

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 15, 2002

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. 01-2206-CR

Cir. Ct. No. 98-CF-679

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD A. MOLINARO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County:
PAUL J. LENZ, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Richard Molinaro, pro se, appeals an order denying his postconviction motion to modify his sentence. Following his guilty pleas, Molinaro was convicted of attempting to elude an officer as a repeater and sentenced to eight years in prison. He was also convicted of hit and run involving injury as a repeater and sentenced to three years in prison, consecutive to the

eluding conviction but concurrent with his present parole revocation. Molinaro argues that he is entitled to an amendment to his sentences, because the repeater allegations were not proved and his sentences exceed the maximum allowed by law. We reject his arguments and affirm the order.¹

¶2 The criminal complaint alleges three counts against Molinaro: (1) operating a motor vehicle without owner's consent, (2) attempting to elude an officer, and (3) hit and run involving bodily injury. The charges arose out of an incident occurring on December 22, 1998.

¶3 Under each count, the complaint states facts necessary to invoke the penalty enhancements under the repeater statute, WIS. STAT. § 939.62. It alleges that Molinaro was convicted of the felonies of burglary, operating a motor vehicle without the owner's consent, and operating a motor vehicle without the owner's consent as party to a crime, on October 12, 1993, in Racine County, Wisconsin. It also states that Molinaro was in custody from September 13, 1993, until October 24, 1996, so as to bring the convictions within five years of the offenses charged. The complaint references the effect the repeater allegation would have on the maximum penalty for each charge.

¶4 At the plea hearing, while questioning Molinaro concerning his plea to the eluding charge, the court asked:

¹ The State argued that Molinaro waived this argument by failing to include it in his motion for postconviction relief. We disagree. Molinaro's postconviction motion states that the repeater portions of his sentence were in excess of the maximum allowed by law. We conclude that his argument is not waived. See *Waushara County v. Graf*, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992) (We leniently review the matters filed by pro se incarcerated defendants.).

Do you acknowledge the following convictions, knowing that your acknowledgment, pursuant to Wisconsin Statute Section 939.62, would increase your penalty up to eight years' imprisonment, a \$2,000 fine, or your operating privileges to be revoked for six months, they are the following felonies: a burglary, operating a motor vehicle without the owner's consent, and an operating a motor vehicle without the owner's consent, party to a crime, on October 12th, 1993 in Racine[?]

¶5 Defense counsel responded for Molinaro that he acknowledged the burglary and “one OMVWOC for sure.” After further discussion regarding a plea to a third count, hit and run involving bodily injury as a repeater, the court asked Molinaro, “Do you acknowledge the same convictions under Wisconsin Statute 939.62, knowing that increases your penalties up to seven years' imprisonment or a \$5,000 fine or both?” to which Molinaro replied, “Yes, I do.” In addition, Molinaro completed a plea questionnaire and waiver of rights form with the assistance of counsel that stated: “I do not contest the facts in the complaint *insofar as they support findings of eluding and hit & run, bodily harm.*” (Emphasis added.)²

¶6 Whether a sentence properly imposed penalties as a repeater involves the application of WIS. STAT. § 973.12(1) to undisputed facts. This is a question of law that we review de novo. *State v. Campbell*, 201 Wis. 2d 783, 788, 549 N.W.2d 501 (Ct. App. 1996).

² The italicized portion was handwritten.

¶7 Under WIS. STAT. § 973.12, a repeater enhancement is permissible only if the defendant admits the repeater charge or the State proves it at sentencing. This section provides in part:

(1) 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. ... An official report of the F.B.I. or any other governmental agency of the United States or of this or any other state shall be prima facie evidence of any conviction or sentence therein reported. Any sentence so reported shall be deemed prima facie to have been fully served in actual confinement or to have been served for such period of time as is shown or is consistent with the report.

The time the defendant spent in actual confinement serving a criminal sentence shall be excluded from the calculation of the five years prior to the commission of the current offense. WIS. STAT. § 939.62(2).

¶8 Molinaro contends that his guilty pleas to the complaint fail to provide a factual basis for the repeater enhancements. We disagree. In *State v. Liebnitz*, 231 Wis. 2d 272, 287-88, 603 N.W.2d 208 (1999), our supreme court stated:

Liebnitz pled no contest, which is an admission to all the material facts alleged in the complaint. The complaint, read in whole to Liebnitz, contained the repeater allegations. He responded affirmatively that he understood these allegations and, at the taking of the plea, stated he would not contest them. We conclude therefore that based upon the totality of the record, Liebnitz's plea to the information constituted an admission for purposes of Wis. Stat. § 973.12.

¶9 We conclude that the record demonstrates Molinaro's express admission of the repeater allegations and increased penalties. The complaint alleged the previous Racine County convictions of October 12, 1993. Although this was more than five years from the date of the current December 22, 1998, charges, the complaint also recited the dates of Molinaro's incarceration, September 13, 1993, to October 24, 1996. Consequently, the prior convictions fell within the five years as required by WIS. STAT. § 939.62(2).

¶10 The trial court specifically questioned Molinaro about his prior convictions, which he admitted. Also, Molinaro completed a plea questionnaire, which referenced the facts of the criminal complaint. On the questionnaire, Molinaro admitted the facts of the complaint for the counts of eluding and hit and run.³ Each count alleged the previous offenses, the date of conviction, the dates of confinement and the effect the repeater penalty enhancements would have on the potential maximum penalties.

¶11 In *State v. Zimmerman*, 185 Wis. 2d 549, 558, 518 N.W.2d 303 (Ct. App. 1994), we stated:

The State must make a specific allegation of the preceding conviction and incarceration dates so as to permit the court and the defendant to determine whether the dates are correct and the five-year statutory time period is met. In the alternative, the trial court may obtain a direct and specific admission from the defendant.

Here, both alternatives were present. The complaint specifically alleged the preceding convictions and incarceration dates. And, as in *Liebnitz*, Molinaro's plea to the complaint constitutes a valid admission to the facts supporting the

³ The charge of operating a motor vehicle without owner's consent was dismissed but read in at sentencing.

repeater penalty enhancements. As a result, contrary to Molinaro's contention, the State is not required to produce independent proofs of the prior convictions and periods of confinement.

¶12 The record reveals that the State met its obligation to prove that the prior convictions, minus time spent in actual confinement, fell within the five years necessary before the trial court could impose an enhanced sentence as a repeater as defined in WIS. STAT. § 939.62(2). Because the repeater portions of his sentences were factually supported and authorized by law, Molinaro's arguments must be rejected.

By the Court.—Order affirmed.

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