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

**June 6, 2002**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 01-2965** **Cir. Ct. No. 98-CM-2587**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**THOMAS C. SMITH,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Rock County: JOHN W. ROETHE, Judge. *Affirmed*.

¶1 DYKMAN, J.[1] Thomas Smith appeals from a judgment and an order denying his motion for postconviction relief. He contends that his repeater

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000).

status was not established in accordance with WIS. STAT. §§ 939.62(1) (1997-98)[2] and 973.12. We disagree and affirm.

## Background

¶2 On August 7, 1998, the State filed a criminal complaint against Smith for obstructing an officer, in violation of WIS. STAT. § 946.41. The complaint included a habitual criminality allegation, based on a 1991 conviction for second-degree sexual assault.

¶3 At his August 28, 1998 plea and sentence hearing, Smith pleaded no contest to the obstruction charge. Smith admitted that he was convicted of second-degree sexual assault in 1991. The court adjudged Smith guilty of the obstruction charge. At that point, the State asked the court to make more of a record on the repeater allegation because Smith's 1991 conviction was more than five years old. Smith admitted that he had been continuously incarcerated from 1991 to March 1998. The court reiterated its adjudication of guilty on the obstruction charge, then sentenced Smith to a prison term of three years.

¶4 In a fourth postconviction motion, Smith asked the circuit court to "correct, modify, or vacate" his sentence because it was "in excess of the maximum term authorized by law." The circuit court denied Smith's motion and he appeals.

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

## Analysis

¶5 Smith challenges his sentencing as a repeater. He argues that the State failed to prove and he did not admit that he was a repeater as required by WIS. STAT. §§ 939.62(2) and 973.12(1). Review of the circuit court's use of the penalty enhancer requires the application of §§ 939.62 and 973.12 to an undisputed set of facts. The issue is therefore a question of law that we review de novo. ***State v. Zimmerman***, 185 Wis. 2d 549, 554, 518 N.W.2d 303 (Ct. App. 1994).

¶6 As a preliminary matter, the State argues that WIS. STAT. § 974.06(4) bars Smith's motion because Smith already argued in a previous conviction motion that "he was illegally sentenced as a habitual criminal." Among other things, § 974.06(4) provides that inmates may not seek relief on "[a]ny ground finally adjudicated." *See also* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). However, ***State v. Flowers***, 221 Wis. 2d 20, 30, 586 N.W.2d 175 (Ct. App. 1998), created a "narrow exception" to § 974.06(4) and ***Escalona-Naranjo*** when it held that they do not apply "when a defendant alleges that the State has neither proven nor gained the admission of the defendant about a prior felony conviction necessary to sustain the repeater allegation." The court in ***Flowers*** reasoned that WIS. STAT. § 973.13, which governs motions alleging an excessive sentence, provides that a sentence imposed in excess of that authorized by law is void "[i]n any case," and therefore "*all* sentences imposed in excess of their maximum term are void." ***Id.*** at 29. Thus, we will consider the merits and determine whether the trial court properly applied a penalty enhancer to Smith's sentence.

¶7 Under WIS. STAT. § 939.62(2) a defendant is a repeater if he or she was convicted of a felony or three misdemeanors "during the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced." Time spent in actual confinement is excluded in computing the five-year period. ***Id.*** The State must prove or the defendant must admit the prior convictions before the defendant may be sentenced as a repeater. WIS. STAT. § 973.12(1). This requirement includes proof or an admission that the past conviction falls within the five-year window. ***State v. Goldstein***, 182 Wis. 2d 251, 260, 513 N.W.2d 631 (Ct. App. 1994).

¶8 Smith first contends that because the complaint against him did not contain allegations of continuous incarceration, his repeater status was not fully established prior to the acceptance of his plea, and the trial court improperly enhanced his sentence. WISCONSIN STAT. § 973.12 prohibits a circuit court from accepting a plea for a repeater charge under WIS. STAT. § 939.62 unless the complaint alleges the prior convictions. In the case before us, the complaint contained the repeater allegation. Smith contends that the complaint was nonetheless deficient because it did not indicate the dates of Smith's period of continuous incarceration. Section 973.12, however, does not require that the charging document allege continuous incarceration. *See* ***State v. Squires***, 211 Wis. 2d 876, 886-87, 565 N.W.2d 309 (Ct. App. 1997). A proper admission from the defendant about periods of incarceration may be obtained in two ways. ***Id.*** at 886. If the complaint does not allege incarceration dates, the trial court may obtain direct and specific admissions from the defendant as to the dates. ***Id.*** This is what occurred at Smith's plea and sentencing hearing.

¶9 Smith does not dispute admitting at the hearing that he was continuously incarcerated from 1991 to March 1998, and thus, that that period of

time would not be included in determining whether the past conviction occurred within five years. He points out, however, both that: (1) the admission did not contain the "particulars of all dates of continuous incarceration;" and (2) he did not make the admission regarding when he was incarcerated until after the circuit court first accepted his plea. He argues that both of these facts barred the circuit court from sentencing him as a repeater.

¶10 With respect to Smith's first argument, we disagree that Smith's admission regarding when he was incarcerated is insufficient to establish that he is a repeater simply because he did not admit to the exact days he was confined and released. The only authority Smith cites to support this argument is ***State v. Farr***, 119 Wis. 2d 651, 659, 350 N.W.2d 640 (1984), which stated that an "admission [of a prior conviction ] may not be inferred." No inference is required in Smith's case to conclude that his prior conviction fell within the "5-year period immediately preceding the commission of the [present] crime." Smith admitted that he was convicted of sexual assault in 1991, that he was incarcerated in 1991, that he was released in March 1998, and that the obstruction crime occurred on August 7, 1998. Even assuming that he was convicted of sexual assault on January 1, 1991, confined on December 31, 1991, and released on March 1, 1998, this would still leave less than eighteen months between the sexual assault conviction and the commission of the obstruction crime during which Smith was not confined. As eighteen months is well within the five-year window, Smith's prior conviction would still qualify him as a repeater under WIS. STAT. § 939.62(2). We therefore conclude that Smith's admission did not need to be more specific.

¶11 We also disagree that the circuit court was prohibited from sentencing Smith as a repeater because it questioned Smith regarding his times of

confinement immediately after first accepting his plea rather than before. We first note that the circuit court accepted Smith's plea a second time after Smith admitted he was confined from 1991 to 1998 so the court corrected any error that may have occurred. Regardless, WIS. STAT. § 973.12(1) requires only that a defendant's repeater status be *alleged* before acceptance. *See* ***State v. Martin***, 162 Wis. 2d 883, 896, 470 N.W.2d 900 (1991). It does not impose a similar requirement with respect to proving periods of actual confinement. Rather, as the State points out, it is sufficient that the prior conviction be proven or admitted at sentencing. ***Goldstein***, 182 Wis. 2d at 260. Therefore, the State did all it was required to do before the court's acceptance of Smith's plea and Smith was properly sentenced as a repeater under WIS. STAT. § 939.62(2).

*By the Court*.—Judgment and order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4 (1999-2000).