COURT OF APPEALS
DECISION
DATED AND RELEASED

December 7, 1995

No. 95-1601-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TYRONE JACKSON,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Dane County: MARK A. FRANKEL, Judge. *Affirmed*.

EICH, C.J.[1] Tyrone Jackson appeals from a judgment of conviction and sentence for criminal trespass to a dwelling, and from an order denying his motion for postconviction relief.

He raises a single issue: whether the State proved his repeater status. We believe it did and we therefore affirm the judgment and order.

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

On July 10, 1993, a complaint was issued charging Jackson with felony bailjumping and two misdemeanors: criminal trespass and disorderly conduct. The offenses were alleged to have taken place on June 29, 1993. Each charge contained a repeater allegation stating that Jackson had been convicted of three misdemeanors--battery on June, 18, 1991, and of bailjumping and theft on November 16, 1992--within the five-year period required for application of the repeater statute, § 939.62, STATS.[2] The complaint alleged that, because of the prior convictions, the applicable penalties for the currently-charged offenses could be increased by the periods of time specified in the statute.

After a preliminary hearing on the felony bailjumping charge, an information was issued charging him with bailjumping and criminal trespass, and restating the repeater allegations from the complaint.

On the day his trial was to begin, he entered into a plea agreement with the prosecution, pleading no contest to criminal trespass, and also to another pending charge of battery by a prisoner. In the plea colloquy, the court discussed the charges with Jackson:

> THE COURT: And you underst[an]d that because of the repeater allegations here that the maximum penalties that you were looking at were seven years in jail and/or a $10,000 fine on the battery by an inmate, and on the criminal trespass charge you were

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[2] Sections 939.62(1) and (2), STATS., provide that if the defendant was either convicted of a felony during the five-year period immediately preceding the commission of the presently charged offense, or else "was convicted of a misdemeanor on 3 separate occasions during that same period," he or she is a "repeater" within the meaning of the statute and subject to increased penalties as follows:

(a) A maximum term of one year or less may be increased to not more than 3 years.

(b) A maximum term of more than one year but not more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 6 years if the prior conviction was for a felony.

> looking at a maximum of three years and nine months or a $10,000 fine?
>
> MR. JACKSON: Yes.
>
> MS. HAYWARD [for the State]: Actually, Your Honor, it is just three years.
>
> THE COURT: It is not an additive?
>
> MS. HAYWARD: No.
>
> THE COURT: Thank you for that correction. I stand corrected. It's a maximum of three years and a $10,000 fine on the misdemeanor with the repeater. Is that understood?
>
> MR. JACKSON: Yes.
>
> THE COURT: And you understand that I'm free to impose whatever sentence I feel is appropriate in these cases and that I'm not bound by any recommendations that might be made?
>
> MR. JACKSON: Definitely.

The court continued to question Jackson about his understanding of the charges and the voluntary nature of his plea and then asked:

> THE COURT: Is Mr. Jackson willing to stipulate to his status as a repeater with regard to both counts that we have entered pleas on here, Mr. Burr, or do you want some proof offered by Ms. Hayward?
>
> MR. BURR [for the defendant]: No, we're willing to stipulate to that.
>
> THE COURT: I'll so find based on the defense stipulation that the defendant is a repeater with regard to both offenses.

The court ordered a presentence investigation and report and adjourned the proceedings. The report, as eventually prepared, began by reciting the charged offenses and the statutory penalties, adding that, "[u]nder the Habitual Criminality statute," Jackson could be imprisoned for an additional two years on the battery charge and an additional two years and three months for trespass under § 939.62, STATS. The report went on to list Jackson's prior record, including the following convictions occurring within five years of the date on which the present offenses were alleged to have been committed: (1) felony possession of cocaine on July 10, 1989; (2) misdemeanor trespass on February 15, 1990; (3) misdemeanor resisting/obstructing an officer on June 18, 1991; (4) misdemeanor domestic abuse on June 18, 1991; and (5) misdemeanor theft on November 16, 1992. Elsewhere in the report it is stated that, after absconding from supervision in January 1992, Jackson was arrested and, on December 3, 1992, "was sentenced to ... three months for ... bailjumping." The report also indicates that the agent preparing the document discussed all these charges and convictions with Jackson in some detail.

The court withheld sentence and placed Jackson on probation for two years. His probation was subsequently revoked and he was returned to court for sentencing on December 15, 1994. He was sentenced to four years for battery and two years for trespass.

Jackson filed a postconviction motion seeking to have his two-year trespass sentence reduced to nine months--which would be the maximum *unenhanced* sentence for the misdemeanor. He claimed that he never "personally acknowledge[d]" the prior convictions and that the State never "adequately prove[d] their existence." The trial court denied the motion, stating:

> First of all, rather than claiming that there's anything inaccurate about any of the allegations here, we're talking about the admission coming from the defendant's attorney rather than the defendant. The defendant hasn't submitted any affidavits ... saying that there's anything inaccurate about any of the allegations about the underlying convictions. It appears there are even additional convictions that would have sufficed to render the defendant a repeater. There was no misunderstanding on his part. There are indications from other sources that

> these same convictions were timely had, and clearly there's no dispute as to two out of the three being established in the Presentence....
>
> ... The defendant's attorney conceded that he had sustained the appropriate convictions. There were additional convictions he clearly sustained that would have justified his status. He is not saying now that he didn't know that he was a repeater. In fact he did know fully the maximum penalty that he was facing. He bargained for the sentence that he got, and he got the sentence that he bargained for....
>
> Given the existence of the Presentence which seems to adequately ... corroborate the existence of the defendant's repeater status, I'm going to have to deny the relief that's [requested].

Our review of the trial court's application of the penalty enhancers is de novo. ***State v. Zimmerman***, 185 Wis.2d 549, 554, 518 N.W.2d 303, 304 (Ct. App. 1994). And our independent review of the record satisfies us that there was no error.

In ***State v. Farr***, 119 Wis.2d 651, 659-60, 350 N.W.2d 640, 645 (1984), the supreme court stated that, under § 973.12(1), STATS., which provides that "[i]f such prior convictions are admitted by the defendant or proved by the state," he or she shall be subject to sentence as a repeater,

> [t]he admission may not ... be inferred nor made by defendant's attorney, but rather, must be a direct and specific admission by the defendant. The trial court may ask the defendant the direct question while observing the defendant's criminal record before him whether the defendant was convicted on a particular date of a specific crime .... If that is done, the admission of the defendant as allowed by the statute is satisfied. If the defendant stands mute or denies the conviction, a certified copy ... can be presented to the trial court ... or in the alternative, the proof may be made by an

> official report ... which is specific enough to identify the defendant, the [crime], and the date of conviction.

In a later case, ***State v. Rachwal***, 159 Wis.2d 494, 465 N.W.2d 490 (1991), the trial court, like the court in this case, never specifically asked the defendant about the prior convictions. In explaining the charges to him at the plea hearing, however, the court asked whether the defendant understood that the offense, a misdemeanor carrying a nine-month maximum jail sentence, could be "increase[d] ... up to a maximum of zero to three years" because it was "a repeater type of an offense," to which the defendant responded "Yes." ***Id***. at 503, 465 N.W.2d at 493. The supreme court held that "the colloquy into the defendant's understanding of the meaning of the allegations he was facing can be said to have produced a direct and specific admission" within the meaning of ***Farr***. ***Id***. at 509, 465 N.W.2d at 496.

While we think the court's colloquy with Jackson in this case is sufficiently similar to that in ***Rachwal*** to reach the same result, we are also satisfied that Jackson's repeater status was adequately established by the presentence report prepared and filed in his case. *See* ***State v. Caldwell***, 154 Wis.2d 683, 693, 454 N.W.2d 13, 18 (Ct. App. 1990), where we held that the State may prove a defendant's repeater status by reference to the presentence report.

Jackson does not dispute the contents of the presentence investigation report with respect to the prior convictions. He claims only that, of the three predicate misdemeanor offenses alleged in the charging documents as supporting repeater enhancement--battery on June 18, 1991, bailjumping on November 16, 1992, and theft on November 16, 1992--only the battery and theft convictions are identified in the criminal record listed in the report. He acknowledges the later reference in the report to the bailjumping charge. He maintains, however, that the report states only the date of sentencing, not the date of conviction and, additionally, that the stated sentencing date, December 3, 1992, differs from the November 16, 1992, conviction date alleged in the information; and he claims that this "discrepancy" fails to adequately establish ***Farr***'s "conviction-on-a-particular-date" requirement.

The argument is readily answered. First, there is no question that the report's compilation of Jackson's prior record shows conviction dates for at least one felony and five misdemeanors, all occurring within the requisite five-

year period. And we consider his contention that our decision in ***State v. Wilks***, 165 Wis.2d 102, 477 N.W.2d 632 (Ct. App. 1991), bars consideration of these other offenses to be unavailing.

We held in ***Wilks*** that where the charging documents listed a prior conviction *which did not exist* as justifying repeater enhancement, and where the defendant pled to the charge on that basis, the information could not later be amended, after the State learned of its error, to reflect another prior conviction to justify enhancing the sentence. ***Id***. at 110-11, 477 N.W.2d at 636. Our decision in ***Wilks*** was based on the following analysis: because Wilks entered his plea "believing that the state could not prove the [stated] conviction" because it did not exist, "the basis upon which [he] pled has been changed by the amendment" and, as a result, "the due process considerations which underpin ... the repeater statute" barred the amendment. ***Id***. We believe ***Wilks*** does not compel the result Jackson urges because there is no suggestion in this case that the 1992 bailjumping conviction did not exist. Indeed, Jackson's only argument with respect to that conviction is that the presentence investigation report does not state the date of conviction with sufficient clarity.

We reject that argument as well. We said in ***Wilks*** that the State's burden in this regard is "to plead a repeater allegation with relative clarity and precision." ***Id***. at 111, 477 N.W.2d at 636. And we agree with the State's argument that the difference between the statement in the information that Jackson was convicted of bailjumping on November 16, 1992, and the statement in the presentence that he was sentenced for the offense on December 3, 1992, is not a material discrepancy. "These dates," says the State, "are neither different nor mutually exclusive since a person can be convicted on a different date than [he or she is] sentenced, and since both [dates] are within the five years required by the habitual offender statute, there is no legally relevant difference between them."

Again, we think the trial court correctly summarized the situation when it stated:

> The defendant hasn't submitted any affidavits here saying that there's anything inaccurate about any of the allegations about the underlying convictions....
>
> ....

> ... He is not now saying that he didn't know that he was a repeater.... Frankly, I see no injustice here. It's clear that the underlying reality is that the defendant was a repeater that he was alleged to be. He hasn't suggested anything to the contrary.

We stated in ***Caldwell*** that because the defendant in that case could have challenged the pertinent facts in the presentence investigation report but elected not to, "[t]he court was therefore free to rely on the report and sentence [him] as a repeater." ***Caldwell***, 154 Wis.2d at 695, 477 N.W.2d at 18. The same is true here. The presentence report establishes that Jackson's criminal record of one felony and six misdemeanor convictions within the requisite five-year period is more than adequate to support enhancement of his sentence as a repeater. He does not challenge the existence of any of those convictions--only that the presentence report does not state the exact date of one of the convictions alleged in the charging documents. And a commonsense reading of the report's statement that he was sentenced for bailjumping shortly after he was arrested for absconding from supervision in 1992 establishes that his conviction for that offense occurred between April 5, 1987, and April 5, 1993, the applicable dates under the five-year provisions of § 939.62, STATS. The ***Caldwell*** test was met.

By the Court.—Judgment and order affirmed.

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