COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2022-CR **Cir. Ct. No. 2006CM504**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRYAN JAMES HATHAWAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Douglas County: MICHAEL T. LUCCI, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Bryan Hathaway appeals a judgment of conviction for committing an act of sexual gratification with an animal in violation of WIS.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

STAT. § 944.17(2)(c). He argues the statute does not apply to dead animals. Because his actions occurred with a dead deer, he contends the trial court erred by denying his motion to dismiss. He also argues that statements he made to police should have been suppressed. We conclude that by pleading no contest Hathaway waived his argument on the motion to dismiss. Further, the trial court properly denied his suppression motion. We therefore affirm the judgment.

BACKGROUND

¶2 On October 11, 2006, officer Adam Poskozim was assisting Wisconsin Department of Corrections probation agents with home visits at the Transitional Living Program housing in Superior. Hathaway, a resident of the facility, arrived and Poskozim observed that Hathaway was covered in hair and blood. Hathaway moved his hand into his pocket and Poskozim saw that Hathaway had a knife. Poskozim approached Hathaway to take the knife from him and, because Hathaway's pants were loose, observed that his underpants were also bloody. Poskozim was concerned that Hathaway was injured or that a violent crime, such as a sexual assault, had taken place. Poskozim also was aware that Hathaway had been suspected of bestiality in the past.

¶3 Because having contact with animals was a probation violation, the probation agents requested that Poskozim take Hathaway into custody. Poskozim transported Hathaway to the county jail where the probation agents questioned Hathaway in an interview room. Poskozim waited outside the room. He could hear the agents' questions but could not hear Hathaway's answers. Afterward, the agents told Poskozim they wanted Hathaway charged with having sex with a deer. Poskozim reviewed the statutes and then met with Hathaway. Poskozim advised

Hathaway of his ***Miranda***[2] rights and Hathaway waived those rights. Poskozim then asked Hathaway what happened and Hathaway stated he had sex with a dead deer he found by the side of the road.

¶4 Hathaway was charged with committing an act of sexual gratification with an animal in violation of WIS. STAT. § 944.17(2)(c). He moved to dismiss the complaint, arguing the statute did not apply to dead animals. The circuit court denied the motion. Hathaway then moved to suppress his statement to Poskozim. He argued his statement was not obtained from a legitimate source wholly independent of his inadmissible compelled statement given to the probation officers. The court denied Hathaway's motion and Hathaway subsequently pled no contest to the charge.

DISCUSSION

I. The Offense

¶5 Hathaway first argues his conviction should be reversed because the term "animal" in WIS. STAT. § 944.17(2)(c) does not include an animal carcass. He rather convincingly contends that "animal" means a living creature. However, Hathaway pled no contest to the charge. A plea of guilty or no contest waives all nonjurisdictional defects and defenses. *See* ***State v. Kazee***, 192 Wis. 2d 213, 219, 531 N.W.2d 332 (Ct. App. 1995).

¶6 Hathaway claims his argument is jurisdictional rather than nonjurisdictional. If the statute does not apply to a carcass, he reasons he has been convicted of a nonexistent crime. Because a court does not have subject matter

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

jurisdiction over a nonexistent crime, he concludes the waiver doctrine does not apply.

¶7 Hathaway misconstrues the concept of subject matter jurisdiction. He is correct that a court does not have subject matter jurisdiction over a nonexistent crime. He is incorrect in asserting that if the statute does not cover a dead deer, he was convicted of a nonexistent crime.

¶8 Most cases involving criminal subject matter jurisdiction arise from charges of attempts. For example, in ***State v. Briggs***, 218 Wis. 2d 61, 74, 579 N.W.2d 783 (Ct. App. 1998), a plea of no contest to attempted felony murder did not waive appeal because there is no such offense recognized by the Wisconsin statutes. The trial court "was without subject matter jurisdiction to accept a plea." ***Id.*** at 68. Similarly, there is no offense of attempted fourth-degree sexual assault for reasons explained in ***State v. Cvorovic***, 158 Wis. 2d 630, 632-34, 462 N.W.2d 897 (Ct. App. 1990). As a result, the trial court in that case did not have subject matter jurisdiction and Cvorovic could not be held to waiver on appeal. ***Id.*** at 634-35.

¶9 Hathaway, however, was charged with and pled to a crime that does exist. The complaint alleges he committed "an act of sexual gratification involving his sex organ and the sex organ of an animal, to-wit: a deer, contrary to sec. 944.17(2)(c)...." The charge uses the direct words of the statute. This is a crime over which the court had subject matter jurisdiction.

¶10 The probable cause portion of the complaint alleges facts constituting the crime. One of the facts is that the deer was dead. What Hathaway is really arguing is that the facts do not support the offense. Or put another way,

Hathaway is saying he is not guilty because the State cannot prove he committed the offense against a live animal, as he claims is required.

¶11 Here, Hathaway pled no contest to a crime that exists. His plea waived all nonjurisdictional defects and defenses. *See* ***Kazee***, 192 Wis. at 219. His argument that having sex with a dead deer does not violate the statute is a nonjurisdictional argument. It does not go to subject matter jurisdiction. Consequently, the argument was waived.

II. Hathaway's Confession

¶15 Hathaway argues that the statement he made to Poskozim violated his right against self-incrimination because it was not wholly independent of the compelled statement he made to the probation officers.[3] Questions of constitutional fact are mixed questions of fact and law. ***State v. Jennings***, 2002 WI 44, ¶21, 252 Wis. 2d 228, 647 N.W.2d 142. This court will uphold the trial court's findings of fact unless they are clearly erroneous. ***Id.*** We then independently review whether those facts satisfy the constitutional standard. ***Id.***

¶16 Persons on probation are "protected by the Fifth Amendment privilege against self-incrimination." ***State ex rel. Tate v. Schwarz***, 2002 WI 127, ¶20, 257 Wis. 2d 40, 654 N.W.2d 438. However, "the state may compel a probationer to answer self-incriminating questions from his probation or parole agent, or suffer the consequence of revocation." ***Id.*** In order to protect the probationer's right against self-incrimination, a compelled statement may not be put to any use against the probationer in a criminal trial. ***Id.***, ¶¶20-21. The State

[3] This argument is not waived because WIS. STAT. § 971.31(10) provides an exception to the waiver rule that allows the review of a motion challenging the admissibility of statements.

has "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." ***Kastigar v. United States***, 406 U.S. 441, 460 (1972). Thus, the focus is not whether Poskozim was aware of the compelled statement, but whether he used that statement to build a case against Hathaway. *See* ***United States v. Caporale***, 806 F.2d 1487, 1518 (11th Cir. 1986).

¶17 Poskozim was present when Hathaway returned to the transitional living facility covered in hair and blood. Poskozim stated he was concerned about the possibility of injury or violent crime. Additionally, Poskozim was aware of bestiality allegations against Hathaway in the past. Hathaway argues that Poskozim's "judgment about the significance of the observations" was colored by questions the probation agents asked Hathaway. Apparently, Hathaway thinks that otherwise Poskozim would not have wanted to interview him. It is simply unreasonable to conclude that a police officer would not want to interview a person covered in hair and blood.

¶18 When Poskozim questioned Hathaway, Poskozim did not use any information from Hathaway's statement to the probation officers. The circuit court found there was no evidence that Poskozim used any information that had been garnered from the earlier questioning by the probation agents. The circuit court found Poskozim credible when Poskozim stated that he simply asked Hathaway what happened without asking any pointed or specific questions, and Hathaway responded by telling him that he had sex with a dead deer. Therefore, while Poskozim was aware of the probation agents' questioning, he did not use any information obtained from that questioning to build a case against Hathaway.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.