

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 25, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-1694-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL GOLDSMITH,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Richland County: KENT C. HOUCK, Judge. *Affirmed.*

Before Gartzke, P.J., Dykman and Sundby, JJ.

PER CURIAM. Michael Goldsmith appeals from the habitual criminality ("repeater") sentencing provision of a judgment and from a postconviction order. The issue is whether the State proved Goldsmith's repeater status under § 973.12(1), STATS. Because there was proof of Goldsmith's repeater status in the record, we affirm imposition of the enhanced sentence.

Goldsmith pled to possession of burglarious tools as a repeater, contrary to §§ 943.12 and 939.62, STATS. The possession charge carries a maximum sentence of twenty-four months. Section 939.50(3)(e), STATS. The trial court imposed a thirty-month sentence and attributed six months of that sentence to the repeater allegation.

Section 973.12(1), STATS., provides that:

Whenever a person charged with a crime will be a repeater ... under s. 939.62 if convicted, any applicable prior convictions may be alleged in the complaint, indictment or information 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

Section 939.62(2), STATS., provides that, "[t]he actor is a repeater if the actor was convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced" A defendant's guilty plea does not constitute an admission that a prior conviction is less than five years from the date of the present crime. See *State v. Zimmerman*, 185 Wis.2d 549, 555-56, 518 N.W.2d 303, 305 (Ct. App. 1994). In *Zimmerman*, we held that:

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.

Id. at 558, 518 N.W.2d at 306.

The information alleged that Goldsmith was a repeater "as that term is used in sec. 939.62, Wisconsin Statutes, he having been convicted of a felony during the five-year period immediately preceding the commission of this crime." At the preliminary examination, and over Goldsmith's objection, the trial court admitted an exhibit with Goldsmith's criminal history ("CIB") which indicated that in 1988 he had been convicted and sentenced as a party to the crime of burglary.¹

Goldsmith contends that his repeater status must be proved or admitted at the plea or sentencing hearings. It is indisputable that Goldsmith did not admit that he was a repeater and that the State did not prove his repeater status during the plea or sentencing hearings. The State contends that: (1) there was proof of Goldsmith's repeater status in the record; and (2) "all parties were so thoroughly familiar with all aspects of this prior conviction, it was treated as a matter of common knowledge." We accept the former contention, but note that we rejected the "common knowledge" contention in *Zimmerman*. See 185 Wis.2d at 557-58, 518 N.W.2d at 306.²

Section 973.12(1), STATS., requires the State to prove the defendant's repeater status before the trial court can impose an enhanced sentence. Although, in the absence of an admission, the statute requires specific proof, it does not specify when such proof is required. Therefore, the State's unrefuted proof, admitted without limitation at the preliminary examination, meets the requirements of § 973.12(1).

By the Court.—Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

¹ The trial court overruled Goldsmith's objections and admitted the CIB. Contrary to Goldsmith's assertion on appeal, the trial court did not limit the CIB's admissibility to its probable cause determination.

² "When considering important due process concerns, we cannot accept common sense readings as a substitute for more exacting requirements of proof." *State v. Zimmerman*, 185 Wis.2d 549, 558, 518 N.W.2d 303, 306 (Ct. App. 1994).