



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](http://www.wicourts.gov)

**DISTRICT IV**

May 13, 2021

To:

Hon. Todd P. Wolf  
Circuit Court Judge  
Wood County Courthouse  
400 Market St., Br. 3  
Wisconsin Rapids, WI 54494

Cindy Joosten  
Clerk of Circuit Court  
Wood County Courthouse  
P.O. Box 8095  
Wisconsin Rapids, WI 54494

Nicholas DeSantis  
Assistant Attorney General  
P.O. Box 7857  
Madison, WI 53707

Michael J. Herbert  
P.O. Box 4  
Sun Prairie, WI 53590

Amanda Keitel  
Assistant District Attorney  
P.O. Box 8095  
Wisconsin Rapids, WI 54495-8095

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

---

2019AP1761-CR

State of Wisconsin v. John D. Gates (L.C. # 2018CF328)

Before Fitzpatrick, P.J., Kloppenburg, and Nashold, 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).**

John Gates appeals a judgment of conviction for possession of methamphetamine, contrary to WIS. STAT. § 961.41(3g)(g) (2015-16).<sup>1</sup> Based upon our review of the briefs and

---

<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

Gates was convicted of one count of possession of methamphetamine following a traffic stop due to suspended license plates. During the stop, Officer Libby Abel observed an open intoxicant in the vehicle and that the passenger in Gates' vehicle appeared to be under the influence of an intoxicant. Officer Abel searched the vehicle and found baggies containing methamphetamine. Officer Abel then searched Gates and found a baggie containing methamphetamine tucked inside the waistband of Gates' pants. Gates filed a motion in the circuit court asking the court to suppress the evidence seized from the vehicle on the basis that Officer Abel lacked probable cause to search the vehicle. The circuit court denied the motion. Gates pleaded no contest to one count of possession of methamphetamine.

Gates does not renew on appeal his contention raised in the circuit court that the officer did not have probable cause to search the vehicle. Rather, on appeal, Gates argues that his conviction should be reversed because Officer Abel did not have probable cause to search Gates. Gates concedes that he did not raise this issue in the circuit court. Relying on the guilty plea waiver rule, the State opposes Gates' request that we take up the issue of whether there was probable cause to search Gates because Gates did not raise this issue in the circuit court. Gates argues that we should exercise our discretionary authority and overlook his failure to raise this issue in the circuit court. We conclude that Gates does not give this court sufficient reason, in these circumstances, to overlook his failure to raise this issue in the circuit court.

“The general rule is that a guilty, no contest, or *Alford*<sup>2</sup> plea ‘waives all nonjurisdictional defects, including constitutional claims.’” *State v. Kelty*, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (quoted source omitted).<sup>3</sup> A “narrowly crafted exception” to the guilty plea waiver rule “permits appellate review of an order denying a motion to suppress evidence, notwithstanding a guilty plea.” *State v. Conner*, 2012 WI App 105, ¶15, 344 Wis. 2d 233, 821 N.W.2d 267 (quoting *State v. Hampton*, 2010 WI App 169, ¶23, 330 Wis. 2d 531, 793 N.W.2d 901). The State argues that the guilty plea waiver rule applies here to bar the issue Gates raises on appeal because Gates did not in the circuit court invoke the exception to the rule regarding the issue he raises on appeal.

Issues not raised and properly presented for review in the circuit court, even alleged constitutional errors, “are deemed waived” and “generally will not be considered on appeal.” *State v. Huebner*, 2000 WI 59, ¶¶10-11, 235 Wis. 2d 486, 611 N.W.2d 727. This principle “is not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice.” *Id.*, ¶11 & n.2.

---

<sup>2</sup> *North Carolina v. Alford*, 400 U.S. 25 (1970).

<sup>3</sup> Our supreme court has recognized that the term “waiver” may not, in this context, be correct in all particulars.

As we have noted previously, the term “waiver” as used here does not convey the usual meaning of an intentional relinquishment of a known right. Instead, the effect of a guilty plea is to cause the defendant “to forego the right to appeal a particular issue.” If we were writing on a blank slate, a more accurate label would be the “guilty-plea-forfeiture” rule, or something to that effect.

*State v. Kelty*, 2006 WI 101, ¶18 n.11, 294 Wis. 2d 62, 716 N.W.2d 886 (internal citations omitted) (quoted sources omitted).

Having said that, we also observe that the guilty plea waiver rule is not absolute. It “is a rule of judicial administration” and “in our discretion we can decline to apply the rule.” *State v. Tarrant*, 2009 WI App 121, ¶6, 321 Wis. 2d 69, 772 N.W.2d 750. Accordingly, we need not apply the guilty plea waiver rule when the issue not raised in the circuit court is one of “state[]wide importance” or when there are no factual issues that need to be resolved and the issue has been fully briefed in this court. *Id.* As we explain, Gates fails to show either that his challenge to the search of his person is of statewide importance or that there are no factual issues regarding his challenge that need to be resolved.

Gates asserts that whether Officer Abel had probable cause to search his person is an “issue ... of statewide importance” because that issue “has broad implications regarding the scope of an individual’s liberty to be free from unreasonable searches and seizures.” Also according to Gates, this issue is of “statewide importance” because searches without probable cause potentially affect every Wisconsin resident. Issues of statewide importance are generally those that clarify a matter of first impression in this state or are novel issues. *See id.* and *State v. Ramirez*, 2001 WI App 158, ¶4 n.4, 246 Wis. 2d 802, 633 N.W.2d 656. Gates does not identify any matter of first impression or a novel issue relating to the search of his person. In addition, he does not explain why the facts of this particular case make it unique or how resolution of the issue will affect future cases such that use of our discretionary authority is warranted in this appeal.

Gates also asserts that the evidence introduced at the suppression hearing, in particular the video from Officer Abel’s body camera and the testimony of Officer Abel, establishes a “sufficient factual record” from which this court can determine whether probable cause existed to search Gates. *See State v. Brereton*, 2013 WI 17, ¶17, 345 Wis. 2d 563, 826 N.W.2d 369

(explaining that this court determines as a matter of law whether a set of facts found by the circuit court amounts to a Fourth Amendment violation).

We address first the video. The parties dispute whether the video is visually clear enough for us to determine its significance in the context of the suppression issue Gates raises on appeal. The State points to testimony by Officer Abel that it was dark when the video was recorded and that the video was “not quite as good as what [her] vision” was. However, Gates asserts that the video “would have [] captured” anything observed in the vehicle by Officer Abel and that “[a]ny suggestion that the video is inadequate for th[is] court to meaningfully review due to darkness or lack of lighting is belied by the video itself” because Officer Abel used a flashlight for “illumination as she conducted her search” of the vehicle and “the vehicle dome light was on.” Resolution of the parties’ dispute about Officer Abel’s ability to observe, as opposed to what is recorded on the video, would require this court to make findings of fact. However, the circuit court, not this court, makes factual findings. See *State v. Vorburger*, 2002 WI 105, ¶32, 255 Wis. 2d 537, 648 N.W.2d 829 (explaining that the circuit court makes findings of evidentiary or historical fact at a suppression hearing); *Kovalic v. DEC Int’l*, 186 Wis. 2d 162, 172, 519 N.W.2d 351 (Ct. App. 1994) (“The court of appeals cannot find facts.”). For those reasons, Gates’ argument that the body camera video is part of a “sufficient factual record” fails.

We turn next to Officer Abel’s testimony. Gates asserts that Officer Abel did not identify a sufficient reason to support her search of Gates and “there appears to be no reasonable basis from which to conclude that there are additional relevant facts that could be presented at an evidentiary hearing” on whether Officer Abel had probable cause to search Gates. At the suppression hearing, Officer Abel answered questions primarily relating to whether she had probable cause to search the vehicle. Officer Abel was asked only one question relating to her

search of Gates, to which she gave a cursory answer, and she was not asked to discuss what facts led her to believe that Gates had on his person methamphetamine or any other controlled substance. In addition, as acknowledged by Gates, it is not clear from the record whether Officer Abel was aware of Gates' prior criminal record at the time of the search. See *State v. Lange*, 2009 WI 49, ¶33, 317 Wis. 2d 383, 766 N.W.2d 551 (stating that an officer may take into account the defendant's prior convictions in the officer's probable cause determination). In short, the parties were not given the opportunity at the suppression hearing to establish a record through Officer Abel's testimony on what facts led Officer Abel to believe that she had probable cause to search Gates.

Thus, issues of fact remain unresolved. We agree with the State that, were we to disregard the unresolved issues of fact, Gates would benefit from his own failure to raise this suppression issue in the circuit court. In addition, we agree with the State that these unresolved factual issues prevented the State from adequately briefing this issue in this court.

In sum, we decline to exercise our discretionary authority to disregard the guilty plea waiver rule under the circumstances set forth in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the circuit court's judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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

---

*Sheila T. Reiff*  
*Clerk of Court of Appeals*