COURT OF APPEALS
DECISION
DATED AND FILED

August 28, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0602-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GEORGE H. TUTOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Bayfield County: THOMAS J. GALLAGHER, Judge. *Remanded with directions.*

¶1 HOOVER, P.J.[1] George Tutor appeals a judgment convicting him of one count of possession of an untagged deer carcass, contrary to WIS. STAT. § 29.347(2), and an order denying his postconviction motion. Although Tutor

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 1999-2000 version.

alludes to several issues upon which he believes he is entitled to relief, the one theory that is fully developed is not susceptible of appellate determination because the trial court did not make necessary findings of fact. Because the theory in question could well be dispositive, this court deems it appropriate to remand to the trial court to make findings regarding the critical facts.

BACKGROUND

¶2 Tutor was charged with two counts of possessing untagged deer carcasses.[2] The criminal complaint alleges that several Department of Natural Resources wardens heard three gunshots from a nearby wooded location. Later, the wardens saw Tutor driving an all-terrain vehicle (ATV) from the area where the shots were fired. The ATV was dragging an untagged deer carcass. The wardens stopped Tutor. He acknowledged that the carcass was not tagged and, when a warden asked him why he had not tagged it, Tutor did not respond to the specific question. Rather, he told the warden that he had shot another deer at the same time he shot the one attached to the ATV, and it was still in the woods, untagged. When the warden questioned Tutor further about the untagged carcasses, "the defendant only made the comment 'you got me.'"

---

[2] WISCONSIN STAT. § 29.347(2) provides:

> Except as provided under sub. (5) and s. 29.324(3), any person who kills a deer shall immediately attach to the ear or antler of the deer a current validated deer carcass tag which is authorized for use on the type of deer killed. Except as provided under sub. (2m) or s. 29.871(7), (8) or (14) or 29.89(6), no person may possess, control, store or transport a deer carcass unless it is tagged as required under this subsection. The carcass tag may not be removed before registration. The removal of a carcass tag from a deer before registration renders the deer untagged.

¶3 Tutor pled not guilty to the charges and demanded a jury trial. On the day of trial, the State moved in limine to exclude the following evidence. Tutor made an informal offer of proof that he, David Hawkinson and Robert Schuster hunt together and assist each other such that "[w]henever [one of the party members] shoots a deer, the closest party member will come up and help." Tutor's attorney indicated that the evidence would show that a warden prevented Hawkinson from going to and assisting Tutor after Hawkinson and Schuster heard three gunshots.

¶4 The State argued that under the two elements of the offense, the proffered testimony was irrelevant. Tutor's attorney, however, clarified his argument, explaining that this was a "group hunt" and that individuals were on their way to assist him.[3] He had earlier conceded that Tutor had not called for

[3] WISCONSIN STAT. § 29.324 relates to group deer hunting:

> (1) In this section:
>
> (a) "Contact" means visual or voice contact without the aid of any mechanical or electronic amplifying device other than a hearing aid.
>
> (b) "Group deer hunting party" means 2 or more hunters hunting in a group all using firearms, each of whom holds an individual license to hunt deer.
>
> (2) Any member of a group deer hunting party may kill a deer for another member of the group deer hunting party if both of the following conditions exist:
>
> (a) At the time and place of the kill, the person who kills the deer is in contact with the person for whom the deer is killed.
>
> (b) The person for whom the deer is killed possesses a current unused deer carcass tag which is authorized for use on the deer killed.

(continued)

assistance. Tutor's attorney further made the more generalized argument that "the warden's behavior, and the hunting pattern behavior, is relevant to what happened, [they go] to the facts of the case." The discussion then focused on the group hunting statute and whether the proof Tutor offered fit within the statute's language.

¶5 The trial court determined from the offer of proof that Tutor possessed his own tag and he neither used it nor called for assistance. Yet, under the group hunting statute, the person who kills a deer must ensure that a member of his group attaches a tag without delay. The court further concluded that for the group hunting statute to apply, a person must shoot a deer for someone else who possessed an unused tag, and Tutor's offer demonstrated that Tutor shot the deer for himself. The trial court thus held that Tutor's proffered testimony did not establish a defense to the charge under WIS. STAT. § 29.324.[4]

¶6 In light of the trial court's ruling on the motion in limine, Tutor pled guilty to the first count in the complaint in exchange for the State's agreement to move to dismiss the second count. Upon conviction, the trial court imposed the minimum penalty available under the statute, which, with penalty assessments and other "add-ons," totaled $2,068.00.[5] In assessing this penalty, the court noted that

---

> (3) A person who kills a deer under sub. (2) shall ensure that a member of his or her group deer hunting party without delay attaches a current validated deer carcass tag to the deer in the manner specified under s. 29.347 (2). The person who kills the deer may not leave the deer unattended until after it is tagged.

[4] Tutor does not pursue the group hunting defense theory on appeal, and it is therefore abandoned. *See* ***Reiman Assocs. v. R/A Adver.,*** 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed are deemed abandoned).

[5] The applicable penalty provision is WIS. STAT. §29.971(11):

(continued)

it was ironic that the State requires "such a high minimum fine on a charge like this where they are soliciting the killing of deer to reduce the deer herd."[6]

¶7 Tutor filed a postconviction motion, providing affidavits in support of his earlier informal offer of proof that wardens prevented Hawkinson and Schuster from assisting Tutor. He added a new allegation that he did not have his reading glasses and that he could not read the two smudged tags he had. He claimed that only one tag was issued for the zone in which he was hunting. He also asserted that he entered his plea with the misconception that "the issue involved in the state's motion *in limine*" would be preserved for appeal.[7] Tutor's postconviction motion stated that he would have gone to trial if he had been aware

---

> Any person who, for himself or herself, or by his or her agent or employee, or who, as agent or employee for another, violates this chapter shall be punished as follows:
>
> ….
>
> (11) For hunting deer without the required approval, during the closed season, with the aid of artificial light or with the aid of an aircraft, for the snaring of or setting snares for deer or for the possession or control of a deer carcass in violation of s. 29.055 or 29.347, by a fine of not less than $1,000 nor more than $2,000 or by imprisonment for not more than 6 months or both. In addition, the court shall order the revocation of all approvals issued to the person under this chapter and shall prohibit the issuance of any new approval under this chapter to the person for 3 years.

[6] Indeed, on appeal Tutor challenges WIS. STAT. § 29.971(11) as irrational because it provides for more severe punishment than other similar offenses. Because of this court's disposition of the case, it need not address this contention at this time.

[7] The postconviction motion cited ***State v. Riekkoff***, 112 Wis. 2d 119, 332 N.W.2d 744 (1983), for the proposition that a voluntary guilty plea waives the right to raise evidentiary and other nonjurisdictional issues on appeal.

that a plea would not preserve the exclusion of evidence issue.[8] The motion contended that:

> Under the circumstances, trial counsel rendered ineffective assistance by advising the defendant he could raise the evidentiary issue of relevance of the excluded testimony in spite of his plea and in failing to make an adequate offer of proof regarding the evidentiary issue showing that he had a claim regarding the evidentiary issue involving a defense of justification that did not involve party hunting rules, which was deficient performance.

The motion then asserted that Tutor was prejudiced by the deficient performance because his plea was unknowing and involuntary. The motion requested that Tutor be allowed to withdraw his plea.

¶8 At the postconviction motion hearing, Tutor took the position that his trial attorney's performance was deficient because he misinformed Tutor that he could appeal the evidentiary issue. Tutor further claimed that this performance was prejudicial because his jury trial waiver was unknowingly and involuntarily based upon his attorney's erroneous advice.[9] The trial court first held that Tutor had not proven that counsel's claimed performance was deficient. It further concluded that Tutor did not show prejudice because the underlying evidentiary

[8] Tutor's, and to some degree, his trial attorney's, testimony at the postconviction motion hearing reiterated these assertions.

[9] In his postconviction motion and again on appeal, Tutor argues that the sentencing statute, WIS. STAT. § 29.971(11), is irrational and unconstitutional. Because of the remand, it may not be necessary to decide Tutor's challenge to the statute. Therefore, this court declines to do so at this time.

issue was without merit.[10] The trial court did not address Tutor's contention that he was prejudiced because he was misinformed about the effect of his plea.

¶9 On appeal, Tutor refines his principal argument, freeing it from its unnecessary ineffective assistance of counsel framework. He contends that he misapprehended the effect of his plea on his right to appeal the trial court's evidentiary ruling and would have gone to trial had he known a guilty plea would waive the issue for appeal. His plea, Tutor argues, was therefore unknowing and involuntary and as such may be withdrawn as a matter of right.

---

[10] This court agrees with the trial court that the evidentiary issue, now recast in the form of "legal justification," is without merit.

"The guilty-plea-waiver rule, like the general rule that failure to timely raise objections at trial will result in waiver, is a rule of administration and not of power." ***Riekkoff***, 112 Wis. 2d at 125. This court may address an issue if it has been fully briefed and requires no further evidentiary proceedings. ***Wirth v. Ehly***, 93 Wis. 2d 433, 444, 287 N.W.2d 140 (1980). This court elects to do so here; the issue has been adequately briefed, and this court considers it to be in the interest of judicial economy to decide it here and now. *See* ***Shoreline Park Preserv., Inc. v. DOA***, 195 Wis. 2d 750, 763-64, 537 N.W.2d 388 (Ct. App. 1995).

In ***State v. Brown***, 107 Wis. 2d 44, 56, 318 N.W.2d 370 (1982), the supreme court held that a defendant in a civil forfeiture action for speeding may claim that a violation of the law should be excused if it was caused by the State itself through the actions of a law enforcement officer. As indicated, Tutor argues that he should have been permitted to pursue a defense of legal justification. Specifically, he claims that he was justified in failing to tag the deer because he could not read the tags and the wardens prevented his companions from assisting in applying the correct tag. Tutor contends that the State created the legal justification when the wardens prevented Hawkinson and Schuster from coming to Tutor's unsolicited aid. According to Tutor, because Hawkinson and Schuster would have been able to help Tutor read his tags, he would have been able to properly tag the deer. Therefore, he argues, "[t]he wardens improperly prevented Mr. Tutor from being able to apply the doe and hunter's choice tags …."

Tutor's legal justification argument is without merit because he shines the spotlight on the wrong actor. This is not a case where Tutor responded to his claimed inability to tag the deer by requesting aid from his hunting companions and the wardens then knowingly prevented them from assisting. Moreover, Tutor did not claim that he was relying on the pattern of assistance Tutor and his friends asserted. Rather, Tutor was the one who allegedly put himself in the position of not being able to read the tags by failing to have his glasses. Because he does not present a viable legal justification defense, the evidence as to why Tutor did not tag the deer, the group's pattern of assistance and the wardens' refusal to permit assistance was irrelevant.

DISCUSSION

¶10 Whether a plea may be withdrawn is ordinarily within the trial court's discretion. ***State v. Rock***, 92 Wis. 2d 554, 559, 285 N.W.2d 739 (1979). In addition, when a motion to withdraw a plea is made after sentencing, the defendant has the burden of showing by clear and convincing evidence that the plea withdrawal is necessary to correct a manifest injustice. ***State v. Schill***, 93 Wis. 2d 361, 383, 286 N.W.2d 836 (1980). When, however, a defendant establishes a denial of a relevant constitutional right, withdrawal of the plea is a matter of right; the trial court reviewing the motion to withdraw has no discretion in the matter. ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986).

¶11 In ***State v. Riekkoff***, 112 Wis. 2d 119, 332 N.W.2d 744 (1983), the supreme court held that Riekkoff did not have the right to appellate review of an order denying the admission of his proffered evidence. Riekkoff pled guilty, and as a condition of the plea bargain, he reserved the right to challenge the ruling on appeal. The State agreed to the conditional plea and the reservation, and the trial judge acquiesced in the arrangement. ***Id.*** at 120-21.

¶12 The court relied on the well-settled principle that once a guilty plea is accepted, as a matter of law the right to appeal the reserved issues is waived. It thus concluded that

> in situations in respect to orders or objections to which the guilty-plea-waiver rule may apply, it is to be applied even though a defendant expressly states his intent not to waive certain issues on appeal and makes that intention a condition of his plea and even though the prosecutor and the judge acquiesce in that intention.

Id. at 127-28.

¶13 The ***Riekkoff*** court determined that because it was clear that Riekkoff pled guilty believing that he was entitled to an appellate review of the reserved issue, he was under a misapprehension with respect to the effect of his plea. The court held that under these circumstances, as a matter of law his plea was neither knowing nor voluntary. Thus, while Riekkoff's plea waived his appellate rights in respect to the evidentiary ruling, the court held that if Riekkoff desired to move to withdraw his plea he could do so. ***Id.*** at 128.

¶14 In the present case, while Tutor advanced during the postconviction motion hearing the essential argument that he reiterates on appeal, it was perhaps obfuscated by the form in which it was presented: ineffective assistance of counsel. Thus, the trial court was never asked to make specific findings whether Tutor was in fact under the claimed misapprehension, and whether he would have insisted upon a trial if he had been properly informed as to the effect of a guilty plea on his right to appeal the evidentiary issue. While there is substantial testimony to support Tutor's contentions, this court is not empowered to, nor given the need to make credibility determinations. Nor is this court in a position to make findings of fact. *See* WIS. STAT. § 805.17(2); ***State v. Shimkus***, 2000 Wis. App. 262, ¶12, 240 Wis. 2d 310, 622 N.W.2d 763. Because it is possible that Tutor may have indeed entered an involuntary, unknowing plea, this court deems it appropriate to remand the matter to the trial court to make findings regarding the above two issues. If the court finds that Tutor entered his plea believing he could appeal the trial court ruling on the State's motion in limine and that Tutor would have insisted upon a trial had he not been misinformed, then he must be afforded the opportunity to withdraw his plea and have a trial. If the court does not make both findings, then the conviction must stand and, upon notice, this court will address Tutor's challenge to WIS. STAT. § 29.971(11).

By the Court.—Cause remanded with directions.

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