

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 27, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP224

Cir. Ct. No. 2004CM8813

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CINDY LOU KUSISTO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed.*

¶1 FINE, J. Cindy Lou Kusisto appeals from a judgment entered on her plea-bargained guilty pleas convicting her of prostitution, *see* WIS. STAT. § 944.30(1), bail jumping, *see* WIS. STAT. § 946.49(1)(a), and unlawful possession of tetrahydrocannabinols, *see* WIS. STAT. § 961.41(3g)(e), all as an habitual criminal, *see* WIS. STAT. § 939.62. She also appeals from the order denying her

motion for postconviction relief. She claims that she did not admit and the State did not prove the crimes underlying the habitual-criminality enhancers, and, accordingly, that she is entitled to have the enhanced parts of her sentences commuted pursuant to WIS. STAT. § 973.13 (“In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings.”). We affirm.

¶2 This appeal resolves on the clear language of the material statutes as applied to facts that no one disputes. Thus, our review is *de novo*. See *State v. Fields*, 2001 WI App 297, ¶5, 249 Wis. 2d 292, 296, 638 N.W.2d 897, 899.

¶3 WISCONSIN STAT. § 939.62 permits the imposition of enhanced penalties if, as material to this appeal, the defendant “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.” Sec. 939.62(1). Section 939.62(2) defines a “repeater” as a person who “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.”

¶4 WISCONSIN STAT. § 973.12(1) says how repeater status for sentencing purposes is to be shown:

Whenever a person charged with a crime will be a repeater or a persistent repeater under s. 939.62 if convicted, any applicable prior convictions may be alleged in the complaint, indictment or information or amendments so alleging at any time before or at arraignment, and before acceptance of any plea. ... If the prior convictions are admitted by the defendant or proved by the state, 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. An official report ... of this ... state shall be prima facie evidence of any conviction or sentence therein reported.

Thus, two things must happen before a person may be sentenced as a repeater: (1) the “applicable prior convictions” must be alleged “before or at arraignment, and before acceptance of any plea,” and (2) the defendant must admit the prior convictions *or* the State must prove them. Further, proof of the prior convictions may be shown by “[a]n official report ... of this ... state.” The two conditions were met here. We do not consider whether Kusisto admitted to the crimes underlying her repeater status because the State proved them. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed); *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989) (cases should be decided on the “narrowest possible ground”).

¶5 First, the criminal complaint filed by the State alleged that Kusisto was a repeater as defined by the statute. Second, attached to the criminal complaint are certified copies of judgments convicting Kusisto of misdemeanors: one on April 10, 2001; two on July 1, 2003; and one on May 24, 2004. Kusisto committed the crimes in the present case on November 8, 2004, and she was thus convicted of underlying “repeater” crimes “on 3 separate occasions” within the applicable five-year period. Kusisto nevertheless argues that the State did not prove the underlying crimes because the prosecutor at sentencing did not “address the specific prior convictions it was relying upon as a basis for the habitual enhancer,” and also did not “reference any documents” to satisfy its burden of proof. We disagree.

¶6 The criminal complaint and its allegations and attachments were before the trial court. Indeed, the trial court specifically referred to the criminal complaint when it asked Kusisto’s trial lawyer whether Kusisto would “stipulate to the facts outlined in each of the criminal complaints for purposes of the pleas entered.”¹ Also, in reciting the terms of the plea bargain presented to it, the trial court specifically noted that its sentences on the charges to which Kusisto agreed to plead guilty “will be with the enhancers that apply.” In its sentencing argument, the State also specifically referenced the convictions evidenced by the certified copies of the 2001, 2003, and 2004 judgments, albeit not in the specific context of their applicability to the habitual-criminality enhancers. Further, the trial court noted in passing sentence that it had “read through all the files and the complaints.”

¶7 WISCONSIN STAT. § 889.07 permits receipt into evidence of certified copies of “original records, papers and files in or concerning any action or proceeding of any nature or description in any court of the state.” Additionally, WIS. STAT. RULE 909.02(4) designates as self-authenticating certified copies of any “official record or report or entry therein.” The certified copies of Kusisto’s 2001, 2003, and 2004 judgments of convictions were properly received as the proof required by WIS. STAT. § 973.12. *See Fields*, 2001 WI App 297, ¶8, 249 Wis. 2d at 298, 638 N.W.2d at 900 (pre-plea submission of certified copies of judgment of convictions cured defect in the information in not specifying the specific crimes that underlay the charging document’s allegation that the defendant was a repeater). Kusisto’s contention that the underlying convictions

¹ There were other charges that are not material to this appeal, which concerns only the criminal complaint referenced in the main body of this opinion.

must also be either read aloud or referred-to specifically during sentencing is without merit.

By the Court.—Judgment and order affirmed.

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

