COURT OF APPEALS
DECISION
DATED AND FILED

March 17, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2078 **Cir. Ct. No. 01CM001876**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DERRICK EMERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Reversed and cause remanded with instructions*.

¶1 SNYDER, J.[1] Derrick Emerson appeals a three-year prison sentence for theft as a repeat offender and an order denying his postconviction

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

motion for relief. He challenges the imposition of the penalty enhancer, arguing that the court failed to comply with statutory sentencing requirements. We agree and reverse the judgment and order of the circuit court.

¶2 On November 6, 2001, the State charged Emerson with the crime of theft—repeater, pursuant to WIS. STAT. §§ 939.62 and 943.50(1m)(d). Emerson pled guilty to the charge of retail theft as a repeat offender. At his plea hearing, Emerson admitted that he had been convicted of three separate misdemeanor offenses in the five years prior to this case. The court sentenced Emerson to three years in prison. Emerson moved for reconsideration of the sentence, arguing that there were new factors to consider and that the sentence was unduly harsh. The court denied the motion, finding that the alleged "new" factors were known to the court at the time of sentencing, and that the sentence was appropriate for the crime committed.

¶3 Emerson also filed a motion to withdraw his guilty plea, which was denied. Emerson appealed that ruling and we affirmed the trial court's decision denying Emerson's request to withdraw his plea.[2]

¶4 Emerson filed a subsequent motion for postconviction relief, this time alleging that the sentence imposed was illegal. He asserted that the State and the trial court failed to inform him of the maximum penalty for the underlying retail theft offense and how the penalty enhancer would affect the maximum sentence. Emerson further alleged that the State did not produce certified

[2] In an unpublished opinion, we concluded that Emerson failed to demonstrate a "serious flaw in the fundamental integrity of the plea" resulting in a manifest injustice. ***State v. Emerson***, No. 02-2386-CR, unpublished slip op. at ¶11 (WI App Jan. 22, 2003) (citing ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836).

judgments and Emerson did not provide specific admissions of prior convictions to support the penalty enhancer. The trial court denied the motion for relief and Emerson appeals.

¶5 Emerson first argues that the sentencing court had no authority to sentence him as it did because he "did not understand or acknowledge the maximum penalty for the underlying charge of retail theft, or that the repeater allegation increases that penalty." The use of repeat-offender penalty enhancers, as with most sentencing decisions, lies within the discretion of the sentencing court. ***State v. Saunders***, 2002 WI 107 ¶45, 255 Wis. 2d 589, 649 N.W.2d 263. However, whether the court properly interpreted and applied the penalty enhancer requires application of WIS. STAT. §§ 939.62(2) and 971.08 to undisputed facts and presents a question of law, which we review de novo. *See* ***State v. Holloway***, 202 Wis. 2d 694, 697-98, 551 N.W.2d 841 (Ct. App. 1996).

¶6 Emerson pled guilty to the charge of retail theft and the allegation of habitual criminality. The habitual offender (repeater) penalty enhancer applies "if the actor was convicted … of a misdemeanor on 3 separate occasions" during the "5-year period immediately preceding the commission of the crime for which the actor is presently being sentenced." WIS. STAT. § 939.62(2). "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." WIS. STAT. § 973.12(1).

¶7 Before accepting his plea, the court was required to "[a]ddress 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." WIS. STAT. § 971.08(1)(a). We have interpreted this statute to mean that, "[a]t the time of the entry of plea, a defendant is entitled to know what might

or could happen to him or her." ***State v. Mohr***, 201 Wis. 2d 693, 700, 549 N.W.2d 497 (Ct. App. 1996). Accordingly, case law requires that notice of the maximum sentence must be given. ***Id***.

¶8 We have stated that the "touchstone of the admission component" is that the defendant has an "express understanding that the repeater allegations increased the possible penalties." ***State v. Goldstein***, 182 Wis. 2d 251, 256-57, 513 N.W.2d 631 (Ct. App. 1994). We look to see whether the record demonstrates, expressly or inferentially, that Emerson understood or acknowledged the *linkage* between his prior convictions and the maximum potential penalty. *See* ***id.*** at 257.

¶9 Emerson's plea questionnaire references the charge of theft as a repeater and contains the following acknowledgement: "The maximum penalty I face upon conviction is 3 years; $10,000 fine; or both." While this reflects the maximum for the theft conviction with enhancer, it does not indicate what portion of the penalty is attributable to his repeater status. At the plea hearing, the court restated the maximum possible penalty as it was described in the plea questionnaire and Emerson acknowledged that he understood. The following exchange took place:

> THE COURT: The charge against you is one for which you could be imprisoned for up to three years and fined up to $10,000 regardless of any recommendation. Do you understand that?
>
> DEFENDANT: Yes.
>
> THE COURT: The charge against you, Mr. Emerson, is that on the 12th of August of this past year, at the Village of Pleasant Prairie, in this county, you intentionally concealed merchandise held for resale by a merchant without the merchant's consent, knowing that you were acting without the merchant's consent and with intent to deprive the

> merchant permanently of the possession of the property. Do you understand this charge against you?
>
> DEFENDANT: Yes.
>
> THE COURT: How do you plead?
>
> DEFENDANT: Guilty.
>
> THE COURT: It is further charged that you were at the time of the commission of this crime a habitual offender, having been convicted at the Circuit Court of Milwaukee County of misdemeanor crimes in case numbers 98-CM-11824, 98-CM-7103, and 97-CM-701378….
>
> ….
>
> Well, Mr. Emerson, is it correct that you have been convicted of three different misdemeanor crimes in the five years which immediately occurred before August 12th of the year 2001?
>
> DEFENDANT: Yes.
>
> THE COURT: Is that true?
>
> THE DEFENDANT: Yes.

¶10 Though Emerson was allowed to plead separately to his repeat offender status, he was not informed of the consequences that attached to that plea. The retail theft charge, a Class A misdemeanor under WIS. STAT. § 943.50(4)(a), carries a maximum nine-month term of imprisonment. The penalty enhancer, therefore, represented twenty-seven months of the three-year maximum presented to Emerson. We find no indication in the record, nor any contention by the State, that Emerson was advised of or understood the increased maximum penalty resulting from the repeater allegation.

¶11 In comparison, the trial court in ***State v. Rachwal***, 159 Wis. 2d 494, 465 N.W.2d 490 (1991), "expressly drew the defendant's attention to the repeater nature of the charge *and to the fact that the possible penalties the defendant was*

facing might be enhanced, pursuant to the repeater statute." ***Id.*** at 509 (emphasis added). Our supreme court held that this colloquy "approach[ed] the absolute bare minimum necessary for a valid admission." ***Id.*** at 513.

¶12 Here, the proceedings fail to meet the "absolute bare minimum" requirement because the State and the court failed to determine that Emerson had an "understanding of the nature of the … potential punishment if convicted." WIS. STAT. § 971.08(1)(a). For this reason, the portion of the sentence attributable to the habitual criminality penalty enhancement is void as a matter of law.

¶13 Emerson's second argument is that he did not make a "direct or specific admission to the prior convictions alleged in the criminal complaint." Because we conclude that the court improperly applied the penalty enhancer without determining that Emerson understood its impact on the maximum sentence, we need not reach this issue. We note, however, that in the hearing testimony reproduced above, Emerson did admit to three specific prior convictions within the five-year time period preceding the present conviction as required under WIS. STAT. § 973.12(1).

¶14 We commute Emerson's sentence to the maximum permitted for the retail theft charge of which he stands convicted. We remand with instructions that the trial court enter an amended judgment reflecting this decision. All other provisions of the judgment of conviction are affirmed. *See* ***State v. Wilks***, 165 Wis. 2d 102, 112-13, 477 N.W.2d 632 (Ct. App. 1991).

By the Court.—Judgment and order reversed and cause remanded with directions.

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