COURT OF APPEALS
DECISION
DATED AND RELEASED

January 29, 1997

No. 95-2403

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS W. REIMANN,

Defendant-Appellant.

APPEAL from an order of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed*.

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Thomas W. Reimann appeals pro se from an order denying his motion to vacate the repeater portion of his sentence. Because we discern no error at sentencing, we affirm.

In January 1990, Reimann agreed to plead no contest to theft as a repeater and obtaining possession of a controlled substance by fraud as a repeater. Reimann failed to appear for sentencing in March 1990 and was ultimately sentenced in September 1990 to eight years on the drug count and

two years consecutive on the theft count. Reimann's sentence and conviction were affirmed by this court, ***State v. Reimann***, No. 91-1021-CR (Wis. Ct. App. Dec. 18, 1991), on the ground that Reimann proceeded to sentencing after the State increased its sentence recommendation as a result of Reimann's failure to appear at the March 1990 sentencing hearing. Subsequently, Reimann filed several other motions challenging his conviction and sentence, all of which were denied by the trial court.

In December 1994, Reimann brought a pro se motion to vacate the repeater portion of his sentence, claiming that the State did not prove a prior conviction with the degree of certainty required by § 973.12(1), STATS., 1989-90. Section 973.12(1) states that a defendant may be sentenced as a repeater if he or she admits the prior conviction or if the conviction is proved by the State.[1] A defendant is a repeater if convicted of a felony during the five years immediately preceding commission of the crime for which the defendant is being sentenced, excluding time spent in actual confinement on a criminal sentence. Section 939.62(2), STATS., 1989-90.

At the August 1995 hearing on his motion, Reimann argued that the habitual criminal allegation was not properly explored at sentencing once the State increased its sentence recommendation in light of Reimann's failure to appear at his initial sentencing hearing. The State responded that the September 1989 criminal complaint alleged an April 1986 burglary conviction.[2] The State also referred the court to that portion of the September 1990 sentencing hearing at which Reimann responded to the court's inquiry

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[1] Section 973.12(1), STATS., 1989-90, provides in relevant part:

> Whenever a person charged with a crime will be a repeater as defined in s. 939.62 if convicted, any 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 such prior convictions are admitted by the defendant or proved by the state, he shall be subject to sentence under s. 939.62 unless he establishes that he was pardoned on grounds of innocence for any crime necessary to constitute him by repeater ....

[2] The November 1989 information also alleged that Reimann had a 1986 Elkhorn burglary conviction.

regarding this conviction. At the sentencing hearing, the court reviewed Reimann's prior criminal conduct as set forth in the presentence investigation report and specifically referred to an April 1986 Elkhorn burglary conviction. Reimann interrupted the court to clarify that he was convicted as party to the crime. The trial court found that the record at the plea hearing and sentencing was sufficient to constitute Reimann's admission to the 1986 criminal conviction which formed the basis for his 1990 sentence as a habitual offender. Reimann appeals.

On appeal, Reimann argues that the repeater portion of his 1990 sentence should be vacated because his 1986 conviction was neither proved nor admitted. Whether penalty enhancers are void presents a question of law which we review independently of the trial court. ***State v. Koeppen***, 195 Wis.2d 117, 126, 536 N.W.2d 386, 389-90 (Ct. App. 1995).[3] As stated earlier, prior convictions for purposes of an enhanced sentence due to habitual criminality can be established by a defendant's admission. *See* § 973.12(1), STATS., 1989-90; *see also* ***State v. Farr***, 119 Wis.2d 651, 659-60, 350 N.W.2d 640, 645 (1984).

At the plea hearing, Reimann acknowledged on numerous occasions that he understood that he was subject to sentencing as a habitual offender. At sentencing he corrected the trial court's reference to the 1986 Elkhorn burglary conviction by pointing out that he was convicted as party to the crime. On this record, we determine that the requirements of an admission by the defendant under § 973.12(1), STATS., were satisfied, and we find no basis for vitiating the repeater portion of Reimann's sentence. It is also clear that Reimann was a repeater because his 1986 burglary conviction occurred within five years of the August 1989 offenses which yielded the challenged sentences.

We turn to Reimann's second appellate argument that the "renegotiated plea" arising from the State's new sentence recommendation required another colloquy to advise him that the repeater enhancements remained a possibility. Reimann cites no persuasive authority for this proposition. The charges to which Reimann pled were unchanged between the

[3] We will reach the merits of Reimann's appeal rather than impose the bar to repeated postconviction proceedings established in ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 517 N.W.2d 157 (1994).

time the court accepted his no contest plea and the time he was sentenced. The only difference was that the State increased its sentence recommendation based upon Reimann having fled the jurisdiction rather than appear at his initial sentencing hearing. It is clear on this record that Reimann was at all times aware of the possibility of a habitual offender enhancement on his sentence.

Finally, we address an issue raised by Reimann in his reply brief. He asks us to construe his brief as a petition under ***State v. Knight***, 168 Wis.2d 509, 484 N.W.2d 540 (1992), or to otherwise liberally construe his pleadings to grant him relief on his underlying contention that the repeater portion of his sentence was inappropriately imposed. We decline to do so for two reasons. First, we decline to construe a reply brief as a petition for a writ of habeas corpus under ***Knight***. Under ***Knight***, a claim of ineffective assistance of appellate counsel is raised by a petition for a writ of habeas corpus in the appellate court. *See* ***id***. at 512-13, 484 N.W.2d at 541. Second, the underlying premise of Reimann's claim of ineffective assistance of appellate counsel—that the repeater portion of his sentence is void—has now been determined by this court to lack merit.

By the Court.—Order affirmed.

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