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July 14, 2015

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

2014AP1550-CR State of Wisconsin v. Daniel S. Kosinski (L.C. # 2013CF479)

Before Blanchard, P.J., Lundsten and Sherman, JJ.

Daniel Kosinski appeals a judgment of conviction and an order denying postconviction relief. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We summarily affirm.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

A criminal complaint charged Kosinski with failing to comply with the sex offender registry between December 7, 2012, and January 15, 2013. The information added the allegation that Kosinski was a repeater based on convictions for two counts of second-degree sexual assault of a child on February 15, 1994, which was during the five-year period immediately preceding his commission of the present offense. A footnote explained that:

> "In computing the preceding 5-[year] period, time which the actor spent in actual confinement serving a criminal sentence, shall be excluded." Wis. Stat. § 939.62(2). Defendant Kosinski was in the custody of the Wisconsin Department of Corrections in relation to sentences stemming from convictions in Dane County Circuit Court Files 91-CF-506, 91-CF-588, 91-CF-758, 93-CF-1147 and 93-CM-2362 as follows: 02/15/1994 – 05/08/2001 (7 yrs, 2 months, 21 days); 03/30/2004 – 07/27/[2010] (6 yrs, 4 months); and 07/28/2011 – 07/03/2012 (11 months, 5 days). Between 02/15/1994 (felony conviction) and 12/07/2012 (present crime), the defendant was confined serving sentences for a total of 14 years, 4 months and 26 days leaving him free from confinement for less than five years (4 years, 4 months and 4 days).

Kosinski entered a plea agreement calling for Kosinski to plead guilty to the sex offender registry violation, as a repeater. At the plea hearing, the circuit court engaged in the following colloquy with Kosinski:

> THE COURT: Do you understand what this means, the repeater enhancer?
>
> THE DEFENDANT: I don't just because I don't understand why – I can understand me not being out for five years, but I haven't actually committed a new crime since 1993, so that's the only reason I don't understand why the enhancer was put on me.
>
> THE COURT: [Prosecutor], do you want to make a record?
>
> [PROSECUTOR]: Just briefly, Judge. The enhancer isn't from the date of conviction where a person is incarcerated, but it's five years from the date of release from confinement, and that's what [the State] provided and provided the footnote of, and the

> defendant just admitted that he was within five years within the date of confinement at the time of the commission of this crime.
>
> THE COURT: Do you understand that now better Mr. Kosinski?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And do you agree that there is a factual basis for you to be convicted of a repeat offender?
>
> THE DEFENDANT: I guess so.

The court asked Kosinski what his plea was to the charge of sex offender registry violation as a repeat offender, and Kosinski responded "Guilty." The court asked Kosinski if he agreed that there was "a factual basis for you to be found guilty of that crime," and Kosinski responded "Yes." The circuit court accepted Kosinski's guilty plea, and entered a judgment of conviction sentencing Kosinski to four years of initial confinement and three years of extended supervision.

Kosinski moved for postconviction relief, seeking to vacate the repeater enhancement component of his sentence. Kosinski argued that the State did not prove the repeater allegation and that the court did not obtain a sufficient admission from Kosinski as to his repeater status. The circuit court denied the motion, finding that Kosinski fully understood and agreed to his status as a repeater, and that Kosinski's statement of "I guess so" was an affirmative assent to the factual basis for the repeater allegation.

"To sentence a defendant as a repeater, WIS. STAT. § 973.12(1) requires the State to prove, or the defendant to admit, any prior convictions that form the basis of the defendant's repeater status." ***State v. Liebnitz***, 231 Wis. 2d 272, 275, 603 N.W.2d 208 (1999) (footnote omitted). A defendant is a repeater if he or she "was convicted of a felony during the 5-year

period immediately preceding the commission of the crime" in the present case. WIS. STAT. § 939.62(2) (2011-12). "In computing the preceding 5-year period, time which the actor spent in actual confinement serving a criminal sentence shall be excluded." ***Id.*** If periods of confinement must be established to bring the prior offense within the five-year window, those periods of confinement must be admitted or proved. ***State v. Goldstein***, 182 Wis. 2d 251, 260, 513 N.W.2d 631 (Ct. App. 1994). Here, the parties agree that the State did not prove the prior qualifying convictions, and thus the issue is whether Kosinski validly admitted the qualifying convictions.

To obtain a valid admission of prior convictions and the necessary periods of confinement, the State must set forth the convictions and dates of confinement in the information "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. In the alternative, the trial court may obtain a direct and specific admission from the defendant" during an in-court colloquy. *See* ***State v. Zimmerman***, 185 Wis. 2d 549, 558-59, 518 N.W.2d 303 (Ct. App. 1994). When the necessary facts are set forth in the information, the defendant's admission to the information is an admission to all the facts necessary to prove repeater status. ***State v. Squires***, 211 Wis. 2d 876, 886, 565 N.W.2d 309 (Ct. App. 1997). "The significance of the information in the first alternative is that the State is relying on the defendant's admission to the allegations in the information to satisfy its burden of proving all the requirements necessary for the proper imposition of a repeater enhancement." ***Id.*** at 886-87. Alternatively, the court may obtain an in-court admission from the defendant as to those dates. ***Id.*** A defendant's admission as to the conviction and dates of confinement must be direct and specific rather than equivocal. *See* ***Goldstein***, 182 Wis. 2d at 259-60 (response by

defendant that he had been incarcerated "10 months, about" was equivocal and not a direct and specific admission as to dates of confinement).

Kosinski asserts that he did not admit the periods of confinement alleged in the information, which were necessary to bring the prior convictions within five years of the current offense. Kosinski asserts that he did not admit those periods of confinement because: (1) Kosinski did not understand how the five-year period is calculated under the statutes; and (2) Kosinski's response of "I guess so" was equivocal rather than a direct and specific admission. Kosinski also asserts that his guilty plea was not an admission of the facts necessary to establish his repeater status. Kosinski asserts that the cases relying on a plea as an admission to repeater status are distinguishable because, in those cases, the State did not need to prove specific dates of confinement and the defendants did not question the repeater allegations during the plea colloquies. *See* ***Liebnitz***, 231 Wis. 2d at 284-87; ***State v. Rachwal***, 159 Wis. 2d 494, 497-513, 465 N.W.2d 490 (1991).

The State responds that, considering the totality of the record, Kosinski admitted the qualifying prior convictions by entering his guilty plea. *See* ***Liebnitz***, 231 Wis. 2d at 284-87. The State relies on the following: the State included the repeater allegation in the information, setting forth the facts necessary to establish Kosinski's repeater status; Kosinski signed a plea questionnaire acknowledging the increased penalty based on the repeater allegation and indicating he would plead guilty as a repeater; the circuit court informed Kosinski that he was being charged as a repeater and articulated the increased penalty; and Kosinski then pled guilty as a repeater. *See* ***Liebnitz***, 231 Wis. 2d at 284-87 (record established that plea to charge as a repeater was an admission of qualifying prior conviction where information set forth detailed repeater allegation and potential consequences; court ascertained the defendant's understanding

of the repeater allegation and potential consequences during a colloquy at the preliminary examination; defendant completed a plea questionnaire acknowledging the facts set forth in the information; and, at the plea hearing, the defendant affirmed that he was not challenging the facts in the complaint); ***Rachwal***, 159 Wis. 2d at 509 (plea to charge with repeater allegation was admission of prior qualifying conviction where circuit court drew defendant's attention to repeater allegation, informed defendant of increased penalty, and defendant affirmed he understood consequences of entering plea to charge as repeater). The State argues that Kosinski acknowledged that the State's explanation of how repeater status is determined helped him understand why he was charged as a repeater, and that Kosinski's "I guess so" response was a grudging affirmation of the factual basis for the repeater allegation.

Kosinski replies that the more reasonable interpretation of "I guess so" in this case is that Kosinski did not have the knowledge to determine whether there was a factual basis for the repeater allegation following the State's explanation. Kosinki asserts that his guilty plea did not erase the uncertainty Kosinski expressed as to the repeater allegation. We conclude that, under the totality of the record, Kosinski's guilty plea was a valid admission of his prior qualifying conviction to support the repeater penalty enhancer.

It is a well-established rule "that what is admitted by a guilty or no contest plea is all the material facts alleged in the charging document." ***Rachwal***, 159 Wis. 2d at 509. Here, the information clearly set forth the repeater allegation and the facts necessary to establish Kosinski's repeater status under the statutes. The circuit court drew Kosinski's attention to the repeater provision and the possibility of enhanced penalties, and the circuit court determined that Kosinski was submitting his plea freely, voluntarily, and intelligently. *See* ***id.***

In reaching this conclusion, we reject Kosinski's contention that his "I guess so" response was an equivocation. We note that "I guess so" may, in some instances, convey that the speaker does not have knowledge to form an opinion. Here, however, the circuit court found that Kosinski's response was an affirmation that Kosinski understood the repeater allegation and the potential consequences, and that Kosinski agreed that there was a factual basis for the repeater enhancer. The circuit court was able to observe Kosinski's tone and demeanor, and thus was in the best position to judge the meaning of Kosinski's statement. The court's finding as to the meaning of Kosinski's response is reasonable in light of the record. While it is true that the State did not give a fully accurate explanation of how the five-year repeater status is calculated, the State also referred Kosinski specifically to the detailed footnote in the information, which provided a more complete explanation of how repeater status is determined and set forth the necessary dates of conviction and incarceration. Accordingly, we conclude that the totality of the record establishes that Kosinski validly admitted his prior qualifying convictions to prove repeater status.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals