

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 17, 2000

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. 99-2655-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

**JANICE JOHNSON KUHN, D/B/A/
MILWAUKEE AUCTION GALLERIES,**

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JOHN J. DiMOTTO, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Janice Johnson Kuhn appeals, *pro se*, from an order modifying a condition of her probation, following her conviction for four counts of theft by bailee for the theft of auction proceeds. Kuhn claims: (1) the

trial court erred when it refused to address her motion for a continuance to seek counsel, and argues that appointed counsel provided ineffective assistance because he was not prepared to represent her at the June 9, 1999 probation review hearing; (2) the trial court erred when it increased the six-month incarceration condition of her probation to a one-year sentence for failure to pay restitution;¹ (3) the State withheld exculpatory evidence; (4) the trial court's decision on her case was influenced by "prejudicial publicity" released by the State before the June 9, 1999 probation review hearing; (5) the trial court should have recused itself; (6) the trial court should have granted Kuhn's motion to stay her sentence pending appeal; and (7) the order should be reversed in the interests of justice. Because we resolve each claim raised in favor of upholding the order, we affirm.

I. BACKGROUND

¶2 In 1991, Kuhn was convicted after a trial to the court of four counts of theft by bailee for the theft of auction proceeds. The proceeds were from the Milwaukee Auction Galleries, Ltd., where Kuhn was the president and sole shareholder. She was sentenced to two years in prison on each count, concurrent; that sentence was stayed and she was placed on probation for seven years. As a condition of the probation, Kuhn was ordered to serve six months in the House of Correction, on each count, concurrent and stayed, and to pay restitution of \$182,004.27. She appealed that conviction to this court and we affirmed. *See State v. Kuhn*, 178 Wis. 2d 428, 504 N.W.2d 405 (Ct. App. 1993). The facts

¹ Kuhn includes within this issue an argument that she was denied due process rights with respect to the parole review hearing, including proper notice and the right to cross-examine witnesses. We summarily reject this contention. Kuhn was not entitled to the notice that she complains she did not receive and the record reflects that she was afforded the opportunity to, and in fact did, cross-examine witnesses.

pertinent to the conviction can be reviewed in our published decision and will not be repeated here.

¶3 In 1995, Kuhn filed a motion for a new trial based on newly discovered evidence, which was denied. Also in 1995, the trial court ordered Kuhn to serve five days of the six-month prison term in the House of Correction. The remainder of the six-month prison term was stayed indefinitely. As a part of this order, Kuhn was required to pay \$500 per month toward restitution. Before this time, Kuhn had paid only \$215 total toward restitution.

¶4 In May 1998, Kuhn's probation agent asked the court to extend the probation period for seven more years because there was a significant amount of restitution left to be paid.² After a hearing on July 7, 1998, the trial court granted the request. In December 1998, Kuhn's probation agent sought court review of the probation because Kuhn had failed to make restitution payments.

¶5 Public Defender Jeffrey Morgan was appointed to represent Kuhn. The hearing occurred on June 9, 1999. On June 1, 1999, Morgan filed a motion to withdraw on the grounds that Kuhn's indigency status had changed and the public defender's office had ordered him to withdraw. On the same date, Kuhn filed a motion seeking appointment of counsel for the hearing, at county expense, and three days later, Kuhn filed a motion seeking a continuance in order to procure counsel.

¶6 At the June 9, 1999 hearing, the trial court granted Morgan's motion to withdraw, but then appointed him to represent Kuhn at county expense. The

² At that time, Kuhn had paid \$17,000 in restitution.

trial court then modified the probation order, changing the six-month incarcerated condition of probation to a one-year sentence in the House of Correction, with work release privileges. Kuhn appeals from that order.

II. DISCUSSION

A. *Motion for Continuance; Ineffective Assistance.*

¶7 Kuhn claims the trial court erred when it failed to address her motion seeking a continuance. We are not persuaded. Kuhn filed two motions prior to the June 9, 1999 hearing. One motion requested a continuance in order to seek counsel, and the second requested that the court appoint her counsel at county expense. On June 9, 1999, the trial court granted the second request and appointed Attorney Morgan to represent Kuhn. This appointment rendered the continuance motion moot. Further, Kuhn did not object to the court's appointment of Morgan, Morgan accepted the appointment, and no one indicated during the hearing that a continuance was still needed. Accordingly, Kuhn waived the right to raise this issue on appeal. *See State v. Woods*, 144 Wis. 2d 710, 716, 424 N.W.2d 730 (Ct. App. 1988).

¶8 Kuhn's related claim that Morgan provided ineffective assistance was also waived because she failed to raise this issue in a postconviction motion and follow the procedures required in *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

B. *Modification of Probation Condition.*

¶9 Kuhn next claims the trial court erred when it modified her probation condition changing the six-month incarceration term to a one-year sentence. Specifically, Kuhn argues that the trial court should not have modified the term

without considering her reason for failing to pay restitution and whether or not she had the ability to pay. We reject Kuhn's contention.

¶10 First, the record does reflect that the trial court considered Kuhn's ability to pay. The transcript contains much discussion regarding Kuhn's income and liabilities. Thus, the record fails to support Kuhn's contention.³

¶11 Second, WIS. STAT. § 973.09(3)(a) provides the trial court with the authority to modify the terms and conditions of probation for cause.⁴ The modification is permitted any time before the period of probation expires. *See State v. Gray*, 225 Wis. 2d 39, 67-68, 590 N.W.2d 918 (1999). Here, the trial court indicated that good cause existed to justify the modification. Kuhn's last payment toward restitution was May 20, 1998. After that date, she stopped paying—she did not pay even one penny towards restitution. The trial court found that Kuhn had not made a good faith effort toward paying the restitution, and that this constituted good cause to modify the incarceration condition of her probation. The trial court's decision was not erroneous.

C. Nondisclosure of Exculpatory Evidence.

¶12 Kuhn next complains that her case was prejudicially affected by the State's failure to disclose exculpatory evidence. Namely, she refers to the

³ In a related issue, Kuhn argues that the court extended her probation for failure to complete restitution. However, this relates to the July 7, 1998 probation review hearing, from which Kuhn did not appeal. Accordingly, she waived the right to raise this claim on appeal. Her probation was extended at the July 7, 1998, not the July 9, 1999 hearing. The July 9, 1999 hearing, which is the subject of this appeal, involved the modification of the House of Correction-time condition of probation.

⁴ WISCONSIN STAT. § 973.09(3)(a) provides: "Prior to the expiration of any probation period, the court, for cause and by order, may extend probation for a stated period or modify the terms and conditions thereof."

embezzlement history of her company's bookkeeper's father, implying that her bookkeeper and her father may have been responsible for the theft. Her complaint is meritless.

¶13 The State's duty to disclose exculpatory evidence is limited to evidence that is within the prosecutor's exclusive possession. *See State v. Rohl*, 104 Wis. 2d 77, 89, 310 N.W.2d 631 (Ct. App. 1981). Kuhn fails to point to facts in the record to satisfy this requirement. Further, Kuhn raised this issue in her 1995 trial court motion, and the trial court denied the motion in a written order, ruling that even if such allegations had factual support, there was no probability that a new trial would produce a different result. Kuhn never appealed from that order. Accordingly, she waived her right to raise the issue in this appeal.

D. Prejudicial Publicity.

¶14 Kuhn next contends that the State released prejudicial publicity about her case before the probation review hearing and that this prejudicially affected the trial court. We reject her contention.

¶15 There is nothing in the record to demonstrate that the trial court's decision was influenced by any publicity on this case. Moreover, Kuhn did not raise this issue in the trial court and, therefore, she has waived her right to raise it here. *See State v. Gove*, 148 Wis. 2d 936, 940-41, 437 N.W.2d 218 (1989).

E. Recusal.

¶16 Next, Kuhn argues that the trial court should have recused itself from her case because the judge had worked in the Milwaukee County District Attorney's Office at the time she was being prosecuted by that office. We reject her claim.

¶17 Again, Kuhn waived her right to present this issue on appeal because she never raised it at the trial court level. *See State v. Yakes*, 226 Wis. 2d 425, 436, 595 N.W.2d 108 (Ct. App. 1999). Kuhn never moved the trial court for a recusal on this or any other basis.

F. Stay.

¶18 Kuhn also contends that the trial court should have granted a stay of her sentence pending appeal. Kuhn claims that the stay should have been granted because it would have allowed her to engage in business activities, and earn money that could have been paid toward restitution. We are not persuaded for two reasons.

¶19 First, the order denying the stay was entered after the order Kuhn appeals from; thus, issues stemming from the subsequent order are not reviewable on this appeal. *See Chicago & N.W.R.R. v. LIRC*, 91 Wis. 2d 462, 473, 283 N.W.2d 603 (Ct. App. 1979), *aff'd*, 98 Wis. 2d 592, 297 N.W.2d 819 (1980). Second, the standard governing motions for a stay require a showing of the likelihood of success on the merits of the appeal. *See State v. Gudenschwager*, 191 Wis. 2d 431, 440-41, 529 N.W.2d 225 (1995). Kuhn failed to make the required showing and, therefore, the trial court's decision to deny the stay did not constitute an erroneous exercise of discretion.

G. Discretionary Reversal.

¶20 Finally, Kuhn asks this court to exercise its discretionary reversal power pursuant to WIS. STAT. § 752.35 and reverse the order in the interests of justice. This court declines to do so. Kuhn has failed to present any errors or basis for justifying reversal in this matter.

By the Court.—Order affirmed.

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

