

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 20, 1999

Marilyn L. Graves
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 § 808.10 and RULE 809.62, STATS.

**Nos. 98-1751-CR
98-1752-CR**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY D. TAYLOR,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. Anthony Taylor appeals from judgments of conviction for felony bail jumping, and from orders denying his motions for postconviction relief. He raises numerous issues concerning the proceedings. We reject his contentions and affirm.

Taylor was charged in a felony proceeding and released on bond. As conditions of bond he could not violate the law or have any contact with Kyra Hogan, a potential witness against him. Subsequently, on two occasions, Taylor contacted Hogan and in each case assaulted her.

The State initially charged Taylor with two counts of bail jumping in each case. Pursuant to a plea agreement, Taylor entered pleas of guilty to one count in each case, the other two counts were dismissed, and the underlying charges for recklessly endangering safety while armed, bail jumping and concealing a dangerous weapon were dismissed and read-in for sentencing. The agreement also provided a joint sentencing recommendation of five years in prison and five years' consecutive probation. The trial court accepted Taylor's plea and scheduled the matter for sentencing.

Before sentencing occurred, Taylor switched attorneys and moved to vacate his plea. His motion asserted that former counsel pressured him into taking the plea, and left him no choice in any event by failing to subpoena witnesses and exculpatory phone records for the trial in one of the prosecutions. Taylor added that he had a defense in both cases based on his alcohol addiction.

At the hearing on Taylor's motion, the parties stipulated that trial counsel could appear by affidavit. In that affidavit, counsel explained that he had advised Taylor to accept the plea bargain, but did not pressure him to do so. In his testimony Taylor offered a different version of events. He also contended at the hearing that counsel should have subpoenaed witnesses and phone records to show that his contact with Hogan resulted from her persistent requests. Alternatively, he contended that he could have succeeded at trial by proving that his alcoholism negated his intent to violate the bond conditions.

The trial court chose to believe counsel's version of his advice to Taylor, and also noted that Taylor's testimony conflicted with his unequivocal statement at the plea hearing, in which he denied being coerced to plead guilty. Consequently the trial court determined that no fair and just reasons existed to set aside the plea.

The trial court subsequently sentenced Taylor to the recommended sentence. Taylor filed two more postconviction motions to withdraw his plea, and the trial court denied both without a hearing. On appeal, Taylor contends that he received ineffective assistance from trial counsel, the matter was assigned to the wrong courthouse within Rock County, he had too many trials scheduled too close together, his plea was involuntary, the trial court should have allowed him to withdraw his plea before sentencing, and his due process rights were violated because he was not advised that his bond violations could result in a criminal prosecution.

Taylor failed to prove that trial counsel ineffectively represented him. Counsel's two alleged deficiencies were his failure to obtain evidence that Hogan initiated the contacts, and failure to adequately investigate Taylor's alcohol addiction defense. However, evidence concerning Hogan's desire to meet with Taylor was not relevant to the pertinent issue in this case, which was whether Taylor intentionally met with Hogan and assaulted her. The defendant cannot prove ineffectiveness if the evidence counsel failed to obtain is irrelevant or immaterial. *See State v. O'Brien*, 214 Wis.2d 328, 350, 572 N.W.2d 870, 878 (Ct. App. 1997). Additionally Taylor cannot fault counsel for failure to develop a defense based on his alcoholism. Alcohol addiction does not render an intentional act involuntary. *Loveday v. State*, 74 Wis.2d 503, 511-13, 247 N.W.2d 116, 120-22 (1976).

Taylor waived his arguments concerning the venue and scheduling of his prosecutions. A knowing and voluntary plea constitutes a waiver of nonjurisdictional defenses, including those based on constitutional grounds. *Pillsbury v. State*, 31 Wis.2d 87, 93-94, 142 N.W.2d 187, 191 (1966). The same holds true for Taylor's claim that the bond did not provide adequate notice of the criminal penalties for his violations.

Taylor also failed to demonstrate that he entered an involuntary plea. Taylor contends that the trial court failed to advise him that intentional noncompliance with the terms of a bond was an essential element of the crime. However, when the plea colloquy does not resolve all issues pertaining to a knowing and voluntary plea, the State may use evidence anywhere in the record to demonstrate that the defendant knew and understood what he or she was doing. *State v. Bangert*, 131 Wis.2d 246, 274-75, 389 N.W.2d 12, 26 (1986). Here the record unequivocally shows that Taylor knew that intent was an element of the crime because he expressly raised the issue when contending that evidence of his alcohol addiction would have negated his intent. Taylor also contends that the plea was defective because he did not expressly state that he was guilty. However, the court asked him if it was "your desire to enter pleas of guilty to the counts of bail jumping." Taylor answered "yes." That response serves as an effective entry of the plea. *See State v. Salentine*, 206 Wis.2d 419, 426-27, 557 N.W.2d 439, 442 (Ct. App. 1996).

The trial court properly denied Taylor's motion to withdraw his plea before sentencing. The test for allowing withdrawal before sentencing is whether the defendant shows a fair and just reason. *State v. Shanks*, 152 Wis.2d 284, 288, 448 N.W.2d 264, 266 (Ct. App. 1989). Here the trial court chose not to believe the reasons advanced by Taylor pertaining to counsel's alleged ineffectiveness and

pressure. That credibility determination resolves the issue. We will not set aside a trial court's decision on credibility. *Turner v. State*, 76 Wis.2d 1, 18, 250 N.W.2d 706, 715 (1977).

Finally Taylor contends that the trial court did not properly compute his sentence credit. This issue is not ripe for review. The trial court offered to revise the calculation of his credit if Taylor supported his claim with the necessary documentation. The record indicates that Taylor did not avail himself of this opportunity. He cannot seek review of a determination that has not yet been made.

By the Court.— Judgments and orders affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS

