COURT OF APPEALS
DECISION
DATED AND FILED

SEPTEMBER 3, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1084

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

COUNTY OF WALWORTH,

PLAINTIFF-RESPONDENT,

V.

JAMES E. O'DONNELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Appeal dismissed.*

ANDERSON, J. James E. O'Donnell appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant contrary to § 346.63(1)(a), STATS., entered after O'Donnell stipulated to a plea of no contest. The stipulation also provided that the imposition of sentence would be stayed pending appeal. On appeal, O'Donnell questions the

constitutionality of § 343.10(10)(d), STATS., 1993-94,[1] and WIS. ADM. CODE § TRANS 112.05(3)(b). Because we conclude that O'Donnell waived the right to appeal by stipulating to entry of a judgment, we need not address O'Donnell's constitutional claims and we dismiss this appeal.

The following facts are undisputed. On September 1, 1995, O'Donnell was stopped by and received citations from the Walworth County Sheriff's Department for operating a motor vehicle while under the influence of an intoxicant (OWI) and operating with a prohibited alcohol concentration (PAC) in violation of WALWORTH COUNTY, WIS. ORDINANCES §§ 346.63(1)(a) and 346.63(2)(b), adopting the relevant state statutes. Although O'Donnell has a Wisconsin Commercial Driver's License-Occupational License (CDL) with a passenger bus "P" endorsement, he was driving his private vehicle as a regular operator at the time of his arrest and was charged as such.

On September 20, 1995, O'Donnell entered a plea of no contest to the OWI charge and the PAC citation was dismissed. O'Donnell's operating privileges were suspended for six months. On September 29, 1995, O'Donnell and the County of Walworth stipulated to reopen the case for another plea hearing because O'Donnell was unaware that once he was convicted of OWI, his passenger bus "P" endorsement must be suspended for two years pursuant to WIS. ADM. CODE § TRANS 112.05(3)(b).

On the reopened citation, O'Donnell filed a petition challenging the constitutionality of § 343.10(10)(d), STATS., 1993-94, and WIS. ADM. CODE §

[1] Subsequent to O'Donnell's OWI citation, § 343.10(10)(d), STATS., was repealed. *See* 1995 Wis. Act 269, § 26. Consequently, O'Donnell was convicted under § 346.63(1)(a), STATS.

TRANS 112.05(3)(b). The trial court declined to find either the statute or the regulation an unconstitutional exercise of legislative authority. The trial court also concluded that the suspension of O'Donnell's "P" endorsement did not constitute cruel and unusual punishment.

Consequently, on March 11, 1997, O'Donnell and the County again stipulated to a plea of no contest to the OWI charge, $597 in costs and a seven-month suspension of his driving privileges. The stipulation also provided that "the imposition of sentence, including any suspension of driving privileges, shall be stayed to permit … [an] appeal [of] the conviction." O'Donnell appealed.

In an unpublished order dated May 9, 1997, this court ordered the parties to address whether O'Donnell has waived his right to appeal by entering a no contest plea. O'Donnell asks this court to exercise its discretion under § 808.03(2), STATS., to review his constitutional claims and to not apply the waiver rule to his case. Our decision is controlled by ***Cascade Mountain, Inc. v. Capitol Indem. Corp.***, Case No. 96-2562 (Ct. App. July 3, 1997, ordered published August 26, 1997 (per curiam)).[2]

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[2] We also conclude that ***County of Ozaukee v. Quelle***, 198 Wis.2d 269, 275-76, 542 N.W.2d 196, 198 (Ct. App. 1995), is limited to the particular facts of that case. In ***County of Racine v. Smith***, 122 Wis.2d 431, 437-38, 362 N.W.2d 439, 442 (Ct. App. 1984), a challenge to the admission of evidence, we made an appeal to the legislature to "investigate appropriate methods by which to accord standing to seek review of fundamental and important evidentiary questions while avoiding an unnecessary and protracted trial" by enactment of a civil statute similar to § 971.31(10), STATS. The legislature has yet to provide such a remedy.

In ***Quelle***, the appellant also sought to suppress her breath test results asserting that she was subjectively confused by the officer's conduct. *See* ***Quelle***, 198 Wis.2d at 273, 542 N.W.2d at 197. The four factors in ***Quelle*** are nothing more than a judicially imposed test that achieves the goals of providing judicial review of evidentiary issues in civil forfeiture cases, similar to § 971.31(10), STATS., which reviews a "guilty/no contest" plea in a criminal case. The four factors constitute judicial action in the face of legislative inaction to our appeal in ***Smith***. However, O'Donnell's appeal does not present important *evidentiary* issues; accordingly, the ***Quelle*** factors do not control.

There, this court addressed the ability of a party to preserve the right to appeal by stipulation. *See* ***id.***, slip op. at 2. We noted that in criminal law, "'once the guilty plea is accepted, as a matter of law the right to appeal the reserved issues is waived.'" ***Id.,*** slip op. at 4 (quoted source omitted). We further explained that a party may also waive the right to appeal in a civil case where that party has stipulated to the entry of judgment. *See* ***id.*** (citing ***County of Racine v. Smith***, 122 Wis.2d 431, 436-37, 362 N.W.2d 439, 442 (Ct. App. 1984)). Based on principles of appellate review, we concluded that a party could not, by stipulating to the entry of a conditional judgment, obtain a mandatory appeal of an interlocutory order. *See* ***id***.

As we pointed out:

> If we were to allow parties to stipulate to the entry of a conditional judgment, yet retain the right to appellate review, many litigants would seek to avoid the time and expense of trying cases after unfavorable trial court rulings on significant issues, such as the admission or exclusion of important evidence or the dismissal of a cause of action from a multiple count complaint. This would allow parties to circumvent the waiver and finality rules, thereby converting discretionary, interlocutory appeals into appeals as a matter of right from "final" orders or judgments.

Id., slip op. at 5. These same principles are equally applicable here.

In this case, the judgment is conditional as to O'Donnell's constitutional challenges which the trial court had previously dismissed. The stipulation stays imposition of his sentence, *including any suspension of driving privileges*, to allow O'Donnell to appeal the trial court's nonfinal memorandum decision dismissing his constitutional challenges. Essentially, the stipulation allows O'Donnell to appeal only the nonfinal decision and stays enforcement of the WIS. ADM. CODE § TRANS 112.05(3)(b) provision revoking his "P"

endorsement, allowing O'Donnell to continue operating a commercial motor vehicle despite his no contest plea to OWI.

O'Donnell has converted a discretionary, interlocutory appeal into an appeal as a matter of right from a *final* judgment, thereby circumventing the waiver and finality rules. We cannot sanction this circuitous manipulation of the appellate rules if this court is to continue functioning at its current size.[3]

By the Court.—Appeal dismissed.

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

[3] As pointed out in ***Cascade Mountain v. Capitol Indem. Corp.***, Case No. 96-2562, slip op. at 5 n.3 (Ct. App. July 3, 1997, ordered published August 26, 1997) (per curiam)), when the appellate court was created in 1978, it was anticipated that within five years it would reach its capacity of 1200 appeals annually, or 100 opinions per judge. However, the reality is that in 1996, there were 3628 cases filed, or 227 opinions per judge, as well as the miscellaneous matters this court must also decide—in 1996, 324 petitions for leave to appeal, 5643 motions and 931 miscellaneous matters were filed, each requiring a disposition by order. *See* ***id.***