STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP1699-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NAKYTA V.T. CHENTIS,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

Petitioner Nakyta V.T. Chentis seeks review of a decision of the court of appeals that affirmed both the judgment convicting him of possessing a narcotic drug and the order denying his motion for plea withdrawal. *State v. Chentis*, 2022 WI App 4, ___ Wis. 2d ___, 969 N.W.2d 482. (Pet-App. 3–10.) The State opposes Chentis's petition because his case offers little opportunity to develop or clarify the law outside of the highly specific facts presented. While published,[1] the court of appeals' decision merely applied established principles to the unique facts presented in this case in a manner consistent with this Court's precedent. Further review is unwarranted to confirm the same.

STATEMENT OF THE CASE

Chentis agreed to plead no contest to possession of a narcotic drug in exchange for dismissal of a companion paraphernalia charge and a commitment by the State to recommend probation at sentencing. (R. 19:2; 64:2.) Before accepting his plea, the circuit court inquired into the factual basis for Chentis's charge, and the prosecutor confirmed that the State offered the facts alleged in the information and criminal complaint. (R. 64:11.)

The criminal complaint described how the police officer who stopped Chentis for driving with a suspended driver's license observed "fresh track marks" on Chentis's arm—a known indicator of recent intravenous drug use. (R. 1:2.) The criminal complaint also explained that a police canine alerted on Chentis's vehicle, prompting the search that uncovered a wealth of drug paraphernalia, including numerous needles, a constrictor band, cotton balls, a "crack pipe," a metal cap used

[1] Neither Chentis nor the State requested publication of the court of appeals' decision; both parties asserted that the case could be resolved on settled law.

to "cook" or prepare drugs for injection, and a bag containing a substance initially suspected to be oxycodone. (R. 1:2.)

While the court questioned Chentis about the nature of the charge, defense counsel interjected to explain that the State no longer intended to pursue charges of illegal oxycodone possession and would instead pursue the same charge based on the laboratory's discovery of heroin in Chentis's metal cap, also referred to as a "tin cooker." (R. 1:1–2; 64:11.) Defense counsel and Chentis both agreed that this constituted sufficient evidence to support a guilty verdict at trial. (R. 64:11–12.)

After sentencing, however, Chentis moved to withdraw his plea, insisting that the small heroin quantity discovered in his paraphernalia was now insufficient to support his plea and that defense counsel was ineffective for not moving to dismiss his narcotics charge. (R. 33.) The circuit court disagreed, recognizing that it was not just the tin cooker and its contents that established a factual basis for Chentis's plea but also "the other evidence of the other drug paraphernalia as well as the physical characteristics of the defendant at the time of the arrest." (R. 65:45.)

The court of appeals affirmed. (Pet-App. 3–10.) Distinguishing *Kabat v. State*, 76 Wis. 2d 224, 251 N.W.2d 38 (1977), the court reaffirmed that "[o]ur supreme court made clear that *Kabat* does not dictate dismissal of a possession charge when only a trace quantity of a controlled substance is found." (Pet-App. 9 (citing *State v. Poellinger*, 153 Wis. 2d 493, 508, 451 N.W.2d 752 (1990).) Following *Poellinger*'s teachings, the court determined that there was "strong circumstantial evidence of Chentis's knowledge that the tin cooker contained a trace amount of heroin," pointing to the facts that Chentis was driving his own vehicle containing evidence of heroin use, that Chentis had fresh injection marks, and that there was nothing to suggest that Chentis had taken steps to clean or discard the residue from his paraphernalia. (Pet-App. 9–10.)

REASON FOR DENYING THE PETITION

This Court grants petitions for review "only when special and important reasons are presented." Wis. Stat. § (Rule) 809.62(1r). This Court should deny Chentis's petition because it does not fit that mold. Chentis's best and only pitch for review rests on a supposed conflict between the court of appeals' decision and *Kabat*. (Pet. 8–14.) While such tension may ordinarily justify review as contemplated by Wis. Stat. § (Rule) 809.62(1r)(d), there is no conflict to correct here.

Chentis's entire argument rests on the false premise, born from his oversimplified interpretation of *Kabat*, that one cannot infer a defendant knowingly possesses a controlled substance if found in minute quantities in that defendant's drug paraphernalia. (Pet. 3–4, 8–9.) But that's not what *Kabat* says, and it flies in the face of *Poellinger*, where this Court sustained a jury's verdict convicting a defendant of possessing miniscule amounts of cocaine stuck between the threads of a glass vial. *Poellinger*, 153 Wis. 2d at 508–09.

Rather than presenting an actual conflict of appellate authority warranting this Court's intervention, Chentis really seeks just another opportunity to show that his case—which is distinguishable from *Kabat* and *Poellinger* in some ways but alike in others—is more similar to the former and less like the latter, all in an apparent attempt to convince this Court that he should be allowed to withdraw his plea. But that is not law development; it is the epitome of error correction, which is not this Court's duty.

Indeed, to grant review in this case is to suggest that *Kabat* and *Poellinger* have somehow left lower courts without sufficient guidance concerning the quantum of information necessary to find that a defendant knowingly possessed a controlled substance, whether assessed by a jury at trial or a circuit court judge at a plea hearing. But given this Court's detailed analyses in both *Kabat* and *Poellinger*, it's difficult to

see how another decision by this Court could shed more light on what is—and will continue to be—a fact-intensive determination that varies in every case.

To that end, unless this Court is so inclined to impose bright-line rules dictating how a defendant's knowledge that he possessed a small drug quantity *must* be shown in every case, it is unclear how review in Chentis's case will assist lower courts. In some cases, the relevant facts may suggest that a defendant took steps to intentionally clean or discard old drug remnants from his property but overlooked a tiny amount sufficient to trigger a positive drug test. In that situation, a court or jury may decline to find a defendant guilty under this Court's teachings in *Kabat*. In other cases, no facts will suggest that the defendant attempted to rid himself of the drugs he once possessed, and a court or jury might infer from trace amounts that the defendant knew he still possessed the drug, albeit in negligible amounts.

At the end of the day, given the wide variety of illegal drugs and paraphernalia used to ingest them, one could devise countless hypotheticals in which a defendant may or may not know that he possessed some quantity of a controlled substance, and those hypotheticals will turn on variables such as the location and quantity of the drug discovered, the timing of the defendant's drug use, the defendant's inculpatory statements or innocent explanations, the defendant's physical characteristics, statements of other witnesses, and any number of other relevant considerations.

Barring a dramatic break from *Kabat* and *Poellinger*, no decision by this Court will stop circuit courts from conducting those fact-specific assessments in every case to ensure there is a basis to infer that the defendant knowingly possessed a drug before accepting his plea. And unless this Court lacks faith in those courts to conduct those assessments in a reasonable manner, review and additional clarification is unnecessary here.

CONCLUSION

The court of appeals correctly affirmed Chentis's judgment of conviction and the order denying postconviction relief, and review by this Court is unwarranted.

Dated this 28th day of March 2022.

Respectfully submitted,

JOSHUA L. KAUL
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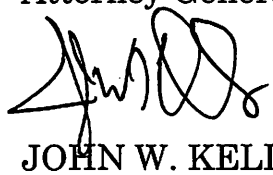

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this petition or response is 1,282 words.

Dated this 28th day of March 2022.

JOHN W. KELLIS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this response, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic petition or response 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 petition or response filed with the court and served on all opposing parties.

Dated this 28th day of March 2022.

JOHN W. KELLIS
Assistant Attorney General