COURT OF APPEALS
DECISION
DATED AND RELEASED

October 5, 1995

No. 95-1471-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL J. RICE,

Defendant-Appellant.

APPEAL from an order of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed*.

GARTZKE, P.J.[1] Michael Rice appeals from an order amending his judgment of conviction for disorderly conduct, § 947.01, STATS., by extending probation for one year and imposing fourteen days in the county jail. He contends that he was denied due process of law because he did not have the proper opportunity to cross-examine witnesses, or present witnesses or other evidence, and because he did not have fair warning before the hearing of the

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

proposed modifications to the conditions of his probation and the reasons therefor. We affirm.

On April 25, 1994, Rice was sentenced for disorderly conduct and placed on probation for one year with the condition of fifty hours of community service.[2] The trial court later set March 7, 1995, for a hearing to consider Rice's probation, but continued the hearing to March 22, 1995. Rice had subpoenaed a probation officer, Laura Gray, to appear at the March 7 hearing but she did not appear at the March 22 hearing. Probation officer Cindy Ellefson reviewed Rice's probation in a letter submitted to the trial court dated March 17, 1995. Rice asserts that the record contains no indication that he received a copy of the letter before the March 22 hearing.

We reject Rice's claim that he was not afforded due process because he could not have a subpoenaed witness testify. The record of the hearing shows that Rice's subpoenaed witness was not present, but he failed to seek a continuance for the purpose of examining her under oath. He has waived that objection. *See* ***State v. Gollon***, 115 Wis.2d 592, 604, 340 N.W.2d 912, 917 (Ct. App. 1987) (failure to renew severance motion waived that ground for error). Rice also asserts that because probation officer Ellefson made statements to the court not under oath, he was denied due process. Since the record contains no objections to Ellefson's unsworn statement to the court, Rice has waived the ground for error. Section 901.03(1)(a), STATS. When Rice's counsel inquired whether the court was making a finding that cause existed to extend probation, Rice did not request the opportunity to put in evidence, and he made no offer of proof. He therefore failed to preserve his objection to the court's procedure for purposes of this appeal. Section 901.03(1)(b).

Although Rice complained that he did not receive a copy of Ellefson's letter before the hearing, the copy of that letter appended to his brief bears a stamp dated March 20, 1995. The State asserts on the basis of that stamp date that Rice had adequate notice. Because Rice does not undertake to refute in his reply brief that claim, we assume he concedes the point. ***Charolais Breeding***

[2] Rice had initially pleaded guilty to disorderly conduct and had been placed in a first offender program. On February 4, 1994, the trial court revoked the diversion agreement due to noncompliance.

Ranches Ltd. v. FPC Securities, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979). Moreover, he made no objection to an inadequate notice of the hearing, and he therefore cannot raise it now. *See* ***Gollon***, 115 Wis.2d at 604, 340 N.W.2d at 917.

Finally, at the hearing Rice questioned the accuracy of a urine test result regarding his marijuana usage. Because the probation officer did not appear, Rice could not examine the process by which his urine sample was collected for testing or show that the test was tainted. However, at that same hearing, the State relied solely on his admitted alcohol use and his refusal to participate in alcohol and drug assessment. Because the State did not rely on Rice's marijuana usage as a reason for modification of probation, the error, if error it was, was harmless.

We conclude that Rice has shown no basis for reversing the order from which he appeals.

By the Court.—Order affirmed.

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