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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP002453-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIK M. SMITH,

Defendant-Appellant.

Appeal from a Judgment and Order Entered
in the Marinette County Circuit Court,
the Honorable David G. Miron, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

- I. Did the State meet its burden of establishing the circuit court's territorial jurisdiction over every crime to which Mr. Smith pled guilty?

The circuit court answered yes.

- II. If not, did Mr. Smith waive his objection to the circuit court's lack of territorial jurisdiction?

The circuit court answered yes.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested but would be welcomed if the court would find it helpful in resolving this case. Publication may be warranted, as this case involves issues that have not previously been addressed by an appellate court in this state.

STATEMENT OF THE CASE AND FACTS

The charges in this case stem from the death of E.M.V. (1:1-2). According to the complaint, Erik M. Smith and E.M.V. spent time at a bar in Iron Mountain, Michigan, on the night of October 10, 2008. (1:3). The two reportedly left the bar together in the early morning hours of October 11, 2008. (1:4). E.M.V. was not seen again until July 6, 2009, when his body was recovered from K.C. Creek in Marinette County, Wisconsin. (1:5).

Following E.M.V.'s disappearance, the Iron Mountain Police Department conducted an extensive but unsuccessful investigation. (1:2-5). Mr. Smith was interviewed repeatedly but denied any knowledge of E.M.V.'s whereabouts. (1:9).

After E.M.V.'s body was recovered, Detective Haber of the Iron Mountain Police Department received a letter from Mr. Smith's cellmate at a federal prison in Illinois, where Mr. Smith was being held on charges in an unrelated case. (1:9). In the letter, Mr. Smith's cellmate reported that Mr. Smith had volunteered information about E.M.V.'s death. (*Id.*).

According to the complaint, the letter set forth the following account of the events surrounding E.M.V.'s death. (1:9-11). Mr. Smith and E.M.V. were at a bar together, and E.M.V. asked Mr. Smith for a ride back to his apartment. (1:9-10). Mr. Smith initially said no and left the bar to drive a few other friends home. (1:10). As Mr. Smith was driving back to the bar, he saw E.M.V. walking by the side of the road. (*Id.*). He pulled over and got out of his car to speak with E.M.V. (*Id.*). An argument ensued between the two men and became physical. (*Id.*). Eventually, Mr. Smith got back into his car and started to leave. (*Id.*). E.M.V. then called Mr. Smith and said "he couldn't just leave him there." (*Id.*). Mr. Smith responded by backing up his car to return to E.M.V. (*Id.*). As the car was backing up, it hit E.M.V. (*Id.*). Mr. Smith then continued to back up, driving over E.M.V. with his front wheels. (*Id.*). At that point, it appeared to Mr. Smith that E.M.V. was still alive. (*Id.*). Nevertheless, Mr. Smith put E.M.V. in a ditch on the side of the road, covered him with leaves and debris, and drove home. (*Id.*). The next morning, Mr. Smith returned to the scene and put E.M.V.'s body in his trunk, where it remained throughout the workday. (*Id.*). Later on, he drove to a highway bridge with a

stream running under it and deposited E.M.V.'s body into the water. (*Id.*).

The complaint states that the information provided by the letter from Mr. Smith's cellmate was consistent with both the location where E.M.V.'s body was recovered and the information police had gathered about the events preceding E.M.V.'s disappearance. (1:11). The complaint further states that Mr. Smith's cellmate was not familiar with Marinette County or K.C. Creek prior to writing the letter. (*Id.*).

As the complaint makes plain, "there is no clear evidence as to the location where [E.M.V] actually met his demise"—that is, whether E.M.V. died in Michigan or Wisconsin. (*Id.*). Nevertheless, the Marinette County District Attorney's office charged Mr. Smith with four felonies: first-degree reckless homicide, homicide by negligent operation of a vehicle, hiding a corpse, and hit-and-run resulting in death. (1:1-2).

Pursuant to a plea agreement, Mr. Smith pled guilty to all but the first-degree reckless homicide charge, which was dismissed and read in. (65:2-3). The parties jointly requested a pre-sentence investigation (PSI) and remained free to argue at sentencing. (65:3).

The plea agreement also provided that Mr. Smith would not be criminally charged in Michigan in relation to E.M.V.'s disappearance or death. (*Id.*). The State explained this aspect of the plea agreement as follows:

Also as part of this agreement I do have a letter I will submit from Lisa Richards who is the prosecuting attorney in Dickinson County[, Michigan,] indicating that in exchange for the defendant's acceptance of this offer, which I've discussed with Attorney Richards, the Dickinson County Prosecutor's Office would agree to

forego filing of criminal charges against the defendant related to the 2008 disappearance and death of [E.M.V] and arising out of Iron Mountain Police Department Incident Number 49265808. She also indicates that they're entering into this agreement with full knowledge and consent of the investigating agency, specifically the Iron Mountain Police Department.

(65:3-4).

After the State recited the plea agreement, the court asked whether it was satisfied "that Marinette County is the proper venue." (65:4). The State responded as follows:

I am. If I can make a record of that.

As we laid out in the Criminal Complaint, the State cannot determine precisely where the initial incident occurred. The State, as laid out in the Criminal Complaint, has venue here because the body was found in Marinette County.

If this were to be an issue, there would be a couple different prongs that the State would proceed under. Under 971.19(4) if a—an offense has been committed in or against a vehicle, the trial may be in any . . . county through which the vehicle has passed or in the county where the travel began or ended.

Clearly the State can establish here that the vehicle traveled into and through our county, if nothing else when the—when the defendant put the body in the creek.

Secondly, under Sub (5) of 971.19 it allows the trial to be held in the county where the body is found. If [] the act causing the death is in one county and the death occurs in another, the trial could be in either county. And if neither location can be determined, then the trial may be held in the county where the body was found.

The State would proceed under those prongs if venue were an issue. And in speaking to [defense counsel,] it's my understanding that they're not challenging venue at all. Clearly the body was found here in Marinette County.

The description or the statements of the defendant are not completely clear as to which state the death actually occurred in; however, the State would contend that the area described by the defendant is consistent with areas in Marinette County. And as I indicated, the vehicle was used in the commission of the crime and at least traveled into our county to transport [E.M.V]'s body.

So on these bases the State believes we have venue.

(65:4-5).

The court then confirmed with both defense counsel and Mr. Smith that "the defense [was] stipulating that Marinette County is a proper place for venue." (65:5-6).

Neither the court nor the parties raised the issue of jurisdiction. The plea colloquy was otherwise thorough, and the court accepted Mr. Smith's guilty pleas. (65:24).

At sentencing, the court imposed consecutive terms of imprisonment totaling 25 years of initial confinement and 20 years of extended supervision. (66:55-56). These prison sentences were imposed consecutive to a federal prison sentence Mr. Smith is currently serving. (66:55).

Mr. Smith filed a timely notice of intent to pursue postconviction relief (28), and the undersigned attorneys were appointed to represent him (37). Counsel thereafter filed a no-merit report pursuant to Wis. Stat. § (Rule) 809.32. Mr. Smith filed a response to the no-merit report, raising, among other matters, the issue of jurisdiction.

After reviewing Mr. Smith's response and conducting additional research, counsel moved to withdraw the no-merit report, dismiss the no-merit appeal, and extend Mr. Smith's deadline for filing a postconviction motion pursuant to Rule 809.30(2)(h). (44). The court of appeals granted counsel's request. (45).

Counsel thereafter filed a postconviction motion on Mr. Smith's behalf, asking the circuit court to vacate the judgment of conviction on the grounds that it lacked territorial jurisdiction over two of the crimes to which Mr. Smith had pled guilty—namely homicide by negligent operation of a vehicle and hit-and-run resulting in death. (48). The motion conceded that territorial jurisdiction existed with respect to the charge of hiding a corpse. (48:8).

The State filed a brief in opposition to the motion (49), and counsel filed a reply (52). The motion was heard and then denied in an oral ruling. (54; 67). The circuit court's reasoning was twofold. First, it concluded that the complaint supported a reasonable inference that every crime with which Mr. Smith was charged had occurred in Wisconsin and thus that the State had established territorial jurisdiction. (67:28). Second, it held that even if the State had failed to establish territorial jurisdiction, Mr. Smith waived any objection thereto by entering the plea agreement and stipulating that venue was proper in Marinette County. (67:27).

This appeal follows.

ARGUMENT

I. The State Failed to Meet Its Burden of Establishing the Circuit Court's Territorial Jurisdiction Over Two of the Three Crimes to Which Mr. Smith Pled Guilty.

A. Standard of review.

Whether the State has established territorial jurisdiction is a question of law subject to de novo review. *See Midland Funding, LLC v. Mizinski*, 2014 WI App 82, ¶10, 355 Wis. 2d 475, 854 N.W.2d 371.

B. Introduction.

There are three types of jurisdiction: personal, subject matter, and territorial. *State v. Randle*, 2002 WI App 116, ¶8, 252 Wis. 2d 743, 647 N.W.2d 324. In criminal cases, personal jurisdiction dictates whom a particular court can punish (*see State v. Dabney*, 2003 WI App 108, ¶10, 26 Wis. 2d 843, 663 N.W.2d 366); subject matter jurisdiction dictates what conduct that court can punish (*see* 9 Wis. Prac., Criminal Practice & Procedure § 11:12 (2d ed. 2008)); and territorial jurisdiction dictates where such conduct or its consequences must occur to be punishable by that court (*see* 4 Wayne R. LaFave et al., *Criminal Procedure* § 16.4(a), at 830 (3d ed. 2007)). To enter a valid judgment of conviction, a circuit court must have all three types of jurisdiction. *Randle*, 252 Wis. 2d 743, ¶8. The only type in dispute here is territorial.

In every prosecution, it is the State's obligation to demonstrate that the circuit court has territorial jurisdiction over all charged crimes. *State v. Brown*, 2003 WI App 34, ¶25, 260 Wis. 2d 125, 659 N.W.2d 110. Although Wis. Stat. § 939.03(1) provides that the State can meet this burden in

seven different ways,¹ just one is relevant here.² Specifically, under § 939.03(1)(a), the State can establish the circuit court's territorial jurisdiction by showing that at least one constituent element of each charged crime took place in Wisconsin:

939.03 Jurisdiction of state over crime. (1) A person is subject to prosecution and punishment under the law of this state if any of the following applies:

(a) The person commits a crime, any of the constituent elements of which takes place in this state.

Because Mr. Smith entered a plea agreement instead of going to trial, the State did not present evidence regarding the location of the events underlying these charges. Rather, as the parties agreed at Mr. Smith's postconviction motion hearing, all facts relevant to the territorial jurisdiction analysis are set forth in the complaint. (67:5-6). The question, then, is whether the complaint supports a reasonable inference that at least one constituent element of each charged crime took place in Wisconsin. (*Id.*).

¹ Case law initially held that Wis. Stat. § 939.03(1) relates to personal jurisdiction. See *State v. Smith*, 131 Wis. 2d 220, 240, 388 N.W.2d 601 (1986); *State v. West*, 214 Wis. 2d 468, 482-83, 571 N.W.2d 196 (Ct. App. 1997). The court of appeals later clarified that § 939.03(1) governs territorial jurisdiction. See *State v. Randle*, 2002 WI App 116, ¶12, 252 Wis. 2d 743, 647 N.W.2d 324.

² Section 939.03(1)(b) and (c) are irrelevant because they pertain to inchoate crimes, which Mr. Smith was not charged with committing. Subsections (d) through (g) are also irrelevant, as they pertain to specific crimes that, again, Mr. Smith was not charged with committing.

C. Argument.

As previously stated, Mr. Smith entered guilty pleas to three crimes: hiding a corpse, homicide by negligent operation of a vehicle, and hit-and-run resulting in death. (65:2-3). The complaint strongly suggests that all constituent elements of two of these crimes—homicide by negligent operation of a vehicle³ and hit-and-run resulting in death⁴—occurred in Michigan. Accordingly, under § 939.03(1)(a), the circuit court did not have territorial jurisdiction over these offenses.

The charges of homicide by negligent operation of a vehicle and hit-and-run resulting in death both center around the allegation that Mr. Smith's car struck E.M.V. and that E.M.V. thereafter died. There are thus two fundamental questions for purposes of territorial jurisdiction: in which state did Mr. Smith's car strike E.M.V., and in which state did E.M.V. die? The complaint leaves both of these questions unanswered—indeed, it explicitly states that the evidence is unclear as to the location of E.M.V.'s death (1:11). However,

³ The elements of homicide by negligent operation of a vehicle are as follows: (1) The defendant operated a vehicle; (2) the defendant operated a vehicle in a manner constituting criminal negligence; and (3) the defendant's criminal negligence caused the death of the victim. Wis. JI-Criminal 1170 (2015).

⁴ The elements of hit-and-run resulting in death are as follows: (1) The defendant operated a vehicle involved in an accident on a highway; (2) the defendant knew the accident involved a person; (3) the accident resulted in a person's death; (4) the defendant did not immediately stop his vehicle at the scene of the accident and remain there until he had (a) given his name, address, and vehicle registration number to the person struck; (b) if requested, shown his driver's license to the person struck; and (c) rendered reasonable assistance to the person struck; and (5) the defendant was physically capable of complying with these requirements. Wis. JI-Criminal 2670 (2015).

it intimates that the relevant events took place in Michigan. First and foremost, it is undisputed that Mr. Smith and E.M.V. were Michigan residents and that they had spent the evening at a bar in Michigan. (1:2-5, 10; 48:9). In addition, Mr. Smith came across E.M.V. on the side of the road when E.M.V. was ostensibly heading home. (1:9-10). If E.M.V. had left a bar in Michigan and was walking towards his home in Michigan, it follows that Mr. Smith most likely encountered E.M.V.—and struck him with his car—in Michigan. This conclusion is further bolstered by the fact that it was the Iron Mountain Police Department that conducted the bulk of the investigation into E.M.V.’s disappearance. (1:2-9). In fact, law enforcement from Marinette County did not become involved until E.M.V.’s body was recovered. (*Id.*).

By contrast, the complaint indicates that all constituent elements of the third crime to which Mr. Smith pled guilty, hiding a corpse, occurred in Wisconsin.⁵ First, the complaint states that “[s]hortly upstream from the location where [E.M.V.’s] body was recovered is a bridge on U.S. Hwy. 8 which spans KC Creek.” (1:11). This bridge is located in Marinette County, Wisconsin. (*Id.*). Next, the complaint alleges that E.M.V.’s body was deposited into the water beneath this bridge. (1:10). Depositing E.M.V.’s body into the water constitutes hiding a corpse under Wis. Stat. § 940.11(2), so long as it was done to avoid prosecution for E.M.V.’s death. *See* Wis. JI-Criminal 1194 (2015). It follows that the facts set forth in the complaint—to which defense counsel stipulated—establish the circuit court’s territorial jurisdiction over this charge under § 939.03(1)(a).

⁵ The elements of hiding a corpse are as follows: (1) The defendant hid a corpse; and (2) the defendant did so with intent to conceal a crime or to avoid apprehension, prosecution, or conviction for a crime. Wis. JI-Criminal 1194 (2015).

Importantly, the fact that E.M.V.'s body was found in Wisconsin does not establish territorial jurisdiction for the other two offenses to which Mr. Smith pled guilty. Consistent with the Model Penal Code, a number of other states have territorial jurisdiction statutes that, with respect to homicide, create a permissive presumption that a death took place within state limits if the body is found there. LaFave, § 16.4(c), at 854 (citing Model Penal Code, § 1.03(4)). No such language appears in § 939.03. Similarly, Wisconsin's venue statute provides that if neither the location of the death nor the location of the act causing death can be determined, the defendant may be tried in the county where the body is found. Wis. Stat. § 971.19(5). But the legislature declined to include language in the statute at issue here that would tie territorial jurisdiction in homicide cases to the place a body is found. Under § 939.03(1)(a), the State had the burden to establish that at least one constituent element of each charged crime took place in Wisconsin. The State carried its burden on the charge of hiding a corpse; it failed to do so on the charges of homicide by negligent operation of a vehicle and hit-and-run resulting in death.

Because the complaint suggests that Mr. Smith committed the crimes of homicide by negligent operation of a vehicle and hit-and-run resulting in death in Michigan, his stipulation to the facts alleged in the complaint does not resolve the issue of the circuit court's territorial jurisdiction over those offenses. Nor did the State otherwise demonstrate that at least one constituent element of each of these offenses took place in Wisconsin. The circuit court thus lacked territorial jurisdiction over two of the crimes to which Mr. Smith pled guilty.

II. Mr. Smith Could Not and Did Not Waive His Objection to the Circuit Court’s Lack of Territorial Jurisdiction.

A. Standard of review.

Whether Mr. Smith’s objection to the circuit court’s lack of territorial jurisdiction can be or has been waived are questions of law subject to de novo review. *Cf. Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶7, 273 Wis. 2d 76, 681 N.W.2d 190 (2004); *State v. Soto*, 2012 WI 93, ¶14, 343 Wis. 2d 43, 817 N.W.2d 848.

B. Introduction.

It is firmly established that objections to personal jurisdiction are waived by entry of a valid guilty plea. *State v. Schroeder*, 224 Wis. 2d 706, 711, 593 N.W.2d 76 (Ct. App. 1999). It is equally clear that objections to subject matter jurisdiction cannot be waived. *State ex rel. Skinkis v. Treffert*, 90 Wis.2d 528, 534, 280 N.W.2d 316 (Ct. App. 1979). No Wisconsin appellate court has yet determined, however, “whether a defendant may waive territorial jurisdiction . . . when an issue arises as to whether the charging document charges a crime that is committed wholly outside the territorial jurisdiction of Wisconsin.” *Randle*, 252 Wis. 2d 743, ¶14.

In *Randle*, the court of appeals determined that the defendant had waived his objection to territorial jurisdiction by entering a no-contest plea. *Id.* But in reaching this decision, the court expressly declined to hold that “a defendant may waive territorial jurisdiction *altogether.*” *Id.* (emphasis added). Instead, it concluded that a defendant may waive territorial jurisdiction when such jurisdiction “exists

[with regard to] the original charge, but becomes questionable because the defendant accepts a plea agreement to a lesser-included charge.”⁶ *Id.*

Here, unlike in *Randle*, the circuit court lacked territorial jurisdiction over three of the *original* charges, and Mr. Smith pled guilty to two of them—not to lesser-included offenses. Thus, this case squarely presents the question the *Randle* court declined to resolve: whether a defendant “may waive territorial jurisdiction altogether” when a charged crime was “committed wholly outside the territorial jurisdiction of Wisconsin.” *Id.*

C. Argument.

An examination of the differing analyses of waiver in the contexts of personal and subject matter jurisdiction demonstrates that Mr. Smith did not—indeed, could not—waive his objection to the circuit court’s lack of territorial jurisdiction.

Personal jurisdiction does not restrict “judicial power [] as a matter of sovereignty, but [rather] as a matter of individual liberty.” *Insurance Corp. of Ireland v. Compagnie*, 456 U.S. 694, 702 (1982). “Because the

⁶ Despite the court of appeals’ explicit statement in *Randle* that it was not resolving the question of whether territorial jurisdiction can be waived altogether, the opinion includes a footnote suggesting that it can. *State v. Randle*, 2002 WI App 116, ¶14 n.4, 252 Wis.2d 743, 647 N.W.2d 324 (“Territorial jurisdiction is part of the due process restrictions on the power of a court to exercise its jurisdiction over a given individual, and is therefore an incident of personal jurisdiction that can be waived.”). This footnote both contradicts the holding of the opinion (which, as previously stated, is limited to the factual circumstances presented in that case) and improperly conflates the concepts of personal and territorial jurisdiction.

requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.” *Id.* at 703. This principle is firmly rooted in Wisconsin law, which has long held that “the knowing, voluntary and intelligent entry of a guilty plea waives all ‘nonjurisdictional defects’ preceding the entry of a plea, including constitutional violations and objections to personal jurisdiction” *Schroeder*, 224 Wis. 2d at 711; *see also Armstrong v. State*, 55 Wis. 2d 282, 285, 198 N.W.2d 357 (1972).

Subject matter jurisdiction has an entirely different purpose than that of personal jurisdiction, “and these different purposes affect the legal character of the two requirements.” *Insurance Corp. of Ireland*, 456 U.S. at 701. The requirement of subject matter jurisdiction restricts judicial power by delineating the controversies over which a court can preside. *See Schroeder*, 224 Wis. 2d at 712. A court has subject matter jurisdiction only insofar as the law grants it such; “the consent of the parties is irrelevant.” *Insurance Corp. of Ireland*, 456 U.S. at 702; *see also Schroeder*, 224 Wis. 2d at 712. In other words, because subject matter jurisdiction relates to the scope of a court’s power rather than the liberty of the individual, it cannot be waived by the individual. *See Mikrut*, 273 Wis. 2d 76, ¶42 (Abrahamson, C.J., concurring).

Territorial jurisdiction, like subject matter jurisdiction, relates to the scope of a court’s power rather than the liberty of the individual. More specifically, territorial jurisdiction relates to the “permissible geographic scope of penal legislation adopted by a particular [state],” the violation of which can be prosecuted in that state’s court system. LaFave, § 16.4(a), at 830. It follows that territorial jurisdiction, like subject matter jurisdiction, cannot ordinarily be waived. Professor LaFave concurs, stating both that “territorial

jurisdictional limits . . . are treated procedurally as presenting issues of subject matter jurisdiction” (*id.* at n.2) and that objections based on territorial jurisdiction “are not subject to waiver and can be raised at any point in the proceeding” (*id.*, § 16.1(a), at 694).

The exception that *Randle* sets forth—that “a defendant may waive territorial jurisdiction when territorial jurisdiction exists under the original charge, but becomes questionable because the defendant . . . [pleads] to a lesser-included charge”—is logically confined to the particular circumstances presented by that case and is therefore inapposite. See *Randle*, 252 Wis. 2d 743, ¶14. Consider, as a helpful analogue, the relaxed factual basis requirement for lesser-included offenses. See *State v. Harrell*, 182 Wis. 2d 408, 418, 513 N.W.2d 676 (Ct. App. 1994). A plea to a lesser-included offense is subject to looser factual basis strictures when factual basis has been established for a more serious charge. *Id.* at 419. Likewise, a plea to a lesser-included offense is subject to looser territorial jurisdiction strictures when territorial jurisdiction has been established for a more serious charge. *Randle*, 252 Wis. 2d 743, ¶14. In both cases, the defendant has conceded that he or she could be convicted of the original, more serious charge—that is, that the requirements of factual basis and territorial jurisdiction were met with regard to that charge—but has opted to plead to a lesser-included offense to derive some benefit therefrom. In neither situation is the original charge suspect, and in neither situation has the defendant pled to a charge for which there is no greater offense to fulfill the factual basis requirement or confer territorial jurisdiction.

The same is not true here. For the reasons discussed above, the circuit court in this case lacked territorial jurisdiction over the *original* charges of homicide by

negligent operation of a vehicle and hit-and-run resulting in death. Mr. Smith entered guilty pleas to *those* charges, not to lesser-included offenses. The court's reasoning in *Randle* thus does not support the conclusion that Mr. Smith waived his objection to the circuit court's lack of territorial jurisdiction.

Finally, despite statements to the contrary by the State and circuit court at the postconviction motion hearing, Mr. Smith's stipulation that Marinette County was an appropriate venue for this case does not resolve the issue of territorial jurisdiction. Beyond the fact that territorial jurisdiction is unwaivable under the circumstances presented here, it is also clear that territorial jurisdiction cannot be waived by a colloquy regarding venue. The concepts are overlapping, but they are distinct:

[Territorial jurisdiction is] tied to the territorial reach of the particular government's legislative power. If the events that would give rise to a criminal charge occurred beyond that territorial reach, then the government cannot grant to its courts the authority to apply its criminal laws to those events. If the government's legislative power could reach those events, then the judiciary is said to have '[territorial] jurisdiction' over the offense. To say that the judiciary has such jurisdiction, however, is not to say that every judicial district within that judiciary is a proper locality for the prosecution of the offense. The determination of proper locality is what the setting of venue is all about. It looks to the convenience of the forum rather than the territorial reach of the government's legislative power.

LaFave, § 16.1(a), at 692. *See also State v. Anderson*, 2005 WI 54, ¶27, 280 Wis. 2d 104, 695 N.W.2d 731.

In sum, Mr. Smith could not and did not waive his objection to the circuit court's lack of territorial jurisdiction. The question thus becomes what remedy Mr. Smith should receive.

III. Because the Circuit Court Lacked Territorial Jurisdiction, and Because Objections Thereto Cannot Be Waived Under the Circumstances Presented by This Case, Mr. Smith's Judgment of Conviction Should Be Vacated.

Although the circuit court lacked territorial jurisdiction over just two of the three crimes to which Mr. Smith pled guilty, Mr. Smith's third guilty plea was rooted in the same plea agreement. Because that plea agreement is *partially* invalid, Mr. Smith's postconviction motion asked to withdraw from the *whole* agreement—that is, to have the judgment of conviction vacated in its entirety—unless the State preferred otherwise. The State opposed Mr. Smith's request without stating what its preferred remedy would be were the motion granted. Due to the State's silence on this point, and because plea agreements are “ordinarily” vacated as a whole (*see State v. Roou*, 2007 WI App 193, ¶26, 305 Wis. 2d 164, 738 N.W.2d 173), Mr. Smith renews his request to withdraw from the entirety of the plea agreement.

CONCLUSION

For the reasons set forth, Mr. Smith requests that this court reverse the circuit court's decision denying his postconviction motion and remand the case to the circuit court with instructions to vacate the judgment of conviction.

Dated this 20th day of February, 2017.

Respectfully submitted,

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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 (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4,511 words.

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 20th day of February, 2017.

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APPENDIX

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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