COURT OF APPEALS
DECISION
DATED AND RELEASED

July 17, 1997

NOTICE

No. 97-0613-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RALPH F. BEILKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: MARK J. FARNUM and JOHN W. ROETHE, Judges. *Affirmed.*

DEININGER, J.[1] Ralph Beilke appeals a judgment convicting him of a misdemeanor, obstructing an officer in violation of § 946.41, STATS., as a repeater under § 939.62, STATS.[2] He also appeals an order denying his motion to

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[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

[2] Section 939.62, STATS., provides, in relevant part:

(continued)

commute his sentence. He was sentenced to three years in prison, the maximum enhanced penalty for the offense. Beilke claims that his no contest plea was not a valid admission of the prior conviction alleged to confer his repeater status, and that the repeater allegations were improperly amended post-plea to correct an erroneous date of conviction. We conclude that Beilke's no contest plea constituted a valid admission of his prior conviction, and that he was not prejudiced by a four day variance in the conviction date. Accordingly, we affirm the judgment of conviction and the order denying Beilke's motion to commute his sentence.

BACKGROUND

The State filed a criminal complaint on July 16, 1996, charging Beilke with obstructing an officer, a misdemeanor. The complaint alleged that Beilke was a repeater subject to an enhanced sentence under § 939.62(1)(a), STATS., in that he had been convicted of two felonies within the previous five years, specifically:

> (1) If the actor is a repeater, as that term is defined in sub. (2), and the present conviction is for any crime for which imprisonment may be imposed … the maximum term of imprisonment prescribed by law for that crime may be increased as follows:
>
> (a) A maximum term of one year or less may be increased to not more than 3 years.
>
> ….
>
> (2) The actor is a repeater if the actor was convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced … which conviction[] remain[s] of record and unreversed.

> [P]ossession with intent to deliver a controlled substance and possession of a firearm by a convicted felon on April 14, 1992, in Milwaukee County Circuit Court, Milwaukee, Wisconsin ….

Beilke pleaded no contest to the charge, and at the plea hearing, the judge initially overlooked the repeater allegations, but then returned to them as follows:

> THE COURT:… What are you doing on the habitual criminality violation?
>
> [DEFENSE COUNSEL]: He's admitting to that, Judge.
>
> THE COURT:… In case it makes any difference to your plea, and I overlooked advising you about it, there is also an allegation of habitual criminality that increases the penalty, and it's claimed that you were convicted of a felony within the last five years, that being possession with intent to deliver a controlled substance and possession of a firearm as a convicted felon on April 14th, 1992; and, as a result of that, the term of imprisonment is increased up to a total of three years. You understand that?
>
> MR. BEILKE: Yes.
>
> THE COURT: Does that make a difference on your plea or anything?
>
> MR. BEILKE: No.

Beilke's plea was accepted. He was sentenced to the maximum enhanced sentence of three years in prison.

Beilke moved after conviction to have his sentence commuted. He argued that his plea did not constitute an admission because the date of the prior conviction was inaccurately alleged. The State conceded that instead of having been convicted of the prior felonies on April 14, 1992, Beilke had been convicted on April 10, 1992. The trial court denied Beilke's motion, concluding that the error was *de minimis* and that Beilke had admitted the prior convictions by

entering a no contest plea. Beilke appeals the judgment of conviction and the order denying his motion to commute sentence.

ANALYSIS

a. Standard of Review

Whether Beilke's conviction and subsequent sentence as a repeater are proper involves the application of §§ 939.62 and 973.12, STATS., to undisputed facts. This is a question of law which we review de novo. ***State v. Zimmerman***, 185 Wis.2d 549, 554, 518 N.W.2d 303, 304 (Ct. App. 1994).

b. Admission of Prior Convictions by Plea of No Contest

Section 973.12(1), STATS.,[3] requires that prior convictions be admitted by the defendant or proven by the State before a defendant can be subjected to enhanced sentencing under § 939.62, STATS. Beilke argues that he did not validly admit to the prior convictions and that the State did not prove them. He contends that he cannot thus be sentenced as a repeater and that his sentence should be commuted. We disagree.

In ***State v. Rachwal***, 159 Wis.2d 494, 512-13, 465 N.W.2d 490, 497 (1991), the supreme court upheld a repeater enhancement following a plea

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

> Whenever a person charged with a crime will be a 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. If the prior convictions are admitted by the defendant or proved by the state, he or she shall be subject to sentence under s. 939.62.

colloquy where the repeater allegations and the possibility of an enhanced penalty were explained to the defendant. The defendant in ***Rachwal*** acknowledged that he understood his situation, and the court accepted his plea of no contest. ***Id.*** at 502-03, 465 N.W.2d at 493. The trial court did not directly ask the defendant if the specified prior convictions existed, and the defendant did not specifically acknowledge the prior convictions. ***Id.*** at 504, 465 N.W.2d at 494. The supreme court stated that although this was the "absolute bare minimum" needed, it was still a valid admission. ***Id.*** at 513, 465 N.W.2d at 497.

Beilke's plea colloquy followed a similar pattern. As in ***Rachwal***, the court specifically drew Beilke's attention to the allegations of the prior conviction and the possibility of an enhanced sentence. Beilke confirmed that he understood the allegations and the enhanced penalty and that it did not affect his decision to plead no contest. The court did not specifically ask Beilke to admit or acknowledge the alleged prior conviction, but neither Beilke nor his counsel made any attempt to challenge or rebut the prior convictions.[4] We conclude that the trial court's colloquy was sufficient for Beilke's no contest plea to constitute an admission under § 973.12(1), STATS., of the prior conviction, thereby relieving the State of the obligation to prove the prior conviction. *See* ***id.*** at 512-13, 465 N.W.2d at 497.

c. Post-plea "Amendment" of the Repeater Allegation

The second issue Beilke raises, that the repeater allegations were tardily, and therefore improperly, "amended" to reflect the correct date of the prior

[4] In fact, as noted above, in response to the court's inquiry regarding "the habitual criminality violation," Beilke's counsel told the court "[h]e's admitting to that."

conviction, in part overlaps his first claim. He argues that any admission under a ***Rachwal*** analysis could not be valid because his prior conviction occurred on April 10, 1992, and not April 14, 1992, as the State alleged in the complaint to which he pleaded. He then argues that the State's action in urging the court to sustain the repeater enhancement based on the correct date constitutes a post-plea amendment, which he claims is impermissible under ***State v. Wilks,*** 165 Wis.2d 102, 477 N.W.2d 632 (Ct. App. 1991). Beilke asserts that the "only difference between the state's position and an *actual* amendment to the charging document is that the state never *formally* requested permission to amend the complaint."[5]

We determined above that Beilke's plea and plea colloquy met the ***Rachwal*** requirements for an admission of the prior conviction. If Beilke had challenged the alleged conviction date or contested the repeater allegations at the time of his plea and sentencing, the State would have been put to its proof and the four day date error would have been exposed. The trial court would then have had to determine whether to allow an amendment to correct the date. Only if we were to conclude that an amendment to the conviction date would not have been allowable would we find the date error a basis for invalidation of the plea. If an amendment would have been allowable to correct the date error, invalidating the plea would be tantamount to rewarding Beilke for his failure, either by inadvertence or design, to timely challenge the pleading error. Accordingly, we

[5] The State argues that Beilke's no contest plea is a waiver of any claims regarding the inaccuracy of the date of conviction as alleged in the complaint. We disagree. We have observed that it is "an open question whether principles of waiver can or should apply to the proof requirements for prior convictions resulting in enhanced sentences." ***State v. Goldstein***, 182 Wis.2d 251, 256 n.2, 513 N.W.2d 631, 633 (Ct. App. 1994). Moreover, Beilke raises the date error in part as an attack on the very validity of his no contest plea as it relates to the repeater allegations. We conclude that a plea that is under attack as invalid cannot be deemed to be a waiver of the issue which underlies the claim of invalidity.

analyze whether a post-plea amendment to correct the conviction date is permissible on these facts.

Beilke would have us read ***State v. Wilks***, 165 Wis.2d 102, 477 N.W.2d 632 (Ct. App. 1991), to require that the allegation of an improper date of conviction in the complaint would have precluded the State from proving the prior conviction. ***Wilks***, however, is not the final word on the issue of the post-arraignment amendment of habitual criminality allegations that are defectively pled in a complaint or information. We noted in ***State v. Campbell***, 201 Wis.2d 783, 794 n.8, 549 N.W.2d 501, 505 (Ct. App. 1996), that "[t]o the extent that our interpretation of § 973.12 in ***Wilks*** is inconsistent with [***State v. Gerard***, 189 Wis.2d 505, 525 N.W.2d 718 (1995)], we must follow ***Gerard***." *See also* ***Hill v. LIRC***, 184 Wis.2d 101, 110, 516 N.W.2d 441, 446 (Ct. App. 1994) (where our decisions conflict with a subsequent supreme court opinion, we must follow the latter).

The supreme court in ***Gerard*** reversed our decision setting aside a habitual criminal penalty enhancer for which the increased penalty had been misstated in the information. The trial court had allowed the State to correct this "clerical error" after the defendant had pleaded not guilty to the information. We reversed the trial court, relying in part on our analysis in ***Wilks***. ***State v. Gerard***, 180 Wis.2d 327, 344-45, 509 N.W.2d 112, 119 (Ct. App. 1993). The supreme court, without referring to ***Wilks***, concluded that "an information may be amended post-plea to correct a clerical error in the sentence portion of the penalty enhancement when such amendment does not prejudice the defendant." ***State v. Gerard,*** 189 Wis.2d 505, 509, 525 N.W.2d 718, 719 (1995). The court noted that the defendant in ***Gerard*** had been given notice in the information of the State's intent to establish his repeater status, and thus he had "knowledge of the extent of

his punishment before pleading to the charges." ***Id.*** at 514, 525 N.W.2d at 721.

While it is true that § 973.12(1), STATS., does not require that the date of a prior conviction be alleged in the complaint or information, the ***Gerard*** court said that "the information will identify" the date of conviction, the offense and whether it is a felony or misdemeanor. ***Id.*** at 515-16, 525 N.W.2d at 722. The complaint in this case fulfills the last two requirements, but the date of commission of the offense is incorrectly stated to be April 14, 1992, instead of the correct date, April 10, 1992. The supreme court in ***State v. Martin,*** 162 Wis.2d 883, 902-03, 470 N.W.2d 900, 907-08 (1991), established a bright-line rule that habitual criminality allegations could not be added to a complaint or information post-arraignment even if no prejudice would result. Our inquiry here, however, as was the supreme court's in ***Gerard,*** is whether the defendant is prejudiced by a post-arraignment amendment to habitual criminality allegations that were inaccurately pled in the complaint. *See* ***Gerard,*** 189 Wis.2d at 517, 525 N.W.2d at 722.

Beilke does not assert that he has been prejudiced by the misstatement by four days of the date of the prior conviction. He does not assert that his plea would have been different if the date had been correctly alleged. Nor does he claim, as did the defendant in ***Wilks***, that he pled no contest to the obstructing charge believing that the State could not prove the prior conviction on the date alleged. *See* ***Wilks,*** 165 Wis.2d at 105, 477 N.W.2d at 634. To the contrary, Beilke acknowledged his understanding during the plea colloquy that acceptance of his plea would expose him to a potential three year prison sentence. He has not shown that the four day error in the alleged date of conviction prejudiced him in any way.

Beilke argues that ***Gerard*** does not apply because it involved an amendment which merely corrected the "*amount of the enhancement* permitted by statute" whereas ***Wilks*** and this case involve amendments which affect the "*basis* upon which" Beilke is alleged to be a repeater. We disagree. The ***Gerard*** court specifically limited the bright-line rule announced in ***Martin*** to a prohibition of post-arraignment amendments seeking to include previously unpleaded repeater allegations in the charging document. ***Gerard***, 189 Wis.2d at 517, 525 N.W.2d at 722. The court's rationale for its holding in ***Gerard*** was that repeater allegations in a complaint or information are sufficient if, when a defendant pleads, he is allowed "to determine the length of the enhanced penalty to which he is exposed." ***Id.*** at 516, 525 N.W.2d at 722. Thus, the court's focus was not on the nature of the error, but its effect: "whether this error prejudiced [the defendant's] ability to assess meaningfully the extent of the punishment at the time he pleaded to the charges." ***Id.*** As discussed above, we conclude Beilke was not prejudiced by the four day date error.

Beilke had notice of the State's intent to establish his repeater status, and he had "knowledge of the extent of his punishment" before pleading to the charges. We conclude that because Beilke would not have been prejudiced by a post-plea amendment to correct the date error, his admission to the prior conviction is not invalidated by the error.

By the Court.—Judgment and order affirmed.

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