COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 1, 1996

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(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0921-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CORY C. MILLER,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Washburn County: WARREN E. WINTON, Judge. *Reversed and cause remanded.*

LaROCQUE, J. Cory Miller appeals his sentence for third offense operating a motor vehicle while intoxicated and the denial of his motions for postconviction relief. Miller claims that sentencing for third offense OWI under § 346.65(2)(c), STATS., requires the same proof of prior convictions as does § 973.12, STATS., the penalty enhancer for habitual criminality. Miller therefore argues that because he did not admit, and the State did not prove his prior OWI convictions, his sentence for third offense OWI was unlawful. This court concludes that § 346.65 requires proof or admission of prior convictions within the statutory period before sentencing pursuant to that section is lawful. Because that standard was not met in this case, the judgment and order are reversed and remanded.

The relevant facts are not in dispute. Miller was charged with multiple offenses including third offense OWI, contrary to §§ 346.63(1)(a) and 346.65(2)(c), STATS.[1] Pursuant to a plea agreement, the State dismissed all the charges except third offense OWI, to which Miller pled guilty. The State also dismissed several unrelated charges in other cases against Miller. The plea agreement called for a joint recommendation of ninety days in jail with Huber privileges and a fine of $1,062. At the plea and sentencing hearing, the parties recited to the court the terms of the plea agreement described above. The court then undertook the following plea colloquy:

> THE COURT: Case number 95-CT-18, the Defendant is charged with operating a motor vehicle while under the influence of an intoxicant in violation of 346.63(1)(a), third offense. To that charge, how do you now plead, Mr. Miller?
>
> THE DEFENDANT: Guilty.
>
> THE COURT: Upon that plea, the Court finds you guilty, and it is the judgment of the Court that you be fined the sum of $1,062, be committed to the county jail of this county for 90 days with Huber Law privileges; you take an alcohol or other drug assessment; your driving privileges are suspended for 24 months. The remaining counts in that case are dismissed.

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[1] The complaint alleged Miller did:

> COUNT I: Unlawfully operate a motor vehicle upon a public highway while under the influence of an intoxicant, to a degree which rendered him incapable of safely operating his motor vehicle, for a third offense within a ten (10) year period; (Said crime constitutes an Unclassified Traffic Misdemeanor punishable by a fine of not less than $600.00 nor more than $2,000.00 and imprisonment in the County Jail for not less than thirty (30) days nor more than twelve (12) months, or both) ....

The complaint was otherwise silent as to Miller's alleged prior OWI convictions.

Miller subsequently filed a motion for postconviction relief arguing that his sentence for third offense OWI was unlawful because he did not admit, and the State did not prove, his prior OWI convictions. The trial court denied his motion, concluding that Miller admitted the prior convictions by pleading guilty to the OWI charge contained in the complaint. Miller now appeals.

Miller asserts that proper sentencing under § 346.65(2)(c), STATS., requires the same evidentiary procedure as that outlined in § 973.12, STATS. He therefore claims that his prior OWI convictions must either be admitted or proved by the State before the trial court may properly convict him as a repeat OWI offender. *See* ***State v. Rachwal***, 159 Wis.2d 494, 465 N.W.2d 490 (1991); ***State v. Farr***, 119 Wis.2d 651, 350 N.W.2d 640 (1984). This issue presents a question of statutory interpretation that we review de novo. ***Johnson v. ABC Ins. Co.***, 193 Wis.2d 35, 43, 532 N.W.2d 130, 132-33 (1995).

As a preliminary matter, the court notes that the language of the two sections differs substantially. In particular, § 973.12, STATS., allows sentencing as a repeat offender only "[i]f the prior convictions are admitted by the defendant or proved by the state ...." By contrast, § 346.65, STATS., contains no explicit requirement. However, this court has previously held the "admit or prove" requirement applicable to a repeater-type statute containing no explicit language. In ***State v. Coolidge***, 173 Wis.2d 783, 496 N.W.2d 701 (Ct. App. 1993), we held that the admit or prove requirement of § 973.12 was applicable to § 161.48, STATS., the repeater statute for drug offenses. We held that "due process concerns" required such a result and that adherence to the admit or prove rule

> ensures that the defendant is sentenced upon accurate information and is properly informed about the nature of the plea and sentence. Through legislation and judicial interpretation, this state has provided methods to address these concerns which are of constitutional magnitude; the system must do its best to see that these concerns are attended to.

Id. at 796, 496 N.W.2d at 708. This court concludes that the same concerns apply here.

Miller's guilty plea admitted the facts contained in the complaint. *See* ***Rachwal***, 159 Wis.2d at 508, 465 N.W.2d at 496. However, the facts alleged in the complaint do not constitute sufficient evidence of the existence of Miller's prior convictions. Other than the general reference to "third offense within a ten (10) year period" in the charging portion of the complaint, the complaint alleges no further facts to support the repeater charge. The complaint cites no prior convictions and does not allege any dates for those convictions to support the allegation that Miller has twice within the last ten years been convicted of OWI.

Nor does the plea colloquy establish an admission of prior convictions. In contrast to the complaint in ***Rachwal***, this complaint contains no reference to specific offenses to which Miller's plea applied. Furthermore, in ***Rachwal*** the court questioned the defendant to ensure the defendant's understanding of the significance of the repeater allegation. Under such circumstances, the court held that "a plea of guilty or no contest to a criminal complaint containing a 'repeater provision' alleging a prior conviction constitutes ... an admission by the defendant of such prior conviction ...." ***Id***. at 512-13, 465 N.W.2d at 497. However, as we recognized in ***State v. Zimmerman***, 185 Wis.2d 549, 518 N.W.2d 303 (Ct. App. 1994), the ***Rachwal*** court "expressly recognized 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." ***Id***. at 555, 518 N.W.2d at 305 (citing ***Rachwal***, 159 Wis.2d at 512, 465 N.W.2d at 497). Because no such questioning occurred in this case, Miller's guilty plea cannot be considered an admission.

Finally, § 971.08, STATS., of the criminal procedure code establishes the method by which pleas of guilty or no contest are accomplished. The plea colloquy in this case demonstrates a plain violation of this section and of the minimum standards for entry of a knowing and voluntary plea as established by ***State v. Bangert***, 131 Wis.2d 246, 389 N.W.2d 12 (1986). This court recognizes that Miller is not challenging the voluntariness of his plea, and that he is presumably avoiding such a challenge in hopes of avoiding the potential that the original charges will be reinstated. Rather, he seeks to have the sentence reduced without facing the possibility of further penalties. However, due to the violation of the ***Bangert*** requirements as well as the failure to assure that Miller in fact understood and admitted to the repeater allegation, this court concludes that reversal is warranted because "it appears from the record that the real controversy has not been fully tried." *See* § 752.35, STATS. Because the issue

was not briefed, this court declines to address any double jeopardy issues that may arise upon remand.

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

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