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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2016AP2453-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

ERIK M. SMITH,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND
AN ORDER DENYING POSTCONVICTION RELIEF
ENTERED IN THE MARINETTE COUNTY CIRCUIT
COURT, THE HONORABLE DAVID G. MIRON,
PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Defendant-appellant Erik Smith pleaded guilty to homicide by the negligent operation of a vehicle, hit-and-run involving death, and hiding a corpse. The victim was last seen alive in Iron Mountain, Michigan, but his body was found in Marinette County, Wisconsin. Did the Marinette County Circuit Court have territorial jurisdiction over the homicide and hit-and-run charges?

The circuit court held that it had territorial jurisdiction.

2. During the plea colloquy, Smith admitted that he committed those crimes in Marinette County, Wisconsin. Did Smith waive his right to challenge territorial jurisdiction following his conviction?

The circuit court held that Smith waived his right to challenge territorial jurisdiction.

3. In his plea colloquy, Smith personally and through counsel stated that the Marinette County Circuit Court was the proper forum to resolve this case. Is Smith judicially estopped from challenging the circuit court's territorial jurisdiction?

The circuit court held that Smith was judicially estopped from challenging territorial jurisdiction.

4. Is Smith entitled to withdraw his guilty plea to the hiding-a-corpse charge if his convictions on the two other counts are invalid?

The circuit court did not address this issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication of the Court's decision is warranted because there are few reported Wisconsin cases addressing issues relating to criminal territorial jurisdiction.

INTRODUCTION

Eric Volp was last seen leaving a bar in Iron Mountain, Michigan, in October 2008. His body was discovered nine months later in KC Creek in Marinette County, Wisconsin.¹

Smith told a cellmate that he struck Volp with his car, put Volp in a ditch, and later disposed of Volp's body in a stream. He pleaded guilty to charges of homicide by the negligent operation of a vehicle, hit-and-run resulting in death, and hiding a corpse. The charging documents alleged that Smith committed those crimes in Marinette County.

Smith seeks to withdraw his pleas, claiming that the circuit court lacked territorial jurisdiction over the homicide and hit-and-run charges. This Court should reject Smith's argument because the facts alleged in the criminal complaint support a reasonable inference that Smith committed both crimes in Marinette County. Moreover, Smith waived his objection to the circuit court's territorial jurisdiction because he pleaded guilty to committing those offenses in Marinette County. He also is judicially estopped

¹ According to the DNR, the name of the creek is "K.C. Creek." See <http://dnr.wi.gov/lakes/documents/fishandplantreports/marinettekccreek2005.pdf> (last visited Apr. 12, 2017). The State uses "KC Creek" because that is how it is spelled in the criminal complaint.

from challenging territorial jurisdiction because his postconviction contention that Wisconsin lacks territorial jurisdiction is inconsistent with the position he took at the plea hearing, where he told the circuit court that his case should be adjudicated in the Marinette County, Wisconsin, Circuit Court.

STATEMENT OF THE CASE

Smith appeals from a judgment convicting him of homicide by the negligent operation of a vehicle, hiding a corpse, and hit-and-run resulting in death. (R. 32:1, A-App. 113.) He also appeals from an order denying his postconviction motion to withdraw his guilty pleas. (R. 54:1.)

Facts. Because Smith waived his right to a preliminary hearing (R. 63:5) and entered guilty pleas to the charges (R. 65:7–9), the relevant facts are those set forth in the criminal complaint (R. 1:2–11, A-App. 102–11).

On October 12, 2008, Eric Volp’s aunt went to the Iron Mountain, Michigan, Police Department to report that Volp had been missing since the evening of October 10, 2008. (R. 1:2, A-App. 102.) Witnesses told police that they had seen Smith and Volp at the North Stables Bar in Iron Mountain in the early morning hours of October 11, 2008, and had seen them leave together. (R. 1:3–4, A-App. 103–04.)

On July 6, 2009, a man who was fishing in KC Creek in Marinette County, Wisconsin, discovered Volp’s body submerged in the water. (R. 1:5, A-App. 5.) Volp suffered fractures to the skull, mandible, and ribs. (*Id.*) The cause of death was multiple blunt force trauma. (*Id.*)

Two witnesses told police that Smith admitted to them that he had sex with Volp the night of October 10–11, 2008.

(R. 1:7–8.) Smith initially told police that he did not know Volp well and never had sex with him, but he later told them that he had sex with Volp the night of October 10–11 at Volp’s apartment in the Downtowner building. (R. 1:9, A-App. 109.) However, the manager of the Downtowner told police that Volp no longer lived there as of October 10, 2008, and would not have had access to the apartment on that date. (*Id.*)

A former coworker of Smith told police that he and Smith “would occasionally go and party out in the county” and that “one of the areas they would party would be in the area of KC Creek.” (R. 1:8, A-App. 108.) Investigators showed the former coworker an overhead view of the creek area and he pointed out where he and Smith partied. (*Id.*) That location was about 200 feet from where Volp’s body was discovered. (*Id.*)

In 2011, Smith was incarcerated in a federal prison. (*Id.*) One of the investigators in this case received a letter from Smith’s cellmate describing Smith’s statements to the cellmate about the death of a man named Eric. (*Id.*) Smith told his cellmate that he was at a bar with Eric and that Eric asked for a ride home. (*Id.*) Smith declined because he had to give other friends a ride home. (R. 1:9–10, A-App. 109–10.)

After Smith dropped off his friends, he saw Eric walking down the street. (R. 1:10, A-App. 110.) Smith “picked Eric up and eventually an argument ensued between them.” (*Id.*) Smith and Eric struggled physically and Smith’s throat was scratched during the argument. (*Id.*)

Smith got back in his car. (*Id.*) Eric called him on the phone and said that Smith “couldn’t just leave him there,” so Smith stopped and backed up, hitting something as he did

so. (*Id.*) Smith saw that Eric was under the car and was alive. (*Id.*) Smith continued driving in reverse and drove over Eric with the front wheels of the car. (*Id.*).

Smith observed that Eric was “breathing and making a gurgling sound.” (*Id.*) He put Eric in a ditch at the side of the road, covered him with leaves and debris, and drove home. (*Id.*)

The next morning, Smith retrieved Eric’s body and put it in the trunk of his car, where it remained that day while Smith was at work. (*Id.*) Smith later drove to a bridge over a stream, dumped the body over the bridge, and dragged the body down the stream away from the road. (*Id.*)

According to the criminal complaint, “[t]he circumstances listed in the statement of [the cellmate] matched the circumstances of both the demise of Eric M. Volp as well as the location where the body of Eric M. Volp was found.” (R. 1:11, A-App. 111.) The complaint stated that there is a bridge on U.S. Highway 8 that spans KC Creek shortly upstream from where the body was recovered. (*Id.*) The complaint further alleged that the body could not have ended up at the location where it was recovered unless it had been pulled down stream from the bridge because a large tree lying across the stream would have prevented a body from floating to that location. (*Id.*)

The complaint further stated that “[t]he body of Eric M. Volp was recovered in Marinette County, Wisconsin, and there is no clear evidence as to the location where Eric M. Volp actually met his demise.” (*Id.*)

Procedural history. The State charged Smith with first-degree reckless homicide, homicide by the negligent operation of a vehicle, hiding a corpse, and hit-and-run

resulting in death. (R. 1:1–2, A-App. 101–02; R. 6:1–2, R. 9:1–2.) The charging documents allege that Smith committed those offenses in Marinette County, Wisconsin. (*Id.*)

Smith and the State reached a plea agreement under which Smith would enter guilty pleas to the charges of homicide by the negligent operation of a vehicle, hiding a corpse, and hit-and-run resulting in death; the reckless homicide charge would be dismissed and read in. (R. 65:2–3.) As part of the agreement, the Dickinson County, Michigan, Prosecuting Attorney agreed not to file any criminal charges against Smith relating to Volp’s disappearance and death. (R. 65:3, 6.)

At the plea hearing, the circuit court and the parties discussed whether Marinette County was the proper venue for the case. (R. 65:4–6.) The prosecutor told the court while “the State cannot determine precisely where the initial incident occurred,” venue in Marinette County was proper under Wis. Stat. § 971.19(4) because the crimes involved a vehicle that passed through or whose travel began or ended in Marinette County and the State “can establish here that the vehicle traveled into and through our county, if nothing else . . . when the defendant put the body in the creek.” (R. 65:4.) The prosecutor also said that venue was proper under Wis. Stat. § 971.19(5), which provides that if the act causing death is in one county and the death ensues in another, the defendant may be tried in either county, and that if neither location can be determined, the defendant may be tried in the county where the body is found. (R. 65:4–5.)

Defense counsel agreed that based on his discussion with the State and his own research, the case was properly venued in Marinette County. (R. 65:5–6.) Smith personally

agreed that the case was properly venued in Marinette County, Wisconsin. (R. 65:6.)

In his plea colloquy, Smith affirmed that he was pleading guilty to having committed the crimes in Marinette County, Wisconsin, including the charges of homicide by negligent operation of a vehicle and hit-and-run resulting in death.

THE COURT: Follow along while [the prosecutor] reads first Count 2, then later Counts 3 and 4. And after each one I will ask you how you plead[.]

[THE PROSECUTOR]: I inform the Court that this defendant did in Marinette County, Wisconsin, cause the death of another on or about the late night hours of October 10, 2008, or early morning hours of October 11, 2008, to wit: Eric M. Volp by the negligent operation of a motor vehicle contrary to Wisconsin Statute Section 940.10(1), a Class G felony.

THE COURT: Mr. Smith, did you hear the Assistant District Attorney read the charge in Count 2?

THE DEFENDANT: Yes.

THE COURT: And how do you plead?

THE DEFENDANT: Guilty.

...

THE COURT: Follow along while he reads Count 4.

[THE PROSECUTOR]: I inform the Court that this defendant did in Marinette County, Wisconsin, after being involved in an accident resulting in the death of a person on or about the late night hours of October 10, 2008, or early morning hours of October 11, 2008, fail to remain at the scene of the accident until he had rendered appropriate assistance to the person injured in said

accident in violation of Wisconsin Statute Section 346.67(1) and 346.74(5)(d) of the Wisconsin Statutes, a Class D felony.

THE COURT: Mr. Smith, did you hear the Assistant District Attorney read the charge in Count 4?

THE DEFENDANT: Yes.

THE COURT: How do you plead?

THE DEFENDANT: Guilty.

(R. 65:6–9.)

After completing the plea colloquy, the circuit court found that Smith's pleas were freely, voluntarily, and intelligently entered and that there was a factual basis for those pleas. (R. 65:23–24.) The court accepted the pleas, found Smith guilty on the three counts, and dismissed and read in the reckless homicide count. (R. 65:24.) The court sentenced Smith to consecutive sentences of five years of imprisonment and five years of extended supervision on the homicide by negligent operation of a vehicle count, five years of imprisonment and five years of extended supervision on the hiding-a-corpse count, and 15 years of imprisonment and ten years of extended supervision on the hit-and-run resulting in death count, to be served consecutively to Smith's federal sentence. (R. 32:1; R. 66:55–56.)

Smith filed a postconviction motion to vacate the judgment and allow him to withdraw his guilty pleas. (R. 48:1–14.) Smith argued that the circuit court lacked territorial jurisdiction over the homicide and hit-and-run counts and that he did not waive his objection to the circuit court's lack of territorial jurisdiction by pleading guilty. (*Id.*)

At the hearing on the motion, the parties agreed that because Smith entered guilty pleas, the issue was whether the criminal complaint supported a reasonable inference that the negligent homicide and hit-and-run offenses occurred in Wisconsin. (R. 67:5–6, 8.) The court ruled that it did not believe that there was “any question at all” that it had jurisdiction. (R. 67:28, A-App. 119.) It noted the body was found about 30 miles from the Menominee River, which forms the Wisconsin-Michigan border, and held that it had jurisdiction based on reasonable inferences in the complaint. (*Id.*)

The circuit court also held that Smith had waived his right to claim a lack of territorial jurisdiction. (*Id.*) It noted that “not only does [Smith] submit to the jurisdiction of the Court, he agrees to enter this plea, he gets concessions from the State of Michigan that they will not prosecute him, he agrees that this should be conducted here in Wisconsin.” (R. 67:27, A-App. 118.) “By agreeing to venue,” the court added, “he’s stipulating that an element of these offenses occurred here in Marinette County, Wisconsin.” (*Id.*) The court further held that judicial estoppel barred Smith’s claim because he told the court, “do this in Wisconsin. We’re not going to do this in Michigan and we have gotten concessions from Michigan that they’re not going to prosecute, provided it’s being done over in -- in Michigan [sic].” (R. 67:28–29, A-App. 119–20.)

SUMMARY OF ARGUMENT

Wisconsin has territorial jurisdiction over an offense if an element of the offense is committed within the state. Because Smith pleaded guilty after waiving a preliminary hearing, the circuit court had territorial jurisdiction if the facts alleged in the criminal complaint support a reasonable

inference that an element of the offense occurred in the state. Because a reasonable inference may be drawn from the facts alleged in the complaint that Smith struck the victim with his car in Wisconsin and left him to die in this state, the circuit court had territorial jurisdiction over the charges of homicide by the negligent operation of a vehicle and hit-and-run resulting in death.

Because the circuit court had territorial jurisdiction, this Court need not determine whether Smith waived his right to object to jurisdiction or is judicially estopped from doing so. But were the Court to reach those issues, it should hold that Smith waived his objection to jurisdiction by pleading guilty because he admitted during the plea colloquy that he committed both offenses in Marinette County, Wisconsin, and affirmatively agreed that the Marinette County Circuit Court was the proper forum for this case. Alternatively, the Court should conclude that Smith is judicially estopped from challenging territorial jurisdiction because he should not be permitted to take a position after sentencing that is contrary to the position he took when he entered his plea.

Finally, were this Court to determine that the circuit court lacked territorial jurisdiction over the two counts at issue on appeal and that Smith is not precluded from challenging territorial jurisdiction, it should not vacate the conviction whose validity he does not challenge for hiding a corpse. Because the remedy is a matter for the circuit court's discretion, Smith's relief on appeal with regard to that count is limited to a remand to the circuit court to allow it to exercise its discretion.

STANDARD OF REVIEW

Whether a Wisconsin circuit court has territorial jurisdiction presents an issue of law that an appellate court reviews de novo. *State v. Randle*, 2002 WI App 116, ¶ 18, 252 Wis. 2d 743, 647 N.W.2d 324.

No Wisconsin case discusses the standard of review with respect to whether a defendant may waive or has waived an objection to lack of territorial jurisdiction. The State believes that these issues are questions of law that this Court reviews independently. *Cf. Dietrich v. Elliott*, 190 Wis. 2d 816, 824, 528 N.W.2d 17 (Ct. App. 1995) (“Whether [the defendant] waived the defense of lack of personal jurisdiction is a question of law for our independent review.”).

Whether judicial estoppel applies presents a question of law that an appellate court reviews independently. *Paul Davis Restoration of S.E. Wisconsin, Inc. v. Paul Davis Restoration of Ne. Wisconsin*, 2013 WI 49, ¶ 39, 347 Wis. 2d 614, 831 N.W.2d 413.

Whether a defendant should be allowed to withdraw all of his pleas if some pleas are invalid is a discretionary decision for the circuit court. *State v. Roou*, 2007 WI App 193, ¶ 26, 305 Wis. 2d 164, 738 N.W.2d 173. The court of appeals reviews matters committed to the circuit court’s discretion under the erroneous exercise of discretion standard. *State v. Pirtle*, 2011 WI App 89, ¶ 16, 334 Wis. 2d 211, 799 N.W.2d 492.

ARGUMENT

I. The circuit court had territorial jurisdiction over the charges of homicide by negligent operation of a vehicle and hit-and-run resulting in death.

“It is elementary that a court may act only upon crimes committed within the territorial jurisdiction of the sovereignty seeking to try the offense.” *State v. Anderson*, 2005 WI 54, ¶ 32, 280 Wis. 2d 104, 695 N.W.2d 731 (quoting *Randle*, 252 Wis. 2d 743, ¶ 18). The statutory bases for territorial jurisdiction of Wisconsin circuit courts are set forth in Wis. Stat. § 939.03. *See id.* ¶ 28. That statute provides in relevant part that “[a] person is subject to prosecution and punishment under the law of this state if . . . [t]he person commits a crime, any of the constituent elements of which takes place in this state.” Wis. Stat. § 939.03(1)(a) (2007–08); *see also Anderson*, 280 Wis. 2d 104, ¶ 32.²

A. The circuit court had territorial jurisdiction if the criminal complaint supports a reasonable inference that Smith committed an element of the offenses in this state.

The standard by which a court determines the adequacy of the facts that establish territorial jurisdiction depends on the stage of the proceeding at which the jurisdictional issue arises. In *Anderson*, where the defendant appealed an order denying a motion to dismiss following

² Section 903.03 provides other bases for territorial jurisdiction, but none of those are applicable here. *See* Wis. Stat. § 903.03(1)(b)–(g). All statutory references are to the 2007–08 version of the statutes.

bindover, the issue on appeal was whether there was sufficient evidence at the preliminary hearing to support territorial jurisdiction in Wisconsin. *See Anderson*, 280 Wis. 2d 104, ¶¶ 21–22. To decide that question, the supreme court applied the probable cause standard applicable to bindover determinations—whether “there exists a set of facts that supports a reasonable inference that the defendant probably committed a felony.” *Id.* ¶ 25.

In this case, because Smith waived a preliminary hearing (R. 63:5) and pleaded guilty (R. 65:7–9), the relevant facts are set forth in the criminal complaint (R. 1:2–11, A-App. 102–11). A criminal complaint must allege facts “that are sufficient, in themselves or together with reasonable inferences to which they give rise, to allow a reasonable person to conclude that a crime was probably committed and the defendant is probably culpable.” *State v. Adams*, 152 Wis. 2d 68, 73, 447 N.W.2d 90 (Ct. App. 1989).

The degree of probable cause to support a criminal complaint is less than that required for a bindover. *State v. O’Brien*, 2014 WI 54, ¶ 55, 354 Wis. 2d 753, 850 N.W.2d 8. “To be sufficient, a complaint must only be minimally adequate.” *Adams*, 152 Wis. 2d at 73. “This is to be evaluated in a common sense rather than a hypertechnical manner, in setting forth the essential facts establishing probable cause.” *Id.* “Where reasonable inferences may be drawn establishing probable cause and equally reasonable inferences may be drawn to the contrary, the criminal complaint is sufficient.” *State v. Manthey*, 169 Wis. 2d 673, 688–89, 487 N.W.2d 44 (Ct. App. 1992); *see also State v. Black*, 2001 WI 31, ¶ 16, 242 Wis. 2d 126, 624 N.W.2d 363 (“[A] factual basis for a plea exists if an inculpatory inference can be drawn from the complaint or facts admitted to by the defendant even though it may conflict with an exculpatory inference elsewhere in the record and the

defendant later maintains that the exculpatory inference is the correct one.”).

So the question here, as Smith acknowledges (Smith’s Br. 8), is whether the complaint supports a reasonable inference that at least one element of the charges of homicide by negligent operation of a vehicle and hit-and-run resulting death took place in Wisconsin.³ For the reasons discussed below, the answer to that question is “yes.”

B. The allegations of the criminal complaint support a reasonable inference that Smith committed the crimes in Wisconsin.

According to the complaint, witnesses told police that they saw Smith and Volp at the North Stables Bar in Iron Mountain, Michigan, in the early morning hours of October 11, 2008, and saw them leave together. (R. 1:3–4, A-App. 103–04.) Smith told police that he had sex with Volp that night. (R. 1:9, A-App. 109.) Volp was not seen again

³ The elements of homicide by negligent operation of a vehicle are: 1) the defendant operated a vehicle; 2) the defendant operated the vehicle in a criminally negligent manner; and 3) the defendant’s criminal negligence caused a person’s death.” *See* Wis JI-Criminal 1170 (2002).

The elements of hit-and-run resulting in death are: 1) the defendant operated a vehicle involved in an accident on a highway; 2) the defendant knew that the vehicle he was operating was involved in an accident and involved a person; 3) the accident resulted in death of the person; 4) the defendant did not immediately stop his vehicle at the scene and remain there until he had given the appropriate information and rendered reasonable assistance to the person struck; and the defendant was physically capable of complying with these requirements. *See* Wis JI-Criminal 2670 (2014).

until his body was discovered in KC Creek in Marinette County, Wisconsin, almost nine months later. (R. 1:5, A-App. 105.)

Smith told a cellmate that he killed Volp and disposed of his body in a stream.⁴ (R. 1:9–10, A-App. 109–10.) Smith said that he was at a bar with Volp, who asked Smith for a ride home. (R. 1:9, A-App. 109.) Smith declined because he was going to give other friends a ride home. (R. 1:9–10, A-App. 109–10.)

After Smith dropped off his friends, he saw Volp walking down the street. (R. 1:10, A-App. 110.) Smith “picked [Volp] up and eventually an argument ensued between them.” (*Id.*) The argument turned physical and Smith’s throat was scratched. (*Id.*)

After the altercation, Smith got back in his car. (*Id.*) Volp phoned Smith and told Smith that he “couldn’t just leave him there,” so Smith stopped, backed up, and hit something. (*Id.*) Smith saw Volp under the car, alive. (*Id.*) Smith continued in reverse and drove over Volp with the front wheels of the car. (*Id.*).

Smith observed that Volp was “breathing and making a gurgling sound.” (*Id.*) He put Volp in a roadside ditch, covered him with leaves and debris, and drove home. (*Id.*)

The next day, Smith retrieved Volp’s body. He drove to a bridge over a stream, dumped the body over the bridge,

⁴ Smith told his cellmate that the victim was named Eric. (R. 1:9–10, A-App. 109–10.) It may reasonably be inferred that Smith was talking about Eric Volp.

and dragged the body down the stream away from the road. (*Id.*)

Because the complaint alleges that Smith and Volp “eventually” argued after Smith picked up Volp, it is a reasonable inference that Smith and Volp drove some distance from where Smith picked Volp up to the location where they argued and Smith struck Volp with his car. That inference is reinforced by the allegation that after Smith drove away after their altercation, Volp called Smith to complain that Smith “couldn’t just leave him there.” That suggests that Smith and Volp were no longer in Iron Mountain and were, instead, a significant distance from Volp’s home. And although the criminal complaint does not indicate the distance, this Court may take judicial notice that Google Maps shows the driving distance between the North Stables Pub in Iron Mountain and the Michigan-Wisconsin border is just 3.5 miles.⁵ (R. App. 101.) *See Cloe v. City of Indianapolis*, 712 F.3d 1171, 1177 n.3 (7th Cir. 2013) (“We have taken judicial notice of—and drawn our distance estimates from—images available on Google Maps, ‘a source whose accuracy cannot reasonably be questioned, at least for the purpose of determining’ general distances.”), *overruled on other grounds by Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760 (7th Cir. 2016).

Smith admitted having sex with Volp that night. But while Smith told police that they had sex at Volp’s apartment in the Downtowner building, the building

⁵*See* <https://www.google.com/maps/dir/North+Stables+Pub,+416+4th+St,+Iron+Mountain,+MI+49801/45.7851076,-88.0823378/@45.7960855,-88.086115,14z/data=!4m14!4m13!1m10!1m1!1s0x4d524b940d93085b:0x58f5d06bdfbf159f!2m2!1d-88.0571081!2d45.8264326!3m4!1m2!1d-88.0713406!2d45.7985114!3s0x4d524c6393881b5d:0x87a309d3852a4451!1m0!3e0?hl=en> (last visited Apr. 12, 2017).

manager told police that Volp no longer lived there as of October 10, 2008, and would not have had access to the apartment on that date. (R. 1:9, A-App. 109.) It is a reasonable inference, therefore, that Smith and Volp drove somewhere else that night. It is also a reasonable inference that they drove to the area near where the body was found in Marinette County, as a former coworker told police that one of the places where Smith would “party out in the county” was a spot near KC Creek that was about 200 feet from where Volp’s body was discovered. (R. 1:8, A-App. 108.)

The fact that Volp’s body was found in Wisconsin further supports the inference that he was killed in Wisconsin. “[T]he presence of the body within the State has been held sufficient to allow the drawing of an inference that the crime was committed at that place.” *State v. McDowney*, 231 A.2d 359, 361 (N.J. 1967) (collecting cases); *see also Breeding v. State*, 151 A.2d 743, 747 (Md. 1959) (rejecting challenges to territorial jurisdiction and venue because “[t]he cases hold that the finding of a dead body in a particular county raises a presumption, or supports an inference, that the killing took place there”); *Commonwealth v. Knowlton*, 163 N.E. 251, 254 (Mass. 1928) (rejecting the argument that the evidence was insufficient to establish that “the homicide was committed in Middlesex County or in the Commonwealth of Massachusetts” because “[t]he finding of the body in Middlesex county was sufficient to give the court jurisdiction, and warrant the jury in concluding that the homicide was committed in that county”); *State v. Fabian*, 263 So. 2d 773, 776 (Miss. 1972) (applying “the reasonable presumption, generally recognized, that a person died in the state and county where his body was found”).

Smith notes that “[c]onsistent with the Model Penal Code, a number of 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.” (Smith’s Br. 11.) He further notes that Wis. Stat. § 939.03 does not contain such a provision. (*Id.*) But none of the cases cited in the preceding paragraph involved a statutory presumption. Rather, they rely on the logical proposition that “[t]he presence of the body within the State . . . allow[s] the drawing of an inference that the crime was committed at that place.” *McDowney*, 231 A.2d at 361. “Aside from any statutory provision, the finding of the body in a county would warrant a finding that the murder was committed in that county.” *Fabian*, 263 So. 2d at 776 (quoting 22 C.J.S. *Criminal Law* § 185(17)). “One should not be permitted to escape punishment for murder because he is clever enough to conceal the place where the victim was killed or died.” *Id.*

Smith argues that the criminal complaint “intimates” that the relevant events took place in Michigan. (Smith’s Br. 10.) He notes that Smith and Volp were Michigan residents, that they had spent the evening at a bar in Michigan, and that Smith “came across [Volp] on the side of the road when [Volp] was ostensibly heading home.” (*Id.*) From that, he argues that “[i]f [Volp] had left a bar in Michigan and was walking towards his home in Michigan, it follows that Mr. Smith most likely encountered [Volp]—and struck him with his car—in Michigan.” (*Id.*)

The flaw in that argument is that it assumes that the only reasonable inference to be drawn from the complaint is that Smith’s car struck Volp at the location where Smith came upon Volp walking down the street. But that is not what the complaint alleges. Rather, the complaint alleges that when Smith saw Volp walking down the street, Smith “picked [Volp] up and eventually an argument ensued between them.” (R. 1:10, A-App. 110.)

The complaint does not say that Smith and Volp argued when Smith first encountered Volp walking down the street. Rather, they “eventually” argued after Smith picked up Volp. (*Id.*) A reasonable inference is that they had been driving for some amount of time before they argued and before the argument turned physical.

The inference that Smith and Volp had driven a distance from the place where Volp got into Smith’s car is reinforced by Smith’s statement that after he got back into his car and drove away after the physical altercation, Volp called Smith to say that Smith “couldn’t just leave him there.” (*Id.*) A reasonable inference from that factual allegation is that Smith and Volp had driven to a location that was a sufficient distance from Volp’s home that Volp objected to being stranded there. Because Iron Mountain is only three-and-a-half miles from the Wisconsin border, and because one of the places Smith and his friends partied was in Wisconsin near the location where the body was found (R. 1:8, A-App. 108), a reasonable inference may be drawn that Smith and Volp got out of the car, argued, and fought in Wisconsin and that Smith struck Volp with his car at that location in Wisconsin.

Smith also argues that the “conclusion” that he “most likely encountered [Volp]—and struck him with his car—in Michigan” is “further bolstered by the fact that it was the Iron Mountain Police Department that conducted the bulk of the investigation into [Volp’s] disappearance” and “law enforcement from Marinette County did not become involved until [Volp’s] body was recovered.” (Smith’s Br. 10.) The State does not follow Smith’s logic. The Iron Mountain Police Department would have investigated Volp’s disappearance because he was last seen alive in Iron Mountain and his aunt reported his disappearance to that department. (R. 1:2–

4.) But that department's investigation of Volp's disappearance sheds no light on where he was killed.

Moreover, it does not matter whether the facts alleged in the criminal complaint can support an inference that Smith killed Volp in Michigan, because the complaint's allegations also support a reasonable inference that Smith killed him in Wisconsin. "Where reasonable inferences may be drawn establishing probable cause and equally reasonable inferences may be drawn to the contrary, the criminal complaint is sufficient." *Manthey*, 169 Wis. 2d at 688–89.

The criminal complaint acknowledges that "there is no clear evidence as to the location where Eric M. Volp actually met his demise." (R. 1:11, A-App. 111.) But a reasonable inference may be drawn from the facts alleged in the complaint that Smith ran over Volp with his car in Marinette County, Wisconsin, and left Volp to die there. Accordingly, this Court should conclude that the circuit court had territorial jurisdiction over the charges of homicide by negligent operation of a vehicle and hit-and-run resulting in death.

II. Smith waived his objection to territorial jurisdiction.

In addition to ruling that it had territorial jurisdiction, the circuit court held that Smith waived his claim that it lacked territorial jurisdiction when he pleaded guilty. (R. 67:27–28, A-App. 118–19.) The circuit court was correct.

"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." *Randle*,

252 Wis. 2d 743, ¶ 14 n.4. In *Randle*, this Court held that “by entering his no-contest plea in this case, [the defendant] waived his right to challenge jurisdiction under Wis. Stat. § 939.03.” *Id.* ¶ 16.

The Court stated in *Randle* that it “need not decide whether a defendant may waive territorial jurisdiction altogether—that is, when an issue arises as to whether the charging document charges a crime that is committed wholly outside the territorial jurisdiction of Wisconsin.” *Id.* ¶ 14. It concluded, however, that territorial jurisdiction may be waived “when territorial jurisdiction exists under the original charge, but becomes questionable because the defendant accepts a plea agreement to a lesser-included charge.” *Id.*

In this case, Smith waived any objection to the circuit court’s territorial objection over the homicide by negligent operation of a vehicle and the hit-and-run resulting in death charges when he pleaded guilty because he admitted during the plea colloquy that he committed both offenses in Marinette County, Wisconsin. (R. 65:6–9.)

[THE PROSECUTOR]: I inform the Court that this defendant did in Marinette County, Wisconsin, cause the death of another on or about the late night hours of October 10, 2008, or early morning hours of October 11, 2008, to wit: Eric M. Volp by the negligent operation of a motor vehicle contrary to Wisconsin Statute Section 940.10(1), a Class G felony.

THE COURT: Mr. Smith, did you hear the Assistant District Attorney read the charge in Count 2?

THE DEFENDANT: Yes.

THE COURT: And how do you plead?

THE DEFENDANT: Guilty.

...

[THE PROSECUTOR]: I inform the Court that this defendant did in Marinette County, Wisconsin, after being involved in an accident resulting in the death of a person on or about the late night hours of October 10, 2008, or early morning hours of October 11, 2008, fail to remain at the scene of the accident until he had rendered appropriate assistance to the person injured in said accident in violation of Wisconsin Statute Section 346.67(1) and 346.74(5)(d) of the Wisconsin Statutes, a Class D felony.

THE COURT: Mr. Smith, did you hear the Assistant District Attorney read the charge in Count 4?

THE DEFENDANT: Yes.

THE COURT: How do you plead?

THE DEFENDANT: Guilty.

(R. 7–9.)

“A guilty plea carries with it admission of the facts charged against the individual.” *State v. Campbell*, 2002 WI App 20, ¶ 8, 250 Wis. 2d 238, 642 N.W.2d 230. This principle applies to admissions of facts that establish territorial jurisdiction. “[A]lthough subject-matter jurisdiction cannot be conferred on a court by consent of the parties, territorial jurisdiction can be so conferred.” *People v. Tabucchi*, 134 Cal. Rptr. 245, 250 (Cal. Ct. App. 1976), *disapproved of on other grounds by People v. Barella*, 975 P.2d 37 (Cal. 1999). The California appellate court held that “[b]y pleading guilty to the sale which was alleged to have occurred in Stanislaus County, appellant must be deemed to have admitted every essential element of the crime charged including the jurisdictional allegations of the county in which the crime occurred.” *Id.*

In this case, the information alleged that Smith committed the homicide by negligent operation of a vehicle and the hit-and-run resulting in death “in Marinette County, Wisconsin.” (R. 9:1–2.) By pleading guilty to those charges, Smith admitted that he committed the offenses in Marinette County, Wisconsin.

Other factors support the conclusion that Smith waived his territorial objection. Smith entered his guilty pleas pursuant to a plea agreement in which both the State of Wisconsin and the State of Michigan made significant concessions. The State of Wisconsin agreed to dismiss the most serious charge against Smith, first-degree reckless homicide,⁶ and the State of Michigan agreed not to file any criminal charges against Smith relating to Volp’s disappearance and death. (R. 65:2–3, 6.)

At the plea hearing, the court discussed with Smith and his lawyer whether the case was properly venued in Marinette County, Wisconsin. (R. 65:5–6.) Smith’s lawyer stipulated that venue was proper in Marinette County, and Smith personally agreed to venue in Marinette County, Wisconsin. (*Id.*)

The State recognizes that the court and the parties discussed the issue in terms of venue and that venue and territorial jurisdiction are distinct concepts. *See Anderson*,

⁶ The dismissed charge of first-degree reckless homicide is a Class B felony punishable by 60 years of imprisonment. *See Wis. Stat.* §§ 939.50(3)(b), 940.02(1). Homicide by negligent operation of a vehicle and hiding a corpse are Class G felonies, punishable by ten years of imprisonment. *See Wis. Stat.* §§ 939.50(3)(g), 940.10(1), 940.11(2). Hit-and-run resulting in death is a Class D felony punishable by 25 years of imprisonment. *See Wis. Stat.* §§ 346.67(1), 346.74(5)(d).

280 Wis. 2d 104, ¶ 27. But that does not alter the fact that Smith, personally and through his lawyer, agreed that the Marinette County, Wisconsin, Circuit Court provided the appropriate forum for resolving these charges.

Citing Professor LaFave’s *Criminal Procedure* treatise, Smith argues that “territorial jurisdiction, like subject matter jurisdiction, cannot ordinarily be waived.” (Smith’s Br. 14.) But this Court stated in *Randle* that “[t]erritorial 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.” *Randle*, 252 Wis. 2d 743, ¶ 14 n.4. Smith argues that this statement “both contradicts the holding of the opinion (which . . . is limited to the factual circumstances presented in that case) and improperly conflates the concepts of personal and territorial jurisdiction.” (Smith’s Br. 13 n.6.) Smith’s critique notwithstanding, this Court is bound by its statement in *Randle* that territorial jurisdiction is “an incident of personal jurisdiction that can be waived.” See *Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997) (“only the supreme court . . . has the power to overrule, modify or withdraw language from a published opinion of the court of appeals”).

III. Smith is judicially estopped from challenging territorial jurisdiction.

The circuit court also held that judicial estoppel barred Smith’s challenge to territorial jurisdiction. (R. 67:28–29, A-App. 119–20.) Smith’s brief does not discuss that ruling. (Smith’s Br. 7–17.) “Failure to address the grounds on which the circuit court ruled constitutes a concession of the ruling’s validity.” *West Capitol, Inc. v. Village of Sister Bay*, 2014 WI App 52, ¶ 49, 354 Wis. 2d 130, 848 N.W.2d 875.

Concession or not, this Court should hold that Smith is judicially estopped from challenging territorial jurisdiction. Judicial estoppel is an equitable rule that precludes a party from asserting a position in litigation after having previously asserted an inconsistent position at a different stage in the litigation or in another proceeding. *Paul Davis Restoration*, 347 Wis. 2d 614, ¶ 40. The purpose of judicial estoppel is to preserve the integrity of the judicial system and prevent litigants from playing “fast and loose” with the courts. *Id.* ¶ 41.

For a party to be judicially estopped from maintaining a particular position in litigation, three elements must be met. *Id.* ¶ 43. First, the party’s position must be “clearly inconsistent” with an earlier position. *Id.* Second, the facts relevant to the party’s position must have been the same at both points in litigation. *Id.* Third, the party to be judicially estopped must have convinced the first court to adopt its position. *Id.*

All three elements of judicial estoppel are satisfied here. Smith’s postconviction contention that the circuit court lacked jurisdiction over the charges is “clearly inconsistent” with the position he took at the plea hearing, where he personally and through counsel told the court that he was agreeing to have the case resolved in Marinette County, Wisconsin. (R. 65:6.) The relevant facts did not change between the plea hearing and the filing of postconviction motion. And Smith convinced the circuit court to accept his guilty pleas based in part on his agreement that the court was the proper forum for this case.

“It is contrary to fundamental principles of justice and orderly procedure to permit a party to assume a certain position in the course of litigation which may be advantageous and then after the court maintains that

position, argue on appeal that the action was error.” *State v. English-Lancaster*, 2002 WI App 74, ¶ 19, 252 Wis. 2d 388, 642 N.W.2d 627. After testing the Wisconsin waters and discovering that the circuit court had imposed substantial consecutive sentences on these offenses (R. 66:55–56), Smith should not be permitted to change his position regarding the court’s power to convict and sentence him.

IV. If this Court agrees that Smith is entitled to withdraw his pleas to the two counts, it should remand the case to the circuit court for a determination of his remedy.

Relying on *Roou*, Smith concludes his brief by asserting that he should be allowed to withdraw all of his guilty pleas, including his plea to hiding a corpse, even though he does not challenge the validity of his plea to that charge. (Smith’s Br. 17.) But this Court held in *Roou* that “[w]hile a return of the parties to their pre-plea positions might . . . ‘ordinarily’ be the proper remedy, such is not the mandated remedy as a matter of law when convictions are based on a negotiated plea agreement and an error later surfaces as to one count.” *Roou*, 305 Wis. 2d 164, ¶ 36. Rather, “[t]his determination lies within the trial court’s sound discretion.” *Id.* Accordingly, were this Court to agree that Smith’s convictions on the homicide by negligent operation of a vehicle and the hit-and-run resulting in death counts should be vacated, it should remand this case to the circuit court to allow that court to exercise its discretion regarding Smith’s remedy.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 20th day of April, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 6,798 words.

JEFFREY J. KASSEL
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 April, 2017.

JEFFREY J. KASSEL
Assistant Attorney General

**Supplemental Appendix
State of Wisconsin v. Erik M. Smith
Case No. 2016AP2453-CR**

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Printout from Google maps showing distance from North Stables Pub in Iron Mountain, Michigan, to the Wisconsin-Michigan border, accessed April 6, 2017.....	101

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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, 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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Dated this 20th day of April, 2017.

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