COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP816

Cir. Ct. Nos. 2007TR10475
2007TR10476

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

VILLAGE OF ELM GROVE,

PLAINTIFF-RESPONDENT,

V.

JUDITH M. PAULICK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: LINDA M. VAN DE WATER, Judge. *Affirmed*.

¶1 SNYDER, J.[1] Judith M. Paulick appeals from a judgment that followed her no contest plea to driving with a prohibited blood alcohol content,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

first offense. Paulick contends that the circuit court erred when it denied her motion to suppress evidence obtained during the investigatory traffic stop. She argues that the stop was not supported by reasonable suspicion and that her arrest was not supported by probable cause. She further contends that the circuit court erred when it refused to allow the arresting officer's administrative hearing testimony into evidence. We affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

¶2 On September 15, 2007, Village of Elm Grove Police Officer Preston Nobile observed a vehicle traveling on Pilgrim Parkway with a left tail light out. Nobile initiated a traffic stop and the driver identified herself as Paulick. She had a passenger in the car named Jerome Rinzel. Paulick stated that she did not know her tail light was out and, as she was speaking, Nobile noticed that Paulick had very slurred speech, her eyes were bloodshot and glassy and she seemed confused and disoriented. Paulick told Nobile that she had been at the Venus Club where she had consumed a few drinks.

¶3 Nobile asked Paulick to perform field sobriety tests, including the horizontal gaze nystagmus test, the walk-and-turn and one-leg stand tests, and the alphabet and counting backwards tests. Nobile observed clues for impairment in each test. He then performed a preliminary breath test. Nobile concluded that Paulick could not operate a motor vehicle safely and he placed her under arrest for operating while intoxicated. A subsequent evidentiary chemical test showed Paulick's blood alcohol concentration to be .18, well over the limit for a first offense. *See* WIS. STAT. § 340.01(46m)(a).

¶4 Paulick demanded a jury trial and filed a motion to suppress. The court held a motion hearing on February 14, 2008. Paulick argued there, as she

does here, that Nobile had no reason to initiate traffic stop and, further, that he had no probable cause for arrest. At the hearing, Paulick attempted to introduce testimony Nobile gave at a previous administrative hearing, but the court refused to allow the testimony.

¶5 Paulick's passenger on the night of the arrest, Rinzel, testified at the hearing. Rinzel indicated that at the direction of defense counsel he took three photographs of the vehicle that Paulick had been driving that night. The first photograph was taken the day before the motion hearing at approximately 7:30 a.m. at a distance of thirty feet. The second photograph was taken at approximately 9:15 p.m. at a distance of two hundred feet. In the second photograph, the inside tail light bulb was removed to "simulate[] the condition on the night in question." The third photograph was taken on February 12 at about 9:15 p.m. and at a distance of two hundred feet, but in this picture the tail light bulb had not been removed. Rinzel explained that on this particular vehicle, there were two red tail lights on the rear of the car along with one tail light on the extreme right side and one on the extreme left side at the rear of the car. On the night of Paulick's arrest, both right side tail lights were working, the outside left tail light was working, but the inside left tail light was not.

¶6 At the conclusion of the hearing, the court denied Paulick's motion to suppress. Specifically, the court held that the defective tail light provided Nobile with reasonable suspicion of an equipment violation and supported the investigative traffic stop. The court further determined that Paulick's slurred speech, bloodshot eyes, admission that she had been drinking, performance on field sobriety tests, and her preliminary breath test results together supported her arrest for OWI.

¶7 Paulick then pled no contest to the charge of operating with a prohibited alcohol concentration and the OWI charge was dismissed. She now appeals, seeking reversal of the conviction and remand to the circuit court with instructions that the motion to suppress be granted.[2]

DISCUSSION

¶8 Paulick presents six issues on appeal, which can be grouped into three topic areas: (1) her right to appeal despite her no contest plea, (2) whether Nobile violated her constitutional right to be free from unreasonable seizures when he initiated the traffic stop, and (3) the court's decision to preclude the use of Nobile's administrative hearing testimony.[3]

¶9 We begin with the issue of waiver. The Village argues that Paulick waived her right to appeal because her no contest plea was made knowingly and voluntarily. Paulick contends that ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995), *partially overruled on other grounds* by ***Washburn Co. v. Smith***, 2008 WI 23, ¶64, 308 Wis. 2d 65, 746 N.W.2d 243, established a discretionary standard by which we may decline to apply the waiver

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[2] In her appellate brief, Paulick fails to present a statement of the facts that complies with WIS. STAT. RULE 809.19(1)(d) and (e). Rather, she editorializes and relies on a map never admitted into evidence in this case. She also attacks the credibility of the arresting officer, calling him evasive and cavalier. We caution Paulick that editorial comment and argument interspersed in what RULE 809.19(1)(d) and (e) requires, namely an objective and completely accurate recitation of the facts, is inappropriate. *See* ***Arents v. ANR Pipeline Co.***, 2005 WI App 61, ¶5 n.2, 281 Wis. 2d 173, 696 N.W.2d 194.

[3] Paulick also argues that the circuit court applied the wrong burden of proof for an OWI conviction. She cites to the motion hearing transcript where the court stated that the Village's burden was "preponderance of the evidence." Paulick mischaracterizes the court's holding. The court was addressing the motion to suppress and the totality of the circumstances supporting Nobile's reasonable suspicion for the traffic stop. It was not stating the burden of proof for an OWI charge.

rule. Paulick emphasizes that the ***Quelle*** court decided not to apply the waiver rule because, among other considerations, the no contest plea saved administrative costs and time, the appeal involved the review of a suppression motion, and the issue on appeal was sufficiently raised and argued such that an adequate record existed for review. *See* ***Quelle***, 198 Wis. 2d 269 at 275. Paulick urges us to exercise our discretion likewise.

¶10 The Village directs us to ***County of Racine v. Smith***, 122 Wis. 2d 431, 437, 362 N.W.2d 439 (Ct. App. 1984), where we stated that "a voluntary and understanding guilty or no contest plea in a civil case constitutes a waiver of the right to appeal." The Village emphasizes that the legislature carved out a narrow exception by allowing an appeal from a no contest or guilty plea following the denial of a motion to suppress in criminal cases but not civil ones. *See* WIS. STAT. § 971.31(10). In ***Smith***, we stated that the guilty or no contest waiver rule was "clearly consistent with established civil law waiver principles." ***Smith***, 122 Wis. 2d at 437. ***Smith*** specifically states that, although the goal of reducing the number of contested trials when the only disputed issue is whether the resolution of a motion to suppress was proper would be advanced by applying § 971.31(10) to guilty or no contest pleas in civil cases, "the statute applies only to criminal cases. The exception is in derogation of common law and must be strictly construed." ***Smith***, 122 Wis. 2d at 435. The Village urges us to follow ***Smith***.

¶11 We agree with the Village that the waiver rule applies. It is a general principle of law that a "guilty plea, made knowingly and voluntarily, waives all nonjurisdictional defects and defenses, including alleged violations of constitutional rights prior to the plea." ***State v. Aniton***, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994). A no contest plea is the equivalent of a guilty plea, and waives the right to raise nonjurisdictional defects and defenses, including

claimed violations of constitutional rights. ***Smith***, 122 Wis. 2d at 434. In criminal cases, an exception exists for orders denying motions to suppress evidence. WIS. STAT. § 971.31(10). That exception, however, does not apply to civil forfeiture matters. ***Smith***, 122 Wis. 2d at 436.

¶12 Waiver is not a jurisdictional bar to an appeal, but rather a principle of judicial administration. Paulick is correct when she asserts that we may, in our discretion, decline to apply the waiver rule. In first offense OWI matters, which are civil in nature, this court may consider four factors: (1) the administrative efficiencies resulting from the plea, (2) whether an adequate record has been developed, (3) whether the appeal appears motivated by the severity of the sentence, and (4) the nature of the potential issue. *See* ***Quelle***, 198 Wis. 2d at 275-76.

¶13 We recognize that, particularly with regard to the first three factors, several facts underlying this case align with those in ***Quelle***. For example, Quelle pled no contest to a charge of OWI, first offense, after the circuit court denied her motion to suppress. ***Id.*** at 273. The issue raised on appeal was presented before the circuit court and an adequate record of the proceedings existed. ***Id.*** at 275. The no contest plea avoided a jury trial that had been scheduled, and the penalty assessed was not unusual. ***Id.*** at 275-76.

¶14 In her appeal, however, Quelle asserted that the results of her breath alcohol test should have been suppressed because she was subjectively confused by the officer's conduct. *See* ***id.*** at 273. One of the primary reasons that we chose not to apply the waiver rule in ***Quelle***, as reflected in the fourth factor, was the nature of the issue presented. At that time there were no published cases addressing the "subjective confusion" concept acknowledged in ***Village of Oregon***

v. Bryant, 188 Wis. 2d 680, 524 N.W.2d 635 (1994). The ***Quelle*** opinion offered an opportunity to address the viability of the "subjective confusion" defense arguably sanctioned by ***Bryant***. *See* ***Quelle***, 198 Wis. 2d at 273, 276. There is no equally compelling reason to decline to apply the waiver rule here.

¶15 Our legislature carved a very specific and very limited exception to the waiver rule in WIS. STAT. § 971.31(10). We presume the legislature chooses its words carefully and precisely to express its meaning. ***Ball v. District No. 4, Area Bd.***, 117 Wis. 2d 529, 539, 345 N.W.2d 389 (1984). If the legislature intended for the exception to the waiver rule to apply in civil cases, it could have chosen words to express that intent. Furthermore, if the legislature determined that the ***Smith*** interpretation of the exception was too strict, it could have revised the statute. Notably, in ***Smith***, we brought the matter to the legislature's attention:

> We feel compelled to note, however, that the burgeoning civil forfeiture caseloads generally, and operating under the influence cases specifically, warrant consideration by the bench, bar, and legislature of an appropriate statute akin to [WIS. STAT.] § 971.31(10) …. [W]e should investigate appropriate methods by which to accord standing to seek review of fundamental and important evidentiary questions while avoiding an unnecessary and protracted trial.

Smith, 122 Wis. 2d at 437-38. Nonetheless, the legislature did not change the waiver rule exception to apply to civil cases. "[T]he legislature is presumed to know that in the absence of the legislature explicitly changing the law, the court's construction will remain unchanged." ***Blazekovic v. City of Milwaukee***, 225 Wis. 2d 837, 845, 593 N.W.2d 809 (Ct. App. 1999), *aff'd*, 2000 WI 41, 234 Wis. 2d 587, 610 N.W.2d 467.

¶16 Paulick raised additional issues on appeal. Because we conclude that she has waived nonjurisdictional defects and defenses, we do not reach the merits of her arguments.

CONCLUSION

¶17 The court of appeals is a fast-paced, high-volume, error-correcting court, ***State ex rel. Swan v. Elections Board***, 133 Wis. 2d 87, 93, 394 N.W.2d 732 (1986); therefore, in the absence of a compelling reason to do so, we will not extend our limited resources by ignoring the guilty or no contest plea waiver rule. Paulick, by pleading no contest, has waived her right to raise nonjurisdictional defects or defenses. *See* ***Smith***, 122 Wis. 2d at 434.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809. 23(1)(b)4.