forfeiture rule in ***Quelle***, should also govern in this case. We disagree.

¶7 We acknowledge that Knuth's guilty plea "avoid[ed] an unnecessary and protracted trial when the sole issue [was] a review of a suppression motion." ***Id.*** at 275, 542 N.W.2d at 198. We also acknowledge that "this does not appear to be a case where the defendant took a chance on a more lenient sentence," and that

Knuth's offense, like ***Quelle's***, is a "garden-variety first offender driving while intoxicated case." ***Id.*** at 275-76, 542 N.W.2d at 198. Unlike the circumstance in ***Quelle***, however, the issue Knuth wishes to raise in this appeal was *not* "squarely presented before the trial court." ***Id.*** at 275, 542 N.W.2d at 198.

¶8 The issue, as Knuth frames it in this appeal, is whether the arresting officer had probable cause for her arrest *before* administering the PBT. In making her arguments, she relies heavily on our opinion in ***County of Jefferson v. Renz***, 222 Wis.2d 424, 588 N.W.2d 267 (Ct. App. 1998), *rev'd,* No. 97-3512 (Wis. Dec. 22, 1999). We decided ***Renz*** on October 15, 1998, almost six months prior to the hearing on Knuth's motion to suppress, which was conducted on March 26, 1999. There is no indication in the record, however, that Knuth cited ***Renz*** to the trial court, or that she argued in the trial court that the administration of the PBT was improper because the deputy lacked probable cause to arrest her for OMVWI before asking Knuth to submit to the PBT.

¶9 Knuth did object at one point during the deputy's testimony that there was insufficient foundation to admit evidence of the PBT result. The court concluded that the County had presented a sufficient basis for the deputy to testify regarding the administration of the PBT and its result. However, at the conclusion of the hearing, the sum total of Knuth's argument was: "We just don't think there was enough probable cause, Your Honor, to arrest." Had Knuth articulated to the trial court the ***Renz***-based argument she now presents to us, the trial court would have had the opportunity to make explicit findings and conclusions regarding the presence or absence of probable cause prior to the administration of the PBT. As the record stands, we do not have the benefit of a trial court decision on the issue Knuth would have us decide. In short, the issue of the allegedly improper administration of the PBT under this court's holding in ***Renz*** was not "squarely

presented before the trial court." *Cf.* ***State v. Rogers***, 196 Wis.2d 817, 827, 539 N.W.2d 897, 901 (Ct. App. 1995) ("We will not ... blindside trial courts with reversals based on theories which did not originate in their forum.").

¶10 We also note that the fourth reason mentioned in ***Quelle*** for reviewing a forfeited issue is not present in this case. We said in ***Quelle*** that there were no published cases "applying the pertinent language" from a recent supreme court case, implying that a published opinion from our court would be helpful to bench and bar. *See* ***Quelle***, 198 Wis.2d at 276, 542 N.W.2d at 198. This is a one-judge appeal under § 752.31(c), STATS., and this opinion will thus not be published. *See* RULE 809.23(1)(b)4, STATS. Knuth has not requested that the case be converted to a three-judge appeal so that a published opinion might result. We also conclude that the present case does not merit our own request for its conversion to a three-judge appeal. Thus, the present appeal cannot yield a helpful precedent, as we concluded was the case in ***Quelle***.

¶11 In summary, Knuth forfeited her right to challenge the denial of her suppression motion when she entered a plea of guilty to the charge of OMVWI under the Eau Claire traffic ordinance, a civil forfeiture action. We are not convinced that reasons exist for us to forgo the forfeiture rule in this case.

¶12 Knuth asserts that it "would be unfortunate for her to now be denied the opportunity to have the suppression motion decision reviewed, simply because she expedited the process by avoiding an unnecessary trial." It may well be "unfortunate for her," as Knuth maintains, but an extension of the exception to the guilty plea waiver rule under § 971.31(10), STATS., to civil forfeiture actions is a matter for the legislature, not this court. Moreover, we note that many appeals of denials of suppression motions in civil forfeiture actions come to us without a full

bench or jury trial having been conducted in the circuit court. Rather, in cases where the only potentially meritorious defense is based on the suppression of evidence, the defendant will often proceed to a brief bench "trial on stipulated evidence," such as police reports and chemical test results. This procedure avoids the entry of a guilty or no contest plea, while still minimizing litigation costs for the defendant, the prosecuting entity and the circuit court.[2]

CONCLUSION

¶13 For the reasons discussed above, we affirm the judgment of conviction.

By the Court.—Judgement affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

[2] Although we conclude that this case is governed by the guilty plea waiver rule, we note that the supreme court has reversed our decision in ***County of Jefferson v. Renz***, 222 Wis.2d 424, 588 N.W.2d 267 (Ct. App. 1998). *See* ***County of Jefferson v. Renz***, No. 97-3512 (Wis. Dec. 22, 1999). Our review of the record convinces us that, had we reached the merits of Knuth's argument on appeal, the result would have been the same. That is, the testimony of the deputy, which we have summarized in the opinion, sufficiently establishes that he had "probable cause to believe" that Knuth was OMVWI before requesting the PBT, as the supreme court has now interpreted that phrase. *See* ***Renz***, No. 97-3512, slip op. at ¶44 (Wis. Dec. 22, 1999) (concluding that "probable cause to believe" for purposes of requesting a PBT means "a level of proof greater than the reasonable suspicion necessary to justify an investigative stop but less than that required to establish probable cause for arrest.").