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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

Wisconsin Statutes

ARGUMENT

I. The State Failed to Establish Territorial Jurisdiction Because the Complaint Does Not Create a Reasonable Inference That E.M.V. Was Killed in Wisconsin.

The parties are in agreement on several basic propositions regarding whether territorial jurisdiction was established for the crimes of homicide by negligent operation of a vehicle and hit-and-run resulting in death.

First, although Wis. Stat. § 939.03(1) provides seven ways in which territorial jurisdiction may be established, the parties agree that only one – sub. (1)(a) – is relevant here. (State's brief, p. 12). Under § 939.03(1)(a), a person may be prosecuted in this state if "any of the constituent elements" of the crime "takes place in this state." Constituent elements are those elements "that the State is required to prove beyond a reasonable doubt in the prosecution of the offense." ***State v. Anderson***, 2005 WI 54, ¶33, 280 Wis. 2d 104, 695 N.W.2d 731.

Second, the parties agree that because Erik Smith's convictions follow guilty pleas rather than a trial, the criminal complaint is the source for determining if the state established territorial jurisdiction. (State's brief, p. 13). The parties agree that the question 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 in death took place in Wisconsin." (State's brief, p. 14; footnote omitted) (See also Smith's brief-in-chief, p. 8).

Third, given the elements of the crimes and the facts alleged to support the charges, the parties seem to agree that, stated more specifically, the question is whether the

complaint supports a reasonable inference that "Smith killed [E.M.V.] in Wisconsin." (State's brief, p. 20). It seems clear from the complaint that E.M.V. died at the location where he was struck by Smith's vehicle. Although he may not have been dead when Smith put E.M.V. in the ditch, there were no signs of life when Smith retrieved the body from that location the next day, which is not surprising given the severity of the injuries. (1:10). Far less clear is whether E.M.V. was killed in Michigan or Wisconsin.

As to whether the complaint established territorial jurisdiction, perhaps the most revealing fact is the state's concession in the complaint that although E.M.V.'s body was recovered in Marinette County, "there is no clear evidence as to the location where [E.M.V.] actually met his demise." (1:11). The state echoed that statement at the plea hearing where the prosecutor stated:

> As we laid out in the Criminal Complaint, the State cannot determine precisely where the initial incident occurred.

(65:4).

> The description or the statements of the defendant are not completely clear as to which state the death actually occurred in ….

(*Id*. at 5). The prosecutor referenced the defendant's statements because the information the state possessed about E.M.V.'s death came from a letter received from Smith's cellmate, Patrick Corp, describing what Smith had allegedly told him. In contrast to its position in the trial court, where the state conceded it did not know where E.M.V. was killed, in this court the state pulls from parts of Corp's letter, as recounted in the complaint, and attempts to create a reasonable inference that Smith killed E.M.V. in Wisconsin,

specifically, near where the body was found. As shown below, its attempt is unsuccessful.

The state argues that it is reasonable to infer that after Smith picked up E.M.V. they "drove some distance … to the location where they argued and Smith struck [E.M.V.] with his car." (State's brief, p. 16). The state crafts this inference from one word of the inmate's recounting, which is that "the defendant picked [E.M.V.] up and *eventually* an argument ensued between them." (1:10; emphasis added). Even if an inference that they drove some distance is reasonable, it is of little value without facts giving rise to a reasonable inference that, by the time of the argument, physical struggle and striking by the vehicle, they had driven into Wisconsin. That is missing. To the contrary, because Smith was giving E.M.V. a ride home, a reasonable inference is that they were driving to E.M.V.'s apartment, which was in Michigan. (1:3, 9). Any other possible location as to where they were driving is not a reasonable inference, just speculation.

The state further argues that it is reasonable to infer that "they drove to the area near where the body was found in Marinette County" because Smith was known to party at a spot near K.C. Creek. (State's brief, p. 17). That is not a reasonable inference because it ignores the information provided by Corp that Smith *moved E.M.V.'s body to the K.C. Creek area the next day*, when he dumped the body in the stream. Specifically, according to Corp, after Smith ran over E.M.V., he put E.M.V. in a ditch on the side of the road, covered him with leaves and debris, and drove home. (1:10). The next day Smith drove back to that location, retrieved the body and put it in the trunk, drove to work and then later in the day drove to what was determined to be K.C. Creek and dumped the body in the stream. (1:10).

If Smith had run over E.M.V. "near where the body was found," he would have had no need to hide the body in a ditch, retrieve it the next day and drive to K.C. Creek to dump the body in the creek. The only reasonable inference from the complaint is that the killing of E.M.V. and the dumping of the body did not occur at the same place. The inference the state wants this court to draw is not reasonable because it is unsupported by facts showing the E.M.V. was not killed where the body was found. Rather, his body was moved to that location a day later.

Finally, the state's citation to cases from other jurisdictions for the proposition that a death is presumed to have occurred where the body is found is of little value for two reasons. First, as argued above, the facts alleged in the complaint support only the opposite inference, which is that E.M.V. was killed at a different location than where his body was found. Second, as argued in Smith's brief-in-chief (p. 11), § 939.03, unlike territorial jurisdiction statutes in many other states, does *not* include such a presumption. To find territorial jurisdiction based upon a presumption that the legislature chose not to include is directly contrary to the governing law in this state.

The state had to establish that one element of each of the two crimes took place in Wisconsin. More specifically, the facts alleged in the complaint had to create a reasonable inference that E.M.V. as killed in Wisconsin. The complaint does not do that, a failure that the complaint itself seems to concede.

II. The Court Should Reject the State's Claims That Smith's Challenge to the Lack of Territorial Jurisdiction Was Waived or Is Barred by Judicial Estoppel.

A. A defendant may not waive territorial jurisdiction "altogether" nor confer it by judicial estoppel.

In response to Smith's argument that he could not waive his claim of territorial jurisdiction, the state asserts that this court is bound by a footnote in ***State v. Randle***, 2002 WI App 116, ¶14 n.4, 252 Wis. 2d 743, 647 N.W.2d 324, which likened territorial jurisdiction to personal jurisdiction that can be waived. (State's brief, p. 24). This court is not bound by that language because the footnote appears in the very same paragraph where the court expressly said it was *not* deciding the issue presented here, which is whether a defendant may waive territorial jurisdiction "altogether." ***Id***. at ¶14.

By "altogether" the court meant a circumstance, as exists here, where territorial jurisdiction is lacking for the original charges and the defendant pleads guilty to the original charges, rather than, as in ***Randle***, where territorial jurisdiction exists for the original charge but becomes questionable as to the lesser included to which the defendant pled guilty. ***Id***. Because the issue was expressly not decided in ***Randle***, this court is free to resolve the unresolved question.

This court should hold that a defendant may not waive territorial jurisdiction altogether, for the reasons stated in Smith's brief-in-chief (pp. 13-16). Other than to cite ***Randle***, the state has not developed an argument to the contrary.

If this court concludes that territorial jurisdiction cannot be waived where, as here, it is lacking for the original charges to which Smith pled guilty, it need not address either the state's claim of waiver or judicial estoppel. *See* ***Wis. Environmental Decade, Inc. v. Public Service Comm.***, 84 Wis. 2d 504, 515-16, 267 N.W.2d 609 (1978) ("Nor can subject matter jurisdiction be conferred by estoppel."). If, however, the court concludes that territorial jurisdiction may be waived altogether, it should conclude that on the facts of this case neither waiver nor judicial estoppel bars Smith's claim.

B. Smith's guilty plea was not an admission that the crimes were committed in Wisconsin because the complaint does not provide a factual basis for that "admission."

The state claims that Smith waived any objection to the court's territorial jurisdiction over the homicide and hit-and-run "when he pleaded guilty because he admitted during the plea colloquy that he committed both offenses in Marinette County, Wisconsin." (State's brief, p. 21). The "admission" was Smith's response of "Guilty" when the court asked him how he wished to plead to the charge read by the prosecutor. (65:7-9).

The state's argument ignores that "establishing a factual basis under [Wis. Stat.] § 971.08(1)(b) is necessary for a valid plea." ***State v. Lackershire***, 2007 WI 74, ¶34, 301 Wis. 2d 418, 734 N.W.2d 23. That statute requires that before accepting a guilty plea, the court "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." The problem for the state, as argued in the preceding section, is that the facts alleged in the complaint – the only source available in this case for finding a factual

basis – do not support a reasonable inference that at least one element of each of the two crimes was committed in Wisconsin, much less in Marinette County. In other words, Smith's guilty plea to the charges does not constitute an admission that the crimes occurred in this state because the complaint does not provide a factual basis for concluding that the crimes occurred in this state.

The legal effect of a guilty plea "is to admit the facts charged …." ***State ex rel. Skinkis v. Treffert***, 90 Wis. 2d 528, 539, 280 N.W.2d 316 (Ct. App. 1979). Missing from the complaint are facts showing that the crimes were committed in Wisconsin within the meaning of § 939.03. Without such facts, Smith's guilty plea does not constitute an admission that the crimes were committed in Wisconsin.

The purpose of the factual basis requirement is "to protect the defendant who pleads guilty 'without realizing that his conduct does not actually fall within the charge.'" ***Lackershire***, 301 Wis. 2d 418, ¶42, *quoting* ***State v. Thomas***, 2000 WI 13, ¶14, 232 Wis. 2d 714, 605 N.W.2d 836. The only reasonable conclusion from the plea hearing transcript is that the requirement of territorial jurisdiction was overlooked by everyone. The state acknowledges that only venue was discussed and venue and territorial jurisdiction "are distinct concepts." (State's brief, p. 23). On this record, the court cannot conclude that Smith knowingly and voluntarily waived a challenge to territorial jurisdiction where no one in the courtroom seemed to be familiar with its restriction on the court's jurisdiction over the two charges. Contrast this case with ***Randle***, where in its colloquy the circuit court "specifically addressed Randle about the jurisdiction issue" and Randle said he "understood he was waiving his right to raise all jurisdictional issues." ***Randle***, 252 Wis. 2d 743, ¶16.

Even if this court concludes that territorial jurisdiction could be waived "altogether," it should hold that waiver is not appropriate here where territorial jurisdiction was not supported by facts alleged in the complaint and the entire concept was overlooked at the plea hearing.

C. Given that territorial jurisdiction was overlooked in the circuit court by the court and parties, including Smith, judicial estoppel cannot be applied.

The court should reject the state's claim that Smith is judicially estopped from challenging territorial jurisdiction because two of the three elements of judicial estoppel are not satisfied.

As the state acknowledges (brief, p. 25), the "equitable" doctrine of judicial estoppel requires that three elements be satisfied: (1) the later position must be clearly inconsistent with the earlier position; (2) the facts at issue should be the same in both cases; and (3) the party to be estopped must have convinced the first court to adopt its position. ***State v. Ryan***, 2012 WI 16, ¶¶32-33, 338 Wis. 2d 695, 809 N.W.2d 37. Smith does not dispute that the facts at issue are the same. But the first and third elements are not satisfied because Smith did not maintain in the circuit court that territorial jurisdiction was established, nor did he convince the court to adopt an assertion that he didn't raise. As noted, the record shows that the question of territorial jurisdiction was not addressed in circuit court until Smith raised the claim in his postconviction motion. It was something apparently overlooked by all.

As set forth in Smith's brief-in-chief (pp. 4-5), the entire discussion at the plea hearing was about venue and the venue statute, Wis. Stat. § 971.19. (65:4-6). Nothing was

said about territorial jurisdiction or the statute governing territorial jurisdiction, § 939.03. And although venue may be based upon where the body is found under § 971.19(5), the same is not true for territorial jurisdiction. No one seemed to understand that. Smith did not assert that the court had territorial jurisdiction. Rather, that requirement appears to have been overlooked not just by Smith but by the prosecutor and the circuit court.

Because judicial estoppel is an "'equitable determination'", it "should be used only when the positions are *clearly* inconsistent.'" ***Ryan***, 338 Wis. 2d 695, ¶39, *quoting* ***Harrison v. Labor & Indust. Rev. Comm'n***, 187 Wis. 2d 491, 497-98, 523 N.W.2d 138 (Ct. App. 1994) (emphasis in original). Certainly, it cannot be said that Smith's postconviction challenge to the court's territorial jurisdiction is clearly inconsistent with his position in the circuit court, which was that the court had venue, but he, like everyone else, had not considered the question of territorial jurisdiction. Nor can it be said that Smith convinced the court to adopt a position on a matter not even considered. The state's claim of judicial estoppel must be rejected because two of the three elements are not satisfied.

CONCLUSION

Mr. Smith respectfully requests that the court reverse the order denying postconviction relief and, at a minimum, reverse the convictions for homicide by negligent operation of a vehicle and hit-and-run resulting in death and order the guilty pleas to those two counts withdrawn. As to whether the conviction for hiding a corpse should also be vacated and the guilty plea withdrawn, Smith does not object to the state's request that this court remand with directions for the circuit court to decide in its discretion whether the entire plea agreement should be undone or whether the conviction for hiding a corpse should remain.

Dated this 4th day of May, 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 2,543 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 4th day of May, 2017.

Signed:

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