Appeal No. 2019AP1983-CR **Cir. Ct. No. 2017CF2831**

WISCONSIN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JACOB RICHARD BEYER,

DEFENDANT-APPELLANT.

FILED

SEP 24, 2020

Sheila T. Reiff
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Fitzpatrick, P.J., Kloppenburg, and Nashold, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2017-18),[1] this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

This appeal concerns whether the guilty-plea-waiver rule should be applied in a particular procedural setting. Under this rule, a guilty, no contest, or ***Alford***[2] plea waives the right to raise on appeal almost all claims, including claims

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] "An ***Alford*** plea is a plea in which the defendant agrees to accept a conviction while simultaneously maintaining his or her innocence," and it is equivalent for most purposes to a guilty plea. ***State v. Kelty***, 2006 WI 101, ¶18 n.10, 294 Wis. 2d 62, 716 N.W.2d 886; *see also* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

of constitutional error. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 and ***State v. Abbott***, 2020 WI App 25, ¶39, 392 Wis. 2d 232, 944 N.W.2d 8. The specific question we certify today is whether the guilty-plea-waiver rule applies when a defendant pleads not guilty to an offense, but stipulates to the inculpatory facts supporting each element of the offense, and explicitly agrees to a finding of guilt at a hearing before the circuit court at which no witness testifies.

The question we certify is a matter of first impression in Wisconsin and implicates the supreme court's previous declaration of public policy pertaining to the guilty-plea-waiver rule. In addition, case law from other fora addressing this question is limited and incongruous. A decision by the Wisconsin Supreme Court on this question will have statewide impact, presents an opportunity to clarify and develop the law, and will provide guidance to Wisconsin courts.

BACKGROUND

Beyer was charged with ten counts of possession of child pornography, and the circuit court entered a plea of not guilty on Beyer's behalf.

The complaint alleged that a Wisconsin Department of Justice special agent "was conducting an online investigation on peer to peer file sharing networks" looking for people sharing child pornography. The agent discovered a file that contained what appeared to be child pornography. Using the IP address from the suspect device, the agent was able to determine that the account holder was Beyer. The City of Madison police executed a search warrant at Beyer's apartment. A subsequent search of Beyer's computer by the State revealed at least ten images of child pornography.

Pre-trial, Beyer filed two motions pertinent to this appeal. Beyer filed a motion to suppress evidence obtained based on the search warrant because, according to Beyer, the search warrant lacked probable cause; law enforcement knew that the warrant lacked probable cause; and the agents omitted, and provided misleading, information concerning the investigative software used by the Department of Justice agent (the "suppression motion"). Beyer also filed a "Motion to View the State's Computer and Its Undercover Software" (the "discovery motion"). The discovery motion requested an order permitting Beyer's forensic expert to analyze the State's computer. That computer, along with its hardware and software configurations, purportedly detected evidence of child pornography on which the Department of Justice agent relied as a basis for the search warrant. Beyer argued that he was entitled to discovery regarding that State computer in order to determine whether there was any validity to the allegations contained in the search warrant. The circuit court denied the discovery motion. The court also denied the suppression motion after an evidentiary hearing.

After those motions were denied, Beyer waived his right to a jury trial during a colloquy with the circuit court. The case then proceeded to a hearing the parties referred to in the circuit court as a "stipulated court trial." The parties informed the circuit court that the State and Beyer had agreed to this procedure in order for Beyer "to maintain an appellate issue," the right to challenge on appeal the court's denial of Beyer's discovery motion to analyze the State's computer.[3]

[3] As context for the parties' arguments that we present in the Discussion below, we observe a statement by defense counsel at that hearing which indicates that a similar or identical procedure was employed in another case to avoid the guilty-plea-waiver rule.

At that hearing: (1) Beyer did not change his plea from not guilty to guilty or no contest; (2) the parties agreed that count 1 of the information would be severed from the remainder of the charged counts; (3) the State dismissed all counts other than count 1; and (4) the parties agreed to submit count 1 to the circuit court on a written stipulation.

The stipulated facts indicated the following. Law enforcement officers executed a search warrant at Beyer's apartment. In the course of executing the warrant, officers located suspected child pornography on Beyer's computer seized by law enforcement. In addition, Beyer admitted to law enforcement that:

- he was the only individual with access to that computer;
- he used a file sharing network to download many different kinds of pornography;
- he was in possession of child pornography; and
- he knowingly possessed the image of child pornography later charged in count 1.

Beyer also admitted that he knowingly downloaded child pornography, which was ultimately verified by law enforcement.

The parties' stipulation submitted to the circuit court also stated that Beyer "agrees to have the Court find him guilty based upon the above stipulated set of facts."

At that same hearing, the circuit court asked Beyer's counsel if it was Beyer's position that the stipulated facts were proof, beyond a reasonable

doubt, of each element of the remaining charged offense. Counsel agreed that the facts were. The court then found that the stipulated facts were proof, beyond a reasonable doubt, of each element of the crime of possession of child pornography and, based on that evidence, found Beyer guilty of that offense.

The circuit court imposed a sentence of three years of initial confinement and two years of extended supervision. The circuit court also granted Beyer's request to stay imposition of his sentence pending appeal.

On appeal, Beyer makes two arguments that the circuit court erred. First, Beyer asserts that the circuit court's denial of his discovery motion violated his right to due process. Second, Beyer asserts that the court erred in denying his suppression motion because the application underlying the warrant failed to establish probable cause. These issues do not present complex or novel issues of law, and we believe those can be resolved with little difficulty.

In addition, the parties raise arguments beyond the two challenges to the circuit court's denial of Beyer's pretrial motions, and it is those arguments that are the basis for this certification. As presented in more detail below, the parties dispute: (1) whether the procedure used at what the State refers to as the "so-called trial" is the functional equivalent of a guilty plea; (2) whether that procedure triggers application of the guilty-plea-waiver rule to bar Beyer from raising on appeal a challenge to the circuit court's denial of his discovery motion[4]; and (3) whether the procedure is recognized under Wisconsin law.

[4] The State does not argue that the appeal of the circuit court's denial of the suppression motion is barred by the guilty-plea-waiver rule.

For the reasons that follow, we believe that our supreme court is best suited to answer these questions.

DISCUSSION

Guilty-Plea-Waiver Rule

In Wisconsin, a defendant who pleads guilty or no contest, or enters an ***Alford*** plea, ordinarily waives the right to raise on appeal almost all claims of error, including constitutional error, that occur before entry of the plea. ***Abbott***, 392 Wis. 2d 232, ¶39; *See* ***Kelty***, 294 Wis. 2d 62, ¶18 ("The general rule is that a guilty, no contest, or ***Alford*** plea 'waives all nonjurisdictional defects, including constitutional claims[.]'" (*quoting* ***State v. Multaler***, 2002 WI 35, ¶54, 252 Wis. 2d 54, 643 N.W.2d 437)); ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984) ("It is well-established that a plea of guilty, knowingly and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses, including claimed violations of constitutional rights.") This tenet is commonly known as the "guilty-plea-waiver rule." ***Kelty***, 294 Wis. 2d 62, ¶18.

The rule is based on the following rationale: "a guilty plea [voluntarily and intelligently made] itself constitutes both an admission that the defendant committed past acts and a consent that a judgment of conviction be entered against [the defendant] without a trial." ***County of Racine***, 122 Wis. 2d at 437 (citing ***Brady v. United States***, 397 U.S. 742, 748 (1970)); *accord* ***State v. Pohlhammer***, 82 Wis. 2d 1, 3-4, 260 N.W.2d 678 (1978) (per curiam). A valid guilty plea "represents a break in the chain of events which has preceded it in the criminal process." ***Pohlhammer***, 82 Wis. 2d at 4 (quoting ***Tollett v. Henderson***, 411 U.S. 258, 267 (1973)). Thus, "[w]hen a criminal defendant has solemnly

admitted in open court that he [or she] is in fact guilty of the offense with which he [or she] is charged … (h)e [or she] may only attack the voluntary and intelligent character of the guilty plea ….” ***Id.*** at 4 (quoting ***Tollett***, 411 U.S. at 267).

The legislature has created one statutory exception to the rule. *See* WIS. STAT. § 971.31(10). Under § 971.31(10), a defendant who pleads guilty does *not* waive the right to challenge on appeal an order denying a motion to suppress evidence or a motion challenging the admissibility of the defendant’s statement. ***Id.*** (“An order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant may be reviewed upon appeal from a final judgment or order notwithstanding the fact that the judgment or order was entered upon a plea of guilty or no contest ….”); *accord* ***Abbott***, 392 Wis. 2d 232, ¶40. In ***State v. Riekkoff***, 112 Wis. 2d 119, 332 N.W.2d 744 (1983), the supreme court concluded that § 971.31(10) represents “the only public policy exception” in Wisconsin to the guilty-plea-waiver rule. ***Id.***, 112 Wis. 2d at 126 (interpreting ***Foster v. State***, 70 Wis. 2d 12, 233 N.W.2d 411 (1975)). Germane to the court’s decision in ***Riekkoff*** was that the legislature has abandoned the guilty-plea-waiver rule in one situation, § 971.31(10). *See* ***id.*** at 124-25. Applying the canon of *expressio unius est exclusio alterius* (the expression of one thing excludes another), the court concluded that only one exception to the rule exists – the legislatively created exception in § 971.31(10), and therefore any intent or action by the parties, or even the circuit court, to preserve a defendant’s right to appeal issues other than those specified in § 971.31(10), is unavailing. *See* ***id.*** at 126-27; *see also* ***State v. Delaney***, 2003 WI 9, ¶22, 259 Wis. 2d 77, 658 N.W.2d 416.

We now summarize the arguments of the parties.

State's Arguments

The State does not contend that Beyer in fact pleaded guilty or no contest, and the State admits that the jury trial waiver colloquy that the circuit court conducted with Beyer at the hearing in question did not satisfy the requirements for accepting a guilty or no contest plea. *See. e.g.*, WIS. STAT. § 971.08(1); ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14.

Nevertheless, the State argues that the guilty-plea-waiver rule applies because, taken together, Beyer's stipulation to facts supporting his conviction and his explicit agreement in the stipulation to have the circuit court find him guilty based on those facts is the functional equivalent of a guilty plea. According to the State, because Beyer did not ask the circuit court to reach its own determination of guilt based on the facts, and instead he agreed to the finding of guilt, he effectively pleaded guilty or no contest to the charge.

In support, the State cites ***United States v. Schmidt***, 760 F.2d 828 (7th Cir. 1985) and cases collected in ***Schmidt***. The ***Schmidt*** court determined that a defendant's stipulation to facts was not the functional equivalent of a guilty plea because the circuit court was tasked with deciding whether the stipulated facts supported a finding a guilt. ***Id.*** at 834. The State contends that "[t]his nuance matters" because the procedure utilized by Beyer did not ask "the circuit court to reach its own verdict based on the agreed statement of facts."

In addition, the State argues that allowing Beyer to circumvent the guilty-plea-waiver rule by use of this procedure would, in effect, create a judicially recognized exception to the rule, which is inconsistent with the supreme court's pronouncement in ***Reikkoff*** that the "only public policy exception" to the guilty-

plea-waiver rule is the legislatively created one in WIS. STAT. § 971.31(10). *See* ***Reikkoff***, 112 Wis. 2d at 126.[5]

Finally, the State argues that, if Beyer's stipulation that he be found guilty is the functional equivalent of a guilty plea, the plea was not knowing, intelligent and voluntary and this matter should be remanded for Beyer to either enter a plea with a proper plea colloquy or proceed to a trial at which witnesses testify.

Beyer's Arguments

Beyer argues that his stipulation to the facts underlying his conviction, and his agreement that those facts support a finding of guilt, is legally distinct from a guilty plea and, therefore, is not the functional equivalent of a guilty plea. Beyer contends that, when a defendant pleads guilty, the defendant makes what Beyer refers to as a "formal admission of guilt to the crime charged." Beyer asserts that he did not make a formal admission of guilt but, instead, "made a series of inculpatory statements upon which a finding of guilty could be predicated." Beyer argues that, when a defendant pleads guilty, the circuit court does not make an independent determination of guilt. In contrast, here, "Beyer simply submitted his case to the trial court for decision on the basis of stipulations of fact."

In support of his position, Beyer relies on federal cases analyzing the application of the guilty-plea-wavier rule. Overall, in each case cited by Beyer

[5] The State also questions whether the "stipulated court trial" procedure used by the circuit court is recognized under Wisconsin law. We will discuss that point shortly.

(which includes ***Schmidt***, discussed above), the reviewing court determined that the defendant's stipulation to the facts underlying the defendant's conviction was not the equivalent of a guilty plea. *See, e.g.*, ***Adams v. Peterson***, 968 F.2d 835, 837, 839-40 (9th Cir. 1992) (holding that a stipulation to certain facts at trial and a stipulation that "it is the expectation of the parties that the defendant will be found guilty [of the charges against him]" by a defendant who pleaded not guilty was not the legal equivalent of a guilty plea because: "A stipulation to facts from which a judge or jury may infer guilt is simply not the same as a stipulation to guilt, or a guilty plea." (emphasis omitted)); ***U.S. v. Lyons***, 898 F.2d 210, 214 and n.5 (1st Cir. 1990) (stating that a defendant's stipulation to inculpatory facts is not a plea requiring an inquiry by the district court under FED. R. CRIM. P. 11 to ascertain that the plea is knowing and voluntary, and also that use of trial by stipulation in federal court in order to preserve appellate issues had been changed by the amendment to Rule 11, Rule 11(a)(2), which allows for a conditional guilty plea).[6]

No Consensus

Our own research reveals that there is no consensus among state courts as to whether, and under what circumstances, a "stipulated court trial" is tantamount to a guilty plea.

[6] Wisconsin has not adopted a procedure equivalent to the conditional plea provision in FED. R. CRIM. P. 11(a)(2) that allows, subject to approval of the court and consent by the government, a defendant to plead guilty but reserve the right to appeal an adverse determination of a pre-trial motion and permits the defendant to withdraw his or her plea if the defendant prevails on appeal.

Some state courts have concluded that a stipulated trial is the functional equivalent of a guilty plea when the defendant also concedes that the evidence is sufficient to establish guilt. *See, e.g.*, ***State v. Steelman,*** 612 P.2d 475, 480 (Ariz. 1980) (stating that, while stipulated trials are procedurally distinct from guilty pleas, "[i]n some instances … submissions are tantamount to a guilty plea because it is obvious that at the time they are made, the defendant has no hope of acquittal," and that a stipulated bench trial is known in California courts as a "slow plea"); ***People v. Smith***, 319 N.E.2d 760, 762, 764 (Ill. 1974) (concluding that a trial to the court based on stipulated facts and a stipulation by the parties that the facts presented are sufficient to find the defendant guilty of the charged crime is tantamount to a guilty plea); and ***People v. Fish***, 737 N.E.2d 694, 697-98 (Ill. App. 2000) (concluding that, although a stipulated trial in which a defendant presents and preserves a defense is generally not tantamount to a guilty plea, if the defendant's stipulation includes a concession that the State's evidence is sufficient to convict the defendant, then the trial is tantamount to a guilty plea).

Some state courts have concluded that a stipulated trial is the functional equivalent of a guilty plea even if there is no concession from the defendant that the stipulated facts are sufficient to establish the defendant's guilt. *See, e.g*, ***In re Mosley***, 464 P.2d 473, 476-79 (Cal. 1970) (en banc) (holding that a stipulation to submit the case to the court for a determination of guilt based on a transcript of the preliminary examination was tantamount to a guilty plea); ***Glenn v. United States***, 391 A.2d 772, 775-76 (D.C. 1978) (recognizing that a stipulation essentially admitting to the criminal conduct of which the defendant was charged can be, but is not always, tantamount to a guilty plea); ***A.E.K. v. State***, 432 So. 2d 720, 721-23 (Fla. Dist. Ct. App. 1983) (concluding that, where stipulated facts were dispositive of the defendant's guilt and no viable defense was proffered by

the defendant, it was the functional equivalent of a *nolo contendere* plea); and ***Yanes v. State***, 448 A.2d 359, 360-62 (Md. Ct. Spec. App. 1982) (concluding that a stipulation to facts supporting the conviction "cannot, under the particular circumstances, be construed as anything short of a plea of guilty …. A mutt called 'Duke' is not *ipso facto* noble," and a stipulated court trial is also known as a "back handed" guilty plea).

At least one state court has concluded that a trial to the court on stipulated facts differs from a guilty plea in such a way that it cannot be said to be tantamount to a guilty plea. *See*, *e.g*, ***State v. Johnson***, 705 P.2d 773, 775-76 (Wash. 1985) (en banc) (concluding that, because a stipulated facts trial is "substantively different" from a guilty plea, it is not effectively a guilty or no contest plea).

Wisconsin Procedural Rules

As alluded to earlier, the State ultimately takes the position that the count of which Beyer was convicted was not terminated by a guilty plea or by a trial to the court. Instead, the State contends that the procedure is not recognized under Wisconsin law.[7]

The parties agree, at least implicitly, that in Wisconsin a criminal case can be terminated in one of three ways: by dismissal of the charges against the defendant; by a plea of guilty, no contest, or an ***Alford*** plea; or by a trial to the court or a jury. Beyer takes the position that his case was tried to the court.

[7] Beyer asserts that the State's objection on appeal to the use of this procedure "smacks of … bad faith and flagrant unfairness."

We are not aware of any statutory provision explicitly authorizing or barring a "stipulated court trial" as was conducted in this case. *See* ***Hoffman v. Memorial Hosp. of Iowa Cty.***, 196 Wis. 2d 505, 512-13, 538 N.W.2d 627 (observing that legislative silence can be evidence of legislative intent). But, we observe that WIS. STAT. § 972.07(1) provides that jeopardy attaches "[i]n a trial to the court without a jury when a witness is sworn."[8] *See* ***State v. Poveda***, 166 Wis. 2d 19, 25, 479 N.W.2d 175 (Ct. App. 1991); ***City of Pewaukee v. Carter***, 2004 WI 136, ¶21, 276 Wis. 2d 333, 688 N.W.449. No witnesses were sworn at the proceeding Beyer contends was a trial to the court. As a result, it could be questioned whether, for double jeopardy purposes, jeopardy ever attached to the proceeding at which Beyer was found guilty of one count of possession of child pornography.

Moreover, it could also be questioned whether the proceeding in the circuit court was a "trial." Our supreme court has stated: "A trial, by definition, is a fact-finding mission to determine the truth of allegations in a pleading. TRIAL, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a trial as '[a] formal judicial examination of evidence and determination of legal claims in an adversary proceeding')." ***City of Cedarburg v. Hansen***, 2020 WI 11, ¶35, 390 Wis. 2d 109, 938 N.W.2d 463.

CONCLUSION

No Wisconsin case has specifically addressed the question we now certify. There is a lack of consensus among federal and state courts that have

[8] When a defendant pleads guilty or no contest, jeopardy attaches when the court accepts the plea. ***State v. Poveda***, 166 Wis. 2d 19, 25, 479 N.W.2d 175 (Ct. App. 1991).

addressed, under comparable facts and controlling law, issues similar to the question we certify. Accordingly, we believe that an answer to the question we now certify is of significant importance and that Wisconsin courts are in need of guidance from our supreme court.

For all these reasons, we certify this appeal to the supreme court.