COURT OF APPEALS
DECISION
DATED AND FILED

September 5, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0767-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BERNIE M. REINHARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: MICHAEL O. BOHREN, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] The guilty-plea-waiver rule blocks Bernie M. Reinhard's challenge to the retroactive application of WIS. STAT. § 346.65(2)(b)

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

that results in Reinhard being charged with a second offense operating while under the influence of an intoxicant (OWI). Therefore, we affirm.[2]

¶2 On November 2, 1993, Reinhard was convicted of a first offense OWI. At that time, WIS. STAT. § 346.65(2)(b) (1993-94) provided that in computing prior convictions for the purpose of enhancing a sentence for a second OWI offense, "the total number of suspensions, revocations, and convictions counted under s. 343.307(1) … in a *5-year period*" were to be considered. (Emphasis added.) That section was amended in 1998 to provide that "the total number of suspensions, revocations, and convictions counted under s. 343.307(1) … in a *10-year period*" were to be considered. 1997 Wis. Act 237, § 527yg (emphasis added). The amendment to the statute was effective on January 1, 1999.[3] ***Id.*** at § 9448(2f). Reinhard was arrested for OWI on

[2] While the State did not raise the guilty-plea-waiver rule in its response brief, this court may sua sponte raise the applicability of the guilty-plea-waiver rule. ***State v. Olson***, 127 Wis. 2d 412, 421 n.5, 380 N.W.2d 375 (Ct. App. 1985). On August 8, 2001, we issued an order requesting Reinhard to brief the applicability of the guilty-plea-waiver rule; he has filed a supplemental brief.

[3] The legislation amending WIS. STAT. § 346.65(2)(b) (1995-96) contained a provision for the application of the amendment extending the time a sentencing court could look back for prior OWI convictions:

> The treatment of … [§] 346.65 (2) (b) … of the statutes first applies to offenses committed on the effective date of this subsection, but does not preclude the counting of other violations as prior convictions, suspensions or revocations for purposes of administrative action by the department of transportation, sentencing by a court or revocation or suspension of operating privileges, except that it does preclude the counting of offenses that occurred before January 1, 1989, as prior convictions, suspensions or revocations.

1997 Wis. Act 237, § 9348(2f).

June 25, 2000, and was charged with a second offense because of his prior conviction for OWI on November 2, 1993.

¶3 Reinhard filed a motion to dismiss the criminal complaint charging a second offense OWI on the grounds that having successfully driven for five years from the date of his first offense without a second or subsequent OWI conviction, he had a vested right not to face criminal penalties. He argued that the retroactive application of the amendment to WIS. STAT. § 346.65(2)(b) to include his first conviction violated the ex post facto clause and the due process clause of the federal and state constitutions. The trial court denied Reinhard's motion.

¶4 Immediately after the denial of his motion, Reinhard's counsel advised the court:

> We would like to enter a conditional no contest plea to the OWI, reserve our right to challenge your rulings on appeal and ask the court [to] withhold sentence while we appeal it to the appellate court.

The court took a brief adjournment to permit Reinhard and his counsel to complete a guilty plea questionnaire. When the court reconvened, it engaged in a plea colloquy with Reinhard. In the colloquy, the court assured itself that Reinhard understood that he was entering a no contest plea to a criminal charge and that he understood he was giving up the constitutional rights specified in the plea questionnaire. The court also quizzed Reinhard on whether he understood that the motions that had been denied were filed by Reinhard's counsel as "defensive procedure and there may be other defenses that your case may involve. Do you understand when you enter a plea like this you give up those other defenses, if any did exist?" After hearing recommendations from the State and defense counsel, the court imposed a sentence consistent with conviction for a second offense OWI. Reinhard now appeals.

¶5 We do not address the substantive issues Reinhard raises on appeal.[4] It is a general principle of law that a plea of guilty, voluntarily and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses, including claims of constitutional dimension.[5] ***State v. Riekkoff***, 112 Wis. 2d 119, 122-23, 332 N.W.2d 744 (1983). Waiver also applies in the case of no contest pleas. ***State v. Princess Cinema***, 96 Wis. 2d 646, 651, 292 N.W.2d 807 (1980). Reinhard contends that the guilty-plea-waiver rule does not apply because his constitutional challenges "focus on the authority, capacity, power, and right by which the lower court compelled him to come before it and whether the court could hear and determine the controversy and pronounce sentence." For the following reasons, we conclude that the guilty-plea-waiver rule applies.

¶6 First, Reinhard cannot avoid the guilty-plea-waiver rule by entering a "conditional plea" and reserving the right to appeal. In ***Riekkoff***, 112 Wis. 2d at 122, the issue was whether the parties and the trial court may stipulate to the right of appellate review. The supreme court held that "even the express reservation of the right to appeal a prior ruling will not survive a guilty plea in respect to a matter which clearly would be waived absent the reservation." ***Id.*** at 127. Thus, we

[4] Reinhard asserts that WIS. STAT. § 346.65(2)(b) is facially unconstitutional because it (1) denies him equal protection, (2) violates the substantive component of the due process clause, (3) violates the ex post facto clause, and (4) violates the double jeopardy clause.

[5] Although there is an exception to the guilty-plea-waiver rule under WIS. STAT. § 971.31(10), we hold that inapplicable in this case. Section 971.31(10) applies to "a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant." In the trial court, Reinhard filed both a motion to dismiss and a motion to suppress evidence of his prior drunk driving conviction. On appeal, he has failed to address the denial of his motion to suppress evidence of his prior conviction. The court of appeals may decline to review an issue raised in the trial court but not briefed on appeal. ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992); ***Reiman Assocs., Inc. v. R/A Adver. Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

determine that Reinhard could not enter a conditional plea in an attempt to reserve his right to appeal and avoid the guilty-plea-waiver rule.

¶7 Second, the guilty-plea-waiver rule does not apply when a defendant raises a challenge to the validity of a statute that calls into question the subject matter jurisdiction of the court.[6] ***State ex rel. Skinkis v. Treffert***, 90 Wis. 2d 528, 538-39, 280 N.W.2d 316 (Ct. App. 1979). Reinhard vehemently argues that his constitutional challenge to the retroactive application of the ten-year look-back period of WIS. STAT. § 346.65(2)(b) is a challenge to the jurisdiction of the court. While Reinhard labels his attack as a constitutional challenge to the jurisdiction of the court, that label does not bind us. "Simply to label a claimed error as constitutional does not make it so." ***State v. Scherreiks***, 153 Wis. 2d 510, 520, 451 N.W.2d 759 (Ct. App. 1989). The penalty structure of § 346.65(2)(b) has been attacked many times, and each time the appellate court has concluded that it is "nothing more than a penalty enhancer similar to a repeater statute which *does not* in any way *alter the nature of the substantive offense*, i.e., the prohibited conduct, but rather goes only to the question of punishment." ***State v. Foust***, 214 Wis. 2d 568, 574, 570 N.W.2d 905 (Ct. App. 1997) (emphasis added); *see also* ***State v. Wideman***, 206 Wis. 2d 91, 98, 556 N.W.2d 737 (1996). Thus, we determine that Reinhard's challenge to the application of the statute does not call into question the subject matter jurisdiction of the court and the guilty-plea-waiver rule applies.

[6] A court has subject matter jurisdiction "where it has been authorized to hear and determine the primary object of the action." ***Mack v. State***, 93 Wis. 2d 287, 294, 286 N.W.2d 563 (1980). The circuit court has original subject matter jurisdiction over all civil and criminal matters not specifically excluded by law or the constitution. ***Id.***; WIS. STAT. § 753.03. Consequently, the circuit court has jurisdiction over any violation of WIS. STAT. § 346.65.

¶8 Third, we have held that under special circumstances, even if a defendant's constitutional challenge is not to the court's subject matter jurisdiction, he or she is nevertheless entitled to reassert the constitutional claims on appeal. *See* ***State v. Olson***, 127 Wis. 2d 412, 427, 380 N.W.2d 375 (Ct. App. 1985). In ***Olson***, we adopted the analysis of the United States Supreme Court in ***Menna v. New York***, 423 U.S. 61 (1975) (per curiam):

> The ***Menna*** Court explained that a guilty plea renders irrelevant constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not prevent a conviction, but, "[h]ere, however, the claim is that the State may not convict petitioner no matter how validly his factual guilt is established."

Olson, 127 Wis. 2d at 422. Reinhard does not fall under this exception because, despite the labels he attaches to the issues, he does not challenge the ability of the State to convict him of OWI—he only challenges the ability of the State to seek the imposition of criminal penalties. Thus, we conclude that Reinhard cannot reassert a nonjurisdictional constitutional challenge and the guilty-plea-waiver rule applies.

¶9 Reinhard maintains that if he is barred from challenging WIS. STAT. § 346.65(2)(b) by the guilty-plea-waiver rule, his plea was defective and this case should be remanded to the trial court to permit him to withdraw his plea. The guilty-plea-waiver rule only applies if the defendant has entered a plea knowingly and understandingly. ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). The record reflects that Reinhard's guilty plea was voluntary and intelligent. Reinhard acknowledged to the trial judge that he had reviewed the guilty plea questionnaire with his attorney and had signed that document. This alone would be sufficient to sustain a finding that the plea was

knowing and voluntary. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). The trial judge here, however, engaged in a lengthy colloquy with Reinhard establishing a factual basis for concluding that Reinhard had indeed committed the alleged offenses and assuring that Reinhard: (1) understood the elements of the crimes to which he was entering a no contest plea, (2) understood the penalties to which he was exposing himself, (3) was competent to understand his decision, (4) had reviewed his decision carefully with counsel, (5) was not acting under any threat or promise, (6) understood he was waiving those constitutional rights assured the criminally accused, and (7) was waiving the right to present any defenses. Thus, we determine that Reinhard entered his plea voluntarily and intelligently and the guilty-plea-waiver rule applies.

¶10 This does not end our analysis, however. The guilty-plea-waiver rule does not deprive us of our subject matter jurisdiction; rather, it is "a rule of administration and not of power." ***State v. Grayson***, 165 Wis. 2d 557, 561, 478 N.W.2d 390 (Ct. App. 1991). We decline to deviate from the rule and consider Reinhard's challenge to the application of the ten-year look-back period for OWI convictions to his situation. This is not the type of question that tempts us.[7] The

[7] The issue raised by Reinhard is not tempting because Wisconsin's crusade against repeat drunk driving offenders has a long history. Enhanced penalties for repeat drunk driving have been part of the law in Wisconsin since 1929. ***State v. Wideman***, 206 Wis. 2d 91, 100, 556 N.W.2d 737 (1996). There is a basic reason why Wisconsin has a public policy supporting enhanced penalties for repeat drunk driving:

> Drunk driving is indiscriminate in the personal tragedy of death, injury, and suffering it levies on its victims. It may transform an innocent user of a highway into a victim at any time—with no advance notice and no opportunity to be heard. It is a tragedy where the intoxicated driver and the victim are often unwittingly the same person.

(continued)

longer look-back period of WIS. STAT. § 346.65(2)(b) has been in effect since January 1, 1999. As far as we can determine, this is the first time this issue has arisen on appeal, and we conclude that it is not of statewide importance. For these reasons, we decline to exercise our discretion and relieve Reinhard of the effect of the guilty-plea-waiver rule.

By the Court.—Judgment affirmed.

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

> It is also a scourge on society: drunk driving exacts a heavy toll in terms of increased health care and insurance costs, diminished economic resources, and lost worker productivity. It is an affliction which produces no offsetting human or economic benefits; it engenders no positive human or economic incentive. It destroys and demoralizes personal lives and shocks society's conscience. It has no legitimate place in our society.

State v. Nordness, 128 Wis. 2d 15, 33-34, 381 N.W.2d 300 (1986). It is because of the carnage caused by repeat drunk drivers that the enhanced penalty structure has been consistently upheld by the appellate courts of this state. ***State v. Foust***, 214 Wis. 2d 568, 570 N.W.2d 905 (Ct. App. 1997); s*ee also* ***State v. Wideman***, 206 Wis. 2d 91, 556 N.W.2d 737 (1996).