

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 8, 2001

Cornelia G. Clark
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.

No. 01-0441-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FLORIAN A. KRESS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed.*

¶1 ANDERSON, J.¹ Florian A. Kress contends that the State's attempt to punish him criminally for his second operating while intoxicated (OWI) arrest within hours of his first drunk driving arrest contravenes the ex post facto provision of the federal constitution. We do not reach Kress's constitutional

¹ This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

challenge because his plea of no contest to the second offense waives any constitutional violations that may have occurred before his plea; therefore, we affirm.

¶2 In the late evening hours of March 24, 2000, and the early morning hours of March 25, Kress was arrested twice for drunk driving. Kress filed a motion to dismiss the charges arising from the second arrest on the grounds that charging him with a criminal offense violated his due process rights and subjected him to an ex post facto punishment. He argued that when one of the two arrests was resolved as a civil matter, the open arrest would automatically become a criminal matter and he would be subject to criminal penalties. He contended that this constituted ex post facto punishment because when he drove drunk the second time, he was unaware that it was a possible criminal violation. The circuit court denied his motion.

¶3 Kress and the State eventually entered into a plea agreement involving the charges from both arrests. After Kress entered a guilty or no contest plea to the OWI charge arising from his first arrest, the State filed a criminal traffic complaint charging Kress with operating while intoxicated, second offense, in violation of WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(b) and operating with a prohibited blood alcohol content, second offense, in violation of §§ 346.63(1)(b) and 346.65(2)(b). Kress entered a no contest plea to the second offense OWI charge and the circuit court imposed a sentence within statutory parameters.

¶4 On appeal, Kress asserts that when he drove a vehicle within an hour of his first arrest for OWI, he was not aware that his conduct was criminal. He argues that there is an “inherent unfairness in declaring conduct ‘a crime, and mak[ing it] punishable as such, when it was not a crime, when done.” Kress

contends that the spirit of the ex post facto clause of the federal constitution protects against changing a prosecution from a civil forfeiture action to a criminal action before judgment is entered.

¶5 Kress raised this issue in a motion that the circuit court rejected. Rather than seek leave to appeal a nonfinal order, WIS. STAT. § 808.03(2), and immediately challenge the denial of his constitutional challenge to his second arrest, Kress entered a no contest plea as part of a plea agreement with the State.

¶6 “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). This is true, of course, of all pleas that result in conviction, “whether denominated as a ‘guilty plea,’ a ‘no contest plea,’ or an ‘Alford plea.’” *State v. Kazee*, 192 Wis. 2d 213, 219, 531 N.W.2d 332 (Ct. App. 1995) (citation omitted). As a matter of policy, however, WIS. STAT. § 971.31(10) preserves to a defendant the right to appellate review of the denial of motions to suppress evidence “notwithstanding the fact that [the] judgment [of conviction] was entered upon a plea of guilty.” This provision applies to a no contest plea as well. *State v. Esser*, 166 Wis. 2d 897, 899 n.1, 480 N.W.2d 541 (Ct. App. 1992).

¶7 Kress did not preserve his right to appeal when at the plea hearing he advised the circuit court that he would be appealing its rejection of his challenge grounded upon the ex post facto clause of the federal constitution. “[I]n situations in respect to orders or objections to which the guilty-plea-waiver rule may apply, it is to be applied even though a defendant expressly states his intent not to waive certain issues on appeal.” *State v. Riekkoff*, 112 Wis. 2d 119, 127, 332 N.W.2d 744 (1983).

¶8 Kress's challenge does not attack the jurisdiction of the court. He does not contend that his conduct at the time of his second offense is not within the conduct prohibited in the statutes. Rather, he argues that his conduct cannot be subjected to criminal penalties. Because Kress entered a no contest plea to the charge of OWI, second offense, he waived his challenge premised on the ex post facto clause of the federal constitution.

By the Court.—Judgment affirmed.

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

