COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

Nos. 00-2820-CR
00-2821-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HENRY L. WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] Henry Williams appeals from the judgment of conviction of disorderly conduct contrary to WIS. STAT. § 947.01, intimidation of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

a witness contrary to WIS. STAT. § 940.44, and battery contrary to WIS. STAT. § 940.19(1), all as a repeater, and from the order denying his motion for postconviction relief.[2] He contends his admissions to the prior convictions that formed the basis for the repeater enhancement were defective, and, therefore, he should be resentenced without the enhancers as a matter of law. Alternatively, he contends, he is entitled to an evidentiary hearing on his postconviction motion for resentencing. We conclude the admissions were not defective and he is not entitled to an evidentiary hearing on his postconviction motion. We therefore affirm.

¶2 The criminal complaints charged Williams with disorderly conduct, intimidation of a witness, misdemeanor battery, felony kidnapping, and two counts of misdemeanor bail jumping. After each charge, there was a provision invoking WIS. STAT. § 939.62(1)(a)[3] permitting enhancement of a sentence for repeaters,

[2] A judgment for the first two convictions was entered in one case and a judgment for the third conviction was entered in a separate case, but we have consolidated the two cases for purposes of this appeal.

[3] WISCONSIN STAT. § 939.62(1)(a) provides:

> (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 (except for an escape under s. 946.42 or a failure to report under s. 946.425) 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.

and factual allegations of prior convictions.[4] Pursuant to a plea agreement, Williams pleaded no contest to three misdemeanors—intimidation of a victim as a habitual criminal, disorderly conduct as a habitual criminal, and misdemeanor battery as a habitual criminal—and the State dismissed the other charges. (The State had earlier dismissed the felony kidnapping count.) Pursuant to the plea agreement, the joint recommendation was that sentence be withheld on the three misdemeanors and Williams be placed on probation for a period of three years with certain conditions.

¶3 At the beginning of the hearing on the plea and sentencing, the prosecutor explained the plea agreement, and after a description of each misdemeanor to which Williams had agreed he would plead no contest, the prosecutor added "as a habitual criminal." The court asked Williams whether the prosecutor had correctly stated the terms of the agreement and Williams answered yes, and also stated in response to the court's question that he did not have any questions about the terms of the agreement. Prior to the hearing, Williams had signed a plea questionnaire which stated he was entering a plea of no contest to the charges of "driving while revoked, driving while under the influence, battery,

[4] One complaint alleged in the repeater provisions that Williams was convicted in Dane County Circuit Court on June 22, 1992, of the felony crime of first-degree recklessly endangering safety, contrary to WIS. STAT. § 941.30(1), "which conviction(s) remain of record and unreversed; and, therefore, upon conviction of the charged offense and proof of repeater, [Williams] may be imprisoned not more than three (3) years." The repeater provisions in the other complaint each alleged that Williams had been convicted of escape, contrary to WIS. STAT. 946.42(3)(a) on October 5, 1992, in Dane County, Wisconsin, "which conviction(s) remain of record and unreversed"; in the case of the charged misdemeanors, the repeater provisions alleged that pursuant to WIS. STAT. § 939.62(1)(a), the maximum period of imprisonment set forth for each misdemeanor may be increased by not more than three years, and in the case of the charged felony, the repeater provision alleged that the maximum period of imprisonment set forth may be increased by not more than six years.

intimidation of a victim, disorderly conduct as a repeater."[5] The court ascertained from the defendant that he had in fact signed the plea questionnaire and waiver of rights, he had read it before he signed it, he was a high school graduate, he knew how to read, and he understood everything he read before he signed it.

¶4 As part of the lengthy colloquy that followed, the court described the elements of each of the three misdemeanors to which Williams was pleading no contest. For each misdemeanor the court received affirmative answers from Williams that he understood what he was charged with and what the State would have to prove beyond a reasonable doubt before he could be found guilty. The court also related what the complaint alleged with respect to each of the two prior convictions, describing the date and the crime for each, and asking Williams whether that was true. Williams answered yes each time. Williams said he had never appealed either conviction. The court asked Williams if he understood that, if he failed to live by the conditions of probation and his probation was revoked, he would come back before the court for sentencing, and at that time would be facing the possibility of being sentenced up to nine years and a $21,000 fine. Williams said he understood that. After ascertaining that Williams understood various other matters, the court found him guilty of each of the three misdemeanors to which he pleaded no contest, stating that each was as a repeater.

¶5 Williams' probation was subsequently revoked and he was sentenced to three years in prison on each of the convictions, with the term for the disorderly conduct and intimidation of a witness charges to be concurrent with

[5] At the same time the plea was entered to the charges in the two complaints involved in this appeal, a plea of no contest was entered to charges in another complaint of operating after revocation and a charge of operating while under the influence of an intoxicant as a second offense.

each other, but consecutive to the term of three years imposed for the battery conviction. Williams filed a motion for resentencing without the enhancers, or to correct sentences to the maximum authorized by law without enhancers, or to allow him to withdraw his pleas and enter new pleas. Williams' affidavit accompanied the motion in which he averred that "he was not aware of the potential punishment upon conviction until after his pleas were entered" and "he became aware of the potential punishment after he signed a waiver for revocation of probation." The trial court denied the motion without an evidentiary hearing. In its written decision, the court stated that the thrust of the motion was that Williams had not knowingly entered the pleas, and even if he were successful on such a motion, he would not be entitled to resentencing or a reduced sentence, but only to withdraw the pleas. However, the court found that he had not met the required threshold showing that his pleas were not knowingly entered, and, therefore, he was not entitled to an evidentiary hearing.

DISCUSSION

¶6 Williams contends he should be resentenced as a matter of law without the repeater enhancement because he did not knowingly and intelligently admit the convictions that were the basis for the repeater enhancement. His admission was not knowing and intelligent, he asserts, because he did not understand that by admitting to the prior convictions he was subjecting himself to an enhanced penalty. He acknowledges that the court informed him of the maximum penalty to which he was subject and that maximum included the repeater enhancer, but, he argues, he must also be informed of the connection between the penalty and the prior convictions. Williams' argument mixes the requirements for a constitutionally valid plea with the requirements for proof of repeater status, and we begin by separating the two.

¶7 As a matter of constitutional right, a defendant is entitled to withdraw a plea if he demonstrates it was not knowingly, voluntarily and intelligently made. ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). A plea is not entered knowingly, voluntarily and intelligently when the defendant is not aware of the potential punishment. ***State v. Byrge***, 2000 WI 101, ¶57, 237 Wis. 2d 197, 614 N.W.2d 477. WISCONSIN STAT. § 971.08(1)(a) governs the plea colloquy procedure a court must follow to ensure that a plea is knowing, voluntary, and intelligent. ***Byrge***, 2000 WI 101 at ¶58. The court must "address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted." Section 971.08(1)(a).

¶8 When a defendant maintains that the WIS. STAT. § 971.08 procedure is not undertaken or the court's mandated duties are not fulfilled at a plea hearing, the defendant must meet two threshold requirements: (1) a prima facie showing of a violation of § 971.08(1)(a) or other mandatory duties, and (2) an allegation the defendant did not know or understand the information that should have been provided at the plea hearing. ***State v. Giebel***, 198 Wis. 2d 207, 216, 541 N.W.2d 815 (Ct. App. 1995). Once these threshold requirements are met, the burden shifts to the State to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily and intelligently entered. ***Byrge***, 2000 WI 101 at ¶59.

¶9 In deciding whether a defendant has made a prima facie showing that his plea was accepted without compliance with WIS. STAT. § 971.08(1)(a) or other mandatory duties, we do not disturb a trial court's findings of historical fact unless they are clearly erroneous; however, the application of the law to the facts as found by the trial court or to undisputed facts is a question of law, which we review de novo. *See* ***Byrge***, 2000 WI 101 at ¶55.

¶10 Turning to the repeater enhancement, WIS. STAT. § 973.12(1) requires that in order to sentence a defendant as a repeater, the State must prove or the defendant must admit any prior conviction that forms the basis of the repeater. When a defendant has been sentenced to the maximum enhanced sentence and there is a later determination that the requirements of the statute have not been met, the proper remedy is a commutation to the maximum for the convicted offense without the repeater enhancer. *See* ***State v. Goldstein***, 182 Wis. 2d 251, 262, 513 N.W.2d 631 (Ct. App. 1994). Application of the statutory requirements to a given set of facts is a question of law, which we review de novo. ***State v. Liebnitz***, 231 Wis. 2d 272, 283, 603 N.W.2d 208 (1999).

¶11 In this case, there is no dispute that Williams personally, directly, and specifically admitted the two prior convictions that formed the basis for the repeater enhancement, and he does not contend otherwise, nor does he contend that he was not in fact previously convicted as he so stated. Rather, his assertion is that his admissions to the prior convictions is "defective" because the court did not ascertain before he made the admissions that he understood the consequences—that the maximum penalty for each of the three misdemeanors to which he pleaded no contest was thereby increased to three years. However, neither the case law on the entry of pleas nor the case law on establishing repeater status imposes or suggests such a requirement.

¶12 The record shows that at the plea hearing the trial court did ascertain that Williams understood the maximum penalty to which he was subject on the three misdemeanors with the enhancers—nine years. There is no requirement in WIS. STAT. § 971.08(1)(a) that the trial court explain what portion of the penalty was due to repeater status. Nor has case law imposed such a duty on the court.

¶13 In ***Byrge***, 2000 WI 101 at ¶68, on which Williams relies, the court held:

> [I]n the narrow circumstance in which a circuit court has statutory authority under Wis. Stat. § 973.014(2) [when the sentence is to life imprisonment] to fix the parole eligibility date, the circuit court is obligated to provide the defendant with parole eligibility information before accepting a plea. Parole eligibility in this discrete situation implicates punishment and constitutes a direct consequence of the plea.

¶14 The court reasoned that if the trial court selects the option setting the parole eligibility date itself—which can be a date that exceeds the defendant's expected life span—"the parole eligibility date links automatically to the period of incarceration." In other words, even though the defendant was informed by the court of the sentence authorized by statute—life imprisonment—he was not informed of the maximum potential period of actual incarceration, which the court could control if it elected to do so. In this case, Williams was informed of the potential maximum sentence with the enhancer, and the information Williams asserts he was not provided—what portion of that potential maximum was attributable to the enhancer—does not affect the maximum potential period of actual incarceration. Therefore, ***Byrge*** does not require that he be given that information in order that his plea be knowing, voluntary and intelligent.

¶15 We conclude Williams has not made a prima facie showing that the trial court did not follow the requirements of WIS. STAT. § 971.08(1) or other mandatory duty. Therefore, as a matter of law, he is not entitled to withdraw his plea.

¶16 Williams is also not entitled to a commutation of his sentences to the maximum for each offense without the repeater enhancer. That remedy applies

only if the requirements of WIS. STAT. § 973.12(1) were not met. But they were—Williams admitted the prior convictions. Neither ***State v. Rachwal***, 159 Wis. 2d 494, 465 N.W.2d 490 (1991), nor ***Goldstein*** suggests his admissions are not valid because the court did not inform him before he made the admissions how much the potential maximum sentence for each offence would be increased as a result. Rather, in both cases, the issue was whether the defendant had made a direct and specific admission of the prior conviction, as is required when the State does not prove it.

¶17 In ***Rachwal***, the supreme court concluded the defendant had made a direct and specific admission because the trial court drew the defendant's attention to the repeater provision in the complaint, advised the defendant that as a result the potential maximum was increased by three years, asked the defendant if he understood this, and the defendant answered yes. ***Rachwal*** is an example of an alternative way in which a defendant can make the admission required by § 973.12(1) when the defendant does not expressly state that the allegations of the prior conviction are true; ***Rachwal*** does not establish additional requirements when the defendant, as here, expressly states the allegations of the prior conviction are true.

¶18 Consistent with ***Rachwal***, the court in ***Goldstein*** concluded there was no admission by the defendant because he had neither expressly admitted that the allegation of the prior conviction was true nor had the court drawn his attention to the link between that allegation and the maximum penalty. The court in ***Goldstein*** refused to infer an admission of the prior conviction from the mere fact that the defendant was informed of the potential maximum penalty that included the enhancer. In this case, there is no need for that link to create an admission of the prior convictions because Williams expressly admitted them. Given that

express admission, we conclude, as a matter of law, that Williams was properly subject to the repeater penalty enhancer.

¶19 Since the record of the plea hearing establishes that, as a matter of law, the plea colloquy met the requirements of WIS. STAT. § 971.08(1)(a) and the applicable case law, and since that record also establishes, as a matter of law, that the requirements for imposition of the repeater enhancement were met, the trial court correctly decided Williams was not entitled to an evidentiary hearing on his motion.

By the Court.—Judgment and order affirmed.

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