COURT OF APPEALS
DECISION
DATED AND FILED

September 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0748-FT

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

COUNTY OF MILWAUKEE,

PLAINTIFF-RESPONDENT,

V.

ELLEN T. ROY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Appeal dismissed.*

SCHUDSON, J.[1] Ellen T. Roy appeals from a judgment entered following her no contest plea to operating a motor vehicle while under the influence of an intoxicant, first offense. The issue presented on appeal is whether by pleading no contest, Roy waived her right to appeal. This court concludes that by entering a no contest plea, Roy waived her right to appeal.

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[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

On August 2, 1997, following a traffic stop, Milwaukee police arrested Roy for operating a motor vehicle while under the influence of an intoxicant. An intoxilizer test, which was administered within three hours of her arrest, revealed that Roy's blood alcohol concentration (BAC) was .12 %.

The case was set for trial on February 11, 1998, six months and nine days after the offense. Prior to trial, the County provided defense counsel with all the discovery materials, including the intoxilizer test results. Based on this information, defense counsel filed motions to suppress the admissibility of the BAC results.

On the date of trial, the County moved to amend the charges by filing the BAC charge. Defense counsel objected. In overruling defense counsel's objection, the trial court found that the defense had notice of the County's intention to amend the charges. The trial court noted that, at the February 2, 1998 final pretrial conference, the County informed defense counsel that it intended to file the additional charge of operating a motor vehicle with a prohibited blood alcohol concentration. The trial court acknowledged, however, that the discussions at the final pretrial were not on the record, stating: "[The County] told you that [it] was going to [file a BAC ticket] at the final pretrial. I realize it was not on the record, but I'm certain of that."[2] The trial court then permitted the County to amend the charge, and Roy's case was passed.

[2] Roy does not challenge, the trial court's recollection of the off-the-record discussions regarding the County's intent to file an operating a motor vehicle with a prohibited blood alcohol concentration. In fact, in her brief to this court, Roy acknowledges that as early as "November 19, the prosecutor talked about using the Intoxilyzer result at trial but only if he had an expert to support it."

When the case was recalled, defense counsel indicated that Roy was prepared to enter a plea, but noted that she wished to reserve her right to appeal, stating: "On this case the defendant is entering a plea of no contest to the original charge issued to her, the OWI. She is reserving her right to take appeal from issues that may have been raised."

On appeal, Roy contends that this court should not apply the waiver rule of ***County of Racine v. Smith***, 122 Wis.2d 431, 362 N.W.2d 439 (Ct. App. 1984), because her case meets the discretionary review criteria enunciated in ***County of Ozaukee v. Quelle***, 198 Wis.2d 269, 542 N.W.2d 196 (Ct. App. 1996). This court cannot agree.

"It is well-established that a plea of guilty [or no contest], knowingly and understandably made, constitutes a waiver of nonjurisdictional defects and defenses, including claimed violations of rights." *See* ***Smith***, 122 Wis.2d at 434, 362 N.W.2d at 441. In criminal cases, an exception exists for orders denying motions to suppress evidence or statements of a defendant. *See* § 971.31(10), STATS. That exception, however, does not apply to civil forfeiture matters. *See* ***Smith***, 122 Wis.2d at 436, 362 N.W.2d at 441.

Waiver, however, is not a jurisdictional bar to an appeal. Rather, it is a principle of judicial administration. Thus, this court "may review nonjurisdictional errors in the exercise of its discretion." ***Quelle***, 198 Wis.2d at 275, 542 N.W.2d at 198. As this court explained in ***Quelle***, an appellate court may consider the issue presented on appeal after considering: (1) whether administrative efficiency resulted 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) whether the issue raised presents a novel or important issue.

In the instant case, the defendant appeals from an order granting leave to amend by adding an additional charge. The merits of the appeal turn on whether the defendant had notice of the operative facts which formed the basis of the amendment, and whether the defendant was prejudiced by the amendment. *See* ***Korkow v. General Cas. Co.***, 117 Wis.2d 187, 197, 344 N.W.2d 108, 113 (1984). The case presents a narrow, factually specific issue, which this court concludes does not merit discretionary review.

> The idea underlying the waiver rule is that a guilty plea itself constitutes both an admission that the defendant committed past acts and a consent that a judgment of conviction be entered against him without a trial. It is accepted that one may waive the right to appeal in civil cases where he has caused or induced a judgment to be entered or has consented or stipulated to the entry of a judgment. "He cannot be heard to complain of any act to which he deliberately consents."

Smith, 122 Wis.2d at 437, 362 N.W.2d at 442 (citations omitted). Accordingly, this court holds that Roy's no contest plea constituted a waiver to her right to appeal.

By the Court.—Appeal dismissed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.