COURT OF APPEALS
DECISION
DATED AND RELEASED

December 12, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0759-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WADE L. HUGGINS,

Defendant-Appellant.

APPEAL from judgments and an order of the circuit court for Rock County: JAMES E. WELKER, Judge. *Affirmed*.

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

DYKMAN, P.J. Wade L. Huggins appeals from judgments convicting him, as a repeater, of one count of battery to an officer, one count of recklessly endangering safety, one count of fleeing an officer, and one count of resisting an officer. Huggins also appeals from an order denying his motion for postconviction relief. Huggins argues that: (1) his trial counsel performed ineffectively by failing to request a hearing in accordance with § 906.09(3),

STATS., to determine whether and to what extent he could be impeached with prior convictions; (2) the portion of the judgment directing him to pay a bond forfeiture must be vacated because the State did not file a motion to enter judgment against him as required by § 969.13(4), STATS.; and (3) the court's finding of habitual criminality must be vacated because the court erred in allowing the State to amend the information after Huggins' plea.

We conclude that: (1) Huggins was not denied effective assistance of counsel; (2) Huggins waived the issue of whether the court could enter judgment on the bond forfeiture because he did not object to the entry of judgment; and (3) the court did not err in allowing the State to amend the information after Huggins' plea because the amendment did not meaningfully change the basis upon which Huggins assessed the extent of possible punishment at the time of his plea. We therefore affirm.

BACKGROUND

On November 2, 1994, the State charged Huggins, as a repeater contrary to § 939.62(1)(b), STATS., with one count each of battery to an officer, recklessly endangering safety, fleeing an officer, and resisting an officer.[1] On November 17, 1994, the court released Huggins on a $11,000 personal recognizance bond. Huggins appeared at his November 21, 1994 preliminary hearing, but failed to appear for a "calendar call" on January 24, 1995. The court ordered a warrant on his nonappearance and cash bond of $11,000. Huggins was arrested on March 23, 1995.

At trial, City of Beloit Police Officer Mark Smith testified that on November 1, 1994, at around 11:00 p.m., he pursued Huggins' vehicle after observing it traveling at a high rate of speed. After Huggins' vehicle forced a truck off the road and went through a flashing red light without slowing down, Smith activated his lights and siren. Huggins' vehicle slowed down and pulled over to the side of the road. When Smith stopped and exited his squad car, however, Huggins' vehicle left the scene.

[1] The State also charged Huggins with possession of drug paraphernalia, but dropped this charge before trial.

Huggins' vehicle passed though two stop signs and another flashing red light and eventually collided with another vehicle. Huggins' vehicle came to a stop. Smith approached the driver's side of Huggins' vehicle with his gun drawn and ordered Huggins to get out of the car. Smith thought that Huggins was trying to put the car back in gear, so he put his gun away and started to pull on the door handle. Smith testified that Huggins then "looked up at me and put both hands on the door and made like a scowled look on his face, and the door came quickly open into my face." The door cracked one of Smith's teeth.

Smith pulled Huggins from the car and placed him on the ground. They wrestled as Smith tried to handcuff Huggins. Smith was eventually able to handcuff Huggins after another officer arrived on the scene and sprayed pepper spray in Huggins' face.

Huggins testified on his own behalf. Huggins disputed the contention that he opened the door into Smith's face. Huggins testified that the car door was broken and could not be opened from the inside. He stated that he started to roll down his car window when Smith took him out of the car and threw him on the ground. He denied either pushing the door open into Smith or struggling with the officer after he was out of the car.

The prosecutor commenced his cross-examination of Huggins by inquiring whether he had ever been convicted of a crime. Huggins answered, "Yes, I have been convicted of -- I did three things." The prosecutor requested a hearing outside the presence of the jury, but the trial court advised: "Well, he's answered he's been convicted of a crime three times. If you think that's not correct, you can cross-examine concerning it." The prosecutor then asked Huggins whether he remembered each of his seven prior convictions, specifically identifying the crime underlying each.

The jury found Huggins guilty of all four offenses. The court sentenced Huggins as a repeat offender under § 969.62, STATS. The trial court also entered a bond forfeiture judgment against Huggins in the amount of the $11,000. Huggins brought a motion for postconviction relief, raising the same issues as he raises here. The trial court denied the motion, and Huggins appeals.

INEFFECTIVE ASSISTANCE OF COUNSEL

Prior to Huggins testifying at trial, defense counsel did not request a hearing under § 906.09(3), STATS.,[2] to determine whether and to what extent Huggins could be impeached with prior convictions. Huggins argues that he was denied effective assistance of counsel by his trial counsel's failure to request a hearing under § 906.09(3).

To establish ineffective assistance of counsel, Huggins must satisfy a two-pronged test. First, he must show that his counsel's performance was deficient. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Second, he must establish that the deficient performance was prejudicial. ***Id.***

To prove deficient performance, Huggins must show that counsel's failure to request a hearing, in light of all the circumstances, was outside the wide range of professionally competent assistance. *See* ***id.*** at 690. In determining whether counsel's conduct fell below an objective standard of reasonableness, we must keep in mind that counsel's function is to make the adversarial testing process work. ***Id.*** At the same time, we strongly presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. ***Id.***

---

[2] Section 906.09, STATS., provides in relevant part:

> (1) GENERAL RULE. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is admissible. The party cross-examining the witness is not concluded by the witness's answer.
>
> (2) EXCLUSION. Evidence of a conviction of a crime may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.
>
> (3) ADMISSIBILITY OF CONVICTION. No question inquiring with respect to conviction of a crime, nor introduction of evidence with respect thereto shall be permitted until the judge determines pursuant to s. 901.04 whether the evidence should be excluded.

In light of all the circumstances, we conclude that the performance of Huggins' counsel was not deficient. Before Huggins testified, the prosecutor and defense counsel agreed that Huggins had seven prior convictions that could be used to impeach his credibility. Defense counsel supplied Huggins with certifications of the seven judgments the State intended to use for impeachment. Huggins did not give counsel any information to indicate that the judgments had been overturned or were otherwise incorrect. Counsel advised Huggins that if he did not answer "seven" when the State asked him how many prior convictions he had, the State could question him specifically with regard to each conviction. If Huggins had answered "seven," the State could not have made any further inquiry. *See* ***State v. Kuntz***, 160 Wis.2d 722, 752, 467 N.W.2d 531, 543 (1991). Yet Huggins ignored his counsel's advice and insisted on explaining his record to the jury.

Huggins does not argue that he was not convicted of seven prior offenses. A § 906.09(3), STATS., hearing for the purpose of determining the number of convictions would have been an exercise in futility. Huggins argues that if counsel would have requested a hearing, he would have been on official notice as to what would happen if he did not comply with the court's ruling. We see no merit to Huggins' contention that he would have agreed to the court's determination of his criminal record when he had already indicated to counsel that he wanted to explain the convictions on the witness stand.

Huggins argues that this case is analogous to ***State v. Pitsch***, 124 Wis.2d 628, 369 N.W.2d 711 (1985), in which the court concluded that counsel's failure to request a § 906.09(3), STATS., hearing resulted in ineffective assistance of counsel. But the cases are distinguishable.

In ***Pitsch***, defense counsel did not obtain a copy of the defendant's record to determine the correct number of prior offenses. Instead, counsel relied on the defendant's statement that he had been convicted on two occasions. ***Id.*** at 637, 369 N.W.2d at 716. The defendant initially agreed not to testify, but ultimately took the stand over counsel's objection and somewhat to counsel's surprise. ***Id.*** On direct examination, defense counsel asked the defendant on "how many occasions he had been convicted of a crime." ***Id.*** at 631-32, 369 N.W.2d at 713-14. The defendant answered "two." ***Id.*** On cross-examination, the prosecutor established that the defendant had been convicted of nine offenses and was able to put the nature of these offenses before the jury. ***Id.*** at 631-32, 369 N.W.2d at 713-14.

The supreme court ruled that defense counsel was ineffective, concluding:

> For counsel to have represented the defendant adequately before and during trial, including sentencing, he should have had reliable information regarding the defendant's prior convictions.... Had defense counsel been appropriately informed of the defendant's prior convictions, both in terms of number and in terms of their nature, he could have more adequately counseled him and might have been more persuasive in dissuading the defendant from taking the stand in his own defense. Defense counsel had nothing to lose and everything to gain by obtaining a complete and accurate record of the defendant's prior convictions....
>
> ....
>
> When the defendant did take the stand, defense counsel had an opportunity to make up for his earlier failure to investigate the defendant's conviction record. Sec. 906.09(3) provides that introduction of evidence with respect to conviction shall not be permitted until the judge determines whether the evidence should be excluded. Yet defense counsel did not seek a hearing outside the presence of the jury at which time the court and the parties could have established the correct number of prior convictions for impeachment purposes.

Id. at 638-39, 369 N.W.2d at 716-17.

Unlike ***Pitsch***, defense counsel investigated Huggins' criminal background and obtained seven certified judgments of conviction. Here, a § 906.09(3), STATS., hearing would have been useless for determining the number of convictions because counsel already had reliable information as to the accurate number. Counsel was not ineffective for failing to request a hearing to determine the number of convictions.

Huggins also does not present any evidence to indicate that any of the seven convictions could not be used to impeach him. "The language of sec. 906.09, Stats., indicates the intention that all criminal convictions be generally admissible for impeachment purposes." ***State v. Kuntz***, 160 Wis.2d 722, 751-52, 467 N.W.2d 531, 542 (1991). Huggins argues that the prosecution's cross-examination of him regarding three prior battery convictions was prejudicial because these convictions were close to the type of crime for which he was being tried. But if Huggins had answered the prosecutor's question accurately as directed by defense counsel, the jury would have never heard specific reference to the battery convictions. Defense counsel was not ineffective for failing to request a hearing when he already had reliable information as to the number of convictions and informed Huggins of the consequences if he answered the prosecutor's questions inaccurately.

BOND FORFEITURE

Huggins argues that the portion of the judgment of conviction directing him to pay the $11,000 bond forfeiture must be vacated because the district attorney did not file a motion to enter judgment on the bond as required by § 969.13(4), STATS.[3] We do not reach the issue of whether the court may enter

[3] Section 969.13, STATS., provides in relevant part:

> (1) If the conditions of the bond are not complied with, the court having jurisdiction over the defendant in the criminal action shall enter an order declaring the bail to be forfeited.
>
> ....
>
> (4) Notice of the order of forfeiture under sub. (1) shall be mailed forthwith by the clerk to the defendant and the defendant's sureties at their last addresses. If the defendant does not appear and surrender to the court within 30 days from the date of the forfeiture and within such period the defendant or the defendant's sureties do not satisfy the court that appearance and surrender by the defendant at the time scheduled for the defendant's appearance was impossible and without the defendant's fault, *the court shall upon motion of the district attorney enter judgment for the state against the defendant and any surety for the amount of the bail and costs of the court proceeding*....

judgment on the bond absent the district attorney's motion, however, because we conclude that Huggins has waived this issue.

At Huggins' sentencing hearing, the court stated, "I gather I should enter judgment in the amount of $11,000 against Mr. Huggins. Would that be correct?" Huggins' counsel replied, "Well, we wouldn't object to that. The State hasn't moved for it. Obviously you have the authority to do that...." This dialogue indicates that defense counsel chose not to object to the court's entry of judgment without the motion of the district attorney. We generally do not consider issues raised for the first time on appeal. ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145 (1980). Therefore, Huggins has waived the issue.

Huggins argues that the trial court did not have the competency or authority to enter the judgment against Huggins and that this defect cannot be waived or cured by stipulation. In support of his position, Huggins cites ***In re B.J.N.***, 162 Wis.2d 635, 469 N.W.2d 845 (1991). In ***B.J.N.***, the supreme court held that a circuit court loses its competence to exercise jurisdiction when a hearing is not held within the maximum thirty-day extension period provided by § 48.365(6), STATS.,[4] and that a circuit court's loss of competency in such a situation cannot be waived by the parties. ***Id.*** at 641, 469 N.W.2d at 847.

B.J.N. is distinguishable, however, because it involved the application of a statutory time limit, while this case does not. Wisconsin courts historically regarded mandatory statutory time provisions as affecting the subject matter jurisdiction of the court. *See* ***State v. Rosen***, 72 Wis.2d 200, 209, 240 N.W.2d 168, 172 (1976). Subject matter jurisdiction cannot be conferred upon a court by waiver. ***Id.***

(..continued)
(Emphasis added.)

[4] Section 48.365(6), STATS., which is part of Wisconsin's Children's Code, provides:

> If a request to extend a dispositional order is made prior to the termination of the order, but the court is unable to conduct a hearing on the request prior to the termination date, the court may extend the order for a period of not more than 30 days ....

After the supreme court in ***In re Guardianship of Eberhardy***, 102 Wis.2d 539, 549-50, 307 N.W.2d 881, 886 (1981), noted the plenary subject matter jurisdiction of the circuit courts, mandatory statutory time provisions were regarded as affecting the competency of the circuit court to proceed, not subject matter jurisdiction. *See* ***In re L.M.C.***, 146 Wis.2d 377, 391, 432 N.W.2d 588, 594 (Ct. App. 1988). In general, failure to timely object to the court's competency to proceed constitutes a waiver to that objection. ***Wall v. DOR***, 157 Wis.2d 1, 7, 458 N.W.2d 814, 816 (Ct. App. 1990). Courts continue to make an exception to this waiver rule, however, for situations in which a party fails to act within a statutory time limit. *See* ***B.J.N.***, 162 Wis.2d at 657, 469 N.W.2d at 854 ("[W]e have consistently ruled that a court's loss of power due to the failure to act within statutory time periods cannot be stipulated to nor waived.").

The issue raised by Huggins is whether the court had the competency to enter judgment against him absent the motion of the district attorney. ***B.J.N.*** is distinguishable because that case involved statutory time limits, an issue that historically implicated the court's subject matter jurisdiction and therefore could not be waived. Instead we follow ***Wall*** and conclude that Huggins' failure to timely object to the court's competency to enter judgment constitutes a waiver to that objection. *See* ***Wall***, 157 Wis.2d at 7, 458 N.W.2d at 816.

REPEATER ALLEGATION

The criminal complaint and information alleged that Huggins was a habitual offender as defined by § 939.62(1)(b), STATS., because he had been convicted of three misdemeanors within the last five years. One of the misdemeanors alleged in the information was a May 20, 1993 disorderly conduct conviction. During trial, the State submitted certificates verifying that Huggins had been convicted on seven occasions, but none of the certificates indicated a May 20, 1993 disorderly conduct conviction.

Huggins argues that the finding of habitual criminality must be vacated because the State failed to establish that Huggins had been convicted of disorderly conduct on May 20, 1993. In support of his argument, Huggins cites ***State v. Wilks***, 165 Wis.2d 102, 477 N.W.2d 632 (Ct. App. 1991). We conclude, however, that ***Wilks*** is distinguishable.

In ***Wilks***, the State filed a complaint charging Wilks with misdemeanor retail theft. ***Id.*** at 104, 477 N.W.2d at 633. The complaint further alleged that Wilks was a habitual offender because he had been previously convicted of forgery on May 24, 1986. ***Id.*** After Wilks pleaded no contest to the retail theft charge pursuant to a plea agreement, the State requested a continuance to obtain documentation of Wilks' May 24, 1986 forgery conviction. ***Id.*** at 105, 477 N.W.2d at 633-34. At the adjourned hearing, the State conceded that the May 24, 1986 forgery conviction against Wilks did not exist and instead sought permission to use a July 3, 1985 forgery conviction as the basis for Wilks' repeater status. ***Id.*** at 106, 477 N.W.2d at 634.

The court concluded that the State's proposed amendment was barred by § 973.12(1), STATS.[5] In making this determination, the court construed ***State v. Martin/State v. Robles***, 162 Wis.2d 883, 470 N.W.2d 900 (1991), in which the supreme court concluded that the State could not amend a criminal charging document to assert a repeater allegation under § 973.12(1) after a defendant had pleaded not guilty to the underlying charges at arraignment. ***Id.*** at 888, 470 N.W.2d at 901-02.

The ***Wilks*** court noted that its case differed from ***Martin/Robles*** in two respects. First, Wilks pleaded no contest, whereas Martin and Robles pleaded not guilty. Second, Wilks pleaded to a charging document that contained a repeater allegation, whereas Martin and Robles pleaded to charging documents that did not contain repeater allegations. ***Wilks***, 165 Wis.2d at 108, 477 N.W.2d at 635.

Regarding Wilks' no contest plea, as opposed to the ***Martin/Robles*** not guilty pleas, the court concluded:

---

[5] Section 973.12(1), STATS., provides in relevant part:

> Whenever a person charged with a crime will be a repeater or a persistent repeater under s. 939.62 if convicted, any applicable prior convictions may be alleged in the complaint, indictment or information or amendments so alleging at any time before or at arraignment, and before acceptance of any plea. The court may, upon motion of the district attorney, grant a reasonable time to investigate possible prior convictions before accepting a plea.

> [A] post-plea repeater amendment is not permitted regardless of the plea which the defendant enters. In barring post-plea repeater amendments, the statute makes no distinction on this basis, nor did the supreme court in ***Martin/Robles***. The supreme court declared that the policy behind sec. 973.12(1), Stats., is to satisfy due process by assuring that a defendant meaningfully understands the extent of potential punishment at the time of the plea. If this principle is at work when a defendant pleads not guilty as in ***Martin/Robles***, it certainly applies with equal, if not greater, force when a defendant pleads guilty.

Wilks, 165 Wis.2d at 109, 477 N.W.2d at 635 (citation omitted).

In deciding whether the State could amend a charging document that already contained a repeater allegation, the court considered ***Martin/Robles*** in conjunction with the policy served by § 973.12(1), STATS., in concluding that "the statute bars those post-plea repeater amendments which violate due process by not sufficiently notifying the defendant of the possible punishment at the time of the plea." ***Wilks***, 165 Wis.2d at 111 n.9, 477 N.W.2d at 636. The court noted that Wilks entered his no contest plea believing that the State could not prove the May 24, 1986 forgery conviction and held that the State's "changing of the rules" after Wilks had entered his plea offended the due process considerations that underpin § 973.12(1). ***Id.*** at 110, 477 N.W.2d at 635. The court concluded:

> [W]e read the supreme court's language in ***Martin/Robles*** to bar post-plea repeater amendments which meaningfully change the basis upon which the defendant assessed the extent of possible punishment at the time of plea. Here we conclude that the basis upon which Wilks pled has been changed by the amendment to the repeater allegation.

Id. at 111, 477 N.W.2d at 636.

This case is similar to ***Wilks*** in that both cases involve the amendment of a charging document that already contained a repeater allegation. The cases are distinguishable, however, in that ***Wilks*** was prejudiced by the post-plea repeater amendment, while Huggins was not.

Wilks pleaded no contest because he did not believe that the State could prove the repeater allegation based on the date of the offense. If Wilks had thought that the State could prove the May 24, 1986 forgery conviction, he might have pleaded not guilty because he could receive a harsher sentence if convicted. When the State amended to include a different offense, it meaningfully changed the basis upon which Wilks assessed the extent of possible punishment at the time of his no contest plea. Therefore, the amendment was prejudicial to Wilks and prohibited by § 973.12(1), STATS.

Here, Huggins' plea of not guilty was not provoked by the incorrect date contained in the repeater allegation. Huggins pleaded not guilty because he wanted to contest the crimes for which he was charged, not the convictions contained in the repeater allegation. Therefore, the post-plea repeater amendment did not meaningfully change the basis upon which Huggins assessed the extent of possible punishment at time of his plea. Because the amendment was not prejudicial to Huggins, it did not offend the due process considerations that underpin § 973.12(1), STATS., and therefore was not barred by that statute.

Huggins argues that the distinction between his not guilty plea and Wilks' no contest plea is irrelevant. Huggins argues that ***Martin/Robles*** "makes clear that the rule prohibiting a post-plea amendment to the charging document to include a repeater allegation also applies when the accused has entered a plea of *not guilty* to the charge." But the State did not amend the charging document "to include" a repeater allegation against Huggins. The information already included a repeater allegation. The State amended a repeater allegation that was already contained in the charging document.

Wilks makes clear that § 973.12(1), STATS., bars "post-plea repeater amendments which meaningfully change the basis upon which the defendant assessed the extent of possible punishment at the time of the plea." ***Id.*** at 111, 477 N.W.2d at 635. When the State amends the charging document to include a post-plea repeater allegation, the amendment will always make the extent of

possible punishment greater than the extent of possible punishment at the time of the plea. Therefore, a post-plea amendment to include a repeater allegation will always meaningfully change the basis upon which the defendant assessed the extent of possible punishment at the time of the plea, regardless of whether the defendant pleaded guilty, not guilty, or no contest.

A different situation arises, however, when the State amends a repeater allegation that was already included in the charging document at the time of the defendant's plea. Here, the amendment does not change the extent of possible punishment at the time of the plea because the extent of possible punishment remains the same. The amendment can only change the basis upon which the defendant *assessed* the extent of possible punishment. It is here that the distinction between Wilks' no contest plea and Huggins' not guilty plea is relevant.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.