**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**August 21, 2007**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2006AP1106** **Cir. Ct. No. 1997CF975624A**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**EZRA CHARLES MARTIN, JR.,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County: JOSEPH R. WALL, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Ezra Charles Martin, Jr., appeals from an order denying his postconviction motion for resentencing. The issues are whether the State failed to properly charge and prove Martin's repeater status to support the trial court's imposition of an enhanced sentence, and whether the trial court relied

on inaccurate information when it imposed sentence. We conclude that evidence of Martin's prior drug conviction attached to and incorporated by reference in the complaint charging Martin with a subsequent drug offense, for purposes of imposing an enhanced sentence, coupled with his admission to his prior conviction, made his enhanced sentence valid. We further conclude that Martin's claim that he was sentenced on the basis of inaccurate information is procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 178, 517 N.W.2d 157 (1994). Therefore, we affirm.

¶2 In 1997, the State charged Martin with possessing cocaine with intent to deliver. The complaint also charged Martin as a repeater, namely, that this was a subsequent drug offense pursuant to WIS. STAT. § 961.48 (1997-98),[1] allowing the trial court to enhance his sentence. Attached to the complaint and incorporated by reference were the judgment roll, judgment of conviction, and criminal complaint from a 1995 case in which Martin had been convicted of possessing marijuana with intent to deliver. The 1997 complaint, however, mistakenly referred to the prior conviction as one for cocaine, rather than marijuana. At the preliminary hearing, however, the trial court took judicial notice of Martin's prior conviction of September 19, 1995, for "possession with intent to deliver, which ... remains of record and unreversed"; the particular controlled substance for which he was convicted was not specified, only that the conviction was for a controlled substance, all that is necessary to establish a subsequent drug offense. Neither Martin nor his trial counsel objected to the trial court's taking judicial notice of that conviction. Immediately after the verdict was read and the

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

jury was excused, the trial court again confirmed with Martin and his counsel that Martin had been previously "convicted of possession of marijuana with intent to deliver back on September 19th, 1995." Both Martin and his counsel separately confirmed that he had. The trial court imposed a thirty-year sentence.

¶3 Martin claims that he was sentenced illegally because the complaint, in alleging the specifics of his prior drug offense for the subsequent drug offense enhancer, erroneously identified a different drug than the one for which he was previously convicted; thus, his sentence was enhanced illegally. His hypertechnical argument fails.

¶4 WISCONSIN STAT. § 973.12(1) addresses the State's obligations in charging and proving a penalty enhancer. To convict an offender as a habitual criminal for purposes of enhancing that offender's sentence, the State may allege "any applicable prior convictions … in the complaint, indictment or information or amendments so [that the applicable prior convictions are] alleg[ed] at any time before or at arraignment, and before acceptance of any plea." The reason for this requirement is to afford notice to the offender "early in the process … to ensure that … the defendant … has notice of the extent of the potential punishment." ***State v. Stynes***, 2003 WI 65, ¶13, 262 Wis. 2d 335, 665 N.W.2d 115 (citation omitted). "A repeater allegation should identify the repeater offense, the date of conviction for that offense, and the nature of the offense—whether for a felony or misdemeanor conviction." ***Id.***, ¶15 (citation omitted). Section 973.12(1) further provides that the offender is subject to the enhanced penalty "[i]f the prior convictions are admitted by the defendant or proved by the state."

¶5 Here, the problem is that the complaint characterized the prior conviction as involving cocaine rather than marijuana. The attached judgment

roll, judgment of conviction and criminal complaint from that prior offense accurately identify the offense as involving marijuana. Those documents were attached to and incorporated by reference in the complaint. Martin and his counsel were present when the trial court took judicial notice of the prior conviction at the preliminary hearing. Martin does not contend that he was not notified of being charged with a subsequent drug offense, or that the penalty enhancer differed depending upon whether that prior offense involved cocaine rather than marijuana, but simply that he thought he could negate the penalty enhancer because he knew he had not been previously convicted of a cocaine offense. He further claims that had he known that the State had a valid basis to enhance his sentence, he would have plea-bargained the charge, rather than proceeding to trial. He was at the preliminary hearing, however, when his subsequent drug offense for penalty enhancer purposes was judicially noticed. The penalty enhancer did not depend upon whether the prior drug conviction was for marijuana or cocaine. *See* WIS. STAT. §§ 961.48 (amended Dec. 31, 1997); 973.12(1). Consequently, his repeater status had been properly alleged "early in the process," and long before he was compelled to decide how he sought to plead to the enhanced charge. *See* ***Stynes***, 262 Wis. 2d 335, ¶13.

¶6 Nevertheless, at the preliminary hearing the trial court took judicial notice of this prior conviction for a controlled substance and again, following the verdict, the trial court explicitly inquired of both Martin and his counsel whether, for that prior conviction from 1995, he was convicted of "possessi[ng] with intent to deliver." Both separately confirmed that he was. Consequently, we need not parse Martin's first argument about whether the complaint's technical misidentification of the specific drug rendered void the penalty enhancer because

Martin's admission and confirmation of that prior conviction rendered the penalty enhancer valid. Thus, we reject Martin's first claim.

¶7 Martin's second claim, that he was sentenced on inaccurate information, is procedurally barred. Following his conviction and sentencing, Martin pursued a direct appeal, moved for postconviction relief pursuant to WIS. STAT. § 974.06 (2001-02), and petitioned for a writ of habeas corpus. A sufficient reason for failing to previously raise this issue is required by § 974.06(4) (2001-02), as well as ***Escalona***. In his current postconviction motion, Martin offers no reason at all.[2] Consequently, this issue is procedurally barred.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

[2] This procedural bar does not apply to Martin's first issue because a claim that one's sentence exceeds the legal maximum penalty for that offense is not subject to that procedural bar. *See* ***State v. Flowers***, 221 Wis. 2d 20, 29-30, 586 N.W.2d 175 (Ct. App. 1998). This "represents only a narrow exception to ***Escalona***," however, and does not extend to Martin's related claim that he was sentenced on inaccurate information. ***Id.*** at 30.