



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

September 10, 2014

To:

Hon. Mary Kay Wagner
Circuit Court Judge
Kenosha County Courthouse
912 56th Street
Kenosha, WI 53140

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
912 56th Street
Kenosha, WI 53140

Sandra L. Tarver
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Robert D. Zapf
District Attorney
Molinaro Bldg.
912 56th Street
Kenosha, WI 53140-3747

Mark A. Weiss, #210143
Wisconsin Resource Center
P.O. Box 220
Winnebago, WI 54985-0220

You are hereby notified that the Court has entered the following opinion and order:

2014AP38-CR

State of Wisconsin v. Mark A. Weiss (L.C. #2008CF210)

Before Brown, C.J., Reilly and Gundrum, JJ.

Mark A. Weiss appeals from an order¹ denying his motion seeking postconviction relief. He contended that he was wrongly sentenced as a repeater because the State failed to prove the repeater allegations beyond a reasonable doubt. We disagree and affirm. Based on our review of

¹ Weiss also filed a second motion seeking additional sentence credit. The trial court denied that motion as raising previously decided issues. Although he indicates he appeals from "orders," Weiss does not address the sentence-credit order. Therefore, we do not, either.

the briefs and the record, we conclude that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21 (2011-12).²

Weiss was charged with stalking and misdemeanor bail jumping, both as a felony repeater. The complaint and information alleged that he committed the crimes between February 24 and 26, 2008, and that the penalty enhancer applied because on May 18, 2007, he was convicted in Kenosha county case number 07-CF-105 of two felonies, forgery and operating a motor vehicle without owner's consent (OMVWOC).

Weiss was found guilty after a bench trial. When he refused to stipulate to the repeater allegation, the court invited the State to submit a certified judgment of conviction. It appears that the State did not.³ In February 2008, the court sentenced him as a repeater. It ordered four years' initial confinement, staying it for probation, plus two years' extended supervision on the stalking charge to be served consecutive to one year initial confinement and one year extended supervision on the bail jumping. Without the repeater enhancer, Weiss could have been incarcerated no longer than three years and six months for stalking and nine months for bail jumping. *See* WIS. STAT. §§ 940.32(2e), 939.50(3)(i), 946.49(1)(a), and 939.51(3)(a).

In October 2013 Weiss filed a postconviction motion alleging that the State had failed to prove the repeater allegations, resulting in a sentence in excess of that authorized by law. Pursuant to WIS. STAT. § 973.13, he asked the court to void the excess and reduce his sentence to

² All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

³ If the State did, the document is not in the appellate record.

the three and a half years allowed for stalking without the penalty enhancer. The court denied the motion. Weiss appeals.

A repeater is one who has been convicted of at least one felony or three misdemeanors in the five years preceding the crime for which he or she is being sentenced. WIS. STAT. § 939.62(2); *State v. Saunders*, 2002 WI 107, ¶17, 255 Wis. 2d 589, 649 N.W.2d 263. A repeater is subject to increased penalties if he or she personally admits to, or if the State proves the existence of, qualifying prior convictions. Sec. 939.62(1); *Saunders*, 255 Wis. 2d 589, ¶19. The State must prove both the existence and the date of the conviction beyond a reasonable doubt. *Saunders*, 255 Wis. 2d 589, ¶51.

“An official report of ... this ... state shall be prima facie evidence of any conviction or sentence therein reported.” WIS. STAT. § 973.12(1). A presentence investigation report (PSI) may constitute such an official report of the state if it contains the prior date of conviction. *See Saunders*, 255 Wis. 2d 589, ¶65; *see also State v. Caldwell*, 154 Wis. 2d 683, 693-94, 454 N.W.2d 13 (Ct. App. 1990).

Weiss contends his status as a repeater was not adequately proved because the PSI does not state the date of conviction. The State responds that an “attachment” to the PSI—a copy of the complaint and information—confirms the date of conviction to be May 18, 2007. Even if preferable that the actual date of conviction be in the PSI proper, the PSI recites that Weiss was charged with felony forgery on March 27, 2006, and with felony OMVWOC on August 30, 2006, and was sentenced for both on July 2, 2007. The date of conviction logically and necessarily had to fall somewhere between the charging and sentencing dates. Since Weiss committed the stalking and bail jumping between February 24 and 26, 2008, there can be no

doubt that the date of conviction plainly was “during the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced.” WIS. STAT. § 939.62(2). We conclude that the PSI constituted prima facie proof of Weiss’s repeater status.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed. WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals