COURT OF APPEALS
DECISION
DATED AND FILED

November 6, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP235-CR **Cir. Ct. No. 2009CF2396**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WALTER E. ELLIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Walter E. Ellis appeals from a judgment of conviction, entered upon his no-contest pleas, on two counts of first-degree murder and five counts of first-degree intentional homicide. Ellis contends the circuit court erred when it denied his motions to sever the charges, to change

venue because of excessive pretrial publicity, and to suppress evidence.[1] We conclude that Ellis's challenges to the denial of his motions to sever and to change venue are forfeited by his pleas, and his challenge to the denial of his suppression motion fails based on a recent decision of our supreme court. Therefore, we affirm the judgment.

BACKGROUND

¶2 In May 2009, the State Crime Laboratory, while doing periodic searches in the DNA database, received "cold hits" indicating a match between Ellis's DNA profile and unknown profiles from seven unsolved homicides. Detectives, informed of the matches, went to interview Ellis at his apartment. When police arrived, Ellis was not home, but his girlfriend Tressie Johnson was. Johnson, the named tenant on the apartment lease, consented to a search of the home. She also offered Ellis's toothbrush to police. Police did not take any items at that time but instead obtained a search warrant, pursuant to which they seized the toothbrush. From the toothbrush, Ellis's DNA was extracted and a match to the unknown profiles was confirmed. In September 2009, an amended information charged Ellis with the deaths of seven different women, spanning from 1986 to 2007.[2]

[1] The Honorable Rebecca F. Dallet denied Ellis's motions. The Honorable Dennis R. Cimpl accepted Ellis's plea and imposed sentence.

[2] Two victims were killed in 1986, so Ellis was charged with first-degree murder. *See* WIS. STAT. § 940.01(1) (1985–1986). The remaining victims were killed in 1992, April 1995, June 1995, 1997, and 2007, so Ellis was charged with first-degree intentional homicide. *See* WIS. STAT. §§ 940.01(1) (1991–1992), 940.01(1) (1995–1996), 940.01(1)(a) (1997–1998), and 940.01(1)(a) (2007–2008).

¶3 In November 2009, Ellis moved to sever the charges. He contended that the charges had been improperly joined from the outset because they failed to satisfy the statutory requirements for initial joinder. He also claimed that continued joinder would be prejudicial to him, thereby warranting separate trials for each charge.

¶4 Under WIS. STAT. § 971.12(1), crimes may be joined if they "are of the same or similar character[.]" Crimes are of "similar character" if they are "the same type of offenses occurring over a relatively short period of time and the evidence" on each count overlaps. ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584, 588 (Ct. App. 1988). The circuit court noted that the crimes were of the same type and that significant evidence overlapped in each case. While Ellis had specifically challenged joinder based on the "relatively short period of time" requirement, the circuit court commented that the offenses should not be viewed in a vacuum. When it considered the other factors and the entire timeline, the circuit court concluded that the initial joinder was proper.

¶5 Even if initial joinder is proper, when a severance motion is made, the circuit court must also consider what, if any, prejudice to the defendant would result from the joined charges, and balance that prejudice against the public's interest in a single trial. *See* ***State v. Bellows***, 218 Wis. 2d 614, 622–623, 582 N.W.2d 53, 57 (Ct. App. 1998). The circuit court, in considering possible prejudice, determined that Ellis had not sufficiently shown severance was warranted. Based on its joinder and prejudice conclusions, the circuit court denied the motion to sever.

¶6 In July 2010, Ellis moved to change venue. He asserted that pretrial publicity, including articles referencing the DNA evidence and calling Ellis the

"North Side Strangler" made it reasonably likely that he would be unable to receive a fair trial in Milwaukee County. The circuit court reviewed multiple factors related to pretrial publicity, *see* ***State v. Fonte***, 2005 WI 77, ¶31, 281 Wis. 2d 654, 678, 698 N.W.2d 594, 605, but concluded that Ellis had failed to make a threshold showing of likely prejudice, *see* ***State v. Albrecht***, 184 Wis. 2d 287, 306, 516 N.W.2d 776, 784 (Ct. App. 1994). The circuit court did, however, leave open the possibility of revisiting the change-of-venue question should there be difficulty in selecting a jury.

¶7 Also in July 2010, Ellis filed a motion to suppress evidence obtained from a search of his home—specifically, the DNA evidence from his toothbrush. Ellis alleged that the search warrant obtained by police was void because it had been signed by a court commissioner who, according to Ellis, lacked the constitutional authority to do so. The circuit court determined that the court commissioner was authorized to sign the warrant and denied the motion.[3]

¶8 Ellis subsequently pled no contest to the seven charges. The circuit court sentenced him to seven consecutive life sentences. Count two includes no possibility of parole. Ellis appeals.

DISCUSSION

¶9 The State encourages us to apply the guilty-plea-waiver rule against Ellis's claims of error regarding the motions to sever and change venue.[4] *See*

[3] Ellis had filed an additional motion to suppress, alleging that the search warrant was illegal because of various procedural defects. Judge Cimpl denied this suppression motion after an evidentiary hearing, and Ellis does not revisit this ruling on appeal.

[4] The legal effect of a guilty plea is to cause the defendant to forego the right to appeal a particular issue, whether or not the defendant intentionally relinquishes that right. *See* ***State v.*** (continued)

State v. Kelty, 2006 WI 101, ¶18, 294 Wis. 2d 62, 73, 716 N.W.2d 886, 892. The rule also applies to no-contest pleas, and provides that a guilty or no-contest plea waives or forfeits all nonjurisdictional defects and defenses. *See* ***State v. Grayson***, 165 Wis. 2d 557, 561, 478 N.W.2d 390, 392 (Ct. App. 1991); *see also* ***Kelty***, 2006 WI 101, ¶18 n.11, 294 Wis. 2d at 73, 716 N.W.2d at 892. Ellis counters that the rule is one of administration only, which means we may exercise our discretion to "review claimed error, particularly if the issues are of state-wide importance or resolution will service the interests of justice[.]" *See* ***Grayson***, 165 Wis. 2d at 561, 478 N.W.2d at 390, 392.

¶10 We agree with the State that Ellis's challenges to the denials of his motions to sever and to change venue are forfeited. Ellis does not dispute the operation of the guilty-plea-waiver rule; he merely asks that, in line with ***Grayson***, we not apply it here. To the extent that Ellis would have us address his issues as broader principles of law, however, we decline the invitation.

¶11 The severance and venue issues, at their core, deal with concerns about maintaining the integrity of a potential *jury trial*. The prejudice question in a severance motion, for instance, considers "[t]he danger of prejudice arising from *the jury's* exposure to evidence that the defendant committed more than one crime[.]" *See* ***State v. Hoffman***, 106 Wis. 2d 185, 210, 316 N.W.2d 143, 157 (Ct. App. 1982) (emphasis added). Factors to be considered when dealing with a motion to change venue based on pretrial publicity include, among other things:

Riekkoff, 112 Wis. 2d 119, 128, 332 N.W.2d 744, 749 (1983). As a result, it has often been explained that the rule might be better described as the guilty-plea-*forfeiture* rule rather than the guilty-plea-waiver rule. *See, e.g.*, ***State v. Kelty***, 2006 WI 101, ¶18 n.11, 294 Wis. 2d 62, 73 n.11, 716 N.W.2d 886, 892 n.11.

the degree of care exercised and the amount of difficulty encountered in selecting the jury; the extent to which the jurors were familiar with the publicity; the defendant's utilization of peremptory and for cause challenges of jurors; and the nature of the verdict returned by the jury. *See* ***Fonte***, 2005 WI 77, ¶31, 281 Wis. 2d at 678, 698 N.W.2d at 605.

¶12 By entering a plea, Ellis eliminated these potential issues from his case, and we see no reason to address them as hypotheticals. *See* ***Pension Mgmt., Inc. v. Du Rose***, 58 Wis. 2d 122, 128, 205 N.W.2d 553, 555–556 (1973). Ellis's case is simply too fact-intensive to persuade us to discard the guilty-plea-waiver rule. *See* ***Grayson***, 165 Wis. 2d at 561, 478 N.W.2d at 392.

¶13 The guilty-plea-waiver rule does not, however, bar Ellis's appellate challenge to the denials of his motion to suppress because of a void warrant. *See* WIS. STAT. § 971.31(10) ("An order denying a motion to suppress evidence … may be reviewed upon appeal from a final judgment or order notwithstanding the fact that the judgment or order was entered upon a plea of guilty or no contest[.]").

¶14 Ellis's challenge, both in the circuit court and on appeal, is to the constitutionality of a court commissioner's authority to issue a search warrant.[5] This matter was recently resolved by our supreme court, which held that court commissioners do, in fact, have the power to issue search warrants and the statute so authorizing, WIS. STAT. § 757.69(1)(b), is not unconstitutional. *See* ***State v. Williams***, 2012 WI 59, ¶¶2–4, 341 Wis. 2d 191, 194–195, 814 N.W.2d 460,

[5] As noted, Ellis does not challenge the denial of the motion to suppress based on an illegal search warrant, nor does he challenge the circuit court's alternate finding that Johnson consented to a search of the apartment.

462–463. Thus, we conclude the circuit court properly denied Ellis's motion to suppress evidence.

By the Court.—Judgment affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.