COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP58-CR **Cir. Ct. No. 2002CF651**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIE E. HARRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. A jury convicted Willie E. Harris of possession of cocaine with intent to deliver, as a party to a crime, a violation of WIS. STAT.

§§ 961.41(1m)(cm)1 and 939.05 (2001-02).[1] Harris filed a postconviction motion seeking a new trial, arguing that because the circuit court accepted a stipulation at trial that the substance was cocaine without conducting a jury-trial waiver, he was denied his right to a jury trial on each element of the charge against him. The circuit court denied the motion, reasoning that Harris's claim was controlled by ***State v. Benoit***, 229 Wis. 2d 630, 640, 600 N.W.2d 193 (Ct. App. 1999), which held that stipulation to one element of a charge does not constitute waiver of the right to a jury determination on that element if the jury is instructed on the element, and the court does not resolve the issue on its own. We agree with the circuit court that ***Benoit*** is dispositive, and we therefore affirm.

¶2 Police observed Lamont Hoover and Harris in a motor vehicle conducting a "hand-to-hand transaction of an unknown object." As they approached the vehicle, the officers saw Harris, who was seated in the front passenger seat, lean forward in a manner consistent with placing something under the front seat. The police removed both men from the vehicle. Under the passenger seat, one of the officers discovered two plastic sandwich bags containing a white substance, which the officers believed to be cocaine base. Police searched the vehicle and recovered five more bags of the white substance. Field tests indicated that the substance in all the bags was cocaine base.

¶3 The substance was submitted to the State Crime Laboratory for weighing and testing. It submitted a report, which is not included in the record. There is no dispute, however, that the report indicated that the substance recovered

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

from Hoover and Harris was cocaine base. Prior to trial, the State offered Harris a written stipulation regarding the contents of the report, but Harris initially declined.

¶4 Although the record is silent on when or how Harris agreed to the stipulation, the State announced during opening statetments that "[t]he parties have already agreed that the substance that they have received, and they caught the defendant with was cocaine." At the end of its case, the State presented a stipulation signed by Harris, in which he agreed that the substance seized from the car was "to a reasonable degree of scientific certainty … cocaine base." The record demonstrates that the circuit court explained to the jury that the parties had agreed to certain facts and read the stipulation to the jury.

¶5 When it instructed the jury, the circuit court laid out the elements of the crime with which Harris had been charged, including the element that requires proof that the substance was cocaine. It also instructed the jury that it should find Harris guilty if it was "satisified beyond a reasonable doubt that the defendant possessed cocaine, that the defendant knew or believed that the substance was cocaine and that the defendant possessed the substance with the intent to deliver it." The jury found Harris guilty, and the circuit court sentenced him.

¶6 Harris subsequently filed a postconviction motion, requesting a new trial. He argued that the circuit court should have conducted a colloquy with him regarding the stipulation because the stipulation, which involved an element of the offense, deprived him of his right to a jury trial on that element. *See* ***State v. Hauk***, 2002 WI App 226, ¶31, 257 Wis. 2d 579, 652 N.W.2d 393. He argued that under ***Hauk***, when a defendant stipulates to an element of a crime, the circuit court must conduct a personal colloquy with the defendant "to determine whether or not

[he] clearly indicate[s] [his] willingness and intent to waive [his] rights to a jury trial on all elements of an offense." He maintained in the circuit court – as he does on appeal – that absent such a colloquy, a new trial is required. The circuit court denied the motion, reasoning that ***Benoit*** requires a different result. We agree with the circuit court.

¶7 In ***Benoit***, the defendant was charged with having been a party to a burglary. Prior to trial, Benoit and his trial counsel stipulated that the owner of the property had not consented to the burglary, nonconsent being the second element of burglary. 229 Wis. 2d at 634. At trial, Benoit again told the the circuit court that he stipulated to the nonconsent element. ***Id.*** at 635. In instructing the jury, the circuit court pointed out that the parties had "stipulated or agreed to the existence of certain facts, and you must accept these facts as conclusively proved." ***Id.*** The circuit court subsequently noted that the owners had not given their consent to the burglary. ***Id.***

¶8 On appeal, Benoit argued that the circuit court should have conducted a thorough colloquy with him on the nonconsent element to ensure that he was knowingly, intelligently, and voluntarily waiving his right to a jury trial on that element. ***Id.*** at 636. He maintained that, as a consequence, he was entitled to a new trial.

¶9 This court rejected Benoit's argument, noting that Benoit's concession simply relieved the State from having to call the owner to testify that he did not give Benoit permission to burglarize his restaurant. ***Id.*** at 636-38. The court reasoned that Benoit had waived only one issue – nonconsent – and the jury had still been instructed on the nonconsent element. *See* ***id.*** at 636-37. In addition, the jury made "a complete and final determination of guilt based on the

evidence presented." ***Id.*** at 637. As such, this court held that the waiver on nonconsent "was a matter of expediency … not subject to such concerns as juror prejudice, distraction or confusion of issues." ***Id.*** at 640. We concluded that there are no "special protections for a defendant seeking to stipulate to an element of a crime where (1) the jury is instructed on the element and (2) the court does not resolve the issue on its own." ***Id.***

¶10 Contrary to Harris's argument, ***Hauk*** is inapposite. In that case, Hauk's attorney indicated that Hauk "wished to stipulate to some of the elements of bail jumping," the crime with which she had been charged. 257 Wis. 2d 579, ¶8. The circuit court approved the stipulation and, as a result, the "jury was not informed that Hauk was charged with bail jumping and did not decide whether Hauk was charged previously with a felony or misdemeanor, whether she was released from custody on bond, or whether she intentionally failed to comply with the terms of her bond." ***Id.*** The jury was asked "to determine only whether Hauk had committed a crime." ***Id.*** The court specifically rejected the State's argument that ***Benoit*** controlled, noting that the "holding in ***Benoit*** … applies only when 'the jury is instructed on the element[s].'" ***Hauk***, 257 Wis. 2d 579, ¶33 n.8. We held that ***Benoit*** was not dispositive for Hauk because Hauk's jury "was not instructed on any of the elements of bail jumping." ***Hauk***, 257 Wis. 2d 579, ¶33 n.8.

¶11 Here, ***Benoit*** is dispositive because, as in this case, Harris simply conceded in the stipulation that the substance seized by police was cocaine. As in ***Benoit***, the stipulation was a matter of expediency "not subject to such concerns as juror prejudice, distraction or confusion of issues." ***Benoit***, 229 Wis. 2d at 640. The circuit court also instructed the jury on each element, including the requirement that the substance was cocaine base, and the jury, not the court,

determined whether the evidence supported guilt on each element. ***Id.*** Harris did not waive his right to a jury trial on any element, and he received the jury's determination on each element.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.