COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2128

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JACQEE R. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Portage County: FREDERIC FLEISHAUER, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Jacqee Anderson appeals an order denying her motion to vacate a judgment convicting her of misdemeanor bail jumping. Anderson raises numerous issues on appeal. She claims that: (1) her trial counsel

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

was ineffective; (2) the circuit court lacked jurisdiction over the offense; (3) the State was unable to prove the intent element of the offense; (4) the State "impermissibly conspire[d]" with defense counsel to suppress evidence; (5) the State committed a "malfeasance of duty"; (6) her conviction was obtained through the breach of a plea agreement; (7) the circuit court erroneously informed defense counsel of her allegations of ineffective assistance; (8) her conviction was obtained through vindictive prosecution; (9) the circuit court should not have accepted her no contest plea because the State was unable to prove intent; and (10) she could not have been convicted of bail jumping if the underlying charge against her was dismissed. We conclude that none of Anderson's arguments have merit. Accordingly, we affirm the order of the circuit court.

BACKGROUND

¶2 In May 1997, Anderson was charged in Oneida County with disorderly conduct and obstructing an officer. She was released on a $250 cash bond with a condition that she not possess or consume any intoxicants. Eight days later, Anderson was charged in Oneida County with misdemeanor bail jumping, and was released on a signature bond with a similar condition of "[n]o intoxicants."

¶3 In July 1997, a Stevens Point police officer was dispatched to a local hotel where an intoxicated Anderson informed him that she intended to "kill herself" by "jumping out of the window in her hotel room." The officer transported Anderson to a local hospital and learned that her blood alcohol concentration was .37 percent. As a result of this incident, Anderson was charged in Portage County with misdemeanor bail jumping.

¶4 In October 1998, Anderson agreed to plead no contest to the Portage County bail jumping charge. As part of the plea agreement, the State agreed to dismiss the pending Oneida County charges and only "read in" these charges for purposes of sentencing. After engaging in a plea colloquy with Anderson, the circuit court accepted her no contest plea and found her guilty of misdemeanor bail jumping in violation of WIS. STAT. § 946.49(1)(a). The court withheld sentence and ordered a twelve-month term of probation.

¶5 Anderson failed to file a timely notice of her intent to pursue postconviction relief under WIS. STAT. § 974.02, but subsequently moved for postconviction relief under WIS. STAT. § 974.06. In her motion, Anderson asked the circuit court to vacate her conviction on the grounds that: (1) she was denied effective assistance of counsel, (2) her conviction was obtained upon a breach of a plea agreement, (3) the State unconstitutionally suppressed evidence, (4) the court was without jurisdiction to impose sentence, (5) her conviction was obtained through vindictive prosecution, (6) the State engaged in prosecutorial misconduct, and (7) her constitutional rights were abridged. The circuit court rejected each of these claims and denied her motion for postconviction relief. Anderson appeals the order denying postconviction relief.

ANALYSIS

¶6 We first consider whether Anderson's defense counsel was ineffective and whether the circuit court erred in denying her ineffective assistance claim without first conducting an evidentiary hearing. In her motion for postconviction relief, Anderson asked the circuit court to vacate her conviction on the grounds that she was denied the right to the effective assistance of counsel. Specifically, Anderson contended that her defense counsel failed to assert an

intoxication defense and failed to challenge the bond condition that required Anderson to avoid alcohol and other intoxicants. The circuit court found no merit in Anderson's ineffective assistance argument, however, and denied her motion without conducting a hearing. Anderson now claims that this denial was erroneous.

¶7 In determining whether the circuit court erred in denying Anderson's motion without conducting an evidentiary hearing, we first consider whether the motion alleges facts which, if true, would entitle Anderson to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). This is a question of law and is subject to our de novo review. *See* ***id.*** at 310. If we conclude that Anderson's motion fails to allege sufficient facts, we will uphold the circuit court's denial of postconviction relief so long as we are convinced that the circuit court properly exercised its discretion. *See* ***id.*** at 310-11.

¶8 To merit an evidentiary hearing, Anderson's motion must allege sufficient facts to establish that her defense counsel was ineffective, that is, that counsel was deficient and that this deficient performance prejudiced Anderson's defense. *See* ***id.*** at 311-12 (adopting the two-part test set forth in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). This court may choose to address either the "deficient performance" component or the "prejudice" component first, and if we determine that Anderson has made an inadequate showing on either component, we need not address the other. *See* ***Strickland***, 466 U.S. at 697.

¶9 In order to satisfy the "prejudice" component, Anderson must allege facts to show that "'there is a reasonable probability that, but for the counsel's errors, [she] would not have pleaded [to the bail jumping charge] and would have insisted on going to trial.'" ***Bentley***, 201 Wis. 2d at 312 (citation omitted).

Anderson must do more than simply allege that she would have pleaded differently; she must also provide objective factual assertions that support such an allegation. *See* ***id.*** at 313. After reviewing the record, we conclude that Anderson's motion did not contain sufficient factual assertions to support the "prejudice" component of her ineffective assistance claim. Anderson did not allege that her no contest plea was in any way connected to defense counsel's failure to pursue an intoxication defense or challenge the bond condition, and Anderson did not assert that, but for counsel's alleged failures, she would have insisted on going to trial. Because Anderson has failed to allege sufficient facts to establish that her defense counsel's performance prejudiced her defense, we need not consider the "deficient performance" component of the ***Strickland*** analysis.

¶10 Having concluded that Anderson failed to allege sufficient facts to establish that her defense counsel was ineffective, we next consider whether the circuit court properly exercised its discretion in denying Anderson's motion without conducting an evidentiary hearing. *See* ***id.*** at 318. A circuit court properly exercises its discretion when it applies the proper legal standards to the relevant facts and engages in a rational decision-making process. *See* ***Schultz v. Darlington Mut. Ins. Co.***, 181 Wis. 2d 646, 656, 511 N.W.2d 879 (1994). The circuit court's written decision demonstrates that the court sufficiently reviewed the record for facts that would substantiate Anderson's ineffective assistance claim.[2] The decision also indicates that the court applied the proper legal

[2] The record contains a "Plea Advisement and Waiver of Rights" form completed by Anderson and her attorney at the time she entered her plea. In it she declared that she had "discussed all the facts and circumstances known to me about this charge with my attorney. I have no questions about what has happened to date, or the facts in this case," by initialing the statement to that effect on the form. (The form also states "I am (am not) completely satisfied with my attorney and the representation and advice my attorney has given me," but Anderson did not select either "am" or "am not" in this statement.)

(continued)

standards to the facts before it. The circuit court ultimately denied Anderson's motion without a hearing because the record conclusively demonstrated that Anderson was not entitled to relief on this claim, and we cannot conclude that the court erroneously exercised its discretion when it did so.

¶11 We turn next to Anderson's claim that the circuit court did not have jurisdiction to accept her plea to the bail jumping charge.[3] The crux of Anderson's argument is that she was charged with bail jumping because she consumed alcohol in violation of a condition of her release bond, and that the State cannot prosecute an individual for bail jumping under these circumstances. Anderson's argument, however, was explicitly rejected in ***State ex rel. Jacobus v. State***, 208 Wis. 2d 39, 559 N.W.2d 900 (1997). In ***Jacobus***, the supreme court acknowledged that

---

Anderson also signified her assent to the following statement on the plea form:

> I understand that by pleading guilty or no contest, I am admitting each and every element of every offense charged. These elements are: While released from custody with conditions of bail—knowing those conditions of bail—intentionally violated a condition. Violated no drink provision of bail.

The record also contains the clerk's minutes of the plea hearing. The minutes indicate that the court questioned Anderson regarding her plea, informed her of her constitutional rights, found her plea and waiver of rights to be free, voluntary and intelligent, and found a sufficient factual basis to support the charge of bail jumping. There is no transcript in the record for the plea hearing, and Anderson informed this court in her "Statement on Transcript" that a "transcript is not necessary for the prosecution of the appeal." As the appellant, Anderson is responsible for ensuring that the record is complete on appeal, and when the record is incomplete, we must assume that the missing material supports the trial court's ruling. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993).

[3] Anderson contends that the circuit court lacked jurisdiction "over the offense of bail jumping" and that the court lacked jurisdiction because the State could not prove that Anderson intentionally failed to comply with the bond condition. These two arguments, however, are improperly characterized as jurisdictional arguments. A legitimate jurisdictional argument challenges either the power of the court to decide the issue before it or the authority of the court to assert personal jurisdiction over the defendant. *See* ***State v. Dietzen***, 164 Wis. 2d 205, 210, 474 N.W.2d 753 (Ct. App. 1991). We conclude that Anderson failed to raise a legitimate jurisdictional argument on appeal.

alcoholics and intoxicated persons are usually immune from criminal prosecution because of their consumption of alcoholic beverages. *See* ***id.*** at 48-49; *see also* WIS. STAT. § 51.45(1). Nonetheless, the court concluded that the State may criminally prosecute an individual for "bail jumping due to consumption of alcohol in violation of a condition of a bond." *See* ***Jacobus***, 208 Wis. 2d at 54. The ***Jacobus*** court explained the basis for its decision:

> [W]hen the State prosecutes an individual for bail jumping due to consumption of alcohol in violation of a condition of a bond, the State is prosecuting the individual for failing to comply with the bond condition. The State is not prosecuting the individual for public drunkenness or the consumption of alcohol.

Id. Under ***Jacobus***, it was proper for the State to charge Anderson with bail jumping after learning that Anderson violated her bond condition by consuming alcohol.

¶12 Anderson next argues that her conviction should be vacated because the State would not have been able to prove the "intent" element of the bail jumping charge.[4] We need not consider the substance of this argument, however, because we conclude that Anderson waived the right to challenge the sufficiency of the State's evidence when she submitted her no contest plea. *See* ***Mack v. State***, 93 Wis. 2d 287, 293, 286 N.W.2d 563 (1980). A plea of no contest waives all nonjurisdictional defects and defenses, and Anderson is therefore barred from raising this issue on appeal. *See* ***State v. Bangert***, 131 Wis. 2d 246, 293, 389 N.W.2d 12 (1986).

[4] To be convicted of bail jumping, a defendant must "intentionally fail[] to comply with the terms of his or her bond…." *See* WIS. STAT. § 946.49(1).

¶13 Anderson also claims that the State "impermissibly conspire[d]" with her defense counsel to suppress evidence that she is an "acute and chronic alcoholic." Anderson's contention appears to contain two separate assertions: (1) that the State and her defense attorney conspired to ensure that evidence of Anderson's alcoholism was not presented to the court, and (2) that the State unconstitutionally suppressed evidence that was favorable to her defense.[5] We reject Anderson's "conspiracy" theory outright, because the record contains no evidence to support this claim. Although Anderson contends that her defense attorney acted unethically by failing to pursue an "alcoholism defense," and that the State unethically ignored evidence of Anderson's alcoholism, there is no evidence in the record that the two conspired to ensure that this evidence was not presented to the court.

¶14 We similarly conclude that there is no evidence in the record to support Anderson's assertion that the State unconstitutionally suppressed evidence of her alcoholism. It appears from the record that Anderson's defense attorney was aware that Anderson had a problem with alcohol and that she wanted to assert an "alcoholism defense" to the charges against her. Anderson does not identify what additional evidence, available to the State but not revealed to defense counsel, that would have aided her defense. Even if we were to conclude that the State failed to disclose evidence of Anderson's alcoholism, however, we could not

[5] Anderson's "malfeasance of duty" claim is no more than a recharacterization of her "conspiracy/suppression" claim, in that her allegation here is that the prosecutor "failed to seek medical evidence" of her alcoholism. We will not separately address her claim under the alternative label.

conclude that this failure violated Anderson's constitutional rights.[6] Anderson's "suppression" claim is therefore without merit.

¶15 Anderson next contends that the State breached its plea agreement by failing to dismiss the pending Oneida County charge. Specifically, Anderson claims that the Oneida County charges were never dismissed and that she was subsequently ordered to appear in court to defend against one of these charges. Anderson's claim has no factual basis and cannot be substantiated by the record before this court.[7] Even if her claim had arguable merit, we note that the right to object to an alleged breach of a plea agreement is waived when the defendant fails to object and proceeds to sentencing. *See* ***State v. Smith***, 153 Wis. 2d 739, 741, 451 N.W.2d 794 (Ct. App. 1989). We therefore conclude that the circuit court properly denied relief with regard to this issue.

¶16 We similarly conclude that there is no merit to Anderson's contention that the circuit court erroneously notified Anderson's defense counsel of the ineffective assistance claim. Under ***State v. Simmons***, 57 Wis. 2d 285, 297, 203 N.W.2d 887 (1973), a defendant who claims that trial counsel was ineffective must "give notice to trial counsel that his [or her] handling of a criminal matter is being questioned…." Such notification is necessary to ensure that counsel has the

[6] Suppression of evidence violates due process only if the evidence is material to the defendant's guilt or innocence and there is a "reasonable probability" that, but for the State's failure to disclose, "the defendant would have refused to plead and would have insisted on going to trial." *See* ***State v. Sturgeon***, 231 Wis. 2d 487, 503-04, 605 N.W.2d 589 (Ct. App. 1999). The fact that one is an alcoholic does not provide a defense to a prosecution for violating a condition of bond. *Cf.* ***State ex rel. Jacobus v. State***, 208 Wis. 2d 39, 54, 559 N.W.2d 900 (1997).

[7] Anderson draws our attention to a bench warrant that was issued when she failed to appear in court to respond to a pending charge. This bench warrant, however, was issued by a Portage County circuit judge on June 3, 1998, when Anderson failed to appear in court to respond to the Portage County bail jumping charge. This bench warrant was issued months before the October 1998 plea agreement and is therefore irrelevant to her argument.

opportunity to explain the basis of his or her actions. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). The circuit court therefore acted appropriately when it notified Anderson's defense counsel of her pending ineffective assistance claim.

¶17 Anderson raises three additional issues, all of which we conclude are without merit. She argues that her conviction was obtained through vindictive prosecution, but asserts no factual allegations to establish that she was prosecuted out of personal vindictiveness or to prevent the exercise of a constitutional right. *See* ***State v. Minniecheske***, 118 Wis. 2d 357, 360, 347 N.W.2d 610 (Ct. App. 1984). Anderson also claims that the circuit court erroneously accepted her no contest plea and that she cannot be convicted of bail jumping because the underlying charge against her was dismissed. Anderson failed to raise these final two issues before the trial court, however, and failed to adequately develop these issues on appeal.[8] We therefore decline to review them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

CONCLUSION

¶18 For the reasons discussed above, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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

[8] See footnote 2, above, noting the record's lack of a transcript of the plea hearing.