**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

May 31, 2001

**Cornelia G. Clark**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 00-3129-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**MICHAEL S. BEHNKEN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Affirmed.*

¶1 DEININGER, J.[1] The trial court, consistent with a joint sentencing recommendation under a plea agreement, imposed and stayed a six-year prison

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

term and placed Michael Behnken on probation. He appeals the judgment convicting him of disorderly conduct and resisting an officer, claiming error only in the enhanced sentence he received for being a habitual criminal. He also appeals an order denying his motion for postconviction relief from the enhanced sentence. Behnken claims that because he never admitted his repeater status as required by statute and case law, his sentence exceeds the maximum penalty for his crimes. We conclude that the totality of the record shows that Behnken admitted to his repeater status, and, even if the record were insufficient in this regard, he should be judicially estopped from attacking the sentence he requested the court to impose. We thus affirm the judgment and order.

## BACKGROUND

¶2 The facts are not in dispute. The State filed an amended criminal complaint charging Behnken with four counts: disorderly conduct, battery, criminal damage to property, and resisting an officer. The complaint also alleged that Behnken had been convicted of three misdemeanors within the preceding five years, thus subjecting him to an enhanced penalty under WIS. STAT. § 939.62 on each of the counts.

¶3 Behnken entered into a plea agreement with the State, which was set out in a "Criminal Case Settlement" agreement, signed by Behnken and his counsel. Behnken also signed and submitted a "Request to Enter Plea and Waiver of Rights" form (plea questionnaire). Under the plea agreement, he pled guilty to disorderly conduct and resisting an officer, both as a repeater, and the parties jointly recommended that the court impose and stay a sentence of six years' imprisonment (the enhanced maximum of three years on each charge), and order three-and-a-half years' probation. The two remaining counts were read-in and

dismissed. Although the plea questionnaire did not specify that the counts included repeater enhancements, it identified the maximum penalties as being three years' imprisonment for each of the two counts to which Behnken pled. The court conducted a colloquy and accepted his plea, found him guilty, and followed the sentencing recommendation jointly proposed by the parties.

¶4 Behnken filed a postconviction motion to vacate the part of his sentence attributable to his repeater status, which the court denied. He appeals the judgment of conviction and the order denying his postconviction motion.

## ANALYSIS

¶5 WISCONSIN STAT. § 939.62 provides for increased penalties for repeat criminal offenders. The definition of a repeater includes a person "convicted of a misdemeanor on 3 separate occasions during [the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced], which convictions remain of record and unreversed." Section 939.62(2). In order for the court to sentence a defendant as a repeater, WIS. STAT. § 973.12(1) requires that either the defendant must admit or the State must prove the prior convictions that serve as the basis for the repeater allegation. Whether, on undisputed facts, the requirements of § 973.12(1) were met is a question of law that we review de novo. ***State v. Liebnitz***, 231 Wis. 2d 272, 283 ¶14, 603 N.W.2d 208 (1999).

¶6 It is undisputed that the State did not prove Behnken's prior convictions. The issue is thus whether Behnken admitted to the repeater allegations. The supreme court recently addressed this issue in ***Liebnitz***, concluding that based on "the totality of the record" before it, the defendant had admitted to being a repeater for purposes of WIS. STAT. § 973.12(1). ***Id.*** at 275

¶2. The defendant in ***Liebnitz*** had entered into a plea agreement, which included a sentence recommendation that could only be achieved by application of the repeater statute. On appeal, the defendant argued that he had not admitted his prior convictions because the circuit court judge did not directly ask him whether he had been convicted of the crimes set forth in the repeater allegations. ***Id.*** at 284 ¶15. The court rejected the argument based on the totality of the record. At the initial appearance, the judge had read each count in the complaint, together with the repeater enhancement, and the resulting increased penalty. After each explanation, the court asked the defendant if he understood, and he said that he did. ***Id.*** at 277-78 ¶6. In the plea hearing, the defendant affirmed that there was a factual basis for the charges in the complaint. ***Id.*** at 282 ¶11.

¶7 Here, the totality of the record also reveals that Behnken admitted the prior misdemeanor convictions. First, in the amended criminal complaint, the State pled each count with a repeater penalty enhancer. After each count and its penalty, the amended complaint includes the following:

> **HABITUAL CRIMINALITY ENHANCEMENT:**
> Having been convicted of three misdemeanors in the last five years, and such convictions remain of record and unreversed, the defendant is therefore a repeater pursuant to § 939.62 and subject to increased penalties of: … imprisonment of not more than 3 years ….

¶8 Second, the plea questionnaire and the case settlement forms, both of which Behnken signed, show that Behnken admitted his repeater status. The case settlement form filed with the court sets out a joint sentencing recommendation for an imposed but stayed prison sentence of six years on the two counts, specifying "(3 + 3 ea ct cs)." In the plea questionnaire, Behnken acknowledged "that a factual basis for my plea and consideration of the read-in offenses is established

by the … (amended criminal complaint)." He also verified that he understood that the possible maximum penalties were as follows: "As to Counts 1 and 4 that I am pleading to, a total maximum … imprisonment for not more than 6 years." The sentence recommended in the plea agreement, as well as the maximum penalties acknowledged by Behnken in the plea questionnaire, could only be imposed if he were a repeater, as the complaint alleged.[2]

¶9 Third, the court's plea colloquy indicates that, in entering his plea, Behnken admitted the repeater allegations in the complaint. We set out the colloquy in its entirety:

> THE COURT: ….
>
> Mr. Behnken, I understand that you're going to plead guilty to charges of disorderly conduct and resisting an officer, *both as repeaters*; is that correct?
>
> MR. BEHNKEN: Yes, Your Honor.
>
> THE COURT: And you're going to ask me to consider charges of battery and criminal damage, *again as repeaters*, but dismiss them; is that right?
>
> MR. BEHNKEN: Yes, Your Honor.
>
> THE COURT: You've given me a written Waiver of your rights.

[2] The maximum imprisonment for disorderly conduct is ninety days, and for resisting an officer is nine months. WIS. STAT. §§ 947.01, 946.41, 939.51(3)(a) and (b). With the penalty enhancer, the maximum for both the disorderly conduct and resisting an officer offenses is three years' imprisonment. WIS. STAT. § 939.62(1)(a).

Before you signed it, did you read and understand all of it?

MR. BEHNKEN: Yes, I did, Your Honor.

THE COURT: Have you had enough time to discuss these matters with [your counsel]?

MR. BEHNKEN: Yes, ma'am.

THE COURT: Let me review in particular five constitutional rights that you forfeit on your guilty pleas: You give up the right to require that the State of Wisconsin prove your guilt by evidence beyond a reasonable doubt. You give up the right to have your guilt decide – or innocence decided by a jury of 12 people. They would have to be unanimous, and they would consider each of the counts separately. You give up the right to have [your counsel] call witnesses for you at trial and make them testify. You give up the right to confront and have [your counsel] cross-examine the State's trial witnesses. And you forfeit the right to remain silent.

Do you understand each of those rights, Mr. Behnken?

MR. BEHNKEN: Yes, I do, Your Honor.

THE COURT: Has anyone made threats to you or promises outside the plea agreement to have you give up those rights and plead guilty?

MR. BEHNKEN: No, ma'am.

THE COURT: Any questions that you'd like to ask me?

MR. BEHNKEN: No, ma'am.

THE COURT: *Just want to underscore there are the penalty enhancements here.*

*By your pleas and stipulations, again, you relieve the State of Wisconsin from proving their allegation that within the five years preceding November 20, 1996, you've been convicted of three misdemeanors.*

It's charged in Count 1: On November 20, 1996, in Jefferson County, Wisconsin, you engaged in violent conduct, under circumstances in which the conduct tended to cause or provoke a disturbance, *as a habitual criminal*, pursuant to 947.01 and 939.62 of the Statutes.

How do you plead, Mr. Behnken?

MR. BEHNKEN: Guilty.

THE COURT: Count 4 alleges that: On same day, at the same place, you knowingly resisted an officer, while the officer was doing an act in official capacity and with law full [sic] authority, *as a habitual offender*, contrary to 946.41 and 939.62 of the Statutes.

How do you plead to that charge?

MR. BEHNKEN: Guilty, Your Honor.

THE COURT: The Court finds the plea to be knowing, voluntary and intelligent. The Court finds factual basis as stipulated in the Complaint, accepts the plea, and finds the Defendant guilty.

*[Prosecutor], did you want to make any other presentation on the repeater allegations?*

[Prosecutor]: No, Judge.

THE COURT: *The Court specifically finds Mr. Behnken to be a habitual offender as to Counts 1 and 4.*

(Emphasis added.)

¶10 Finally, at sentencing, which immediately followed the plea, the State described each of Behnken's three prior misdemeanor convictions, including the offenses, dates, and county of conviction. Each had occurred within five years prior to the offenses at issue on this appeal. Behnken did not dispute that he had these prior convictions. In fact, he personally acknowledged his repeater status: "THE COURT: You're a repeater now. MR. BEHNKEN: I understand that." The supreme court noted in ***Liebnitz*** that "[n]either Liebnitz nor his counsel acknowledged or disputed that Liebnitz was a repeat offender during sentencing." ***Id.*** at 282-83 ¶12. Here, Behnken specifically acknowledged that fact, and his counsel argued in support of the jointly recommended, enhanced sentence: "And if he doesn't make probation, he's got six years in, in prison, Your Honor, which, as [the prosecutor] says, is quite an incentive not to get in trouble."

¶11 Behnken argues that the ***Liebnitz*** holding should not apply here because the criminal complaint fails to state the details of his prior misdemeanor convictions. We disagree. The supreme court based its decision in ***Liebnitz*** on the totality of the record, not merely the allegations in the complaint. We acknowledge that it would have been preferable for the State, either in pleading or at the plea hearing, to specify the prior convictions used as a basis for Behnken's repeater status, including the charges, the dates, and the counties or states of conviction.[3] Likewise, there would be a better record to sustain Behnken's

[3] *See* ***State v. Rachwal***, 159 Wis. 2d 494, 513, 465 N.W.2d 490 (1991) (noting that a plea of guilty to an allegation in the complaint containing the offenses and dates of prior convictions "approach[es] the absolute bare minimum necessary for a valid admission").

admission of the repeater allegations if the court would have asked Behnken to acknowledge the specific convictions relied upon at the time of his plea. Nonetheless, we are satisfied that, based on the totality of the record, Behnken admitted to being an habitual criminal, that is, that he had been convicted of three misdemeanors in the preceding five years, as alleged in the complaint.

¶12 Behnken also contends that he must prevail because he failed to make a "direct and specific admission" to the prior convictions through his guilty pleas. *See* ***State v. Farr***, 119 Wis. 2d 651, 659, 350 N.W.2d 640 (1984). But ***Farr*** did not involve an admission by guilty plea. The court addressed the State's failure to properly prove the repeater allegations following a jury trial on the underlying offense, as well as the impermissibility of inferring an admission from a defendant's lack of objection. ***Id***. We have noted that "a guilty plea may not constitute an admission if the judge fails to conduct the proper questioning so as to ascertain *the meaning and potential consequences of such a plea*." ***State v. Zimmerman***, 185 Wis. 2d 549, 555, 518 N.W.2d 303 (Ct. App. 1994) (emphasis added). Behnken asserts that the court failed to do so in this case. Based on the entirety of the record, which we have described above, we disagree. There can be no question that, as of the time he entered his pleas, Behnken knew what it meant to be sentenced as a repeater and that, by his plea, he was acknowledging that he was one.

¶13 Behnken also points out, however, that although the court advised him that there were penalty enhancers, and that his plea relieved the State of having to prove his three misdemeanor convictions in the preceding five years, he never affirmatively responded to these specific statements by the court. Thus, Behnken again contends that he did not make a direct and specific admission to the repeater allegation. While it is true that the record does not reflect a response

from Behnken, immediately following the court's explanation, the court asked Behnken how he was pleading to each of the counts, specifically mentioning the habitual criminality allegation in each count. Behnken pled guilty to both. Moreover, as we have noted, at the sentencing hearing which immediately followed the plea hearing, Behnken specifically acknowledged his repeater status. In sum, we conclude that the totality of the record demonstrates, as it did in ***Liebnitz***, that the defendant was fully aware of the repeater penalty enhancer and its consequences.

¶14 Finally, we note that even if Behnken did not "directly and specifically admit" to the three prior convictions, the doctrine of judicial estoppel would preclude him from raising the issue. The doctrine of judicial estoppel is intended to protect the judiciary as an institution from the perversion of its machinery. ***State v. Petty***, 201 Wis. 2d 337, 346, 548 N.W.2d 817 (1996). It is an equitable doctrine intended to "preclude[] a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position." ***Id.*** at 347. An appellate court may independently consider and invoke judicial estoppel. *See* ***id.*** The doctrine requires a showing that: (1) a defendant's later position is "clearly inconsistent" with the earlier position; (2) the facts at issue are the same in both cases; and (3) the party to be estopped convinced the first court to adopt its position. ***Id.*** at 348.

¶15 We conclude that judicial estoppel would apply in this case. First, Behnken's position on appeal is clearly inconsistent with his position in the trial court. As the record shows, Behnken knew that his plea agreement was based on his acknowledging his repeater status and its attendant increased penalties. The six-year, enhanced sentence was part and parcel of the plea agreement. Behnken makes no claim that he misunderstood the plea agreement, and neither has he

moved to withdraw his pleas and return to the point in the proceedings where he was facing four penalty-enhanced misdemeanor charges. Instead, he wants to retain the benefits of the plea agreement (dismissal of two charges and an initial placement on probation), while at the same time seeking to void the major portion of the stayed sentence which he asked the court to impose.[4]

¶16 The second and third criteria for judicial estoppel are also present. The facts at issue have not changed, inasmuch as this is an appeal based on the record of the proceedings in the trial court. And finally, Behnken convinced the trial court to adopt the jointly proposed sentence in its entirety, even though the court expressed some misgivings about ordering probation given Behnken's record.[5] He should not now be allowed to claim error in the result, when he agreed in advance that the court should order exactly the sentence he received. Judicial estoppel is intended "'to protect against a litigant playing 'fast and loose with the courts' by asserting inconsistent positions.'" ***State v. Fleming***, 181 Wis. 2d 546, 557, 510 N.W.2d 837 (Ct. App. 1993) (quoted source omitted). It appears to us that that is precisely what Behnken is attempting to do in this appeal.

[4] Behnken asks this court to order the trial court "to enter an amended judgment … to nine months incarceration on each count." Actually, if Behnken were to prevail in this appeal, his maximum sentence would be a total of twelve months on the two convictions, instead of six years. See footnote 2, above.

[5] The court expressed its reluctance to place Behnken on probation several times during sentencing: "[W]hy would we give him another probation?"; "[F]irst let me ask, it really would be unusual for me to order a third probation in such close proximity. What was the thinking on that recommendation?"; "I need to give you one more chance to tell me, Mr. Behnken, why I should give you the privilege of probation again, because it's not sitting right with me."

## CONCLUSION

¶17 For the reasons discussed above, we affirm the appealed judgment and order.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.