COURT OF APPEALS
DECISION
DATED AND FILED

September 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0650

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

CITY OF WHITEWATER,

PLAINTIFF-RESPONDENT,

v.

ELIZABETH M. NELDNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Dismissed.*

BROWN, P.J. Elizabeth M. Neldner appeals a civil forfeiture resulting from an operating a vehicle while intoxicated conviction. Before the trial court, she argued in a motion to suppress that if a person takes the test demanded by law enforcement officers and thereafter requests and receives an alternative test, the prosecution is not entitled to use the results of the alternative test without the consent of that person. The trial court denied the motion and Neldner then

pled no contest. On appeal, she admits that a plea of no contest to a civil forfeiture charge ordinarily acts as a waiver to any further challenges to the admissibility of evidence. She argues, however, that we should do as we did in ***County of Ozaukee v. Quelle***, 198 Wis.2d 269, 275-76, 542 N.W.2d 196, 198 (Ct. App. 1995), where we decided to address the merits rather than apply the guilty-plea-waiver rule. Because the issue in this case does not decide a matter of substantial and continuing public interest as was the case in ***Quelle***, this court applies the guilty-plea-waiver rule and dismisses the appeal.

The facts are undisputed. Neldner took the breath test requested by law enforcement officers. Afterward, she requested and received a blood test. The blood test results showed her blood alcohol to be over the legal limit. She sought to suppress the use of the blood test results by the City of Whitewater, but was unsuccessful. After her motion was denied, she entered into a stipulation with the City whereby she changed her plea to no contest with the understanding that she reserved her right to appeal the court's ruling regarding the admissibility of the blood test results. The trial court was informed of this stipulation, approved it and entered judgment.

Neldner concedes that she has waived her right to further appeal the admissibility of the blood test results even with the stipulation on the record. As long ago as ***County of Racine v. Smith***, 122 Wis.2d 431, 437, 362 N.W.2d 439, 442 (Ct. App. 1984), this court noted that persons convicted of *a crime* may avoid the guilty-plea-waiver rule when appealing a denial of a motion to suppress evidence pursuant to § 971.31(10), STATS. However, we held that persons convicted of *civil forfeiture* violations may not avail themselves of that statute. *See* ***Smith***, 122 Wis.2d at 437, 362 N.W.2d at 442. Thus, the ***Smith*** court held that the guilty-plea-waiver rule applies in situations where a person pleads guilty

or no contest after a denial of a motion to suppress, fully expecting and intending to raise the suppression issue again on appeal.

Neldner notes that in ***Quelle***, this court decided not to apply the guilty-plea-waiver rule even though the issues in that case arose out of a plea to a civil forfeiture. We pointed out that an appellate court may review nonjurisdictional errors in the exercise of its discretion. *See* ***Quelle***, 198 Wis.2d at 275, 542 N.W.2d at 198. We decided not to apply the waiver rule for four reasons: the no contest plea saved time, the issue was squarely before the trial court such that we had an adequate record, there was no evidence that the defendant was appealing to avoid a sentence that was more than expected and there were no published cases applying the pertinent language from an earlier supreme court opinion.

Neldner contends that the same four reasons exist here and should compel us to address the merits. We agree that the first three reasons set forth in ***Quelle*** are also present here. We do not agree that the fourth reason pertains. We must be satisfied that all four reasons are present before we set aside the guilty-plea-waiver rule announced in ***Smith***.

Neldner claims that the fourth reason we gave in ***Quelle*** was that there were no published decisions deciding the issue at hand. While it is true that there are no published Wisconsin cases deciding the particular issue Neldner raises, that fact alone does not capture our discussion of the fourth reason in ***Quelle***. Prior to issuing the ***Quelle*** opinion, the court of appeals had several "refusal hearing" cases on its docket involving the issue of "subjective confusion." The issue of subjective confusion was doubtlessly spurred by a footnote in ***Village of Oregon v. Bryant***, 188 Wis.2d 680, 686 n.3, 524 N.W.2d 635, 637 (1994), in

which the supreme court noted that no claim of being "subjectively confused" had been raised by the appellant in that case. So, we wrote as our fourth reason for reaching the merits that "there are no published cases applying the pertinent language in ***Bryant***." ***Quelle***, 198 Wis.2d at 276, 542 N.W.2d at 198.

Thus, for us to turn away from ***Smith***, we had to be satisfied in ***Quelle*** that we were deciding an issue of substantial and continuing interest or one which would clarify a new rule of law or any of the other criteria found in RULE 809.23(1)(a), STATS. We were so satisfied in ***Quelle***. We are not so satisfied here. The issue in this case is not worth publishing. As succinctly pointed out by the City, Neldner's argument is contrary to the clear language of § 343.305(5)(d), STATS. That is the section providing the defendant with the right to an alternative test. It states that "the results of a test administered in accordance with this section are admissible on the issue of whether the person was under the influence of an intoxicant." ***Id.*** And § 885.235(1)(g), STATS., provides that a blood test is admissible on the issue of whether a person is under the influence of intoxicants. There is no language in the statutes limiting admissibility of the alternative test results only to the defendant. Thus, the statute is clear and a published opinion so stating would not be worthwhile.

By the Court.—Appeal dismissed.

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