162A LAW NOTE: STIPULATIONS

CONTENTS

Scope

This Law Note addresses the issues that arise when a defendant offers to agree that a fact is established.

I. True Stipulations

A. Definition

Strictly speaking, a "stipulation" is an agreement between the parties that a fact will be accepted as established.[1] The agreement – the stipulation – is a substitute for proof of a fact by testimony or other evidence.[2]

Because a true stipulation is an agreement between the parties, neither the state nor the defendant is required to enter into a stipulation. [See Part III. Offers to Stipulate; "Concessions"]

B. Recommended Procedure

The Committee recommends that the following procedure be used when the parties offer a stipulation:

- the parties should clearly identify the agreement on the record;

- personal inquiry should be made of the defendant to establish that he or she agrees with the stipulation[3];

- the jury is instructed to accept the stipulated fact as conclusively proved;

- the instruction also provides for an optional sentence in which the agreed facts would be stated. The sentence is described as optional because the Committee

concluded that by attempting to paraphrase stipulations, the trial judge may commit unintentional error by doing so incorrectly. This danger can be minimized if all stipulations are required to be put into writing before being accepted by the court.

C. Jury Instruction

Wis JI-Criminal 162, Agreed Facts, provides as follows:

> The district attorney and the attorney for the defendant have stipulated or agreed to the existence of certain facts, and you must accept those facts as conclusively proved.

II. Stipulations That Go To An Element Of The Crime

A. In General

The Committee believes the following are the correct legal principles to apply where a stipulation goes to an element of the crime:

- a stipulation may be offered as to proof of an element;

- as with any other stipulation, the agreement of both parties is required;

- when a stipulation is accepted as to proof of an element, a waiver should be obtained; what the defendant is waiving is not the submission of the element as part of the offense definition, but rather the right not to have a verdict directed as to an element of the crime[4];

- an element of the crime is, with one exception,[5] never completely removed from the jury's consideration.

B. Recommended Procedure

When using the term "stipulation," this discussion refers to a true stipulation – agreed to by both the defense and the prosecution.

- As with any other stipulation, the court should address the defendant personally to assure that the defendant understands the stipulation and joins in it.

• The court should also make sufficient inquiry of the defendant to assure that defendant knowingly and understandingly waives the right to what is in effect a partial directed verdict on an element of the crime.[6]

• With one exception, the element will still be presented to the jury as part of the offense definition.

• As with any other stipulation, the jury will be told to accept the facts stipulated to – here, an element – as conclusively proved.

C. Example: Possession Of A Firearm By A Felon – § 941.29

The stipulation would state that the parties agree that the defendant had been convicted of a felony [or satisfied one of the other categories covered by the statute].[7]

A waiver should be obtained from the defendant, confirming his or her understanding that the jury will be instructed to accept the element as proved.[8]

The "convicted of a felony" element would still be included in the offense definition and included in the jury instructions.

The jury would be instructed that:

"The parties have agreed that the defendant was convicted of a felony before (date of offense) and you must accept this as conclusively proved."[9]

Proof of the nature of the felony and evidence of the circumstances giving rise to the felony conviction is not admissible.[10]

D. Exception: Operating With A Prohibited Alcohol Concentration – Stipulation that goes to the "status element" removes that element from the jury's consideration

Under Wisconsin's operating while intoxicated [OWI] laws, the prohibited alcohol concentration level is reduced if the driver has prior convictions, suspensions or revocations related to OWI. Originally, two or more priors reduced the level from 0.10 to 0.08. Under current law, three or more priors reduce the applicable level from 0.08 to 0.02. Because the fact of priors changes the substantive definition of the crime, that fact is an element to be submitted to the jury.

The 0.08 version of the law was addressed in State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997). The Wisconsin Supreme Court referred to the prior convictions element as a "status element" and held that if the defendant admits having two or more prior convictions, suspensions or revocations [the relevant number under prior law], the "admission dispenses with the need for proof of the status element, either to a jury or to a judge." 214 Wis.2d 628, 646. When there is an admission of the status element, "admitting any evidence of the defendant's prior convictions, suspensions or revocations and submitting the status element to the jury . . . [is] an erroneous exercise of discretion." 214 Wis.2d 628, 651. The court's rationale for removing an element in this situation was that the status element involves facts "entirely outside the gravamen of the offense" and "adds nothing to the State's evidentiary depth or descriptive narrative." 214 Wis.2d 628, 649-50.

The court gave explicit direction to the trial courts as to how to handle this situation:

> When a circuit court is faced with the circumstances presented in this case, the circuit court should simply instruct the jury that they must find beyond a reasonable doubt that: 1) the defendant was driving or operating a motor vehicle on a highway; and 2) the defendant had a prohibited alcohol concentration at the time . . . The "prohibited alcohol concentration" means 0.08 . . .
> 214 Wis.2d 628, 651-52.

Wis JI-Criminal 2660C applies the Alexander rule to 0.02 offenses under current law. The third element addresses the fact of three or more priors and has been placed in brackets. If the defendant admits the "status element," the instruction is to be given with two elements: operating a vehicle, and, having an alcohol concentration of more than 0.02. If the defendant does not admit the "status element," the instruction should be given with a third element: having three or more prior convictions, suspensions or revocations as counted under § 343.307(1). Because the defendant's admission removes an element from the jury's consideration, the record should reflect the defendant's acknowledgment that a jury determination is, in effect, being waived on the "status element."

NOTE: Under the procedure required by the Alexander decision, the stipulation procedure described in this Law Note does not apply:

1) Agreement by the state that the fact of priors is established is not required.
2) Consent by the state to the waiver of jury trial on the prior conviction element is not required.
3) The prior conviction element is completely withdrawn from the jury's consideration.

The Alexander procedure – whereby an element is actually removed from the jury's consideration – has not been extended to other situations. See, State v. Warbelton, 2009 WI 6, 315 Wis.2d 253, 759 N.W.2d 557.[11]

The Committee recommends adopting this same procedure in a second situation: where the prohibited alcohol concentration is reduced to 0.02 for those who satisfy the "status element" of being subject to an order under § 343.301 to install an ignition interlock device. See Wis JI-Criminal 2600D.

III. Offers to Stipulate; "Concessions"

True stipulations should be distinguished from offers to stipulate or offers to concede that a fact is established. The latter have been referred to as "Wallerman stipulations," taking their name from the court of appeals decision in State v. Wallerman, 203 Wis.2d 158, 552 N.W.2d 128 (Ct. App. 1996). Wallerman involved a postconviction challenge to other acts evidence that had been admitted on the issues of motive and intent. The court of appeals found that the defendant was not entitled to relief because he had failed to affirmatively concede the motive and intent issues. However, the court set out a four-part methodology for trial courts to use in situations where the defendant did offer to concede an issue. 203 Wis.2d 158, 167-168.

The Wallerman decision was relied on by State v. DeKeyser, 221 Wis.2d 435, 585 N.W.2d 668 (Ct. App. 1998), where the court of appeals reversed a conviction due to ineffective assistance of counsel. The court found that counsel engaged in deficient performance by failing to offer a Wallerman stipulation to avoid the admissibility of other acts evidence.

The Wisconsin Supreme Court addressed "Wallerman stipulations" in State v. Veach, 2002 WI 110, ¶118, 255Wis.2d 390, 645 N.W.2d 913, holding that if offers to stipulate or concede are not accepted or joined in by the prosecution, the court is not required to accept them:

> We determine that to the extent that Wallerman and DeKeyser imply that the state and the circuit court are obliged to accept Wallerman stipulations, those cases are incorrect and must be overruled. . . While we do not hold that Wallerman stipulations are invalid per se, we do hold that, with the exception of stipulations as to the defendant's status, the state and the court are not obligated to accept stipulations to elements of a crime even if the stipulations are offered in compliance with the four-part test set forth in Wallerman.

COMMENT

Wis JI-Criminal 162A was approved by the Committee in February 2011.

1. See, for example, Black's Law Dictionary, 7th Edition: "A voluntary agreement between opposing parties concerning some relevant point."

2. ". . . [T]he admission of a fact dispenses with proof thereof." Myers v. State, 193 Wis. 126, 127, 213 N.W. 645 (1927).

3. It is good practice to assure that the defendant understands and joins in the agreement. This avoids later argument about whether the stipulation involved an issue on which the defendant's personal participation was required or merely a matter of trial tactics within the purview of defense counsel. See Poole v. United States, 832 F.2d 561 (11th Cir. 1987).

4. This might be called a "partial jury trial waiver," a term Wisconsin appellate courts have used primarily to refer to completely withdrawing an element from the jury's consideration. See, for example, State v. Warbelton, 2009 WI 6, 315 Wis.2d 253, 759 N.W.2d 557; State v. Benoit, 229 Wis.2d 630, 600 N.W.2d 193 (Ct. App. 1999); State v. Villarreal, 153 Wis.2d 323, 450 N.W.2d 519 (Ct. App. 1989). That brings into play the rule that the state, and the trial court, are not required to join in that complete waiver. However, the right to a jury trial can be viewed as incorporating additional rights, such as not directing a verdict against the defendant on an element of the crime. When a stipulation is accepted as to an element, that element still goes to the jury and the jury is told the element is "conclusively proved." Telling the jury that an element is "conclusively proved" implicates the right not to have a verdict directed on an element. Thus, the Committee recommends that the trial court assure that the record shows that the defendant understands this and waives the right not to have a verdict [partially] directed against him. Whether this is done as part of the stipulation procedure or viewed as a separate waiver inquiry should not make any difference. A general question about whether the defendant "is still interested in" entering into a stipulation is not sufficient. State v. Hauk, 2002 WI App 226, 257 Wis.2d 579, 652 N.W.2d 393.

5. The Wisconsin Supreme Court has recognized one situation where an element can be removed from the jury's consideration: a stipulation going to the prior convictions, suspensions, or revocations that reduce the prohibited alcohol concentration from 0.08 to 0.02. See State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997), discussed below at Section II. D. The Committee has concluded that the Alexander approach should also apply in a second situation: where the prohibited alcohol concentration is reduced to 0.02 for those who satisfy the "status element" of being subject to an order under § 343.301 to install an ignition interlock device. See Wis JI-Criminal 2600D.

6. A suggested script regarding the waiver of the right to full jury consideration of the element:

> Your right to a jury trial includes the right to have the jury consider all relevant evidence as to each element of the crime. If the proposed stipulation is accepted as to an element of the crime charged against you, that element will still be presented to the jury but the jury will be told that the element is "conclusively proved." Do you understand? Do you wish to proceed with the proposed stipulation?

For an example of a complete waiver inquiry, see note 8, below.

7. The example is for violations of § 941.29 involving possession of a firearm by a person convicted of a felony. However, the statute also applies to other categories of individuals. See § 941.29(1)(a) through (g).

8. An example of a complete waiver inquiry is as follows:

TO THE DEFENDANT:

1. Do you understand that one of the elements of the crime of felon in possession of a firearm is that you have been convicted of a felony before the date of this offense?

2. Do you understand that you have the right to have a jury, that is, twelve people, decide whether or not the state has proved beyond a reasonable doubt that you have been convicted of a felony before the date of this offense?

3. Do you understand that the State has to convince each member of the jury that you have been convicted of a felony before the date of this offense?

4. With this stipulation, you are agreeing that I tell the jury that you have been convicted of a felony before the date of this offense, and that they are to accept this fact as conclusively proved?

5. Has your attorney explained the pros and cons, that is, the advantages and disadvantages of entering into this agreement?

6. Have you had enough time to talk all of this over with your attorney?

7. Has anyone pressured you or threatened you in any way, or made any promises to you, to get you to enter into this agreement?

8. Are you entering into this agreement of your own free will?

9. Have you had enough time to make your decision?

TO DEFENSE COUNSEL:

1. Are you satisfied that your client thoroughly understand (his) (her) right to enter into this agreement regarding (his) (her) prior conviction or to not enter into this agreement?

2. Are you satisfied that your client is entering into this agreement freely, voluntarily, intelligently, and knowingly?

FINDING: The court is also satisfied that the defendant is entering into this agreement freely, voluntarily, intelligently, and knowingly. The court therefore accepts the stipulation.

9. This is the approach recommended in Wis JI-Criminal 1343, the instruction for violations of § 941.29. It is consistent with the description of the effect of a stipulation in a prosecution for violating § 941.29 in State v. McAllister, 153 Wis.2d 523, 451 N.W.2d 764 (Ct. App. 1989).

10. Old Chief v. United States, 519 U.S. 172 (1997); State v. McAllister, supra, note 9. "When the defendant agrees to a sanitized stipulation admitting the prior conviction, there is no need for further proof relating to the nature of the conviction." State v. Warbelton, 2009 WI 6, ¶53, 315 Wis.2d 253, 759 N.W.2d 557.

11. In State v. Warbelton, 2009 WI 6, 315 Wis.2d 253, 759 N.W.2d 557, the defendant urged that the Alexander approach be applied to the crime of stalking under § 940.32(2m)(a) which provides an increased penalty for stalking offenses where the defendant has a previous conviction for a violent crime. The Wisconsin Supreme Court declined to extend Alexander:

> ¶46 Despite the parallels between Alexander and this case, we decline to extend Alexander's holding to the stalking statute. Alexander is limited to prosecutions for driving while under the influence of an intoxicant or with a prohibited alcohol concentration. In these unique cases, the risk of unfair prejudice is extremely high given the likelihood that jurors will make prohibited inferences based on the fact of multiple prior convictions, suspensions, or revocations.

