COURT OF APPEALS
DECISION
DATED AND FILED

October 17, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP487-CR **Cir. Ct. No. 2004CT1526**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALAN A. NIENKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: MARK J. McGINNIS, Judge. *Affirmed*.

¶1 PETERSON, J.[1] Alan A. Nienke appeals a judgment convicting him of causing injury while operating a motor vehicle with a prohibited alcohol concentration. Nienke claims the trial court erred by denying his motion to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

dismiss for prejudicial delay in commencing prosecution, and denying his motion to suppress the blood test result.[2] Nienke argues the charges against him should be dismissed due to the two and a half year delay between the incident and when the State brought charges. In the alternative, Nienke argues the blood test should be suppressed because the blood sample was destroyed before charges were issued and therefore the State could not produce the blood sample for retesting.[3]

¶2 We conclude Nienke waived his right to appeal prosecutorial delay by entering a no-contest plea. While the no-contest plea did not affect Nienke's motion to suppress blood evidence, Nienke had no due process right to retest the original blood sample. Therefore, we affirm the judgment.

BACKGROUND

¶3 On July 12, 2002, Nienke was involved in a three-car accident. As a result of the accident Nissa M. Vinquist was injured. Vinquist told deputy Peter Gervais at the scene that a black S-10 pickup truck swerved and hit the vehicle in front of it, then swerved into her vehicle. Gervais approached the truck and observed two almost empty bottles of vodka inside the vehicle. Gervais asked Nienke, the driver of the truck, how much he had to drink. Nienke replied,

[2] The record indicates Nienke did not actually file a motion to suppress the blood evidence due to its destruction. However, the State was aware of Nienke's intent to do so and the court proceeded as if the motion had been filed.

[3] Nienke's brief violates multiple rules of form and content and is entirely unsupported by reference to record citations. *See* WIS. STAT. RULE 809.19(1)(d) and (e). A reviewing court need not sift through the record for facts to support counsel's contentions. ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964). In addition, Nienke fails to provide proper legal authority to support his assertions and even cites a case that is no longer good law. Nienke's argument is wholly inadequate and need not be considered by this court. ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980). Future arguments of this quality may be summarily dismissed.

"[p]robably too much." Gervais observed a strong odor of intoxicants on Nienke and asked Nienke if he had been drinking vodka in the car while driving. Nienke stated he had a mixed drink in the car.

¶4 Nienke was transported from the accident scene to Appleton Medical Center where he was informed of his rights under WIS. STAT. § 343.305(3) and a blood sample was collected. Results from the blood test indicated an alcohol concentration of .318%. After six months, the blood sample was destroyed per the policy of the State of Wisconsin Laboratory of Hygiene.

¶5 On December 2, 2004, the State charged Nienke with causing injury by intoxicated operation of a motor vehicle and causing injury by operation of a motor vehicle with a prohibited alcohol concentration. Nienke filed a motion to dismiss on grounds of prejudicial delay in commencing prosecution. Nienke also filed an affidavit stating his intent to file a motion to dismiss due to the destruction of the blood evidence. The court proceeded as if Nienke had filed a motion to suppress due to destruction of the blood evidence. The court denied Nienke's motions.

¶6 On January 30, 2006, Nienke pled no-contest to causing injury while operating a motor vehicle with a prohibited alcohol concentration. The charge of causing injury by operating a motor vehicle while intoxicated was dismissed. Nienke stated he was reserving his rights to challenge the pretrial order denying his motions.

DISCUSSION

Prosecutorial Delay

¶7 Nienke argues the charges against him should be dismissed due to the two and a half year delay between the incident and when the State brought charges. However, Nienke waived his right to appeal prosecutorial delay when he entered his no-contest plea. A no-contest plea is the equivalent of a guilty plea and waives the right to raise nonjurisdictional defenses.[4] ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). The fact that Nienke reserved the right to appeal does not affect the waiver rule. *See* ***State v. Riekkoff***, 112 Wis. 2d 119, 127, 332 N.W.2d 744 (1983) ("in situations … to which the guilty-plea-waiver rule may apply, it is to be applied even though a defendant expressly states his intent not to waive certain issues on appeal ….").

Suppression of the Blood Test

¶8 Nienke argues the blood test should be suppressed because the blood sample was destroyed before charges were issued and therefore the State could not produce the blood sample for retesting.[5] Nienke claims he had a due process right to inspect the blood sample.

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[4] Though Nienke's motion refers to this claim as jurisdictional, he provides no citation to authority for this position and does not address the issue in his brief. This court can find no legal authority for the proposition that prosecutorial delay is a jurisdictional defense. Indeed, our supreme court held that right to a speedy trial is not a jurisdictional defense. ***State v. Foster***, 70 Wis. 2d 12, 20, 233 N.W.2d 411 (1974). The claim of prosecutorial delay is analogous to that of right to a speedy trial.

[5] Though Nienke entered a no-contest plea, an exception to the waiver rule exists for orders denying motions to suppress evidence. WIS. STAT. § 971.31(10). Therefore, we address this issue on the merits.

¶9 Our supreme court has held the nonproduction of blood evidence with respect to blood alcohol tests does not violate due process. *See* ***State v. Ehlen***, 119 Wis. 2d 451, 453, 351 N.W.2d 503 (1984) ("The importance of the production of the original breath ampoule or a portion of the blood sample as the sine qua non of due process is a myth that should not be perpetuated."); ***State v. Disch***, 119 Wis. 2d 461, 351 N.W.2d 492 (1984) ("No duty devolves upon the district attorney to preserve or maintain a quantity of a blood sample in order that a defendant may retest the blood … nor does due process require the retention and production of the sample.").

¶10 Due process is afforded by the defendant's right to have an additional test at the time of arrest. ***Ehlen***, 119 Wis. 2d at 452-53; ***Disch***, 119 Wis. 2d at 463. Further, due process is afforded by the defendant's right to cross-examine the person who performed the test as well as all persons in the chain of custody of the original sample. ***Disch***, 119 Wis. 2d at 463.

¶11 Nienke's argument that he had a due process right to inspect the blood sample has already been twice rejected by our supreme court. Therefore, we affirm the trial court's order denying Nienke's motion to suppress the blood test.

By the Court.—Judgment and order affirmed.

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