COURT OF APPEALS
DECISION
DATED AND RELEASED

May 6, 1997

NOTICE

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No. 96-1717

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TERRENCE L. WEBB,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

CURLEY, J. Terrence L. Webb, *pro se*, appeals from a judgment of conviction after a jury found him guilty of four counts of second-degree recklessly

endangering safety as a party to a crime and as a habitual criminal.[1] He also appeals from an order denying his motions for postconviction relief. He raises essentially three issues for our review: (1) whether the trial court improperly sentenced him under the penalty enhancement provision of § 939.62, STATS, the habitual criminality statute; (2) whether the trial court erred when it allowed the State to file a new complaint charging him with additional offenses—Webb argues the additional offenses were based on prosecutorial vindictiveness; and (3) whether the trial court erred in denying his call for a new trial based on his ineffective assistance of counsel claim. Because we reject his arguments on these issues, we affirm.

I. BACKGROUND.

The State charged Webb with four counts of first-degree recklessly endangering safety while armed with a dangerous weapon, as a party to a crime and as a habitual criminal. He was also charged with one count of possession of a firearm by a felon. The criminal complaint alleged that on October 31, 1993, Webb was angry that vandals had damaged his car and that Webb and several friends went searching for the vandals. Webb, and possibly several of his friends, were carrying semi-automatic handguns. The group spotted the alleged vandals, two of whom were entering a parked car. Webb and the others ran towards the car and began firing the handguns at the car. The car was hit, but the two occupants sped off unharmed. A woman walking her dog with her sister heard the gunshots

[1] We note that the judgment of conviction does not reflect that Webb was convicted of the penalty enhancer for criminal habituality, although the sentencing record clearly reflects that he was sentenced under its provisions. Accordingly, on remittitur, we direct the clerk of the circuit court to correct the judgment of conviction so that it properly reflects Webb's conviction of § 939.62, STATS.

and dropped to the ground. One of the women was struck in the abdomen by a bullet. A man in a nearby house heard the gunshots outside. He recovered a bullet that penetrated the outside wall of his home and entered his living room. The police alleged that all of the bullets were found in "the line of fire," from which Webb and his accomplices had been firing. Each of the charged counts of recklessly endangering safety was connected to each of the victims discussed above.

A jury found Webb guilty of four counts of the lesser-included offense of second-degree recklessly endangering safety as a party to a crime. He was acquitted of the possession of a firearm by a felon charge and the "while armed" penalty enhancers.

Additionally, just prior to trial, Webb, his defense counsel, and the prosecutor signed a stipulation which read: "The undersigned parties hereby stipulate and agree that defendant, Terrence Webb, had been previously convicted of a felony, and was therefore a convicted felon on Oct. 31st, 1993." The stipulation did not mention the type of felony or the date of conviction for the felony.

Later, at Webb's sentencing hearing, his defense counsel made the following remarks:

> And originally the case was charged as two counts, and originally there was not an enhancer provision charge for habitual criminality. It was only after the first preliminary hearing in which the charges were dismissed that the State came back and issued additional charges and put on the additional enhancement factor for the habitual criminality.

The prosecutor then responded:

> Judge, if I could just put two things into context. When counsel explained how the additional counts came to be added, the court could have wrongly inferred that it was retaliatory for the dismissal. In fact when I issued the case, I was still optimistic and hopeful, turned out that was not realistic, but I was optimistic and hopeful that Mr. Webb would cooperate and name the other people who were still being sought by the Milwaukee Police Department. I only issued a couple of the many counts that clearly could be issued. Right on the file that -- I indicated on the file as follows, "Several more counts to be added if trial." And then I list just some of the counts, numerous recklessly endangering safeties while armed, felon in possession of firearm, second degree recklessly endangering safety while armed.
>
> I noted on the file also at that time that two more people in the car as well as the victim's sister may have been endangered, and that those were all additional counts that were potentially there. It's not at all usual to charge not all the counts, expecting a disposition short of trial when there are this many witnesses who were this clear about the defendant's role. It was in no way retaliatory. That would have happened whether or not there ever was a dismissal at prelim court and the case had to be reissued. The only question was if it was going to be a couple of pleas to a couple counts or whether a trial on multiple count information.

The trial court sentenced Webb and entered the judgment of conviction. Webb filed postconviction motions seeking a new trial. Among other things, Webb claimed that he had received ineffective assistance of counsel. The trial court rejected Webb's motions without holding any evidentiary hearings. Further facts are discussed with the relevant issues below.

II. ANALYSIS.

Webb first argues that he should not have been sentenced under the habitual criminality penalty enhancer, *see* § 939.62, STATS., because the State did not provide adequate proof of his prior conviction. We disagree.

Pursuant to § 939.62(1), STATS., a defendant may receive an enhanced penalty "[i]f the actor is a repeater" as defined by the statute and if "the present conviction is for any crime for which imprisonment may be imposed." As relevant to this case, a repeater is defined as an "actor … convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced." Section 939.62(2), STATS.

Proof of a defendant's repeater status is controlled by § 973.12(1), STATS., which provides, in relevant part: "If the prior convictions are admitted by the defendant … he or she shall be subject to sentence under s. 939.62 unless he or she establishes that he or she was pardoned on grounds of innocence for any crime necessary to constitute him or her a repeater or a persistent repeater."

Webb argues that his stipulation did not contain the date of his prior conviction and, therefore, the admission is insufficient to support his status as a repeater. Webb is correct that the stipulation he entered into with the prosecutor did not provide a date of his prior conviction. The prosecutor should have ensured that this relevant fact was part of any stipulation that was to serve as an admission of Webb's repeater status. Accordingly, we conclude that the stipulation was insufficient to serve as an admission under § 973.12(1), STATS.

Notwithstanding this deficiency, we conclude that evidence of the date of Webb's prior conviction was presented at the sentencing hearing through the presentence investigation report and that this was sufficient to form the basis of Webb's repeater status.

Section 973.12(1), STATS., also provides that: "An official report of the F.B.I. or any other governmental agency of the United States or of this or any

other state shall be prima facie evidence of any conviction of sentence therein reported."

In ***State v. Farr***, 119 Wis.2d 651, 350 N.W.2d 640 (1984), the Wisconsin Supreme Court intimated that if a presentence investigation report contained the date of conviction of the prior offense, the report would satisfy the definition of an "official report" under § 973.12(1). *See* ***Farr***, 119 Wis.2d at 657-58, 350 N.W.2d at 644-45.

The presentence investigation report is not part of the appellate record. The State notes, however, that the sentencing court "specifically recited the date of the defendant's prior conviction from the presentence investigation." The State is correct—the sentencing court found that on January 12, 1993, Webb received three years of probation for the felony offense of burglary. This date of conviction is well within the five-year period set forth in § 939.62(2), STATS., and makes Webb a repeater subject to the penalty enhancer.

While this court would prefer that the actual presentence investigation report was part of the appellate record, we must assume that the missing material supports the trial court's finding. *See, e.g.*, ***Duhame v. Duhame***, 154 Wis.2d 258, 269, 453 N.W.2d 149, 153 (Ct. App. 1989). Accordingly, although the State's record below on this issue is sloppy, it is sufficient to support Webb's sentencing as a habitual criminal under § 939.62, STATS.

Webb next argues that the State was guilty of prosecutorial vindictiveness. He asserts that the prosecutor assigned to this case added additional charges and criminal habituality penalty enhancers in order to punish him for rejecting a plea agreement. The record, however, does not reflect any prosecutorial vindictiveness.

The only reference in the record of charges being added to Webb's prosecution is found in the exchange occurring between Webb's counsel and the prosecutor during the sentencing hearing. There is a reference in this discussion to an original criminal complaint that contained fewer charges than those for which Webb was prosecuted in this case; this original complaint was dismissed and a new criminal complaint was filed. This original criminal complaint is not part of the record.

A prosecutor is invested with great discretion in determining whether to prosecute a suspected criminal. *See* ***Thompson v. State***, 61 Wis.2d 325, 328-29, 212 N.W.2d 109, 111 (1973) (citation omitted). It is an abuse of that discretion, however, "to charge when the evidence is clearly insufficient to support a conviction," or "to bring charges on counts of doubtful merit for the purpose of coercing a defendant to plead guilty to a less serious offense." ***Id***. at 330, 212 N.W.2d at 111; *see also* ***State ex rel. Unnamed Petitioners v. Connors***, 136 Wis.2d 118, 141, 401 N.W.2d 782, 792 (1987), *overruled on other grounds by,* ***State v. Unnamed Defendant***, 150 Wis.2d 352, 441 N.W.2d 696 (1989).

Here, there is no evidence that the State brought either additional charges unsupported by the evidence, or charges of doubtful merit in order to coerce Webb to plead guilty. The prosecutor stated that when he originally issued the charges he was "optimistic and hopeful that Mr. Webb would cooperate and name other people who were still being sought by the Milwaukee Police Department."

The prosecutor then stated that he originally "issued a couple of the many counts that clearly could be issued" in hopes that a trial could be avoided. When the original complaint was dismissed and Webb opted to go to trial, the

prosecutor charged Webb with all of the offenses he believed were clearly supported by the evidence. Based on this record, there is no evidence of prosecutorial vindictiveness or prosecutorial abuse of discretion. *See* ***Bordenkircher v. Hayes***, 434 U.S. 357, 358, 365 (1978) (holding that it is not a violation of federal Due Process Clause or Fourteenth Amendment when "a state prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged").

Finally, Webb argues that he received ineffective assistance of trial counsel. He alleges that his trial counsel was ineffective because: (1) counsel did not pursue a claim of prosecutorial vindictiveness in the charging decisions; and (2) counsel did not assert or pursue a claim of multiplicitous charges. The trial court rejected his arguments without an evidentiary hearing.

A trial court may properly deny a defendant's ineffective assistance of counsel claim without an evidentiary hearing "'if the record conclusively demonstrates that the defendant is not entitled to relief.'" ***State v. Bentley***, 201 Wis.2d 303, 309-10, 548 N.W.2d 50, 53 (1996) (citation omitted).

To succeed in an ineffective assistance of counsel claim, a defendant must satisfy the two-pronged test of ***Strickland v. Washington***, 466 U.S. 668 (1984). Thus, a defendant "must show that counsel's performance was both deficient and prejudicial." ***Bentley***, 201 Wis.2d at 312, 548 N.W.2d at 54.

Here, Webb did not show how counsel's performance was deficient or prejudicial under ***Strickland***. First, he was not prejudiced by his trial counsel's failure to raise the prosecutorial vindictiveness issue because, as noted, there is no evidence of prosecutorial vindictiveness in the record. Second, there was no

deficiency in his counsel's failure to pursue a claim of multiplicity in the State's charges. Counsel did move the trial court to dismiss based on a claim of multiplicity. The trial court rejected this motion, concluding that the four charges were not multiplicitous.

Webb has not shown how the trial court's ruling on his multiplicity claim was incorrect. Accordingly, Webb's counsel was not deficient for failing to pursue a futile claim. In short, the trial court properly denied Webb's claim of ineffective assistance of counsel.

For the foregoing reasons, we affirm the judgment of conviction and the order denying Webb's postconviction motions.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

No. 96-1717(D)

FINE, J. *(dissenting)*. When is a constitutional right not a constitutional right? When its exercise appears to both 1) cost government some money, and 2) inconvenience prosecutors, defense lawyers, and trial judges by making them do work that is consistent with their job-descriptions—actually try cases. Of all the rights guaranteed to criminal defendants by the federal and state constitutions, it is only the jury-trial right, in the context of plea bargaining, that the government may force a defendant to surrender. The majority decision says that this is OK in Wisconsin. I respectfully dissent.

The prosecutor in this case upped the ante on Terrence L. Webb only because Webb demanded what both the Sixth Amendment to the United States Constitution and Article I, section 7, of the Wisconsin Constitution says is his inviolate right: the right to a trial before a jury of his peers. There is no dispute about this. Majority at 4. The prosecutor piled on additional charges because Webb refused to plead guilty. There is also no dispute about this. ***Ibid.*** The prosecutor told the trial court that he wrote on his file: "Several more counts to be added if trial." ***Ibid.***

As the Majority points out, the United States Supreme Court—by a five-to-four vote—said that the United States Constitution permits a prosecutor to add more charges if a defendant rejects the prosecutor's proposed plea bargain. ***Bordenkircher v. Hayes***, 434 U.S. 357, 358, 365 (1978); Majority at 8. Upping the ante for defendants who insist on a trial, however, can extort guilty pleas from the innocent as well as the "guilty":

> Underlying many plea negotiations is the understanding—or threat—that if the defendant goes to trial and is convicted he will be dealt with more harshly than would be the case if he had pleaded guilty. An innocent defendant

> might be persuaded that the harsher sentence he must face if he is unable to prove his innocence at trial means that it is to his best interest to plead guilty despite his innocence.

U.S. NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE, COURTS 43 (1973), *quoted in* Ralph Adam Fine, *Plea Bargaining: An* Un*necessary Evil*, 70 MARQ. L. REV. 615, 622 (1987). Thus, a report issued thirty years ago by President Lyndon B. Johnson's Commission on Law Enforcement recognized that a prosecutor's threat to punish a defendant who does not plead guilty places "unacceptable burdens on the defendant who legitimately insists upon his right to trial." PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY 135 (1967), *quoted in* Fine, 70 MARQ. L. REV. at 621–622. I have discussed this problem at length in ESCAPE OF THE GUILTY at 59–84 (1986), which gives examples of innocent persons who wanted to plead guilty because of prosecutors' threats to up the ante.

The only reason given by the five-to-four majority in ***Hayes*** for permitting prosecutors to extort guilty pleas from defendants is that expediency demands it:

> While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable"—and permissible—"attribute of any legitimate system which tolerates and encourages the negotiation of pleas." It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

Hayes, 434 U.S. at 364 (internal citation omitted) (brackets by ***Hayes***). "But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in

particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." ***Stanley v. Illinois***, 405 U.S. 645, 656 (1972).

In other contexts, of course, the chilling of a defendant's rights would be unthinkable. Thus, ***United States v. Jackson***, 390 U.S. 570 (1968), struck down a statute that permitted the death penalty only if the defendant chose a jury trial because it "impose[d] an impermissible burden upon the assertion of a constitutional right"—the defendant's right to a trial by jury. ***Id.***, 390 U.S. at 583. ***Blackledge v. Perry***, 417 U.S. 21 (1974), held that it was unconstitutional to up the ante and charge a defendant with a felony following the defendant's exercise of his statutory right to *de novo* review of his misdemeanor conviction, when both the misdemeanor conviction and the felony charge were based on the same conduct. The following analysis is applicable here:

> A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial de novo in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such appeals—by "upping the ante" through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy—the State can insure that only the most hardy defendants will brave the hazards of a de novo trial.
>
> There is, of course, no evidence that the prosecutor in this case acted in bad faith or maliciously in seeking a felony indictment against Perry. The rationale of our judgment in the Pearce case [***North Carolina v. Pearce***, 395 U.S. 711 (1969)], however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather, we emphasized that "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally

> attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." 395 U.S. at 725. We think it clear that the same considerations apply here. A person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.

Id., 417 U.S. at 27–28. ***Pearce*** held that imposition of a more severe sentence following a new trial ordered after a successful appeal, unless there were circumstances that justified the more severe sentence, "would be a flagrant violation of the rights of the defendant" because a "defendant's exercise of a right of appeal must be free and unfettered," even though the right to an appeal is purely statutory. ***Pearce***, 395 U.S. at 724–726 (internal quotation marks and citations omitted). In my view, the legal system's enchantment with plea bargaining cannot trump a defendant's right under the Wisconsin Constitution to "a speedy public trial by an impartial jury." WIS. CONST. Art. I, § 7.

I cannot believe that those who wrote Wisconsin's constitution would have tolerated today's result; after all, the Wisconsin Supreme Court, a mere generation after that great document was written to secure all of our liberties, condemned plea bargaining as "a direct sale of justice." ***Wight v. Rindskopf***, 43 Wis. 344, 354 (1877). They knew, as ***Stanley*** recognized more than one-hundred years later, that "speed and efficiency" are not to be elevated over fundamental rights. ***Stanley***, 405 U.S. at 656. There is no more fundamental right in this country than the right to a trial by jury—a right secured by the sacrifice of millions of men, women, and children since the time the nobles at Runnymede secured it for themselves from King John in June of 1215. As inheritors and guardians of that sacred legacy, we must prefer what is right to what is expedient.

I would reverse Webb's conviction and remand for a new trial on the original charges.