COURT OF APPEALS
DECISION
DATED AND RELEASED

February 12, 1997

Nos. 96-2700-CR
96-2701-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY A. MALKMUS,

Defendant-Appellant.

APPEAL from judgments and an order of the circuit court for Fond du Lac County: STEVEN W. WEINKE, Judge. *Affirmed*.

BROWN, J. Gary A. Malkmus alleges that the State did not sufficiently prove the repeat offender penalty enhancements relating to his misdemeanor convictions. We do not agree.

The dispute arises out of a comprehensive plea agreement that the State reached with Malkmus in December 1990. The agreement covered a total of fifteen charges in Fond du Lac and Dodge counties ("Malkmus plea

agreement"). The charges involved two types of offenses: issuing worthless checks, *see* § 943.24, STATS., and administrative law violations relating to Malkmus's home contracting business. *See* WIS. ADM. CODE §§ ATCP 110.02(6)(m) and 110.04(1).

The agreement required Malkmus to plead guilty to five of the fifteen charges—two of the check charges and three of the home contracting charges. The remaining counts were dismissed, but they were read in for restitution. Moreover, Malkmus permitted the State to read in allegations that he wrote eight other worthless checks in Outagamie and Calumet counties for restitution purposes.

The penalty enhancer related to four of the five charges to which Malkmus entered his guilty pleas. Malkmus was convicted of felony enticement of a child in April 1985. This earlier offense was described on the two home contracting complaints. Moreover, a certified copy of Malkmus's prior conviction was attached to the plea questionnaire that Malkmus completed for one of the check charges.

Although Malkmus entered guilty pleas pursuant to this agreement in December 1990, the trial court withheld sentencing and placed Malkmus on probation. However, his probation was later revoked in November 1995. And in January 1996, the court sentenced Malkmus to three years of imprisonment on each of the home contracting offenses.

Malkmus then filed a postconviction motion seeking to have the penalty enhancements declared void. Malkmus argued that the State had not proven the existence of a prior conviction through either a certified document or through his admission.

The court, however, denied the motion. It first noted that Malkmus had indeed admitted to the existence of the prior offense when he answered "guilty" after the court asked if he was entering a plea to the check charge "as a repeater." Based on this affirmation, the trial court inferred that Malkmus understood he was likewise admitting to the same punishment on the other pleas that he was offering during that hearing. The court additionally found that one of the case files that was to be settled during that plea hearing contained a certified copy of Malkmus's earlier conviction. Thus, it concluded that the one copy was "enough to incorporate and bring into each of the separate files the basis on which the repeater status was made."

Malkmus now renews his claim that the penalty enhancers on the two home contracting charges are void because the State failed to submit adequate proof of a prior offense. The issue of whether a penalty enhancer is void presents a question of law that we answer independently of the trial court. *See* ***State v. Koeppen***, 195 Wis.2d 117, 126, 536 N.W.2d 386, 389-90 (Ct. App. 1995).

The State argues that it proved Malkmus's prior conviction with an official document. It writes:

> [T]he Court file indicates that a certified copy of the defendant's prior record was on file with the Court in the [check charge] case where the defendant filed the 32-B.[1]

Because there was solid proof of Malkmus's prior conviction at this consolidated hearing, the State contends that it satisfied the crucial task of proving that Malkmus committed a prior offense.

Malkmus argues, however, that the State never proved the repeater in the check charge case. He notes that defense counsel, not the State, prepared the plea questionnaire and apparently attached the certified copy of Malkmus's prior conviction to it. Indeed, Malkmus suggests that the State could have directed the trial court's attention to the attached copy had it wanted to rely on this document to satisfy its burden.

Nonetheless, the answer to this case rests with the trial court's postconviction finding that evidence of Malkmus's prior conviction was before it at the plea hearing. Contrary to Malkmus's argument, this finding means that the State did in fact provide adequate proof that he had a prior offense. Thus, the question is not whether the *State proffered* the proof; the question is whether the *court is provided* with adequate proof to support a finding that the defendant has a prior conviction.

Although the State may have never asked the court to make an explicit finding that it had met its burden of proof on this issue, the record

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[1] *See* WIS J I—CRIMINAL SM 32B

plainly shows two things: one, that the plea questionnaire submitted to the court during that hearing contained a certified copy of Malkmus's prior conviction; and two, that the court read the plea questionnaire as it reviewed the contents with Malkmus. Therefore, we see no reason to upset the trial court's conclusion that the State had met its burden of proving that Malkmus had a prior conviction.[2]

By the Court.—Judgments and order affirmed.

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

[2] Because we affirm the trial court on this ground, we need not address Malkmus's claim that the trial court erred when it found that he admitted his prior offense.