COURT OF APPEALS DECISION DATED AND RELEASED

DECEMBER 3, 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

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No. 96-2186-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KIM D. TESKY,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Lincoln County: J. MICHAEL NOLAN, Judge. *Reversed and cause remanded with directions.*

LaROCQUE, J. Kim D. Tesky appeals the application of the penalty enhancer for habitual criminality, § 939.62, STATS., to his sentence on a conviction for possession of marijuana and the subsequent denial of his motions for postconviction relief. Tesky argues that the portion of his sentence attributable to that section is void because he did not admit, and the State did not prove, any prior convictions. This court agrees and therefore reverses the repeater component of Tesky's sentence and commutes the sentence to the maximum provided on the underlying charge.

The relevant facts are not in dispute. Pursuant to a plea agreement, Tesky pled guilty to one count of possession of a substance containing tetrahydrocannabinols contrary to § 161.41(3r), STATS. Tesky's complaint alleged the following:

> COUNT TWO: On January 22, 1994 in the City of Merrill, Lincoln County, Wisconsin, the defendant did unlawfully possess tetrahydrocannabinols listed at Sec. 161.14(4)(t), Wisconsin Statutes, to-wit: the defendant did unlawfully possess marijuana in a bag, said marijuana containing tetrahydrocannabinols contrary to Sec. 161.41(3r) and 939.62(1), Wisconsin Statutes.
>
> ....
>
> POSSIBLE PENALTY AS TO COUNT 2:
>
> May be fined not more than $1,000 or imprisoned for not more than three years or both. (Habitual criminal)

The complaint was otherwise silent as to the factual basis for the repeater allegation. No prior felony or misdemeanor convictions were alleged.

At the plea hearing, the court questioned Tesky regarding his understanding of the consequences of his guilty plea. The plea colloquy included the following exchange regarding the repeater allegation:

> [THE COURT]: Mr. Tesky, what is your plea to a charge that on January 22nd, 1994, in the City of Merrill ... you unlawfully possessed marijuana containing the ingredient tetrahydrocannabinols? If convicted of this offense you may be fined not more than a thousand dollars or imprisoned not more than three years or both.
>
> The reason you can be imprisoned up to three years is because they claim that, due to prior convictions, you are in a status known as a habitual criminal offender in the

State of Wisconsin. Understanding that, what is your plea?

[MR. TESKY]: Guilty, Your Honor.

The State did not present any evidence of Tesky's prior convictions, nor did the court question Tesky regarding those convictions.

At sentencing, the court ordered Tesky incarcerated for a period not to exceed three years. This sentence included the statutory maximum of six months under § 161.41(3r), STATS., with the remainder attributable to § 939.62, STATS.[1] After sentencing, Tesky filed a motion for postconviction relief seeking that part of his sentence attributable to the repeater provision be commuted. Tesky argued that he did not admit, and the State did not prove, any particular prior convictions to support the allegation that he was a habitual criminal. *See* § 973.12(1), STATS. The court denied the motion, and Tesky appeals.

It is undisputed that Tesky's complaint failed to allege any prior convictions. It is also undisputed that the State failed to present any evidence of

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[1] Section 939.62, STATS., states in part:

939.62 Increased penalty for habitual criminality.
(1) If the actor is a repeater, as that term is defined in sub. (2), and the present conviction is for any crime for which imprisonment may be imposed ... the maximum term of imprisonment prescribed by law for that crime may be increased as follows:
(a) A maximum term of one year or less may be increased to not more than 3 years.
....
(2) The actor is a repeater if the actor was convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced, or if the actor was convicted of a misdemeanor on 3 separate occasions during that same period, which convictions remain of record and unreversed. It is immaterial that the sentence was stayed, withheld or suspended, or that the actor was pardoned, unless such pardon was granted on the ground of innocence. In computing the preceding 5-year period, time which the actor spent in actual confinement serving a criminal sentence shall be excluded.

any prior convictions at any time in this proceeding prior to taking Tesky's plea. Citing ***State v. Rachwal***, 159 Wis.2d 494, 465 N.W.2d 490 (1991), the State argues that Tesky admitted his repeater status by pleading guilty to the charge contained in the complaint. It does not contend that it proved Tesky's repeater status. The application of the repeater statute to an undisputed set of facts presents a question of law that this court reviews de novo. ***State v. Zimmerman***, 185 Wis.2d 549, 554, 518 N.W.2d 303, 304 (Ct. App. 1994). This court concludes that Tesky did not admit sufficient facts to establish his repeater status.

Our supreme court in ***State v. Farr***, 119 Wis.2d 651, 659, 350 N.W.2d 640, 645 (1984), stated that an "admission [of repeater status] may not by statute be inferred ... but rather, must be a direct and specific admission by the defendant." However, in ***Rachwal***, the court stated that "***Farr***'s prescription for determining an admission is not necessarily exclusive." ***Id.*** at 508, 465 N.W.2d at 496. The court went on to find an admission in that case where the defendant pled no contest to a criminal complaint containing a repeater provision that specifically alleged Rachwal's prior convictions. The court held that Rachwal's plea constituted an admission of every fact contained in the complaint and, since the complaint included allegations of prior convictions within the statutory period, admission of those convictions constituted admissions of his repeater status.[2] ***Id***. at 512, 465 N.W.2d at 497.

This case is not governed by ***Rachwal***, where the criminal complaint explicitly alleged the prior convictions that created the repeater status. Here, in contrast, the criminal complaint was completely silent as to any prior convictions. The mere allegation that Tesky was a "Habitual criminal" under § 939.62(1), STATS. is insufficient. For a guilty or no contest plea to constitute an admission under § 939.62(2), STATS., the complaint must allege specific prior convictions within the statutory period. ***Rachwal***, 159 Wis.2d at 512-13, 465 N.W.2d at 497.

This court also concludes that the plea colloquy does not constitute a sufficient admission. The circuit court remarked to Tesky that "[the State]

[2] The court also noted that the circumstances described in ***State v. Rachwal***, 159 Wis.2d 494, 513, 465 N.W.2d 490, 497 (1991), "approach the absolute bare minimum necessary for a valid admission ...."

claim[s] that, due to prior convictions, you are in a status known as a habitual criminal offender" and that therefore the potential penalty for the relevant charge was increased. Tesky's plea in response to this statement demonstrates his understanding of the significance of the repeater allegation. Absent any specific allegations, it does not constitute the "direct and specific" admission required. ***Farr***, 119 Wis.2d at 659, 350 N.W.2d at 645. The point of the specificity requirement is to assure a knowing admission.

The State's argument that Tesky admitted his repeater status in his plea questionnaire fails for the same reason. In that document, Tesky acknowledged that he would plead guilty to "possession of marijuana as a repeater" and that the possible penalty was a fine of $1,000 and/or three years in prison. While this document demonstrates Tesky's understanding of the significance of his plea, it does not constitute the direct and specific admission required by § 939.62, STATS.

This court rejects the State's request for remand for resentencing pursuant to § 161.48(2), STATS. In ***State v. Coolidge***, 173 Wis.2d 783, 496 N.W.2d 701 (Ct. App. 1993), this court held that § 161.48, STATS., mandates the same "admit or prove" requirement expressed in § 973.12(1), STATS. Thus, this court concludes that Tesky did not admit, and the State did not prove, Tesky's repeater status for purposes of either §§ 939.62 or 161.48, STATS. Accordingly, this court reverses the repeater component of Tesky's sentence and commutes the sentence to the maximum on the underlying charge. *See* ***State v. Zimmerman***, 185 Wis.2d 549, 559, 518 N.W.2d 303, 306 (Ct. App. 1994) (citations omitted); § 973.13, STATS. Upon remand, the circuit court is directed to enter an amended judgment accordingly.

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

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