COURT OF APPEALS DECISION DATED AND FILED

January 31, 2012

A. John Voelker
Acting 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. 2011AP1717-CR

Cir. Ct. No. 2009CF769

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER J. HOLAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Christopher Holan appeals a judgment of conviction for two counts of misdemeanor battery and one count of disorderly conduct, all as a repeater, and an order denying postconviction relief. He argues

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

his admission to the prior conviction that formed the basis for the repeater enhancement was defective, and, therefore, his sentence should be commuted to the maximum penalties for the offenses without the repeater enhancer. We affirm.

BACKGROUND

¶2 Following an incident on September 12, 2009, the State charged Holan with two counts of physical abuse to a child and one count of negligent handling of a weapon, all as a repeater. In support of the repeater allegation, the criminal complaint alleged that Holan had been convicted of felony operating while intoxicated on September 3, 2004 and, as a result of that conviction, he had been incarcerated for a total of three years and nine months.[2]

¶3 At the plea hearing, the State, pursuant to a plea agreement, amended the charges to two counts of misdemeanor battery and one count of disorderly conduct, all as a repeater. Holan then pled no contest to each misdemeanor with the repeater enhancement.

¶4 During the hearing, the court informed Holan that the "[m]aximum penalty for each of these misdemeanor battery [charges] is a $10,000 fine or two years in prison or both," and the maximum penalty for the disorderly conduct charge is $1,000 or two years in prison, or both. The court asked Holan whether he understood that he "face[d] $21,000 in fines and six years in prison?" Holan indicated he did. The court did not explain to Holan that the misdemeanors

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[2] WISCONSIN STAT. § 939.62(2) provides an individual is a repeater if "convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the actor is presently being sentenced …. In computing the preceding 5-year period, time which the actor spent in actual confinement serving a criminal sentence shall be excluded."

normally carried maximum penalties of less than one year and the repeater enhancers caused the maximum penalty on each charge to increase.

¶5 Holan indicated he understood the court would find him guilty based on the facts offered by the State in support of the allegations. The parties stipulated the complaint and the preliminary hearing transcript provided a factual basis for the charges. The court reviewed the criminal complaint and determined "it contain[ed] a sufficient factual basis for Mr. Holan's pleas." The court found Holan guilty.

¶6 The court also stated:

> I do also note, and I want you to confirm this, Mr. Holan, that apparently you have been convicted of an operating while under the influence of intoxicants fifth offense or subsequent in Winnebago County case No. 04CF391. That occurred on September 3rd, 2004, and that's a felony matter, and it's still of—is a valid conviction and it's on your record; is that correct?

Holan responded, "That's correct." The court then said, "All right. That's the basis for the repeater provisions then. So this is a repeater matter."

¶7 The court sentenced Holan to one year of initial confinement and one year of extended supervision on each count, to be served consecutive to each other and to any other sentence. Holan filed a postconviction motion, asserting, in part, his admission to the conviction that formed the basis of the repeater enhancer was improper and, as a result, the court was required to commute the sentence to the maximum penalties for the offenses without the repeater enhancement. Following a hearing, the court denied Holan's motion.

DISCUSSION

¶8 WISCONSIN STAT. § 973.12(1) requires that, in order to sentence a defendant as a repeater, the defendant must admit or the State must prove the prior conviction that forms the basis of the repeater enhancement. If a defendant has received an enhanced sentence and there is a later determination that the requirements of § 973.12(1) have not been met, the remedy is to commute the sentence to the maximum for the convicted offenses without the repeater enhancer. *See* ***State v. Goldstein***, 182 Wis. 2d 251, 262, 513 N.W.2d 631 (Ct. App. 1994).

¶9 On appeal, Holan renews his argument that his admission to the conviction that formed the basis of the repeater enhancement was defective. In support, Holan relies on ***State v. Rachwal***, 159 Wis. 2d 494, 465 N.W.2d 490 (1992), and ***Goldstein***, 182 Wis. 2d 251, and contends that his "admission [was] invalid because the record fail[ed] to establish he knew the potential penalties he faced were increased due to the prior conviction and the repeater allegation." He contends that, in order for a defendant's admission to be valid, ***Rachwal*** and ***Goldstein*** require circuit courts to "link" the prior conviction to the increased penalty.

¶10 Holan's reliance on ***Rachwal*** and ***Goldstein*** is misplaced. These cases do not stand for the proposition that a circuit court must establish the link between a defendant's maximum penalty and the prior conviction in order for an admission to be valid. Rather, these cases provide that a defendant who pleads to an offense, but never expressly admits to the prior conviction, can be held to have admitted the prior conviction if the record shows the defendant understood the link between the prior conviction and the increase in the maximum penalty. *See*

Rachwal, 159 Wis. 2d 509; ***Goldstein***, 182 Wis. 2d at 256-57 (relying on ***Rachwal***).

¶11 For example, in ***Rachwal***, the circuit court "failed to directly ask the defendant whether the specified prior conviction existed; nor did the defendant specifically acknowledge the prior conviction." ***Rachwal***, 159 Wis. 2d at 504. Our supreme court determined that because the circuit court informed the defendant that the repeater allegation increased the maximum penalties and the defendant indicated he understood this and pled no contest, the defendant's plea constituted an admission. ***Id.*** at 509, 511-13.

¶12 In ***Goldstein***, the circuit court sentenced Goldstein as a repeater without "obtaining any admissions from Goldstein regarding the prior felony conviction." ***Goldstein***, 182 Wis. 2d at 253. The court in ***Goldstein*** concluded, however, that unlike ***Rachwal***, it could not hold Goldstein's plea constituted an admission to the prior conviction because the circuit court had failed to obtain "Goldstein's express understanding that the repeater allegations increased the possible penalties." ***Id.*** at 256-57.

¶13 In this case, unlike the situations in ***Rachwal*** and ***Goldstein***, we do not need to determine whether Holan's no contest plea constitutes an admission to the prior conviction. Here, the circuit court expressly asked Holan if he admitted to the prior conviction, and Holan responded, "yes."

¶14 Next, although not identified as a separate issue on appeal, Holan states in a paragraph at the end of his brief that "it is noteworthy that [his] admission was to a felony which occurred more than five years prior to the instant offense." He points out he admitted to an offense that occurred on September 3,

2004 and the present offense occurred on September 12, 2009. He then contends that,

> [W]ithout proof or a valid admission that Holan was incarcerated during some of the five-year period, Holan's admission to being a repeat offender [is] insufficient. And, unlike the record in ***Goldstein***, there is no presentence report in this case to remedy the insufficient in-court proceedings. Thus, the record, as is, does not establish Holan's repeater status.

¶15 We agree with Holan that, because his prior conviction occurred more than five years before the offense in this case, Holan needed to admit or the record needed to establish Holan was incarcerated. *See* WIS. STAT. § 939.62(2) (time spent in custody is excluded from five-year computation). However, other than his assertion that there was no presentence report in this case, he fails to explain why the record "does not establish [his] repeater status." Moreover, we are confused by his argument that the lack of a presentence report makes the record here insufficient because, in ***Goldstein***, the presentence report did not remedy Goldstein's failure to specifically admit he was incarcerated.[3] *See* ***Goldstein***, 182 Wis. 2d at 260-61.

¶16 Nevertheless, we observe that, in addition to admitting his prior conviction and pleading no contest to the repeater charges, Holan agreed the court could rely on the facts the State presented to support the allegations. The probable cause portion of the criminal complaint offered by the State established that Holan was incarcerated for three years and nine months as a result of his prior

[3] In fact, Goldstein's sentence was commuted because there was not sufficient proof in the record of his incarceration. ***State v. Goldstein***, 182 Wis. 2d 251, 260-62, 513 N.W.2d 631 (1994).

conviction.[4] Holan's offense falls within the five-year window of WIS. STAT. § 939.62(2).

By the Court.—Judgment and order affirmed.

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

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[4] Specifically, the complaint provides that on September 3, 2004, as a result of the felony operating while intoxicated conviction, Holan was sentenced to three years' initial confinement and three years' extended supervision. It states Holan began serving the initial confinement portion of his sentence on September 3, and following his release to extended supervision, Holan was revoked on October 9, 2007, and sentenced on November 9, 2007 to nine additional months' incarceration. The complaint asserts that Holan's custodial periods, which total three years and nine months, "bring the date of Holan's previous felony conviction within five years of the date of the offense in this incident."