COURT OF APPEALS
DECISION
DATED AND FILED

September 4, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0863-CR **Cir. Ct. No. 01-CT-75**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN M. SETH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Calumet County: DONALD A. POPPY, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] We do not reach the substantive issues raised by John M. Seth because his guilty plea to operating a motor vehicle with a prohibited alcohol concentration waives any challenge he could raise to the

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

constitutionality of the statutory scheme defining a prohibited alcohol concentration. Therefore, we affirm his conviction for fourth offense drunk driving.

¶2 The facts and history of this case are undisputed. After being charged with his fourth offense operating while intoxicated and operating with a prohibited alcohol concentration, Seth brought a motion challenging the constitutionality of the statutory provisions establishing the prohibited alcohol concentration for a fourth offense as more than 0.02%.[2] While the motion was pending, Seth entered a "guilty" plea to the charge of operating with a prohibited alcohol concentration of 0.02%; however, the circuit court deferred the entry of judgment until Seth filed his final brief on the issues posed in the motion and the court ruled on the motion. After rejecting Seth's assault on the constitutionality of the statutory provisions, the circuit court entered a judgment of conviction.

¶3 In this appeal, Seth raises the same issues he did before the circuit court. He contends that Wisconsin's definition of a "prohibited alcohol concentration" that decreases after the second offense and again after the third offense is constitutionally infirm. First, Seth argues that the statutory scheme interferes with a defendant's due process rights because the scheme adversely impacts on the accused's right to present a defense. Second, he argues that the statutory scheme violates procedural due process because the recommended jury

[2] WISCONSIN STAT. § 346.63(1)(b) proscribes operating a motor vehicle with a prohibited alcohol concentration that is defined in WIS. STAT. § 340.01(46m)(c):

> If the person has 3 or more prior convictions, suspensions or revocations, as counted under s. 343.307(1), an alcohol concentration of more than 0.02.

instructions will lead to juror confusion. Finally, he argues that applying a prohibited alcohol concentration of 0.02% to fourth and subsequent offenses violates equal protection.

¶4 Because Seth pled guilty to the charge, we do not address the substantive issues he raises on appeal. It is a general principle of law that a plea of guilty, voluntarily and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses, including claims of constitutional dimension. ***State v. Riekkoff***, 112 Wis. 2d 119, 123, 332 N.W.2d 744 (1983). While the State did not raise the guilty plea waiver rule in its reply brief, this court may sua sponte raise the applicability of the guilty plea waiver rule. *See* ***State v. Olson***, 127 Wis. 2d 412, 421 n.5, 380 N.W.2d 375 (Ct. App. 1985).

¶5 Under some circumstances, the guilty plea waiver rule does not prevent a defendant from raising an equal protection argument that goes to the very power of the State to require a defendant to appear in court to answer the charges brought against him or her. *See* ***id.*** at 421-24. Seth's equal protection argument does not fall into this category. His argument is that it is "fundamentally unfair to conclude that a particular class of people [individuals with three or more prior convictions] could be intoxicated at an alcohol concentration lower than that of another class of individuals based solely upon differences in conviction status reports." His argument is limited to a complaint about a legislatively created classification and not the power of the State to require him to answer drunk driving charges in court. This argument also falls short because it ignores the simple fact that a charge of operating with a prohibited alcohol concentration does not require any evidence of intoxication or impairment. *See* WIS JI—CRIMINAL 2660B.

¶6 We note that the guilty plea waiver rule does not deprive us of our subject matter jurisdiction; rather, it is "a rule of administration and not of power." ***State v. Grayson***, 165 Wis. 2d 557, 561, 478 N.W.2d 390 (Ct. App. 1991), *aff'd*, 172 Wis. 2d 156, 493 N.W.2d 23 (1992). We decline to deviate from the rule and consider Seth's challenge to the constitutionality of the prohibited alcohol concentration statutory scheme because it is not the type of question that tempts us. In order to have standing to challenge a statute as unconstitutional, he must show that the statute injures him and that he is within the zone intended to be protected by the constitutional guarantee. *See* ***Mogilka v. Jeka***, 131 Wis. 2d 459, 467, 389 N.W.2d 359 (Ct. App. 1986). We conclude that Seth cannot show that he is injured by the constitutional infirmities he alleges.

¶7 We observe that with respect to the prohibited alcohol concentration charge, Seth's blood alcohol concentration of 0.113% is sufficient to establish a violation of WIS. STAT. § 346.63(1)(b), even if the 0.10% level for first and second offenders or 0.08% level for third offenders were applied to him. We fail to see how he is injured by the application of the 0.02% standard rather than the 0.10% or 0.08% standard.

By the Court.—Judgment affirmed.

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