**COURT OF APPEALS
DECISION
DATED AND FILED**

March 29, 2001

**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. 00-0246-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY A. PLUEMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Jeffrey Pluemer appeals from a judgment of conviction. The issue is whether the trial court properly vacated a deferred sentencing agreement. We affirm.

¶2 In 1999 Pluemer pleaded no contest to certain crimes. His sentencing was stayed pursuant to a deferred sentencing agreement. The State later moved to vacate that stay and impose sentence on the ground that Pluemer had violated a condition of the deferral agreement. The trial court granted the motion and sentenced Pluemer, who now appeals from that judgment of conviction. Although Pluemer is appealing from the judgment, the arguments on appeal actually go to whether the court properly concluded he violated a condition of the deferral agreement. That decision is brought before us as a prior nonfinal order. WIS. STAT. RULE 809.10(4) (1999-2000).[1]

¶3 The condition Pluemer was alleged to have violated prohibited him from ingesting alcohol or drugs while caring for his children. The trial court held an evidentiary hearing on whether Pluemer violated this provision. At the end of that hearing, the prosecutor asked the court to take judicial notice of certain testimony given at a recent preliminary hearing in a different criminal case against Pluemer. From that witness's testimony, it could be inferred Pluemer was drinking while caring for the children. Pluemer objected to introduction of this testimony by judicial notice, and both counsel argued the point. The trial court never expressly ruled on the judicial notice issue, but it did rely on the preliminary hearing testimony when it found that Pluemer violated the agreement.

¶4 Pluemer argues the court erred in taking judicial notice of this testimony. One of his arguments is that the trial court cannot take judicial notice of its own records in another case. However, as the State points out, without further reply by Pluemer, the case he relies on for that proposition was later

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

overruled. Pluemer also argues that one of the requirements of judicial notice is that opposing parties be given notice before a request for judicial notice is made. He offers no legal authority for that argument, and we see no such requirement in the judicial notice statute, WIS. STAT. § 902.01.

¶5 Pluemer also argues judicial notice is not the proper procedure to introduce the testimony from the preliminary examination. Rather, he argues, the testimony should have been offered under the hearsay exception for former testimony provided in WIS. STAT. § 908.045(1). That section requires a showing that the witness who gave the former testimony is unavailable, and Pluemer notes no such showing was made in his case.

¶6 In the trial court and on appeal, the State acknowledged that the court cannot take judicial notice of the actual facts the witness testified to, but only of the fact that she testified in that fashion. In other words, judicial notice of her testimony establishes only that she testified in a certain way, and not that her testimony was correct. The State also acknowledges this analysis leaves "a hearsay problem that must be considered." However, the State argues we need not consider the hearsay problem because Pluemer failed to make a hearsay objection in the trial court.

¶7 We agree. In addition to objecting to the State's use of judicial notice to bring the testimony before the court, Pluemer should have made a hearsay objection in anticipation of the possibility that the trial court would take judicial notice, or after the court did so while announcing its decision on the merits of the State's motion. Once the court took judicial notice of the testimony, the testimony was before the court unless another objection was made. The failure to

raise an objection waives the issue. ***State v. Peters***, 166 Wis. 2d 168, 174, 479 N.W.2d 198 (Ct. App. 1991).

¶8 Pluemer also argues the court erred by allowing certain other hearsay testimony under the excited utterance rule. However, the State argues, and we agree, that any error here was harmless because the testimony from the preliminary hearing, which we discussed above, is sufficient evidence to affirm the trial court's finding that Pluemer violated the agreement.

¶9 Pluemer also argues the State's motion did not properly identify the relief sought. The State's motion was captioned as a "motion to revoke deferred sentencing agreement." Pluemer argues the State should actually have moved for a termination of the stay of entry of judgment. When Pluemer made this objection in the trial court, the court asked Pluemer's counsel whether it was his understanding that the bottom line objective of the motion was terminating the stay of the judgment. Counsel replied: "That's my understanding on what he thought he was doing, but he doesn't do it properly, and I just have to represent my client by objecting when it's appropriate to object here." The court said it would "accept the objections of counsel as to the language," but would also accept the motion as one to terminate the stay.

¶10 On appeal, Pluemer argues the court should have dismissed the motion because he did not have proper notice of the relief sought by the State. We disagree. His attorney's response in the trial court does not support that argument. His counsel did not say he was unable to understand the intent of the motion. The motion, though inartfully worded, provided sufficient notice.

¶11 Finally, Pluemer argues the trial court applied only a probable cause standard in weighing the evidence, rather than a preponderance-of-the-evidence

standard. While the trial court did make some statements about probable cause when it was proposing to delay its decision on this motion, when it did issue its decision there was no indication the court was applying anything other than a preponderance-of-the-evidence standard.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.