

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 10, 2012

A. John Voelker
Acting Clerk of Court of Appeals

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.

Appeal No. 2011AP294

Cir. Ct. No. 2003CF98

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC L. FANKHAUSER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Barron County:
TIMOTHY M. DOYLE, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Eric Fankhauser, pro se, appeals from an order denying postconviction relief. Fankhauser was convicted upon a guilty plea of second-degree sexual assault of a child. Fankhauser raises three issues: (1) whether subject matter jurisdiction was proper because he was not legally

processed into adult court as a juvenile;¹ (2) whether he waived the issue by virtue of his guilty plea or his failure to pursue the issue on direct appeal; and (3) whether he was entitled to a hearing on his postconviction motion. We affirm.

¶2 Fankhauser’s conviction arose from sexual intercourse with a six-year-old boy. Fankhauser was seventeen years old at the time of the assault. The circuit court sentenced Fankhauser to three years’ initial confinement and seven years’ extended supervision.

¶3 Our review of a circuit court’s summary denial of a postconviction motion is well established. Whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief is a question of law that we review independently. See *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). If the motion raises such facts, the court must hold an evidentiary hearing. *Id.* at 310. However, if the motion does not raise facts sufficient to entitle the defendant to relief, or raises only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. *Id.* at 310-11.

¶4 Fankhauser first argues the circuit court lacked subject matter jurisdiction to hear his case because it failed to obtain a petition of waiver from the juvenile court. Fankhauser’s premise is flawed. There was no need to obtain a petition of waiver from the juvenile court before resolving his case in adult court.

¹ Had Fankhauser actually been a juvenile at the time of his assault, the argument he now raises would implicate the circuit court’s competency to proceed, not its subject matter jurisdiction. See *Michael J.L. v. State*, 174 Wis. 2d 131, 137, 496 N.W.2d 758 (Ct. App. 1993). A circuit court lacks criminal subject matter jurisdiction only when the complaint “does not charge an offense known to law.” *State v Webster*, 196 Wis. 2d 308, 317, 538 N.W.2d 810 (Ct. App. 1995).

Fankhauser was not a juvenile under Wisconsin law at the time he was investigated and prosecuted for sexual assault of a child.

¶5 Under the Juvenile Justice Code at the time of Fankhauser’s assault, a “juvenile” was defined as: “a person who is less than 18 years of age, except that for purposes of investigating or prosecuting a person who is alleged to have violated a state or federal criminal law or any civil law or municipal ordinance, ‘juvenile’ does not include a person who has attained 17 years of age.” WIS. STAT. § 938.02(10m) (2003-04).²

¶6 Fankhauser was seventeen years of age at the time he was investigated and prosecuted for sexual assault of a child. Therefore, by definition he was considered an adult under Wisconsin law, and a juvenile waiver hearing did not apply to him. *See* WIS. STAT. § 938.18(1) (2003-04). The circuit court had competency to proceed in this case.

¶7 The record conclusively demonstrates that Fankhauser was not entitled to relief. Therefore, the circuit court also appropriately denied his postconviction motion without a hearing. We need not fully address Fankhauser’s remaining argument concerning waiver. However, unlike subject matter jurisdiction, competency to proceed may be waived by failing to timely object, and Fankhauser waived his objection here. *See Village of Trempeleau v. Mikrut*, 2004 WI 79, ¶3, 273 Wis. 2d 76, 681 N.W.2d 190.

² An adult was defined as: “a person who is 18 years of age or older, except that for purposes of investigating or prosecuting a person who is alleged to have violated any state or federal criminal law or any civil law or municipal ordinance, ‘adult’ means a person who has attained 17 years of age.” WIS. STAT. § 938.02(1) (2003-04).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5. (2009-10).

