COURT OF APPEALS DECISION DATED AND FILED

June 17, 2008

David R. Schanker
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. 2007AP2232

Cir. Ct. No. 1998CF1861
1998CF1927

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NANCY EZELL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY DUGAN and JOSEPH R. WALL, Judges.[1] *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

[1] The Honorable Timothy Dugan imposed the sentences in this case. The Honorable Joseph R. Wall issued the order from which Ezell currently appeals.

¶1 PER CURIAM. Nancy Ezell appeals, *pro se*, from an order denying her postconviction motion to cure allegedly excessive sentences. *See* WIS. STAT. § 973.13 (2005-06).[2] The circuit court concluded that Ezell was not entitled to relief, and we affirm.

Background

¶2 Ezell pled guilty to multiple felonies, including one count of conspiracy to deliver cocaine and six counts of delivery of cocaine as a party to a crime, all as second or subsequent offenses. *See* WIS. STAT. §§ 961.41(1x), 961.41(1)(cm)1., 2. & 4., 939.05, 961.48 (1997-98). On June 1, 1999, the circuit court imposed an aggregate indeterminate sentence of sixty-five years in prison. The court additionally imposed and stayed a twenty-five year sentence in favor of a consecutive term of probation.

¶3 We briefly review Ezell's subsequent efforts to secure postconviction relief. On January 13, 2000, Ezell filed a notice of appeal from her convictions pursuant to WIS. STAT. RULE 809.30 (1999-2000). This court summarily affirmed. *See* ***State v. Ezell***, No. 2000AP0176-CR, unpublished slip op. (WI App Apr. 9, 2001). In July 2001, Ezell filed a postconviction motion to correct her sentences, citing WIS. STAT. ch. 973 (1999-2000). The circuit court denied the motion; Ezell did not appeal. In July 2002, Ezell filed a postconviction motion pursuant to WIS. STAT. § 974.06 (2001-02), alleging ineffective assistance

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

of counsel. The circuit court denied the motion, and this court affirmed. *See* ***State v. Ezell***, No. 2002AP1933, unpublished slip op. (WI App Mar. 26, 2003). In January 2003, Ezell filed a third postconviction motion. Citing both WIS. STAT. §§ 974.06 and 973.13 (2003-04), Ezell challenged the validity of her convictions and sentences. The circuit court denied the motion; Ezell did not appeal. In January 2004, Ezell filed a fourth postconviction motion, pursuant to WIS. STAT. § 974.06 (2003-04), asserting that the State did not adequately allege or prove her prior convictions. The circuit court denied the motion, and Ezell did not appeal.

¶4 On July 3, 2007, Ezell filed her fifth postconviction motion, citing WIS. STAT. §§ 973.12 and 973.13. She claimed that the State failed to adequately prove her prior convictions. The circuit court denied the motion on the ground that Ezell admitted a prior conviction on the record. This appeal, her third, followed.

Discussion

¶5 Ezell first contends that her status as a repeat offender was inadequately alleged in the charging documents. We understand Ezell to claim that her constitutional rights were thereby violated. *See* ***State v. Trammel***, 141 Wis. 2d 74, 80, 413 N.W.2d 657 (Ct. App. 1987) (due process requires notice of repeater allegations). Constitutional violations may be raised by postconviction motion pursuant to WIS. STAT. § 974.06. However, Ezell did not raise this claim in the postconviction motion underlying the instant appeal, and the circuit court did not address the contention. As a rule, we do not consider an issue raised for

the first time on appeal. *See* ***State v. Gaulke***, 177 Wis. 2d 789, 793-94, 503 N.W.2d 330 (Ct. App. 1993). We decline to make an exception here.

¶6 Ezell has already pursued four prior postconviction motions and two prior appeals. A claim that could have been raised, or that was inadequately raised, in a prior proceeding under WIS. STAT. § 974.06 is barred in a subsequent proceeding, absent the defendant demonstrating a sufficient reason for the failure to raise the issue in the first appeal. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). Ezell offers no reason, much less a sufficient reason, for failing to fully and sufficiently challenge the adequacy of the charging documents in prior postconviction proceedings. Thus, the issue is not only improperly raised for the first time on appeal, but also procedurally barred. We will not address it.

¶7 Ezell next contends that she was wrongly subjected to an enhanced penalty as a repeat offender because the State failed to prove her prior conviction for a drug offense. A defendant may challenge improper repeater sentences on the grounds that the State failed to prove the necessary prior conviction, notwithstanding the procedural bar imposed by ***Escalona-Naranjo***. *See* ***State v. Mikulance***, 2006 WI App 69, ¶14, 291 Wis. 2d 494, 713 N.W.2d 160. Accordingly, we consider the claim.

¶8 The State charged Ezell in an amended information with six counts of delivery of cocaine and one count of conspiracy to deliver cocaine, and alleged that she had "been previously convicted of an offense as defined by WIS. STAT. § 961.48 …." The State alleged two prior convictions as bases for an enhanced

penalty under § 961.48: (1) possession of a controlled substance with intent to deliver in 1986; and (2) delivery of a controlled substance in 1987.

¶9 When the State invokes the enhanced penalty provisions of WIS. STAT. § 961.48, this court "look[s] to the requirements of WIS. STAT. § 973.12(1) and cases interpreting that statute …."[3] ***State v. Coolidge***, 173 Wis. 2d, 783, 793, 496 N.W.2d 701 (Ct. App. 1993) (discussing WIS. STAT. ch. 161, subsequently renumbered ch. 961 by 1995 Wis. Act 448), *abrogated on other grounds by* ***State v. Tiepelman***, 2006 WI 66, ¶31, 291 Wis. 2d 179, 717 N.W.2d 1. Section 973.12 provides that allegations of prior offenses may be proved by the defendant's admission. *See* ***State v. Saunders***, 2002 WI 107, ¶19, 255 Wis. 2d 589, 649 N.W.2d 263. In this case, Ezell admitted one of the two alleged prior convictions during the plea colloquy. The court asked Ezell if she was convicted in 1987 of delivery of a controlled substance, and Ezell replied, "yes."

¶10 Ezell asserts that her admission is insufficient to support an enhanced penalty because she did not admit a 1986 conviction. We disagree. Any prior conviction under WIS. STAT. ch. 961 may serve as the basis for an enhanced penalty under WIS. STAT. § 961.48. ***Coolidge***, 173 Wis. 2d at 792. Thus, the State was not required to prove more than one prior offense. *Cf.* ***State v. Baldwin***, 101 Wis. 2d 441, 447, 304 N.W.2d 742 (1981) (State need not prove every fact alleged in the charging documents, but only those facts sufficient to constitute the offense.).

[3] WISCONSIN STAT. § 973.12 governs sentencing a person who has been charged as a repeat offender under the general repeater statute, WIS. STAT. § 939.62.

¶11 Ezell next contends that her admission is insufficient to establish her prior conviction because she did not admit the exact date of her conviction. We reject her contention.

¶12 The State is required to prove the specific date of a defendant's prior conviction when that date is relevant to applying the general repeater statute, WIS. STAT. § 939.62. *See* ***State v. Bonds***, 2006 WI 83, ¶41, 292 Wis. 2d 344, 717 N.W.2d 133. Section 939.62 permits a court to increase the defendant's term of imprisonment when the defendant was previously convicted of a crime within the five years preceding sentencing. In this case, however, Ezell was not charged as a repeater under § 939.62. The operative statute was WIS. STAT. § 961.48, which applies if the defendant has "any prior conviction" under WIS. STAT. ch. 961. *See* ***Coolidge***, 173 Wis. 2d at 792. The State proved a prior conviction under ch. 961. No more was required.

¶13 Moreover, when the State fails to prove its allegation that the defendant is a repeat offender, the remedy is to commute the sentence to the maximum on the underlying charge. *See* ***State v. Zimmerman***, 185 Wis. 2d 549, 559, 518 N.W.2d 303 (Ct. App. 1994). Here, the circuit court did not impose a sentence beyond the range of the underlying charge pursuant to any penalty enhancer.[4] Thus, there is nothing to commute. Accordingly, Ezell is not entitled to any relief, even assuming her prior conviction was inadequately established.

[4] Ezell did not refute the State's showing that each of her sentences was less than or equal to the maximum on the underlying charge. We deem the fact admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (propositions are taken as confessed when not refuted by opposing party).

¶14 Ezell failed to show that her sentence was excessive or imposed without adequate proof of her prior conviction. We conclude that the circuit court properly denied her postconviction motion.

By the Court.—Order affirmed.

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