OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

June 13, 2017

To:

Hon. James R. Habeck
Circuit Court Judge
Shawano County Courthouse
311 N. Main Street
Shawano, WI 54166

Sue Krueger
Clerk of Circuit Court
Shawano County Courthouse
311 N. Main Street
Shawano, WI 54166

Sarah Burgundy
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Gregory A. Parker
District Attorney
311 N. Main St.
Shawano, WI 54166-2145

Michael J. Kettner
N2521 Thornapple Lane
Appleton, WI 54913

You are hereby notified that the Court has entered the following opinion and order:

2016AP22-CR State v. Michael J. Kettner (L. C. No. 2014CF253)

Before Stark, P.J., Hruz and Seidl, JJ.

Michael Kettner, pro se, appeals a judgment, entered upon his no-contest pleas, convicting him of operating a motor vehicle with a detectable amount of a restricted controlled substance in his blood, second offense, and possession of tetrahydrocannabinol (THC), as a second or subsequent offense. Kettner also appeals the order denying his postconviction motion to "overturn" the judgment of conviction. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We reject Kettner's

arguments, and summarily affirm the judgment and order. *See* WIS. STAT. RULE 809.21 (2015-16).[1]

The State charged Kettner with operating a motor vehicle with a restricted controlled substance in his blood, second offense; possession of THC, second or subsequent offense; and possession of drug paraphernalia. The State alleged that in August 2014, a state trooper stopped Kettner's vehicle on suspicion of operating with illegal window tints on the front and rear side windows. During the stop, the trooper remarked that he could smell marijuana, and Kettner admitted to having both marijuana and related paraphernalia in the car. Kettner also told law enforcement he had recently smoked marijuana. During field sobriety testing, the officer administering the tests noted Kettner's eyes were "glassy looking" and the skin around them was red. Kettner's hands were shaky, and the officer observed a lack of ocular convergence on the horizontal gaze nystagmus test. Kettner was then arrested.

Kettner moved to dismiss the possession of THC charge, asserting the statutes criminalizing THC possession were unconstitutional for failing to recognize an exception for marijuana prescribed to him by a California doctor. The circuit court denied the motion and a subsequent request for reconsideration. Kettner opted to enter into a plea agreement rather than proceed to trial. In exchange for his no-contest pleas to the operating and THC possession charges, the State agreed to dismiss and read in the remaining charge. The circuit court sentenced Kettner to ninety days in jail with Huber privileges and, relevant to this appeal, ordered use of an ignition interlock device for thirteen months. Kettner filed a postconviction

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

motion to overturn the conviction, again suggesting he should be exempt from conviction for possessing marijuana prescribed by a California physician. Kettner's postconviction motion was denied, and this appeal follows.

On appeal, Kettner argues the Wisconsin statutes criminalizing marijuana possession without excepting possession by persons with out-of-state prescriptions for medical marijuana are unconstitutionally vague as applied to him. Kettner also claims his arrest was invalid because the arresting officers lacked drug recognition expertise. Finally, he claims the circuit court erred by requiring ignition interlock when his conviction was based on drug impairment, not alcohol impairment. Kettner has waived his first two claims on appeal by entering no-contest pleas.

"A guilty [or no-contest] 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). Kettner does not challenge the validity of his pleas. Accordingly, Kettner's no-contest pleas waived his constitutional challenge to the Wisconsin statutes criminalizing marijuana possession, WIS. STAT. §§ 961.14(4)(t) and 961.41(3g)(e). Kettner's challenge to his arrest is likewise waived by his pleas. Although there is a statutory exception to the guilty-plea-waiver rule for orders denying the suppression of evidence, *see* WIS. STAT. § 971.31(1), that exception does not apply here. Kettner seeks invalidation of the arrest and dismissal of the charges, not suppression of the evidence. Moreover, Kettner never raised his present claim in the circuit court through a motion to suppress. Kettner consequently forfeited any challenge to the arrest by failing to preserve it before his plea, and then waived the claim by entering his no-contest pleas. Although the guilty-plea-waiver rule is one of administration, not jurisdiction, *see* ***State v. Riekkoff***, 112 Wis. 2d

119, 124, 332 N.W.2d 744 (1983), Kettner provides no compelling argument for us to deviate from the rule.

With respect to Kettner's challenge to installation of the ignition interlock device, Kettner has also forfeited this argument. Although the sentencing court sua sponte questioned whether the ignition interlock device was appropriate where the OWI conviction was not based on alcohol impairment, Kettner offered no argument to counter the State's position on the matter and, ultimately, failed to raise any challenge to the ignition interlock in his postconviction motion. Therefore, we deem the argument forfeited. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (appellate courts generally do not consider unpreserved claims of error).

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals