COURT OF APPEALS DECISION DATED AND FILED

November 18, 1998

Marilyn L. Graves
Clerk, Court of Appeals of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-2941-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES NESBITT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMMANUEL J. VUVUNAS, Judge. *Judgment affirmed in part and reversed in part; order reversed and cause remanded with directions.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

SNYDER, P.J. James Nesbitt appeals from the habitual offender (repeater) sentencing provision of a judgment of conviction for receiving stolen property and from an order denying his motion for postconviction relief. Nesbitt argues that the repeater portion of his sentence was not authorized by law because

he did not admit and the State failed to prove that the prior conviction was within five years of the present offense as required by § 939.62(2), STATS. We agree and therefore reverse the repeater provision of the sentence and commute the sentence to the maximum on the underlying offense. We also reverse the trial court's order denying the postconviction motion.

On August 19, 1996, Nesbitt was charged with one count of burglary as a repeater pursuant to §§ 943.10(1)(a) and 939.62, STATS., for an incident occurring on August 2, 1996. On August 21, 1996, the complaint was amended to include Nesbitt's criminal record which consisted of burglary convictions on October 18, 1988, and August 3, 1989. On November 11, 1996, the State filed an information alleging the same charges as stated in the complaint and which included Nesbitt's criminal record as recited in the August 21, 1996 complaint.[1] Neither the complaint nor the information specifically stated when Nesbitt's sentence commenced and over what period of time he was actually incarcerated.

At a December 16, 1996 plea hearing,[2] Nesbitt pled no contest to a reduced charge of receiving stolen property as a repeater contrary to §§ 943.34(1)(b) and 939.62, STATS. The trial court sentenced Nesbitt to six years in

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[1] Nesbitt's criminal record was reported as follows:

> On 10-18-88: burglary under Case Number 88-CF-316 and was sentenced to probation; on 1-18-91: resentenced to seven years prison concurrent; on 8-3-89: convicted of burglary under Case Number 89-CF-254 and was sentenced to probation, consecutive to 10 years prison in Court Case 88-CF-316; on 8-3-89: Convicted of burglary under Case Number 89-CF-254 and was sentenced to 10 years probation consecutive to 10 years in Case Number 88-CF-316; according to the NCIC, the defendant was returned to Dodge Correctional Institution on 1-23-91 and was paroled on 11-24-92.

[2] The details of this hearing are addressed in our discussion.

prison of which two years was the maximum for the underlying felony and four years was attributed to the repeater penalty. On July 3, 1997, Nesbitt filed a postconviction motion to vacate the repeater portion of his sentence. He argued that he had not admitted and that the State had failed to prove that he was incarcerated for a sufficient amount of time to bring the prior felony within the five-year time period required for the repeater penalty under § 939.62. The court denied Nesbitt's motion and he now appeals.

Our review of the trial court's use of the repeater penalty in this case requires the application of §§ 939.62 and 973.12, STATS., to a set of facts. This presents a question of law which we review de novo. *See* ***State v. Squires***, 211 Wis.2d 876, 880, 565 N.W.2d 309, 311 (Ct. App. 1997). Section 939.62(2) provides in relevant part that a defendant "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." Additionally, "[i]n computing the preceding 5-year period, time which the actor spent in actual confinement serving a criminal sentence shall be excluded." ***Id.*** Section 973.12(1) requires that in order for the penalty enhancer to apply, the prior convictions must be "admitted by the defendant or proved by the state."

In Nesbitt's case, he was convicted of a felony on August 3, 1989, seven years prior to his current August 2, 1996 offense. Because we exclude the time Nesbitt spent in confinement, the five-year penalty enhancer would not take effect unless Nesbitt was incarcerated for at least two years between August 3, 1989, and August 2, 1996.

Relying on ***Squires***, Nesbitt contends that the penalty enhancer should not apply because he never specifically admitted to being incarcerated for

more than one year and ten months. *See* ***Squires***, 211 Wis.2d at 886, 565 N.W.2d at 313-14. The State responds that the repeater penalty should be employed because the trial court properly discussed the repeater penalty with Nesbitt pursuant to ***State v. Rachwal***, 159 Wis.2d 494, 465 N.W.2d 490 (1991). Because the issue in this case concerns the length of Nesbitt's incarceration, not merely the existence of a prior conviction, we hold that ***Squires*** is controlling.

In ***Squires***, we determined that § 973.12(1), STATS., did not require that the State's charging document include the length of time the defendant had been incarcerated for his previous conviction. *See* ***Squires***, 211 Wis.2d at 882, 565 N.W.2d at 312. In discussing our holding in ***State v. Zimmerman***, 185 Wis.2d 549, 518 N.W.2d 303 (Ct. App. 1994), we recognized two alternative ways a trial court could obtain a proper admission from a defendant. *See* ***Squires***, 211 Wis.2d at 886, 565 N.W.2d at 313-14. First, the information may allege the incarceration dates "so that the defendant's admission to the information is an admission to all the facts necessary to prove repeater status." *See* ***id.*** at 886, 565 N.W.2d at 314. Second, the court may receive direct and specific admissions from the defendant as to the incarceration dates. *See* ***id.***; *see also* ***State v. Farr***, 119 Wis.2d 651, 659, 350 N.W.2d 640, 645 (1984) (An admission for purposes of § 973.12(1) must be "direct and specific.").

Under the first alternative, we look to the information which reads in relevant part, "according to the NCIC [National Crime Information Center], [Nesbitt] was returned to Dodge Correctional Institution on 1-23-91 and was paroled on 11-24-92." This statement only indicates an incarceration period of one year and ten months. Accordingly, based on the information we conclude that Nesbitt could not have admitted to two years or more of actual confinement.

As to the second alternative, we review Nesbitt's colloquy with the trial court at the plea hearing. The trial court first explained to Nesbitt that he was charged as a habitual offender because of his felony record. The court then said, "[T]here were two counts of burglary and then you came back and were re-sentenced on the one charge and you got seven years in the State Prison System." Nesbitt agreed. He then confirmed that he was released from prison on November 24, 1992. The court continued: "Do you understand that makes you eligible [for the penalty enhancer] because they don't count the time that you're in prison?" Nesbitt indicated that he understood.

The trial court then attempted to elicit Nesbitt's period of incarceration:

> COURT: And you agree you were convicted and you were in prison until that date, November of '92?
>
> [NESBITT]: I remembered. I don't think—I don't think I've been in any trouble since '89 because I was, you know, into the correctional system, justice system, after that.
>
> [DEFENSE COUNSEL]: Your Honor, I would just like—
>
> [NESBITT]: After '92, I didn't have anything up till now.
>
> COURT: Yeah.
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> [DEFENSE COUNSEL]: I would just indicate we went through in great detail on the habitual offender. He had a great deal of difficulty understanding the habitual offender allegation so I went through it with him thoroughly.
>
> COURT: So you were convicted of burglary and you got out in '92?
>
> [NESBITT]: Right.
>
> COURT: Do you understand that makes the penalty eight years in the State Prison ... rather than two years in the State Prison ...?
>
> [NESBITT]: Yes, sir.

This colloquy indicates that although Nesbitt had difficulty understanding the repeater penalty, his attorney carefully explained it to him. The exchange also demonstrates that the court wanted to be certain that Nesbitt understood the consequences of the penalty enhancer. Most importantly, Nesbitt's comments reveal that although he agreed that he was "convicted of burglary and … got out in '92," he did not admit that he was "convicted and … *in prison until that date, November of '92*." In other words, Nesbitt acknowledged his date of release but did not state when in fact he entered prison. Therefore, because Nesbitt did not directly and specifically admit to confinement from the August 1989 conviction until his release in November 1992, we conclude that there was no admission of incarceration for more than one year and ten months.

Citing ***Rachwal***, the State suggests that a specific admission of the dates of incarceration is not required. In ***Rachwal***, the defendant pled no contest to a misdemeanor charge with a repeater allegation. *See* ***Rachwal***, 159 Wis.2d at 500, 465 N.W.2d at 493. The defendant did not specifically acknowledge his prior convictions and the trial court did not directly ask the defendant whether his prior convictions existed. *See* ***id.*** at 504, 465 N.W.2d at 494. However, the judge did make a pointed effort to draw the defendant's attention to the repeater provision. *See* ***id.*** The supreme court noted that the defendant's no contest plea constituted an admission of "all the material facts alleged in the charging document." ***Id.*** at 509, 465 N.W.2d at 496. The court concluded that under the circumstances the defendant's no contest plea to the criminal complaint containing a repeater provision alleging a prior conviction constituted a direct and specific admission for purposes of § 973.12(1), STATS. *See* ***Rachwal***, 159 Wis.2d at 512-13, 465 N.W.2d at 497.

Like ***Rachwal***, the trial court here specifically addressed the consequences of the repeater penalty with Nesbitt. In addition, Nesbitt's counsel carefully explained the repeater penalty and Nesbitt replied that he understood. Both ***Rachwal*** and the instant case also involve no contest pleas to criminal complaints which contain a repeater charge alleging prior convictions. In Nesbitt's case, however, the complaint does not indicate when he was incarcerated. Accordingly, we are convinced that Nesbitt did not admit to being confined for a period of two years or more.

Our determination is consistent with ***Zimmerman***, a repeater case also involving a dispute over the defendant's length of incarceration for a prior conviction. In ***Zimmerman***, we noted that "[i]n addition to asking the question 'whether the defendant was convicted on a particular date of a specific crime,' the trial court could simply ask the follow-up question *'what period of time was the defendant incarcerated as a result of the conviction.'"* ***Zimmerman***, 185 Wis.2d at 558-59, 518 N.W.2d at 306 (citation omitted; emphasis added). The trial court, unfortunately, did not specifically ask Nesbitt when or how long he was in confinement. Therefore, we are left with a confusing record that provides only uncertain dates of incarceration.

Because we determine that Nesbitt did not admit to two years or more of confinement, we must next consider the State's proof of incarceration. *See* § 973.12(1), STATS. The State argues that Nesbitt's presentence report fills the two-month gap that remains from Nesbitt's admission of only one year and ten months of confinement. In ***State v. Caldwell***, 154 Wis.2d 683, 694, 454 N.W.2d 13, 18 (Ct. App. 1990), we held that a presentence report could be used as an

official governmental report under § 973.12(1)[3] in order to prove a defendant's conviction. The use of such a report depends on the satisfaction of certain requirements which include: (1) checking court files to confirm information in the presentence report; (2) providing a synopsis of the prior conviction relied upon in the information for repeater status; and (3) stating the date of conviction for the prior offense and relevant information regarding the issue of repeater status. *See* ***Farr***, 119 Wis.2d at 658, 350 N.W.2d at 644-45. We conclude that Nesbitt's presentence report satisfies these requirements.

In a section entitled "Prior Record," Nesbitt's presentence report listed the felonies and misdemeanors he had been charged with between 1968 and 1996. Among these were Nesbitt's May 30, 1988 burglary which resulted in "5 Years Probation (Resentence on 01/18/91 to 7 years WSP [Wisconsin State Prison])" and his February 4, 1989 burglary for which he received "10 Years Probation (Vacated on 12/13/90) (7 Years WSP)." The next section of the report described Nesbitt's "rather confusing" criminal record. According to the report:

> He was placed on five years probation for one of the burglaries and ten years probation for the other one. However, apparently both of these sentences were vacated in 1990 and Mr. Nesbitt was sentenced to seven years in the Wisconsin State Prison system less 632 days county jail time. On 11/24/92 Mr. Nesbitt was paroled to the Division of Intensive Sanctions (DIS) and began Phase II of that program.

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

> An official report of the F.B.I. or any other governmental agency of the United States or of this or any other state shall be prima facie evidence of any conviction or sentence therein reported. Any sentence so reported shall be deemed prima facie to have been fully served in actual confinement or to have been served for such period of time as is shown or is consistent with the report.

This information, read in conjunction with the "Prior Record" section, indicates that Nesbitt was on probation from the date of his 1988 burglary conviction until December 13, 1990, and confirms that he was released from prison on November 24, 1992. The report also indicates that Nesbitt spent 632 days in jail.

The State contends that the "632 days county jail time" fills the two-month gap left short by Nesbitt's admission. The State proposes that if we add 632 days to Nesbitt's May 30, 1988 burglary offense, 201 days remain following Nesbitt's August 3, 1989 burglary conviction. According to the State, the 201 days adequately cover the two-month gap. We are not persuaded.

As we stated in ***Zimmerman***, 185 Wis.2d at 558, 518 N.W.2d at 306, "[t]he State must make a specific allegation of the preceding conviction and incarceration dates so as to permit the court and the defendant to determine whether the dates are correct and the five-year statutory time period is met." The State's effort to piece together a sufficient amount of incarceration time to satisfy the five-year repeater penalty requirement is inadequate because it can hardly be considered a "specific allegation" of the incarceration dates. We are again reminded that the increasing number of cases on appeal concerning procedural irregularities for repeater convictions requires careful adherence to the requirements of § 973.12(1), STATS. *See* ***State v. Coolidge***, 173 Wis.2d 783, 795, 496 N.W.2d 701, 707-08 (Ct. App. 1993); ***Zimmerman***, 185 Wis.2d at 558, 518 N.W.2d at 306.

We conclude that the trial court improperly imposed the five-year penalty enhancer under § 939.62, STATS., because Nesbitt did not admit and the State failed to prove that the prior conviction occurred within the previous five years, notwithstanding Nesbitt's period of confinement. Section 973.13, STATS.,

provides that where a court imposes a maximum penalty in excess of that permitted by law, the excess portion of the sentence is void. *See* ***State v. Wilks***, 165 Wis.2d 102, 112, 477 N.W.2d 632, 637 (Ct. App. 1991). In such a case, the sentence will be commuted without further proceedings to the maximum permitted by law. *See* ***id.*** Therefore, we commute Nesbitt's sentence to two years, the maximum permitted for the charge of receiving stolen property. All other provisions of the sentence are confirmed. Upon remand, the court is directed to enter an amended judgment of conviction accordingly.

By the Court.—Judgment affirmed in part and reversed in part; order reversed and cause remanded with directions.

Not recommended for publication in the official reports.