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DISTRICT III

January 30, 2018

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

2016AP1222-CR State of Wisconsin v. Tricia N. Phillips (L. C. No. 2013CF1127)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Tricia Phillips appeals a judgment, entered upon her no-contest pleas, convicting her of second-degree reckless homicide with use of a dangerous weapon and aggravated battery with intent to cause great bodily harm. Based upon our review of the briefs and record, we conclude

at conference that this case is appropriate for summary disposition. We reject Phillips' arguments and summarily affirm the judgment. *See* WIS. STAT. RULE 809.21 (2015-16).¹

On August 17, 2013, Phillips shot and killed her boyfriend, David Rosenberg. Phillips claimed self-defense, telling police she and Rosenberg fought when she told him she might be pregnant. According to Phillips, Rosenberg grabbed her and choked her as she was lying on her bed. When Rosenberg stopped choking her less than a minute later, Phillips retrieved a gun from her nightstand and "shot him in the head." Phillips then called 911 and told dispatch she shot Rosenberg. After an investigation, the State charged Phillips with first-degree intentional homicide.

Relevant to this appeal, Phillips sought to introduce two law enforcement policy manuals regarding "use of force." Phillips argued the manuals were "relevant to the objective reasonableness that ... Phillips acted in when she shot her boyfriend and the circumstances surrounding it" because the manuals "give guidelines about when officers can reasonably use deadly force and other types of force." The State filed a motion in limine to prohibit Phillips from introducing any evidence concerning "use of force" policies established by law enforcement agencies, as neither Phillips nor Rosenberg was a law enforcement officer. After a hearing, the circuit court granted the State's motion to exclude this evidence, concluding the "use of force" policy manuals were not relevant to the issues at hand and, even assuming there was some relevance, the manuals would likely mislead or confuse the jury. Specifically, the court reasoned it "would be very difficult for a jury to try to distinguish exactly what [defense counsel

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

was] attempting to show with those policies when the issue of law enforcement [was] not relevant at all.”

The parties subsequently entered into a plea deal. In exchange for her guilty or no-contest pleas to an amended charge of second-degree reckless homicide with the use of a dangerous weapon and one count of aggravated battery, the State agreed to cap its initial confinement recommendation for both counts to a total of twenty years. Phillips was convicted upon her no-contest pleas, and the circuit court ultimately imposed consecutive sentences resulting in a forty-five-year term, consisting of thirty years’ initial confinement followed by fifteen years’ extended supervision.

Phillips filed a postconviction motion “to confirm plea making decision”—specifically, Phillips moved for confirmation, if needed, that she would not have accepted the plea offer and would have gone to trial if not for the adverse decision she received in regard to the police agencies’ “use of force” policy manuals. After a hearing, the circuit court entered no formal order on the postconviction motion, indicating Phillips’ hearing testimony created a record of the purported reason she entered into the plea agreement. This appeal follows.

Phillips argues that the circuit court “should have allowed the Defense to question various witnesses on the law enforcement policy manual for the use of deadly force.” Phillips, however, waived her right to appeal the circuit court’s ruling on the admissibility of the police manual evidence when she pleaded no contest. “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). Phillips does not challenge the validity of her pleas. Accordingly, Phillips' no-contest pleas waived her present challenge to the circuit court's evidentiary ruling.

WISCONSIN STAT. § 971.31(10) provides an exception to the guilty-plea-waiver rule for orders “denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant,” but that exception does not apply here.² “[B]y its express terms, this statute excepts only motions to suppress evidence and motions challenging the admissibility of a defendant’s statement.” *State v. Nelson*, 108 Wis. 2d 698, 702, 324 N.W.2d 292 (Ct. App. 1982). Consequently, the statute “cannot be construed so as to except from the rule of waiver every motion to exclude evidence.” *Id.* Because the statute provides only a narrow exception to the guilty-plea-waiver rule, courts must recognize the distinction “between ‘suppressing’ evidence and ‘excluding’ evidence.” *State v. Eichman*, 155 Wis. 2d 552, 562, 456 N.W.2d 143 (1990). “The former generally bars admission of evidence at trial as a result of governmental misconduct, such as a constitutional violation,” whereas “[t]he latter generally involves only a violation of the rules of evidence.” *Id.* at 562-63.

The ruling challenged here—excluding the “use of force” manuals—cannot accurately be characterized as “an order denying a motion to suppress evidence.” Accordingly, it cannot be held to be within the scope of the WIS. STAT. § 971.31(10) exception to the waiver rule. Phillips nevertheless urges this court to review what she characterizes as a “unique evidentiary ruling in an important homicide case,” claiming the issue is “important” and will “likely reoccur.” We are

² Phillips filed a motion to suppress her confession; however, she is not challenging the order denying her suppression motion. Therefore, the narrow statutory exception to the guilty-plea-waiver rule does not apply.

not persuaded. 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), Phillips provides no compelling argument for us to deviate from the rule.

Upon the foregoing,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Acting Clerk of Court of Appeals