COURT OF APPEALS
DECISION
DATED AND RELEASED

June 18, 1997

NOTICE

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

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

No. 97-0159

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LOTHAR W. PENKERT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County: WALTER J. SWIETLIK, Judge. *Affirmed.*

SNYDER, P.J. Lothar W. Penkert appeals pro se from an order denying his postconviction motion for reconsideration.[1] He raises the following issues: (1) that he has an "inalienable right" to travel by automobile and therefore

[1] Penkert's January 13, 1997 notice of appeal stated that he was appealing from a September 12, 1996 order and a December 12, 1996 order. In an order dated March 4, 1997, we dismissed the appeal as to the September 12 order as untimely. *See* § 808.04(5), STATS.

the State's licensing requirements violate the "Organic Law of the United States"; (2) that driving without a license is not a "crime" because it is a violation of the state administrative code, and consequently his incarceration with "convicted felons" is a violation of his equal protection rights; and (3) that he was not lawfully charged through a sworn affidavit.[2] Because we conclude that the first two challenges in this second appeal are barred by his no contest plea and that all three challenges are subject to the bar of ***Escalona-Naranjo,***[3] we affirm.

This is the second appeal arising out of Penkert's conviction for operating after revocation. Penkert pled no contest to the underlying offense on February 13, 1991. His first appeal, brought by counsel, challenged the number of prior convictions that could be counted pursuant to ***State v. Banks,*** 105 Wis.2d 32, 313 N.W.2d 67 (1981). *See* ***State v. Penkert,*** No. 91-1211-CR, unpublished slip op. (Wis. Ct. App. Dec. 18, 1991). None of the defects now alleged were argued in that earlier appeal.

We first note that Penkert's no contest plea to the charges waives his right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *See* ***County of Racine v. Smith,*** 122 Wis.2d 431, 434, 362 N.W.2d 439, 441 (Ct. App. 1984). Therefore, his claim that his "inalienable right" to drive is violated when the State requires him to have a driver's license and his claim that the prior proceedings violated his due process rights need not be considered. *See* ***id.***

---

[2] We note that Penkert's brief outlines four appellate issues; however, our understanding of his arguments leads us to frame the appellate issues in the above manner.

[3] ***State v. Escalona-Naranjo,*** 185 Wis.2d 168, 517 N.W.2d 157 (1994).

We liberally construe Penkert's remaining issue as jurisdictional, and therefore conclude that it is not waived pursuant to ***County of Racine.*** Penkert claims that he was not lawfully charged because the prosecutor "Simulate[d] Legal Process before the lower court" in violation of § 946.68, STATS. Our understanding of this argument is that Penkert contends that the prosecutor did not present a sworn complaint and that this violated § 968.01, STATS. However, he does not direct us to any portion of the trial court record to substantiate this claim.[4] Assertions of fact which are not part of the record will not be considered. *See* ***Jenkins v. Sabourin,*** 104 Wis.2d 309, 313-14, 311 N.W.2d 600, 603 (1981).

Furthermore, in ***State v. Escalona-Naranjo,*** 185 Wis.2d 168, 185, 517 N.W.2d 157, 163-64 (1994), the supreme court held that under § 974.06(4), STATS., a prisoner is required to raise all grounds for postconviction relief in his or her original, supplemental or amended motion. The court went on to state, "Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation." ***Id.*** at 185, 517 N.W.2d at 164.

Even if we were to assume that Penkert's final claim has merit, he has provided no reason for his failure to raise this issue in his original appeal. The only exception to the bar of ***Escalona-Naranjo*** is if a criminal defendant can provide a sufficient reason for not asserting the issue earlier. *See* ***id.*** at 184, 517 N.W.2d at 163. As we have stated subsequent to ***Escalona-Naranjo,*** a defendant

[4] While Penkert did not include a copy of the complaint in the record, the State's appendix includes a document entitled "Amended Criminal Complaint" which was sworn to by an assistant district attorney for Ozaukee county.

should have all of the necessary facts to raise such a challenge at the time of the original appeal. *See* ***State v. Tolefree,*** No. 96-0786-CR, slip op. at 6 (Wis. Ct. App. Mar. 12, 1997, ordered published Apr. 29, 1997). We therefore decline to address Penkert's final claim.

By the Court.—Order affirmed.

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