COURT OF APPEALS
DECISION
DATED AND RELEASED

April 10, 1997

NOTICE

No. 96-2901-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN L. GRIFFIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed.*

EICH, C.J.[1] John L. Griffin appeals from a judgment convicting him of misdemeanor disorderly conduct and obstructing an officer and from an order denying his motion for postconviction relief. His sentences on the charges included repeater enhancements on each, and he argues on appeal that the enhancements were improper because they were the result of the government's

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

dismissal of the charges, in order to refile them with amended repeater allegations, on the eve of trial.

When initially charged, Griffin entered a plea of not guilty and requested a speedy trial. Six days before the scheduled trial, the district attorney, apparently having discovered an error in the repeater-enhancement allegations in the complaint, orally moved the court for dismissal without prejudice in order to be able to refile the charges with the correct repeater information. The trial court granted the motion, dismissing the charge without prejudice and ordering Griffin's bond continued for seventy-two hours to permit the district attorney to refile the charges. A new complaint was filed the following day and Griffin moved to dismiss the repeater allegations, arguing that the post-plea dismissal and resistance of the charges was prohibited by § 973.12(1), STATS., and cases decided thereunder. The statute provides as follows:

> Whenever a person charged with a crime will be a repeater … if convicted, any applicable prior convictions may be alleged in the complaint … or amendments so alleging *at any time before or at arraignment, and before acceptance of any plea*….

The trial court denied the motion, discussing the applicable law—which we also discuss in some detail below—and then, after pointing out how the repeater-charge mistake was the result of an inadvertent and understandable error in the prosecutor's office, stating:

> It does not seem to me that the State is asking anything other than to be given the opportunity to correctly charge the defendant. And I do not see how the defendant can be prejudiced. This Complaint is going to be dismissed. His plea will be no longer, a new charge apparently will be made by the State, at which time he will be given the opportunity to plead to that charge.

Griffin argues that the plain language of § 973.12(1), STATS., limits the State's authority to allege prior convictions "to the time period prior to the

accused's entry of a plea to the complaint," and he refers us to ***State v. Martin***, 162 Wis.2d 883, 891, 900, 470 N.W.2d 900, 903, 907 (1991), as conclusive on the issue. In ***Martin*** the supreme court held that, under the statute, the charging document may not be amended to assert a repeater allegation "after a defendant has pleaded not guilty to the underlying charges at arraignment." ***Id***.

The State disagrees. It says we should limit ***Martin*** to its facts, pointing out that the issue in that case was whether the *charging document could be amended* to add a repeater allegation, whereas the issue here is whether the trial court properly allowed the state to *dismiss and refile a charging document already containing repeater allegations* in order to permit an error in those allegations to be corrected. And it points to our decision in ***State v. Larsen,*** 177 Wis.2d 835, 503 N.W.2d 359 (Ct. App. 1993), as a case much more on point.

In ***Larsen***, the misdemeanor complaint did not contain any repeater allegations and the court commissioner entered a plea of not guilty on Larsen's behalf at the arraignment. When the discussion turned to bail, Larsen revealed that he had previously been in prison and the prosecutor stated that she would, in all likelihood, be dismissing the charge and reissuing it to add repeater charges. ***Id***. at 837, 503 N.W.2d at 361. The following day, the prosecutor did just that, informing the commissioner that Larsen's last name had been misspelled in office documents ("-s*o*n" instead of "-s*e*n"), causing them to miss his criminal record. Over Larsen's objection, which cited ***Martin***, the commissioner granted the motion. On appeal, we distinguished ***Martin***, calling the difference between *amending* the complaint and *moving to dismiss and refile* a "subtle, but important,

distinction"—pointing out that the supreme court's concerns about "sandbagging" a defendant, which it discussed at some length in ***Martin***, 162 Wis.2d at 900-02, 470 N.W.2d at 907, were not present because, with the new complaint, "the slate has been wiped clean …. and [he] has been permitted to fully consider his plea options and to enter a fresh plea with full awareness of the possible punishment." ***Larsen***, 177 Wis.2d at 839-40, 503 N.W.2d at 362. In such a situation, we considered the issue to be whether the trial court properly exercised its discretion in granting the motion,[2] and concluded that it had. ***Id***. at 841, 503 N.W.2d at 362.

"We will not reverse a discretionary determination by the trial court if the record shows that discretion was exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). The facts facing the trial court in this case are almost identical to those facing the trial court in ***Larsen***. There, as here, the absence of repeater allegations in the initial complaint were the result of a clerical error—a misspelling of Larsen's name—in the investigatory process in the prosecutor's office. ***Larsen***, 177 Wis.2d at 840-41, 503 N.W.2d at 362. In upholding the trial court's without-prejudice dismissal of the charges, we said:

> While unfortunate, this mistake was an understandable and excusable human error. The ability of the prosecutor to properly charge a defendant as a repeat offender should not turn on such a common human failing if the defendant is not prejudiced thereby.... Larsen was not prejudiced by the dismissal and filing of the new complaint [because he had the opportunity to consider his options and enter a "fresh plea" knowing of the repeater allegations].

Id.

[2] As we said in ***State v. Larsen***, 177 Wis.2d 835, 503 N.W.2d 359 (Ct. App. 1993), while Wisconsin prosecutors have wide charging discretion, that discretion is "subject to the independent authority of the trial court to grant or refuse a motion to dismiss." ***Id.*** at 840, 503 N.W.2d at 362 (citing ***State v. Kenyon***, 85 Wis.2d 36, 45, 270 N.W.2d 160, 164 (1978)).

In this case the closed-case card file in the district attorney's office contained an error: Griffin's card showed two charges, a trial and a sentence, but failed to note that he had been acquitted of one of them at trial. As refiled, the complaint alleged another conviction.

Griffin claims he was prejudiced by the refiling because the district attorney waited until several days before the scheduled trial to make the request and, even though the State agreed to trial on the scheduled date, the court postponed it. He fails to state, however, how the delay—which he does not quantify—was detrimental to his ability to defend the charges. He also suggests ***Larsen*** is distinguishable because in that case the court commissioner "mechanistic[ally] invo[ked] a plea on [the defendant's] behalf," whereas in this case he "personally entered a plea to the original charge." We do not see that as a distinction. Our opinion in ***Larsen*** carefully analyzed ***Martin*** and explained why a begin-all-over-again dismissal and refiling did not raise the concerns expressed by the ***Martin*** court over an amendment to an already-pleaded-to charging document.

We conclude, therefore, that neither § 973.12, STATS., nor the supreme court's decision in ***Martin*** compel the result Griffin urges in this case. We are satisfied that this is a ***Larsen*** situation and that the trial court plainly exercised its discretion in granting the State's motion; where, as here, the resulting decision is one a reasonable judge could reach, we may not overturn it. ***Prahl***, 142 Wis.2d at 667, 420 N.W.2d at 376.

By the Court.–Judgment and order affirmed.

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