**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

July 16, 1997

**NOTICE**

**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, STATS.**

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

**No. 96-2049-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**TERRY L. CLEVELAND,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Terry L. Cleveland appeals pro se from a trial court order denying his motion to reduce his sentence. We affirm the trial court.

In February 1995, Cleveland was convicted after a jury trial of battery to a correctional officer as a repeater contrary to §§ 940.20(1) and 939.62,

STATS. Immediately after the jury returned its guilty verdict,[1] the trial court proceeded to find Cleveland to be a repeater for purposes of sentence enhancement. The trial court relied upon allegations in the information that Cleveland was convicted in April 1989 in Marathon County of possession of a firearm by a convicted felon and other charges, and that he was in confinement under that sentence when he committed battery to a correctional officer. Cleveland's counsel stated that he did not dispute those facts. The prosecutor then suggested to the trial court that Cleveland should personally affirm the prior conviction before he could be deemed a repeater. At that point, Cleveland's counsel asserted Cleveland's right to remain silent and declined to permit him to admit the conviction. The trial court granted Cleveland the right to remain silent, ruled that counsel could affirm the prior conviction for him and found Cleveland to be a repeater.

At sentencing, the trial court had the benefit of a presentence investigation report (PSI) which set forth Cleveland's April 1989 conviction in Marathon County and the fact that he was serving the sentence for that conviction at the time of sentencing in this case. In sentencing Cleveland as a repeater, the court tracked the description of prior convictions set forth in the PSI.

> [W]hat kind of an offender did they put in this institution? Convicted felon possessing a firearm, battery, reckless use of a weapon, armed with a concealed weapon, resisting an officer, resisting an officer, attempted escape, ....

The trial court's recitation of Cleveland's criminal history tracks the history set forth in the PSI. Cleveland did not contest the court's recitation of his criminal record or offer any correction to the PSI's summary. We have no doubt

[1] The jury acquitted Cleveland of one count of battery to a different corrections officer.

that had the court misstated Cleveland's criminal record, Cleveland would have made his disagreement known to the court, having already taken the opportunity to object to the PSI's description of various conduct problems during his then-current prison sentence. The trial court imposed an enhanced sentence of eleven years.

Cleveland then sought a reduced sentence on the ground that the repeat offender enhancer was void because the requirement of § 973.12(1), STATS., for proving prior convictions was not met. The trial court acknowledged its error in ruling at the time the jury verdict came in that Cleveland was a repeater. Nevertheless, the court concluded that Cleveland was a repeater because the PSI substantiated Cleveland's prior conviction and incarceration dates.

Section 973.12(1), STATS., governs proof of prior convictions for purposes of a repeater enhancement at sentencing. The prior conviction(s) may be admitted by the defendant or proved by the State. *See* ***id.*** An official report of a governmental agency is prima facie evidence of any conviction reported therein. *See* ***id.*** Whether Cleveland's prior convictions were proved as required by § 973.12(1) presents a question of law which we decide independently of the trial court. *See* ***State v. Koeppen,*** 195 Wis.2d 117, 126, 536 N.W.2d 386, 389-90 (Ct. App. 1995).

We conclude that there was legally adequate proof of Cleveland's prior conviction. In ***State v. Goldstein,*** 182 Wis.2d 251, 513 N.W.2d 631 (Ct. App. 1994), we held that a PSI containing the date of a prior conviction qualifies as an "official report" which may be used to prove a defendant's prior conviction. *See* ***id.*** at 259, 513 N.W.2d at 635; *see also* ***State v. Caldwell,*** 154 Wis.2d 683, 693-95, 454 N.W.2d 13, 17-18 (Ct. App. 1990). The PSI prepared for Cleveland's sentencing states the date of his 1989 felony conviction and thus, under ***Goldstein,***

it constitutes adequate proof of his prior conviction for purposes of sentencing enhancement. It is clear that the trial court reviewed and relied upon Cleveland's PSI in sentencing him as a repeater. *See* ***Caldwell,*** 154 Wis.2d at 695, 454 N.W.2d at 18. Cleveland offered no correction to the prior conviction reported in the report. We are satisfied that the requirements of § 973.12(1), STATS., were satisfied. Cleveland's repeater enhancer is valid.

Cleveland makes much of the fact that the trial court admitted error in the manner in which it handled proof of Cleveland's prior conviction after the jury verdicts were returned. Section 973.12(1), STATS., requires proof of a prior conviction at sentencing. As we have held, such proof was presented at sentencing. Accordingly, the trial court's handling of Cleveland's repeater status after the jury verdicts were returned is not relevant to Cleveland's ultimate sentence as a repeater.

Cleveland also appears to argue that there was inadequate proof that he was a repeater because the record does not reveal that he was convicted of a felony in "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), STATS. We have already held that the PSI was adequate proof of Cleveland's prior conviction. The PSI, the details of which Cleveland did not dispute at sentencing, indicates that Cleveland was sentenced in April 1989 and was under that sentence at the time he committed the battery for which he was convicted. Under § 939.62(2), the time spent incarcerated is excluded from the five-year period. Therefore, the April 1989

conviction is a conviction which would make Cleveland a repeater under the applicable statute.[2]

*By the Court.*—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[2] In his reply brief, Cleveland confirms that his inquiries reveal that the April 4, 1989, conviction date is correct for the prior conviction which formed the basis for the repeater enhancement. This date appears in the PSI.