

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 14, 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. 00-1248-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAD CONSTANTINEAU,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Chad Constantineau appeals a judgment convicting him of attempted robbery and an order denying his motion to withdraw his no contest plea. He argues that the police violated his due process rights by failing to preserve exculpatory evidence. Because we conclude that the issue was waived by

his no contest plea and he has not established any basis for deciding the issue despite the waiver, we affirm the judgment and order.

¶2 Constantineau was initially charged with attempted robbery, two counts of criminal damage to property and obstructing an officer, all as a repeater. The parties negotiated a plea agreement that resulted in dismissal of the three misdemeanor offenses and Constantineau entered a no contest plea to the attempted robbery charge. Before reaching the plea agreement, Constantineau filed a motion to dismiss based on the State's failure to preserve exculpatory evidence. He argued that the police had reason to believe he was intoxicated and may have consumed LSD from his demeanor and statements he made at the hospital after his arrest. Although Constantineau refused to consent to drawing his blood, he argued that the officer should have forced him to submit to a blood test. The blood test could have established whether he was intoxicated or had consumed LSD, possibly negating his intent. The trial court denied the motion to dismiss, and Constantineau raises the same issues on appeal.

¶3 Constantineau's no contest plea waives all nonjurisdictional defects and defenses including claims of violations of constitutional rights prior to the plea. *See County of Racine v. Smith*, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). Therefore, the alleged failure to preserve evidence is not properly before this court.

¶4 In rare cases, this court will address an argument that has been waived. *See Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). In this case, however, Constantineau has presented no compelling reason for disregarding the waiver. His argument is based on factual and legal assertions that are not supported by the record and that erroneously apply the law.

Constantineau's argument fails to recognize the distinction between a failure to preserve evidence and a failure to collect evidence. *See State v. Greenwold*, 189 Wis. 2d 59, 69, 525 N.W.2d 294 (Ct. App. 1994). A defendant's due process right does not include a requirement that the State collect all evidence that might turn out to be exculpatory. *See State v. Smith*, 125 Wis. 2d 111, 130, 370 N.W.2d 827 (Ct. App. 1985), *rev'd on other grounds*, 131 Wis. 2d 220, 388 N.W.2d 601 (1986).

¶5 Constantineau also fails to distinguish between the effects of voluntary and involuntary intoxication. He does not argue that his alcohol intoxication was involuntary. Also, to the extent he relies on alcohol intoxication, he would have had to prove that it rendered him utterly incapable of forming the intent to rob the victim. *Roe v. State*, 95 Wis. 2d 226, 237, 290 N.W.2d 291 (1980). Based on his ability to flee from the officers, it is highly unlikely that a jury would have concluded that he was too intoxicated to form the requisite intent regardless of the blood test results.

¶6 Constantineau claimed involuntary intoxication by LSD. However, nothing in the record establishes that LSD in the blood dissipates over a short time. If the presence of LSD in Constantineau's blood was exculpatory, he could have arranged for preservation of the evidence at a later date. His brief assumes without any citation to authority that the presence of LSD in his blood would have dissipated when the alcohol dissipated.

¶7 His argument also assumes the right of the officer to compel the blood test over Constantineau's objection, even though alcohol in the blood would not be evidence of a crime. He cites no authority for that proposition. *Cf. State v. Seibel*, 163 Wis. 2d 164, 166, 471 N.W.2d 226 (1991) (police may draw blood

without consent when they reasonably believe it contains evidence of a crime). We conclude that Constantineau has not established sufficient factual or legal basis for this court to disregard his waiver.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

