COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0497-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

FREDERICK B. HARVEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Reversed and cause remanded with directions.*

¶1 PETERSON, J.[1] Frederick Harvey appeals the denial of his postconviction motion challenging his sentence under the repeater statute. *See*

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

WIS. STAT. § 973.12. Harvey claims that because he never admitted his repeater status as required by statute and case law, his sentence of two years was in excess of the maximum penalty for misdemeanor battery. This court agrees and reverses.

BACKGROUND

¶2 Harvey was originally charged with one count of aggravated battery, a class D felony. The complaint alleged that Harvey had been convicted of one felony within five years, thus subjecting Harvey to an enhanced penalty under WIS. STAT. § 939.62. At his initial appearance, the complaint was not read and no mention was made of the previous felony conviction alleged in the complaint.

¶3 A preliminary hearing was held later, and the court found probable cause to believe Harvey committed a felony. The State filed an information in open court, charging one count of aggravated battery in violation of WIS. STAT. § 940.19(3). The court, however, did not read the information aloud and did not mention either the repeater allegation or the maximum penalty contained in the information. At his arraignment, Harvey stood mute and the court entered a not guilty plea. There was no mention of his repeater status or the possible penalty.

¶4 After Harvey entered into a plea agreement with the State, the information was amended to misdemeanor battery, and the State recommended a sentence of three years. A plea questionnaire was submitted to the court. The questionnaire stated that Harvey was pleading no contest to "misdemeanor battery with repeater." Before accepting Harvey's no contest plea, the court conducted a colloquy. However, the court did not question Harvey about the past conviction alleged in the information or its potential effect on the maximum penalty. The

court accepted Harvey's plea, found him guilty, and sentenced him to the maximum three years in prison.[2]

DISCUSSION

¶5 WISCONSIN STAT. § 939.62 allows for increased penalties for repeat criminal offenders. The statute delineates how a criminal defendant achieves the status of a repeat offender for the purposes of enhancing maximum sentences. WISCONSIN STAT. § 973.12(1) articulates the requirements for the sentencing of a repeater and requires that the defendant admit or the State prove the prior convictions that serve as the basis for the repeater allegation. Here, because the State did not prove the repeater allegation, the issue is whether Harvey admitted the repeater allegation. The application of § 973.12(1) to undisputed facts presents a question of law that this court reviews independently. *See* ***State v. Liebnitz***, 231 Wis. 2d 272, 283, 603 N.W.2d 208 (1999).

¶6 The basic rule is that the admission of a repeater allegation may not "be inferred nor made by defendant's attorney, but rather, must be a direct and specific admission by the defendant." *See* ***State v. Farr***, 119 Wis. 2d 651, 659, 350 N.W. 2d 640 (1984). Application of this rule has spawned numerous appeals. The two recent cases guide the analysis here.

[2] Harvey's brief contains several disparaging references to the trial judge's actions. For example, it states that the judge wanted to "jump" right to arraigning Harvey. After Harvey's plea was accepted, his brief states that "[w]ithout missing a beat" the court began sentencing. The Rules of Professional Conduct for Attorneys state that "[a] lawyer should demonstrate respect for the legal system and those who serve it, including judges …." SCR 20 Preamble: Rules of Professional Conduct For Attorneys (2000). These remarks do not demonstrate respect for those who serve the legal system. They also detract from the persuasiveness of an appellate argument.

¶7 In ***State v. Rachwal***, 159 Wis. 2d 494, 465 N.W.2d 490 (1991), the judge failed to directly ask the defendant whether his prior offense existed, and the defendant never specifically acknowledged the offense. However, the conviction was upheld because, during the plea colloquy, the judge specifically drew the defendant's attention to the repeater allegation in the complaint and advised the defendant of the increased penalty he would face under the repeater provision. The defendant said he understood. *See* ***id.*** at 502-03. The supreme court concluded that the defendant admitted the repeater allegation, but observed that the circumstances "approach the absolute bare minimum …." ***Id.*** at 513. It further warned that, "[i]n the future, it may be that his plea of guilty or no contest would not constitute an admission, *e.g.*, if the judge does not conduct the questioning as did the judge here so as to ascertain the defendant's understanding of the meaning and potential consequences of such a plea." ***Id.*** at 512.

¶8 In ***Liebnitz***, 231 Wis. 2d at 288, the supreme court held that based on the totality of the record, the defendant's plea was an admission for the purposes of fulfilling the requirement of the statute. The defendant entered into a plea agreement that included a sentence recommendation that could only be achieved by application of the repeater statute. On appeal, the defendant argued that he had not admitted his prior convictions because the circuit judge did not directly ask him whether he had been convicted of the crimes set forth in the repeater allegations. *See* ***id.*** at 284. The court rejected the argument based on the totality of the record. At the initial appearance, the judge read each count in the complaint. After each count, the judge explained that the complaint alleged that the defendant was a repeater because he had been convicted of a felony. With each explanation, the judge specified the felony and the date of conviction, and said that, as a result, the penalty could be increased by six years, to a total

maximum of eight years. After each explanation, the court asked the defendant if he understood and he said he did. *See* ***id.*** at 277-78. In two later hearings, the defendant affirmed that there was a factual basis for the charges found in the complaint.

¶9 Here, the record does not reveal that the trial court ever drew Harvey's attention to the repeater allegation or explained to him the effect of the allegation on the maximum penalty. In ***Rachwal***, during the plea colloquy, the judge specifically drew the defendant's attention to the repeater provision and its effect on the penalty. *See* ***id.*** at 502-03. In ***Liebnitz***, the defendant had the complaint read to him at the initial appearance, including the prior convictions and their effect on the penalties that he faced. *See* ***id.*** at 277-78. As a result, even the "absolute bare minimum" requirements of ***Rachwal*** and ***Liebnitz*** have not been met.

¶10 The State argues that the plea questionnaire represents an admission that Harvey knew of the repeater allegation and the maximum penalty that would result. The plea questionnaire Harvey signed acknowledged that the original felony battery charge would be amended to "misdemeanor battery as a repeater" and the maximum penalty would be three years. The plea questionnaire also indicated that Harvey had read and understood the consequences of the charge.

¶11 However, the plea questionnaire here cannot replace the requirement of a direct and specific admission by Harvey. To begin with, direct questioning on the record to determine "express understanding that the repeater allegations increased the possible penalties" has been called the "touchstone of the admission component" of the repeater enhancer statute. ***State v. Goldstein***, 182 Wis. 2d 251, 256-57, 513 N.W.2d 631 (Ct. App. 1994). There was no direct questioning here.

Further, even assuming that a questionnaire could suffice, this particular questionnaire has two critical deficiencies. First, it does not specify the prior felony conviction. Second, it does not explain the effect of that conviction on the maximum penalty for the misdemeanor battery.

¶12 The State also argues that defense counsel's recommendation that Harvey receive a two-year sentence was an admission to his repeater status. It is well established, however, that a repeater admission may not be made by a defendant's attorney. *See* ***Farr***, 119 Wis. 2d at 659. The admission must come directly from the defendant. *See* ***id.***

¶13 The State points out that Harvey never denied that he was a repeater. Citing ***Rachwal,*** the State claims Harvey waived his right to challenge his sentence. ***Rachwal***, however, is not a waiver case. "Rather, it is an *admission* case, satisfying one of the alternative forms of proof contemplated under the statute." ***Goldstein***, 182 Wis. 2d at 255-56. A defendant does not waive the right to challenge the State's failure to prove a repeater enhancer by sitting silently at the sentencing hearing. *See* ***id.*** at 255.

¶14 The State makes a compelling equitable argument based on the circumstances of this case. It asserts that this court

> should hold that when a defendant never disputes the State's allegation that he is a repeater under Section 939.62, Stats., bargains for a sentence enhanced under Sections 939.62 and 973.12, Stats., pleads no contest to the crime at issue, and receives the sentence contemplated in the plea agreement, he cannot later complain about that sentence.

This is almost identical to the argument certified by the court of appeals to the supreme court in ***Liebnitz***, 231 Wis. 2d at 283. Unfortunately, the court did not

address the issue as phrased by the court of appeals. Instead, it employed a traditional analysis centered on the requirement for a "specific and direct admission." The result urged by the State would require a modification in the case law. As reasonable as the argument may be, this court may not overrule or modify prior case law. Only the supreme court may do that. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W. 2d 246 (1997).

¶15 A related argument might also question whether re-sentencing without the repeater enhancement is the appropriate remedy here. Admission to repeater allegations must be made at or before the sentencing hearing. *Cf.* ***State v. Koeppen***, 195 Wis. 2d 117, 130, 536 N.W.2d 386 (1995). If the repeater is not established and the sentence is reversed on appeal, the cases require re-sentencing without the repeater. *See* ***State v. Robles***, 157 Wis. 2d 55, 64, 458 N.W.2d 818 (Ct. App. 1990). But if the repeater could have originally been established at sentencing, why can it not be proved at re-sentencing? There is no double jeopardy or due process violation since "[a] charge of being a repeater is not a charge of a crime and, if proved, only renders the defendant eligible for an increase in penalty for the crime of which he is convicted." ***Farr***, 119 Wis. 2d at 661 (quoting ***Block v. State***, 41 Wis. 2d 205, 212, 163 N.W. 2d 196 (1968)).

¶16 Perhaps the remedy should be withdrawal of the plea rather than re-sentencing. In cases without a repeater, if a court fails to secure a defendant's understanding of the maximum penalty, the remedy is plea withdrawal rather than re-sentencing. *See* ***State v. Bangert***, 131 Wis. 2d 246, 256, 389 N.W.2d 12 (1986). Why should a repeater case be any different?

¶17 Furthermore, in non-repeater cases, the ultimate question is whether the defendant knowingly, voluntarily, and intelligently entered the plea. *See* ***id.*** at

267-68. The defendant bears the initial burden of establishing a prima facie showing that the judge did not follow the correct procedure and that the defendant did not understand the information the court should have provided. The burden then shifts to the State to prove that the defendant nevertheless understood the information. *See* ***State v. Byrge***, 2000 WI 101 ¶59. Relief is not automatic just because a judge forgot to ask a magic question. Likewise, in a repeater case, should not the ultimate question be whether the defendant really understood? If the court neglects to properly question a defendant, but the defendant nevertheless understands, what is the logic in allowing the defendant to escape the consequences of the repeater sentence?

¶18 As previously stated, however, under the present state of the law, a direct and specific admission of the repeater allegation is required. Even employing the ***Liebnitz*** totality-of-the-record test, Harvey did not make a direct and specific admission. Therefore, he must be re-sentenced without the repeater enhancement.

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

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.