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DISTRICT IV

September 9, 2013

To:

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You are hereby notified that the Court has entered the following opinion and order:

2012AP114

State of Wisconsin v. Earl DeWayne Phiffer (L.C. # 2002CF3370)

Before Lundsten, Higginbotham and Kloppenburg, JJ.

Earl Phiffer appeals a circuit court order that denied his WIS. STAT. § 974.06 (2011-12)¹ motion for postconviction relief from a felony bail-jumping conviction. The sole issue on appeal is whether Phiffer's counsel provided ineffective assistance by failing to challenge the bail-jumping charge on double jeopardy grounds because Phiffer was also charged and convicted of second-degree sexual assault of a child for the same conduct that formed the basis for his violation of the conditions of release. After reviewing the briefs and record, we conclude at

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

The double jeopardy clause protects against multiple punishments for the same offense. *See* U.S. CONST. amend. V; *State v. Kurzawa*, 180 Wis. 2d 502, 515, 509 N.W.2d 712 (1994). Multiplicity arises when a single criminal episode or course of conduct is charged as multiple counts rather than merged into a single offense. *State v. Hirsch*, 140 Wis. 2d 468, 471, 410 N.W.2d 638 (Ct. App. 1987). Multiple punishments may not be imposed for charges that are identical in law and fact unless the legislature intended to impose such punishments. *State v. Patterson*, 2010 WI 130, ¶15, 329 Wis. 2d 599, 790 N.W.2d 909. Charges are different in fact if they are separated in time or place, require separate acts of volition within a course of conduct, or are otherwise of a significantly different nature. *See State v. Anderson*, 219 Wis. 2d 739, 748-49, 580 N.W.2d 329 (1998). Charges are different in law if each requires proof of an element that the other does not. *See State v. Smits*, 2001 WI App 45, ¶¶6-7, 241 Wis. 2d 374, 626 N.W.2d 42.

The Wisconsin Supreme Court has held that bail jumping is a separate and distinct offense from any additional crime that that same conduct might constitute, because the focus is on the violation of the conditions of release. *State ex rel. Jacobus v. State*, 208 Wis. 2d 39, 53, 559 N.W.2d 900 (1997) (*citing with approval State v. Nelson*, 146 Wis. 2d 442, 449, 432 N.W.2d 115 (Ct. App.), *review denied*, 147 Wis. 2d 890, 436 N.W.2d 30 (1988)). *Jacobus* controls the outcome of this case. Because bail jumping and second-degree sexual assault are different charges in law, trial counsel did not provide ineffective assistance by failing to raise a double jeopardy challenge.

IT IS ORDERED that the postconviction order is summarily affirmed under WIS. STAT.
RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals