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March 17, 2017

Wisconsin Court of Appeals
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

Re: State v. Julieann Baehni – Appeal No. 2015AP2263-CR

Dear Court:

The Court ordered the parties to file supplemental letter briefs on the applicability of the guilty plea waiver rule on the three remaining issues and the effect of any stipulation regarding prior offenses entered into between the parties. Please accept this letter the State's response. The Court ordered it filed within 10 days. I apologize that this is one day late as I calendared it due within 10 days of my receipt (3/8/17) of the Court's order.

Effect of No Contest Plea

Issue #1, petitioner's argument that the blood test result should have been suppressed because she was not given a breath test, appears to fall squarely in the suppression motion exception, codified in Wis. Stat. § 971.31(10), to the guilty plea waiver rule.

Issue #3, petitioner's argument regarding a prima facie showing for collateral attack of the 1990 case, also appears to be an exception to the guilty plea wavier rule. As this Court stated in State v. Peters, 2000 WI App 154, 237 Wis. 2d 741, 744 n. 3, 615 N.W.2d 655, there does not appear to be a case that addresses guilty plea waiver of a sentence enhancement issue, such as a collateral attack.

Issue #4, regarding the circuit court's order to allow evidence of the prior offenses, might be an issue that is waived by Baehni's no contest plea. This order arose due to the State's motion for reconsideration of Baehni's collateral attack on the 1992 case. Baehni's motion in regards to the 1992 case was a collateral attack, which the circuit court originally granted and later reversed itself on the State's motion. Baehni now contests the admission of that evidence at trial, not the reversal of the collateral attack. The admission of the prior offenses in front of the jury was no longer a sentencing issue, it was discretionary admission of evidence as relevant

under Wis. Stat. § 904.01. This may be a non-jurisdictional motion that can be waived by a guilty plea. The State is not aware of a case that is directly on point, however.

Stipulation Regarding Prior Offenses

There was no stipulation between the parties regarding the prior offenses. Baehni attempted to stipulate to the first two priors and contest the third in front of the jury. But excising evidence of the first two would have unfairly hampered the State's ability to present evidence on the third. Proof of the first two priors, which appeared as similar notations on the same document (the certified driving record) as the third prior, reinforced that the evidence of the third prior offense was accurate. Furthermore, evidence of the first two priors was inextricably tied to evidence of the third, as they were all contained on the same physical exhibit. The circuit court determined that evidence of all priors would be heard in front of the jury if there was no stipulation regarding all priors.[1]

This is distinguishable from the facts in State v. Alexander, 214 Wis. 2d 628, 571 N.W.2d 662 (1997). Alexander sought to stipulate to his 2 priors, which was a direct admission to an element of the offense: that he was subject to a .08 prohibited alcohol concentration (PAC), as opposed to the .10 standard. This stipulation eliminated the need for any evidence of priors to go before the jury. Here, the issue of 3 priors directly affected the applicability of a .02 prohibited alcohol concentration. Baehni's attempted stipulation regarding the first two priors did not admit the status element of the offense. Rather, she wanted to contest the applicability of that status element (the .02 standard), while simultaneously undercutting the State's ability to prove that element with a partial stipulation.

In State v. Veach, 2002 WI 110, 255 Wis. 2d 390, 648 N.W.2d 447, the court specifically addressed Alexander (which in turn quoted Old Chief v. U.S., 519 U.S. 172 (1997)) and distinguished it:

> Fundamental differences exist between the stipulations offered in Old Chief and Alexander and the stipulation Veach asserts he would have offered. The stipulations in Old Chief and Alexander related solely to the defendant's status, were unconditional, and were absolutely dispositive of the stipulated element. The stipulation offered by Veach was to an element of the criminal act he allegedly committed, was conditional, and was not sufficiently broad and clear to remove the issue from the case.
>
> In Old Chief and Alexander, the defendants' stipulations were essentially "I agree that I have one prior felony conviction," and "I agree that I have two prior convictions." In other words, the defendants agreed to admit to a status element of the crimes.

Veach, ¶ 127-28. Old Chief's and Alexander's stipulations eliminated the need to present evidence on the status issue – they were not piecemeal, conditional stipulations. Alexander agreed he was subject to the .08 PAC standard. Old Chief agreed he was a felon for the purpose of a felon in possession of a firearm charge.

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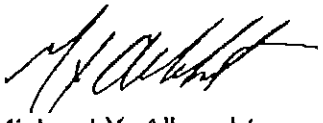
[1] The issue would be entirely different if there were, for example, 4 prior offenses and the defense contested 1 or if there were 2 prior offenses and the defense contested 1. If either scenario were the case, then the status element, the relevant prohibited alcohol concentration (.02 or .08), would not be at issue. It would only be a sentencing issue. But because there were 3 prior offenses and the defense contested 1, the entire status element (the PAC) was implicated and had to be proven beyond a reasonable doubt to the jury.

Here, Baehni did not stipulate to a status element, she stipulated to part of a status element. Her proposed stipulation was not sufficiently broad and clear as to remove the issue from the case – it would put it in focus. The jury would have been confronted with multiple potential statuses (.02 and .08) and evidence the State would need to prove the third prior existed would have been censored from the jury. In these circumstances, the State was not obligated to stipulate where the stipulation's effect (if not intent) was to undermine the State's ability to present evidence on the contested issue.

Thank you for the opportunity to be heard on these additional issues.

Sincerely,



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