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STATE OF WISCONSIN **03-28-2017**

COURT OF APPEALS **CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT IV

Case No, 2016AP002364

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD VERKUYLEN,

Defendant-Appellant.

On Appeal from Judgment of Conviction Entered in Waupaca County, the
Honorable Vicki Clussman, Presiding

BRIEF AND APPENDIX OF
PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did the Appellant waive his right to appeal by signing a stipulation indicating that there was an Implied Consent violation under Wisconsin Stat. §30.683 and §30.684? Did the form read by the Warden satisfy the requirements of Wisconsin Statute §30.684?

STATEMENT ON ORAL ARGUMENT

The State is not requesting oral argument in this case. Rather, the State believes that the issue can be presented and addressed adequately in written argument.

STATEMENT ON PUBLICATION

The State does not request publication. This case can be resolved by applying well-established legal principles to the facts of the case.

STATEMENT ON THE CASE AND FACTS

As the plaintiff-respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § 809.19(3)(a). Facts additional to those presented in Verkuylen's brief will be set forth where necessary within the argument section

ARGUMENT

I. THE APPELLANT WAIVED HIS RIGHT TO APPEAL BY SIGNING A STIPULATION INDICATING THAT HE WAS PLEADING NO CONTEST TO AN IMPLIED CONSENT VIOLATION.

The United States Supreme Court has established the principle that a knowing and voluntary guilty plea normally bars the defendant from later challenging alleged constitutional violations that occurred prior to the plea. *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970).

Wisconsin has adopted an analogous rule finding that a voluntary and intelligent guilty or no-contest plea waives all non-jurisdictional defects and defenses, including alleged constitutional violations. *State v. Oakley*, 2001 WI 103, 123, 245 Wis. 2d 447, 629 N.W.2d 200; *State v. Bangert*, 131 Wis. 2d 246, 293, 389 N.W.2d 12 (1986); *State v. Riekkoff*, 112 Wis. 2d 119, 123, 332 N.W.2d 744 (1983); *Hawkins v. State*, 26 Wis. 2d 443, 448, 132 N.W.2d 545 (1965); *State v. Damaske*, 212 Wis. 2d 169, 188, 567 N.W.2d 905 (Ct. App. 1997). Courts refer to this as “the guilty-plea-waiver rule.” *State v. Kelty*, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

There is a sole statutory exception to the guilty-plea-waiver rule in criminal cases. Wis. Stat. § 971.31(10) allows a defendant in a criminal case to plead guilty or no contest but still preserve the ability to appeal “[a]n order denying a motion to suppress evidence”. *Id.* This exception is found to be unique to criminal cases. Indeed, in the *County of Racine v. Smith*, 122 Wis. 2d 431, 436, 362 N.W.2d 439 (Ct. App. 1984), the court of appeals determined that:

The legislature has not directed that sec. 971.31(10), Stats., which is part of the criminal code, be applied to guilty or no contest pleas in civil

forfeitures. It provides no defense against the application of the common law rule that such pleas constitute a waiver of non-jurisdictional defects. The extension of sec. 971.31(10) to civil forfeitures is a matter for the legislature, not this court, to consider.

This case involves a civil forfeiture, and as such, is not a criminal case. Both in statute and case law, it is clear that Verkuylen has waived his right to appeal the findings of the circuit court after his plea of no contest.

While an appellate court may, in its discretion, review non-jurisdictional errors, *County of Racine*, 122 Wis. 2d at 434, 362 N.W.2d at 441, there are not any compelling reasons to do so in this case. The defendant knew he was giving up his ability to present the very issue he now raises in this appeal by entering his no contest plea. The stipulation was drafted and signed by the defense attorney (App. 109-110). Indeed, the defendant, through the stipulation, recognized that there was a factual basis for which the court could find an Implied Consent violation.. (App. 109-110). In addition, the Defendant entered into the stipulation where he received a more lenient settlement.(App 109-110). There is nothing to suggest that the defendant's plea was anything other than knowing, voluntary, and intelligently made. When Verkuylen waived his right to a trial, he rendered moot his ability to present the issues he's now raising on appeal. There is no reason to revisit those issues and disregard the guilty-plea-waiver rule.

In deciding whether the guilty plea waiver rule should apply, this court may consider four factors: (1) the administrative efficiencies resulting from the plea (2)

whether an adequate record was developed (3) whether the appeal was motivated by the severity of the sentence, and (4) the nature of the issue. *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 275-76, 542 N.W.2d 196 (Ct. App. 1995). The State does not dispute that the signing of the plea agreement saved time and expense, nor does it dispute that an adequate record has been developed. The State, does however, assert that Verkuylen did receive a more lenient sentence in exchange for accepting responsibility of his Implied Consent violation by having the OWI-boating dismissed.. He now appeals the very settlement that he negotiated for. As such, this court should apply the guilty-plea-waiver rule in this case and promptly dispose of this appeal. The rule is further applicable here because the issue before the court is well-settled. It is clear that the legislature intended that §343.305(4) not apply to boating violation because they created a separate and distinct statute §30.684 dealing with boating violations. For all these reasons, this court should apply the guilty-plea-waiver rule and dismiss the defendant's appeal.

II. THE FORM READ TO APPELLANT SATIFIES THE REQUIRMENTS UNDER §30.684

Wis. Stat. §30.684(1) Requirement.

(a) *Samples; submission to tests.* A person shall provide one or more samples of his or her breath, blood or urine for the purpose of authorized analysis if he or she is arrested for a violation of the intoxicated boating law and if he or she is requested to provide the sample by a law enforcement officer. A person shall submit to one or more chemical tests of his or her breath, blood or urine for the

purpose of authorized analysis if he or she is arrested for a violation of the intoxicated boating law and if he or she is requested to submit to the test by a law enforcement officer.

(b) *Information.* A law enforcement officer requesting a person to provide a sample or to submit to a chemical test under par. (a) shall inform the person at the time of the request and prior to obtaining the sample or administering the test:

1. That he or she is deemed to have consented to tests under s. 30.683;
 2. That a refusal to provide a sample or to submit to a chemical test constitutes a violation under sub. (5) and is subject to the same penalties and procedures as a violation of s. 30.681 (1) (a); and
 3. That in addition to the designated chemical test under sub. (2) (b), he or she may have an additional chemical test under sub. (3) (a).
- 5) Refusal. No person may refuse a lawful request to provide one or more samples of his or her breath, blood or urine or to submit to one or more chemical tests under sub. (1). A person shall not be deemed to refuse to provide a sample or to submit to a chemical test if it is shown by a preponderance of the evidence that the refusal was due to a physical inability to provide the sample or to submit to the test due to a physical disability or disease unrelated to the use of an intoxicant. Issues in any action concerning violation of sub. (1) or this subsection are limited to: (a) Whether the law enforcement officer had probable cause to believe the person was violating or had violated the intoxicated boating law.

(b) Whether the person was lawfully placed under arrest for violating the intoxicated boating law.

(c) Whether the law enforcement officer requested the person to provide a sample or to submit to a chemical test and provided the information required under sub.

(1) (b) or whether the request and information was unnecessary under sub. (1) (c).

(d) Whether the person refused to provide a sample or to submit to a chemical test.

In this case the Warden read verbatim from a sheet labeled Informing the Accused. The form consists of three paragraphs:

- 1) You have been arrested for an offense that involves the intoxicated operation of a motorboat, ail-terrain vehicle,' utility terrain vehicle or snowmobile, or you are suspected of operating a commercial motorboat after consuming an Intoxicant
- 2) This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of intoxicants or restricted controlled substances in your system. If you refuse to take any test that this agency requests, you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.
- 3) If you take all the requested tests, you may choose to take further teats. you may take the-alternative test that this law enforcement agency provides free of charge. You also may have a test conducted by a

qualified person of your choice at your expense. You however will have to make your own arrangements for that test

After being read those three paragraphs the Warden asked Mr. Verkuylen whether he would submit to an evidentiary chemical test of his blood and he indicated that he would not. (App. 108)

The Appellant raised the issue of whether the form as read satisfied the statutory requirements of §30.684. The Appellant continues to try and draw a connection between §343.305 and §30.684. They are clearly distinct and separate statutes and have far different consequences. For instance if you refuse under §343.305 there is the possibility of a driving license suspension, however no such consequence exists under §30.684.

The State would argue that the Warden substantially complied with the statute. When reviewing the form as read by the Warden it provides the arrestee with all the information that is required to make an educated decision on whether or not to provide an evidentiary chemical test of your breath, blood or urine. It indicated that there could be a penalty for refusing to take a test, as well as the option to request a second test at their own expense.

The fact that the form indicated that there could be further penalties instead of the same penalty would likely do very little to influence an arrestee one way or another. The important information present is the fact that there is a penalty if you decide to refuse to take the test. When comparing the form read to Verkuylen to the statute the circuit court determined that the Warden substantially complied

with the statute (App.107 ln. 5-9) In so doing the circuit court order the motion denied (App 107 ln.8-9).

CONCLUSION

The court should apply the “guilty-plea-waiver-rule” and dispose of this appeal.

In the alternative, for all the reasons stated above, the State asks the court to affirm the judgement of conviction as stipulated to by the parties.

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CERTIFICATION OF MAILING

I hereby certify that:

This brief was, on March 27th, 2017, deposited in the United States mail for delivery to the clerk by first-class mail, or other class of mail that is at least as expeditious, postage pre-paid.

DATED this 27th day of March, 2017

Signed:

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and 3b in that it is a monospaced font, 10 characters per inch, double spaced, a 1.5 inch margin on the left side and a one-inch margin on all other sides. The length of this brief is 1,840 words.

DATED this 27th day of March, 2017.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

DATED this 27th day of March, 2017.

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