COURT OF APPEALS
DECISION
DATED AND RELEASED

AUGUST 14, 1996

No. 96-0750-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACQUELINE J. COLE,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Reversed and cause remanded with directions.*

ANDERSON, P.J. Jacqueline J. Cole appeals from an order denying her motion to commute her sentence. Cole was found guilty of two misdemeanor counts of obtaining a prescription drug by fraud, contrary to § 450.11(7)(a), STATS., and found to be a repeater, pursuant to § 939.62(1)(a), STATS. The trial court sentenced Cole to three years imprisonment, the maximum sentence under § 939.62. We conclude that the trial court incorrectly enforced

the repeater statutes, and therefore, reverse the trial court's decision to enhance Cole's sentence.

The facts in this opinion will be limited to those facts regarding the trial court's use of the repeater statutes to enhance Cole's sentence. The circuit court of Kenosha county convicted Cole of one count of obtaining a prescription drug by fraud on July 27, 1995. At sentencing, the court questioned Cole regarding her prior convictions. The trial judge questioned Cole about her first two convictions that took place on February 25, 1992, and Cole's attorney responded, "she [Cole] admits to the previous convictions."[1] The court questioned Cole directly regarding her first two convictions and she admitted, "Yeah, yes." The trial judge then questioned Cole about her third conviction on June 2, 1993. Cole responded, "probably."[2] The trial court accepted these responses as evidence of three prior convictions. The court then found her to be a repeater, pursuant to § 939.62, STATS., sentencing Cole to three years imprisonment. Cole appeals.

[1] On February 25, 1992, Cole was convicted of "attempting to obtain a prescription drug by fraud" and "obstructing an officer."

[2] On June 2, 1993, Cole was convicted of "attempting to obtain a prescription drug by fraud."

Cole asserts that the trial court erred because the prosecution failed to prove her prior convictions as required by § 973.12(1), STATS. Cole contends that the State's burden was not met: an attorney cannot admit prior convictions for a client, the word "probably" is not definitive, and the prosecution failed to include a copy of either of the judgments of conviction in the criminal complaint.

Chapter 939 and § 973.12, STATS., provide the law when interpreting a matter such as the one before this court. The application of a statute to a particular set of facts is a question of law which we review de novo. ***DOR v. Sentry Fin. Servs. Corp.,*** 161 Wis.2d 902, 910, 469 N.W.2d 235, 238 (Ct. App. 1991).

Section 939.62, STATS., provides the State with the opportunity to enhance sentences of habitual offenders. With that opportunity comes a burden, which is rather small. The most absolute and efficient way of proving an actor is a repeater is to include the judgments of past convictions with the criminal complaint, which may be obtained from the clerk of courts. This was never done by the prosecuting attorney. "We have previously observed that while prosecutors face difficult tasks, properly pleading and proving repeater allegations are not among them." ***State v. Koeppen***, 195 Wis.2d 117, 130, 536 N.W.2d 386, 391 (Ct. App. 1995).

Also, this court has repeatedly stated that attorneys may not admit to prior convictions on behalf of their clients. ***State v. Farr,*** 119 Wis.2d 651, 659, 350 N.W.2d 640, 645 (1984); ***Koeppen***, 195 Wis.2d at 127, 536 N.W.2d at 390.

Because Cole confirmed her attorney's admission by stating, "yeah, yes," we conclude that the admission of the first two convictions was sufficient.

To determine whether the State proved Cole's third misdemeanor conviction, this court must look at Cole's response at trial because the State once again did not include Cole's judgment of conviction in the criminal complaint. When the court questioned Cole regarding whether she was convicted a third time on June 2, 1993, she responded, "probably." This court addressed this problem in ***State v. Goldstein***, 182 Wis.2d 251, 260, 513 N.W.2d 631, 635 (Ct. App. 1994) (*citing* ***State v. Meyer***, 258 Wis. 326, 337, 46 N.W.2d 341, 346 (1951)), where we stated that "[t]he state must carry the burden to make good the charge in the essential particulars." Here, the State did nothing to remedy the equivocal response of Cole. The State failed to establish the third conviction.

Therefore, without proving this third offense, the State could not meet the three-offense requirement outlined in § 939.62, STATS. We conclude that the State did not meet the burden placed upon it by the repeater statutes.

Accordingly, we reverse the enhanced sentencing provisions of the judgment and the order denying postconviction relief. We commute Cole's sentence to the maximum permitted for the misdemeanor of obtaining prescription drugs by fraud without imposing the repeater statutes. We direct the trial court to enter an amended judgment in accord with this decision.

By the Court.—Judgment and order reversed and cause remanded with directions.

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