COURT OF APPEALS
DECISION
DATED AND FILED

October 13, 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. 97-2973-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SEAN PATRICK OKRAY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Sean Patrick Okray appeals *pro se* from an order denying his postconviction motion to modify the sentence that the trial court imposed after Okray pled guilty and was convicted of second-degree intentional homicide, while armed with a dangerous weapon, as an habitual criminal. *See* §§ 940.05(1)(b), 939.62 and 939.63, STATS. Okray argues: (1) that the trial court

erred in sentencing Okray as an habitual criminal because the State amended the information to add the habitual-criminality enhancer after Okray had entered his initial plea of not guilty; (2) that the habitual-criminality enhancer was insufficiently charged in the amended information; (3) that the trial court did not grant him the proper amount of pre-sentence credit; and (4) that the trial court erred in amending the judgment of conviction to reflect Okray's pre-sentence credit without requiring Okray's presence. We affirm.

BACKGROUND

Okray beat Gregg Zeichert to death with a metal weight bar. The State initially charged Okray with first-degree intentional homicide while armed. *See* §§ 940.01(1) and 939.63, STATS. At his arraignment, Okray entered a plea of not guilty to this charge. Okray subsequently agreed to plead guilty to a plea-bargained charge of second-degree intentional homicide while armed, as an habitual criminal. The State, therefore, presented, and the trial court accepted, an amended information charging Okray in accordance with the plea bargain. Okray pled guilty as charged in the amended information, and the trial court accepted the plea.

At sentencing, Okray's counsel advised the trial court that Okray was not entitled to any pre-sentence credit towards his second-degree intentional homicide conviction for the time that he had spent in custody since his arrest because Okray's probation had been revoked on a prior forgery conviction, and Okray's time in custody was credited towards his sentence for that conviction. The trial court imposed a thirty-five year sentence, and found that Okray was entitled to no pre-sentence credit. Subsequently, Okray filed a postconviction motion for sentence modification, challenging the habitual-criminality

enhancement and requesting pre-sentence credit. In response to Okray's motion, the trial court granted Okray pre-sentence credit of fifty-eight days, which was the amount of time Okray served from his arrest to the revocation of his probation on the forgery conviction. The trial court rejected Okray's other grounds for sentence modification.

DISCUSSION

Okray argues that the State improperly amended the information to add the habitual-criminality enhancer after Okray had entered his initial plea of not guilty, and that he was, therefore, improperly sentenced as an habitual criminal. Okray also argues that the habitual-criminality enhancer was insufficiently charged in the amended information. The State responds that Okray has waived these alleged defects by pleading guilty. We agree.

Generally, "a guilty plea, voluntarily and understandingly made constitutes a waiver of nonjurisdictional defects and defenses including claims of violations of constitutional rights prior to the plea." ***Mack v. State***, 93 Wis.2d 287, 293, 286 N.W.2d 563, 566 (1980). Defects in an information, other than the failure to charge an offense known to law, are nonjurisdictional and are thus waived by a guilty plea. *See* ***id.***, 93 Wis.2d at 295–296, 286 N.W.2d at 567; *see also* ***State v. Webster***, 196 Wis.2d 308, 316–319, 538 N.W.2d 810, 813–814 (Ct. App. 1995) (failure to properly file an amended information is a procedural defect that does not deprive the trial court of subject matter jurisdiction, and is thus subject to waiver).

Okray does not assert that the information fails to charge an offense known to law, but, rather, he asserts that the habitual-criminality enhancer was not properly filed and that it failed to set forth the specific statutory method by which

his sentence was subject to enhancement. These arguments are nonjurisdictional claims, and are thus waived by Okray's guilty plea.

We further conclude that Okray is not entitled to challenge the filing of the amended information because it was filed in order to effectuate the plea-bargain Okray struck with the State. Okray was originally charged with first-degree intentional homicide while armed, which subjected him to a life sentence for the homicide charge and a five-year enhancement for committing the crime while armed with a dangerous weapon. Okray pled not guilty to this charge, but in order to avoid going to trial on this charge, he decided to plead guilty to second-degree intentional homicide while armed, as an habitual criminal. The amended charge subjected him to a total potential sentence of thirty-five years, rather than the life sentence he faced under the original charge. Okray cannot seek to retain the benefit of his plea bargain and simultaneously avoid its consequences. *Cf.* ***State v. Rivest***, 106 Wis.2d 406, 416–417, 316 N.W.2d 395, 400–401 (1982) (a defendant is not entitled to retain the benefit of a plea bargain if he or she materially breaches the plea agreement). We therefore reject Okray's attempt to avoid the habitual-criminality portion of his sentence while simultaneously retaining the benefit of his plea-bargained conviction to the lesser offense of second-degree intentional homicide.

We also conclude that the habitual-criminality enhancer was sufficiently charged in the information. Okray asserts that the information did not give him notice of the statutory provision under which his sentence would be

enhanced.[1] Contrary to Okray's assertion, the information stated that Okray was convicted of two felony offenses on July 21, 1989, that those convictions remained of record and unreversed, and that Okray was, therefore, subject to a total sentence enhancement of not more than ten years pursuant to § 939.62, STATS. Although the information did not set forth a specific subsection of the statute, it clearly provided that Okray's sentence for the 1993 crime was subject to a potential enhancement of ten years based upon his 1989 felony convictions; thus the information clearly notified Okray that his sentence was subject to enhancement based upon his prior felonies, pursuant to § 939.62(1)(c) and (2), STATS.[2] Okray's

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[1] Okray also argues that the habitual-criminality enhancer was insufficiently charged because it erroneously identified the defendant as Gregg Zeichert, the man Okray killed, rather than Okray, when setting forth Okray's prior convictions. Because Okray was obviously aware that he, rather than Zeichert, was the defendant, and because Okray acknowledged that he had been convicted for the crimes identified in the information, we conclude that Okray is not entitled to relief based on this clerical error.

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

> **Increased penalty for habitual criminality. (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:
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> (a) A maximum term of one year or less may be increased to not more than 3 years.
>
> (b) A maximum term of more than one year but not more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 6 years if the prior conviction was for a felony.
>
> (c) A maximum term of more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 10 years if the prior conviction was for a felony.
>
> **(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, or if the actor was convicted of a misdemeanor on 3 separate occasions during that same period, which convictions remain of record and unreversed. It is immaterial that sentence was stayed, withheld or suspended, or that the actor was pardoned, unless such pardon was granted on the ground of innocence. In computing the preceding 5–year period, time

(continued)

assertion that the habitual-criminality enhancer was insufficiently charged is without merit.[3]

Okray next argues that he is entitled to more than fifty-eight days of pre-sentence credit towards his second-degree intentional homicide conviction.[4] As noted, the trial court granted Okray fifty-eight days of credit towards his second-degree intentional homicide conviction for the days Okray spent in custody from the time of his arrest to the time his probation was revoked and he began serving sentence on his prior forgery conviction. Okray concedes that this time period was "rightly calculated as 58 days," but argues that he is nonetheless entitled to additional credit. We disagree.

When a defendant is arrested on one charge, but subsequently has his probation revoked and begins to serve a sentence on a prior conviction, the defendant is thereafter in custody solely on the prior conviction; the time served after the probation revocation, therefore, is not credited towards the subsequent

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> which the actor spent in actual confinement serving a criminal sentence shall be excluded.

[3] Okray also argues that the evidence was insufficient to establish that he was an habitual criminal. The record belies this claim. Under § 973.12(1), STATS., a defendant is subject to sentence as an habitual criminal "[i]f the prior convictions are admitted by the defendant or proved by the state." If the defendant confirms his prior convictions in response to direct questioning by the trial court, the statute is satisfied. *See* ***State v. Rachwal***, 159 Wis.2d 494, 508–509, 465 N.W.2d 490, 496 (1991). Here, the record reveals that the trial court specifically questioned Okray about his prior convictions before accepting Okray's guilty plea, and that Okray acknowledged his prior convictions.

[4] Okray also argues that he did not receive the proper credit towards his previous convictions. Those convictions are not properly before us, and, as the State asserts and Okray does not refute, the issue is moot because Okray has completed the sentences imposed for those convictions. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (arguments that are not refuted are deemed admitted).

charge. *See* ***State v. Beets***, 124 Wis.2d 372, 380–382, 369 N.W.2d 382, 385–387 (1985). Okray is not entitled to additional sentence credit.

Okray's final argument is that the trial court erred in amending the judgment of conviction to reflect Okray's pre-sentence credit without requiring Okray's presence. In support of his argument, Okray cites the language from § 971.04, STATS., providing that "the defendant shall be present … [a]t the pronouncement of judgment and the imposition of sentence." Section 971.04(1)(g), STATS. He argues that the trial court's grant of pre-sentence credit was equivalent to re-sentencing, and that he was thus required to be present. *See* ***State v. Upchurch***, 101 Wis.2d 329, 336, 305 N.W.2d 57, 61 (1981) (trial court erred in re-sentencing defendant in his absence after determining that previously imposed sentence was invalid).

The trial court's amendment of the judgment of conviction to reflect Okray's pre-sentence credit, however, was not equivalent to a sentencing proceeding, and Okray's presence was not required. *Cf.* § 973.155(2) and (5), STATS. (after the imposition of sentence, the trial court shall make a finding of the number of days for which sentence credit is to be granted; if credit is not granted at sentencing, the defendant may petition department of corrections for appropriate credit). The trial court did not alter the thirty-five year sentence it had imposed on Okray. The trial court merely corrected the judgment of conviction to reflect that Okray had already served fifty-eight days of that thirty-five year sentence prior to the imposition of sentence. The trial court did not err in amending the judgment of conviction in Okray's absence.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.