COURT OF APPEALS
DECISION
DATED AND FILED

October 21, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1192-CR **Cir. Ct. No. 00-CM-1391**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH D. MINKIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Joseph Minkin appeals a judgment finding him guilty of possession of drug paraphernalia as a repeat offender. He argues the circuit court should not have allowed the State to amend its complaint after Minkin entered his not guilty plea. We disagree and affirm the judgment.

---

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

BACKGROUND

¶2 The State charged Minkin with possession of drug paraphernalia as a repeat offender on July 24, 2000. The complaint alleged that Minkin had been convicted of three misdemeanors in a previous case, No. 98-CM-163: one count of possession of drug paraphernalia and two counts of bailjumping. Minkin pled not guilty on August 22, 2000. On January 30, 2001, the State filed an amended complaint because the original complaint misstated Minkin's previous misdemeanors. The amended complaint listed two misdemeanor convictions from case No. 98-CM-163, one count each of possession of drug paraphernalia and bailjumping. The amended complaint also listed one misdemeanor conviction for possession of drug paraphernalia in case No. 97-CM-428.

¶3 Minkin filed a motion to dismiss the amended complaint because it was filed after he entered his not guilty plea. The court denied the motion and allowed the amendment. A jury found Minkin guilty. The circuit court withheld sentence and placed Minkin on probation without jail time. The State later revoked Minkin's probation and the court sentenced Minkin as a repeater to eighteen months in prison. Minkin appeals, arguing that because the complaint was amended after he entered his not guilty plea, the amendment violated WIS. STAT. § 973.12.

DISCUSSION

¶4 Minkin's appeal depends on an interpretation of WIS. STAT. § 973.12(1), which provides in part:

> Whenever a person charged with a crime will be a repeater or a persistent 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.

We must therefore determine whether the post-plea amendment violates § 973.12(1). The interpretation of a statute presents a question of law this court determines without deference to the trial court's determination. ***Three & One Co. v. Geilfuss***, 178 Wis. 2d 400, 412, 504 N.W.2d 393 (Ct. App. 1993).

¶5 A discussion of this issue must begin with our supreme court's decision in ***State v. Martin***, 162 Wis. 2d 883, 470 N.W.2d 900 (1991). ***Martin*** involved two defendants. The informations did not allege repeater status. Both defendants pled not guilty at arraignment. Before trial the State moved to amend each information to add a repeater allegation. The trial court allowed the amendments. The supreme court held this violated WIS. STAT. § 973.12(1) because the statute

> make[s] clear that the legislature has established the time of arraignment and of *any* plea acceptance as the cut-off point after which time a defendant can no longer face exposure to repeater enhancement for the crime set forth in the charging document and pleaded to by the defendant at arraignment

Id. at 900.

¶6 The court further commented that prejudice is an irrelevant consideration in this type of case:

> The legislature has established a rule. Regardless of the kind of plea entered in response to the charges alleged at arraignment, the defendant's plea will be more meaningful if he or she is aware of the extent of potential punishment which ensues from a conviction of the crime.

Id. at 902-03. Minkin therefore argues that we should not look to whether he was prejudiced by the amendment. Instead, he argues that ***Martin*** established a bright-line rule that amendments made after a defendant enters a plea violate WIS. STAT.

§ 973.12(1). However, subsequent case law shows that prejudice is a consideration when, as here, the original complaint alleges repeater status.

¶7 In ***State v. Gerard***, 189 Wis. 2d 505, 525 N.W.2d 718 (1995), the complaint and information alleged repeater status. However, the documents incorrectly stated an enhanced penalty of six years for one of the counts. After Gerard entered his plea, the circuit court allowed the State to amend to provide the correct enhanced penalty of three years. The supreme court determined that an analysis of prejudice was necessary because, unlike in ***Martin***, Gerard was initially charged as a repeat offender. ***Id.*** at 512. Therefore, the issue in ***Gerard*** became "whether [the] error prejudiced Gerard's ability to assess meaningfully the extent of the punishment at the time he pleaded to the charges." ***Id.*** at 516. The court concluded the amendment was merely a correction of a clerical error and Gerard was not prejudiced. ***Id.*** at 518-19.

¶8 Here, the State argues the change is similar to the change in ***Gerard***. It contends the change was "analogous to a clerical error." We disagree. The change in ***Gerard*** was merely to correct the number of additional years Gerard could be sentenced because he was charged as a repeater. Here, the amendment changed the prior misdemeanors the State was attempting to use to establish that Minkin was a repeat offender. The change was not simply clerical.

¶9 Minkin argues the amendment is more similar to the amendment in ***State v. Wilks***, 165 Wis. 2d 102, 477 N.W.2d 632 (Ct. App. 1991). In that case, the complaint charged Wilks with misdemeanor retail theft as a repeater and cited a prior forgery conviction on May 24, 1986. Wilks pled no contest to the theft charge but denied the prior conviction. After some investigation, the State conceded it would be unable to prove the May 24, 1986, conviction. It therefore

sought permission to use a July 3, 1985, forgery conviction as the basis for charging Wilks as a repeat offender. We determined this violated WIS. STAT. § 973.12 because Wilks had no notice of the July 3, 1985, conviction. ***Id.*** at 110. Wilks explicitly entered his plea believing the State would be unable to prove the May 24, 1986, conviction. ***Id.*** Therefore, Wilks was prejudiced by the amendment because it changed the basis upon which Wilks pled. ***Id.*** at 111.

¶10 Minkin argues he was similarly prejudiced by the amendment. He notes our statement in ***Wilks*** that the State must "plead a repeater allegation with relative clarity and precision." *See* ***id.*** He claims that, as in ***Wilks***, the basis upon which he assessed the extent of his punishment changed as a result of the amendment. Instead of being charged with three prior misdemeanors resulting from a single case, he was charged with two prior misdemeanors from that case and one from a different case that was not mentioned in the original complaint.

¶11 However, unlike in ***Wilks***, Minkin does not indicate, nor does the record show, that Minkin's plea was based on his belief the State could not prove the repeater allegation in the original complaint. This fact was essential to our decision in ***Wilks***.

¶12 Instead, ***State v. Campbell***, 201 Wis. 2d 783, 549 N.W.2d 501 (Ct. App. 1996), leads us to conclude that the amendment here was proper. The State initially charged Campbell with three misdemeanors. After Campbell pled not guilty, the State moved to amend the complaint to allege a fourth prior misdemeanor. The trial court allowed the amendment. We applied ***Gerard***, and concluded the holding in that case was not limited to correction of clerical errors. ***Id.*** at 791. Instead, we concluded ***Gerard*** held that

> where the information correctly alleges a defendant's repeater status, a post-arraignment amendment to the information does not violate [WIS. STAT.] § 973.12 as long as it does not affect the sufficiency of the notice to the defendant concerning his or her repeater status.

Id. The original complaint correctly alleged that Campbell was a repeat offender and included three prior misdemeanor convictions. ***Id.*** Campbell therefore had notice that he was being charged as a repeater and entered his plea on that basis. ***Id.*** at 793. We concluded that Campbell was not prejudiced by the amendment:

> We can see no reason why Campbell would have pleaded guilty rather than not guilty at the arraignment had he known the State was going to add a fourth prior misdemeanor conviction to the information.

Id.

¶13 Minkin's case is similar to ***Campbell.*** The State charged Minkin as a repeat offender and included three prior misdemeanor convictions. Minkin pled not guilty. The State's amendment, although it changed the misdemeanor convictions it would use to show Minkin's repeater status, continued to allege three prior misdemeanors. The amendment did not affect Minkin's notice that he was being charged as a repeater. Therefore, the amendment does not violate WIS. STAT. § 973.12

¶14 We then turn to the issue of prejudice. As in ***Campbell***, we see no reason why Minkin would have changed his plea based on the amendment. Under the amended complaint, as well as the original one, Minkin was charged with three prior misdemeanors required to establish he is a repeat offender. Therefore, the amendment did not affect Minkin's ability to evaluate his potential punishment because the punishment remained the same. Further, as we have already noted, there is nothing to indicate Minkin's plea was based on his belief the State would

be unable to prove the prior misdemeanors it alleged in the original complaint. We therefore conclude that Minkin was not prejudiced as a result of the amendment.

By the Court.—Judgment affirmed.

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