COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 2008

David R. Schanker
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.

Appeal No. 2007AP2874 **Cir. Ct. No. 2007TR4246**

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

CITY OF MENASHA,

PLAINTIFF-RESPONDENT,

V.

JAMES G. LIEBHAUSER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed*.

¶1 SNYDER, J.[1] James G. Liebhauser appeals from a judgment that followed his no contest plea to driving with a prohibited blood alcohol content, first offense. Liebhauser contends that the circuit court erred when it denied his motion to suppress evidence obtained following his arrest. He argues that the forced blood draw was performed in an unreasonable manner, that he reasonably objected to the blood draw, and that the gravity of the offense did not justify the forced blood draw. We affirm the judgment.

BACKGROUND

¶2 On April 26, 2007, Menasha Police Officer Zachary Albrecht observed a vehicle traveling west on Plank Road. As the vehicle approached Albrecht, who was traveling east, it started crossing the center line of the road. Albrecht moved his squad to the right side of his lane, and the other vehicle continued veering across the center line and nearly side-swiped the squad car. Albrecht turned around to follow the vehicle, and activated his emergency lights to initiate an investigative stop.

¶3 Albrecht approached the driver and asked for identification. The driver attempted to pull his license from his wallet but eventually handed the entire wallet to Albrecht to get the license out. Albrecht identified the driver as Liebhauser. Albrecht asked Liebhauser why he had crossed the center line and almost hit the squad car. Liebhauser stated he did not recall that happening. Albrecht noticed that Liebhauser was not wearing a seatbelt and that there was a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

strong odor of intoxicants in the vehicle. Liebhauser admitted he had consumed "a few beers."

¶4 Albrecht then asked Liebhauser to exit his vehicle, which Liebhauser did with some difficulty. Liebhauser stumbled and used the vehicle for balance when walking. Albrecht decided to have Liebhauser perform field sobriety tests. Another officer arrived to assist. Albrecht first asked Liebhauser to perform the horizontal gaze nystagmus test, which provided six out of six clues for intoxication. Next, Albrecht asked Liebhauser to perform the walk-and-turn test. Liebhauser declined, stating that he could not perform the test because of his cerebral palsy. Albrecht then concluded the test. Because of Liebhauser's physical disability, Albrecht decided to use the alphabet test next. Liebhauser was unable to recite the alphabet as directed. Finally, Albrecht asked Liebhauser to submit to a PBT. After trying three times for a successful test, Albrecht determined that Liebhauser would not blow into the test device.

¶5 Albrecht determined that, based upon his observations of Liebhauser's driving and physical unsteadiness along with the field sobriety test result, there was probable cause to arrest Liebhauser for operating while intoxicated. He put handcuffs on Liebhauser and escorted him to the squad car. Liebhauser became very uncooperative. He would not pull his feet into the squad car and when officers attempted to assist him, he would not budge. Albrecht offered to transfer Liebhauser to a different police vehicle, an SUV, if that would help, but Liebhauser refused to leave the back of Albrecht's squad. An ambulance was called and James was transported to Theda Clark Hospital.

¶6 Liebhauser was disorderly at the hospital, he kicked at one of the emergency room doctors and continued to resist. During a brief calm period,

Albrecht read the Informing the Accused form to Liebhauser. Liebhauser stated he would not submit to an evidentiary chemical test. Albrecht marked the form as a refusal and a blood draw was then performed by a laboratory technician at the hospital. Liebhauser was cited for operating while intoxicated and for operating with a prohibited alcohol concentration, both as first offenses.

¶7 Liebhauser filed a motion to suppress evidence derived from the evidentiary chemical blood test. The circuit court denied the motion and Liebhauser pled no contest to the PAC charge, the OWI and refusal charges were dismissed. Liebhauser now appeals, arguing that the court's denial of his motion was error.

DISCUSSION

¶8 Liebhauser presents three issues for our review: First he argues that he has not waived his right to appeal despite his no contest plea, next he asks whether the evidentiary blood draw violated his statutory and constitutional right to be free from unreasonable search and seizure, and finally he contends that the gravity of his offense was insufficient to support the intrusion of the forcible blood draw.

¶9 We begin with the issue of waiver. The City argues that Liebhauser waived his right to appeal because his conviction rests on a stipulated plea that was made knowingly and voluntarily. Liebhauser contends that ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995), *partially overruled on other grounds by* ***Washburn County v. Smith***, 2008 WI 23, ¶64, 308 Wis. 2d 65, 746 N.W.2d 243, established a "*rule of law*" allowing us to decline to apply the waiver rule. Liebhauser emphasizes that the ***Quelle*** decision "encourages judicial administration" and encourages appellate courts "to look to

these factors." In ***Quelle***, the court decided not to apply the waiver rule because, among other considerations, the no contest plea saved administrative costs and time, the appeal involved the review of a suppression motion, and the issue on appeal was sufficiently raised and argued such that an adequate record existed for review. *See* ***id.*** at 275. Liebhauser urges us to exercise our discretion likewise.

¶10 The City directs us to ***County of Racine v. Smith***, 122 Wis. 2d 431, 437, 362 N.W.2d 439 (Ct. App. 1984), where we stated that "a voluntary and understanding guilty or no contest plea in a civil case constitutes a waiver of the right to appeal." The City emphasizes that the narrow exception to this rule of waiver for circumstances where the court denied a motion to suppress was carved by the legislature for criminal cases, not civil ones. *See* WIS. STAT. § 971.31(10). In ***Smith***, we stated that the guilty or no contest waiver rule was "clearly consistent with established civil law waiver principles." ***Smith***, 122 Wis. 2d at 437. ***Smith*** specifically states that, although the goal of reducing the number of contested trials when the only disputed issue is whether the resolution of a motion to suppress was proper would be advanced by applying § 971.31(10) to guilty or no contest pleas in civil cases, "the statute applies only to criminal cases. The exception is in derogation of common law and must be strictly construed." ***Smith***, 122 Wis. 2d at 435. The City urges us to follow ***Smith***.

¶11 We agree with the City that the waiver rule applies. It is a general principle of law that 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). A no contest plea is the equivalent of a guilty plea, and waives the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. ***Smith***, 122 Wis. 2d at 434. In criminal

cases, an exception exists for orders denying motions to suppress evidence. WIS. STAT. § 971.31(10). That exception, however, does not apply to civil forfeiture matters. ***Smith***, 122 Wis. 2d at 436.

¶12 Waiver is not a jurisdictional bar to an appeal, but rather a principle of judicial administration. Liebhauser is correct when he asserts that we may, in our discretion, decline to apply the waiver rule. In first offense OWI matters, which are civil in nature, this court may consider four factors: (1) the administrative efficiencies resulting from the plea, (2) whether an adequate record has been developed, (3) whether the appeal appears motivated by the severity of the sentence, and (4) the nature of the potential issue. *See* ***Quelle***, 198 Wis. 2d at 275-76.

¶13 We recognize that, particularly with regard to the first three factors, several facts underlying this case align with those in ***Quelle***. For example, Quelle pled no contest to a civil charge of OWI after the circuit court denied her motion to suppress. ***Id.*** at 273. The issue raised on appeal was presented before the circuit court and an adequate record of the proceedings existed. ***Id.*** at 275. The no contest plea avoided a jury trial that had been scheduled, and the penalty assessed was not unusual. ***Id.*** at 275-76. Likewise, Liebhauser points out, his stipulated plea on the date of the final pretrial conference saved the court resources because a jury trial had been scheduled. Also, the record contains the transcripts from the motion hearing where all of the relevant facts and arguments were presented. Third, Liebhauser asserts that he was not motivated by hopes of a less severe sentence because he only faces the routine fine and court costs associated with a first offense. We agree with Liebhauser that the first three ***Quelle*** factors are present.

¶14 Liebhauser also argues that he has presented an issue that requires clarification by the court of appeals. One of the primary reasons that we chose not to apply the waiver rule in ***Quelle***, as reflected in the fourth factor, was the nature of the issue presented. Quelle asserted that the results of her breath alcohol test should have been suppressed because she was subjectively confused by the officer's conduct. *See* ***id.*** at 273. At that time there were no published cases addressing the "subjective confusion" concept acknowledged in ***Village of Oregon v. Bryant***, 188 Wis. 2d 680, 524 N.W.2d 635 (1994). The ***Quelle*** opinion offered an opportunity to address the viability of the "subjective confusion" defense arguably sanctioned by ***Bryant***. *See* ***Quelle***, 198 Wis. 2d at 273, 276. There is no equally compelling reason to decline to apply the waiver rule here. Liebhauser's challenge to the implied consent law, specifically the evidentiary chemical blood draw, is a much-covered subject in our extensive implied consent jurisprudence.

¶15 Our legislature carved a very specific and very limited exception to the waiver rule in WIS. STAT. § 971.31(10). We presume the legislature chooses its words carefully and precisely to express its meaning. ***Ball v. District No. 4, Area Bd.***, 117 Wis. 2d 529, 539, 345 N.W.2d 389 (1984). If the legislature intended for the exception to the waiver rule to apply in civil cases, it could have chosen words to express that intent. Furthermore, if the legislature determined that the ***Smith*** interpretation of the exception was too strict, it could have revised the statute. Notably, in ***Smith***, we brought the matter to the legislature's attention:

> We feel compelled to note, however, that the burgeoning civil forfeiture caseloads generally, and operating under the influence cases specifically, warrant consideration by the bench, bar, and legislature of an appropriate statute akin to [WIS. STAT.] § 971.31(10) …. [W]e should investigate appropriate methods by which to accord standing to seek review of fundamental and important evidentiary questions while avoiding an unnecessary and protracted trial.

Smith, 122 Wis. 2d at 437-38. Nonetheless, the legislature did not change the waiver rule exception to apply to civil cases. "[T]he legislature is presumed to know that in the absence of the legislature explicitly changing the law, the court's construction will remain unchanged." ***Blazekovic v. City of Milwaukee***, 225 Wis. 2d 837, 845, 593 N.W.2d 809 (Ct. App. 1999), *aff'd*, 2000 WI 41, 234 Wis. 2d 587, 610 N.W.2d 467.

¶16 Liebhauser raised additional issues on appeal. Because we conclude that he has waived nonjurisdictional defects and defenses, we do not reach the merits of his arguments.

CONCLUSION

¶17 The court of appeals is a fast-paced, high-volume, error-correcting court, ***State ex rel. Swan v. Elections Board***, 133 Wis. 2d 87, 93, 394 N.W.2d 732 (1986); therefore, in the absence of a compelling reason to do so, we will not extend our limited resources by ignoring the guilty or no contest plea waiver rule. Liebhauser, by pleading no contest, has waived his right to raise nonjurisdictional defects or defenses. *See* ***Smith***, 122 Wis. 2d at 434.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809. 23(1)(b)4.