COURT OF APPEALS
DECISION
DATED AND FILED

DECEMBER 9, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1799-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

v.

KENNETH HEINRICH,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

ANDERSON, J. The State appeals from an order granting a new trial to Kenneth Heinrich. The trial court granted Heinrich a new trial as a result of his assertion in a postconviction motion that his charges were multiplicitous and therefore violated the Double Jeopardy Clause. Although the

State continues to oppose Heinrich's allegations of multiplicitous charges, it argues that even if the charges were multiplicitous, ordering a new trial was not the appropriate remedy. Heinrich counters that the State failed to raise this issue about the appropriate remedy before the trial court and therefore waived its right to present the issue on appeal. We agree and, accordingly, affirm the order granting a new trial.

After a three-day trial, a jury found Heinrich guilty on three counts: (1) conspiracy to escape while armed with a dangerous weapon in violation of §§ 946.42, 939.31 and 939.63, STATS.; (2) conspiracy to commit assault while armed with a dangerous weapon contrary to §§ 946.43, 939.31 and 939.63, STATS.; and (3) conspiracy to commit the crime of felon in possession of a firearm in contradiction of §§ 941.29 and 939.31, STATS. These convictions stemmed from a foiled plot to escape from the Kettle Moraine Correctional Institution where Heinrich was an inmate.

Shortly after the verdict, Heinrich filed a series of postconviction motions; the last one was successful and the genesis of this appeal. He argues that his conviction and sentence for three conspiracy charges violated the Double Jeopardy Clause's prohibition against multiple punishments for the same offense. In his motion, he conceded that existing precedent provides that where multiple punishment has been imposed for a single act, the appropriate remedy is to vacate the multiplicitous convictions and punishments. However, he further contended that:

> [T]he State proceeded to trial with the theory of a single agreement which violated several criminal statutes, and the jury decided the case based upon that theory; thus, it is difficult to know which two of the three convictions are multiplicitous. Under these circumstances, Mr. Heinrich requests that the court grant him a new trial.

The trial court concluded that three conspiracy convictions based on a single agreement subjected Heinrich to multiple punishments. Without any explanation, it granted Heinrich's request for a new trial.

In response to the State's appeal, Heinrich asserts that the State failed to contest whether a new trial was the appropriate remedy before the trial court; therefore, it has waived any challenge of this issue on appeal. The State argues that the application of the waiver rule by this court is discretionary and, accordingly, urges this court to ignore the rule and address the merits of the issue.

In general, parties must raise issues for the first time before the trial court. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443, 287 N.W.2d 140, 145 (1980). If a party does not present an issue before the trial court, he or she effectively waives the right to assert this issue because an appellate court will not be the first court to consider the issue. *See* ***id.*** This doctrine has become known as the "waiver rule."

Principles of efficient judicial administration support the application of this rule, *see* ***State v. Holt***, 128 Wis.2d 110, 124, 382 N.W.2d 679, 686 (Ct. App. 1985), and give us the discretion to make exceptions to it, *see* ***Wirth***, 93 Wis.2d at 444, 287 N.W.2d at 146. The rationale behind the waiver rule is that by bringing the issue before the trial court, the litigant gives that court an opportunity to correct its own errors. *See* ***Holt***, 128 Wis.2d at 124, 382 N.W.2d at 686. When all issues are presented before the lower court, efficient judicial administration is accomplished by avoiding the delay and expense incident to appeals, reversals and new trials. *See* ***id.*** "Moreover, the waiver rule prevents a party from deliberately setting up the record for appeal by sitting silently by while error occurs and then seeking reversal if the result is unfavorable." ***Id.*** Additionally, this court prefers not to "blindside trial courts with reversals based on theories which did not

originate in their forum." ***State v. Rogers***, 196 Wis.2d 817, 827, 539 N.W.2d 897, 901 (Ct. App. 1995).

In the present case, the State argues that "this court should not apply the doctrine of waiver to preclude [the State] from challenging, as a matter of law, the scope of the remedy ordered by the trial court once it concluded the three crimes for which defendant was convicted were multiplicitous." We addressed the issue of when to apply the waiver rule if the State is a party in ***Holt***. The issue in ***Holt*** was whether the trial court erred when it refused to instruct the jury on second-degree murder but did give an instruction on intoxication. *See* ***Holt***, 128 Wis.2d at 122, 382 N.W.2d at 685. On appeal, the State conceded that if the evidence justified the intoxication instruction, it was an error for the court to have refused the second-degree instruction because a successful intoxication defense negates intent and reduces first-degree murder to second-degree murder. *See* ***id.*** However, the State argued that no reversible error occurred because the evidence was insufficient to support the intoxication instruction, so the intoxication instruction should never have been given. *See* ***id.*** at 122, 382 N.W.2d at 685-86. Yet at the trial, the State did not object to the request for the second-degree murder instruction and actually requested the intoxication instruction. *See* ***id.*** at 122, 382 N.W.2d at 686.

In ***Holt***, we held that the State had not waived its right to assert its claim. *See* ***id.*** at 123, 382 N.W.2d at 686. There, the State was seeking to assert a ground to uphold the trial court's decision. *See* ***id.*** As a result, we used our discretion not to apply the waiver rule in ***Holt*** because of our concerns for judicial efficiency and justice. *See generally* ***id.*** at 124-26, 382 N.W.2d at 686-87. We also emphasized that:

> There are cases in which the state is the appellant. In such cases, the state seeks to reverse the trial court. *We will without hesitation apply the waiver rule against the state where the issue was not raised by it at the trial court*.

Id. at 125, 382 N.W.2d at 687 (emphasis added).

In the present case, the State contends that "the concerns for both fairness and judicial economy strongly support" not applying the waiver rule. This assertion disregards precedent. In ***State v. Milashoski***, 159 Wis.2d 99, 109, 464 N.W.2d 21, 25 (Ct. App. 1990), we concluded that the ***Holt*** waiver rule exception should not apply in a case where the State failed to object to the defendant's standing on an issue. We held that this court would be at a disadvantage without a fully litigated record on the issue. *See* ***Milashoski***,159 Wis.2d at 109, 464 N.W.2d at 25. "Without such a record, we cannot meaningfully address the … issue." ***Id.*** In sum, we conclude that applying the waiver rule would best serve efficient judicial administration.

The State also urges this court to make an exception to the waiver rule because "the scope of the appropriate remedy when convictions are found to be multiplicitous after trial is essentially a question of law." Indeed, we do make exceptions to the waiver rule "in cases where the new issue is a question of law and has been fully briefed by both sides, and the question presented is of sufficient public interest to merit a decision." ***State v. Gaulke***, 177 Wis.2d 789, 794, 503 N.W.2d 330, 331 (Ct. App. 1993). We determine that in this case these criteria are not satisfied.

Here we are presented with a question of law—whether a defendant may be convicted of more than one count of conspiracy under § 939.31, STATS., if there is one agreement to commit multiple crimes—that has yet to be addressed by a court in Wisconsin. In its brief, the State explained:

> On this appeal, the state assumes but does not concede that the trial court was correct when arguendo it concluded that the three conspiracy convictions based on a single agreement subjected defendant to multiple punishment.… Furthermore, the question of whether a defendant may be convicted of more than one count of conspiracy under § 939.31, Stats., if there is one agreement to commit multiple crimes has not been decided in Wisconsin.
>
> The state does not, however, believe this case is an appropriate vehicle in which to resolve relatively sophisticated questions concerning the scope of Wisconsin conspiracy law and the manner in which the double jeopardy protection against multiple punishment limits the number of conspiracy charges under § 939.31, Stats., on which a defendant may be simultaneously charged and convicted in a single trial. [Citations omitted.]

We agree with the State that this is not the proper case to resolve this issue. We conclude that it would be improper to address whether a new trial is the appropriate remedy for a "violation" of a defendant's double jeopardy protection before deciding the ultimate issue—whether the defendant's rights were indeed violated. Like in ***Milashoski***, we will apply the waiver rule to this case. We are at a disadvantage to decide this issue without a fully-litigated record before us. Therefore, in the interests of efficient judicial administration, we affirm the order for a new trial.[1]

By the Court.—Order affirmed.

[1] Heinrich cross-appeals several issues concerning the inclusion of the "armed enhancer," § 939.63, STATS., and the level of proof for imposition of the habitual criminality enhancer. Heinrich notes that he is pursuing the cross-appeal in the event we would reverse the trial court. Because we have affirmed the trial court, Heinrich's cross-appeal is moot.

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