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April 19, 2016

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

2015AP392-CR State of Wisconsin v. Wayne D. Voegtline (L.C. # 2008CF57)

Before Kloppenburg, P.J., Higginbotham and Sherman, JJ.

Wayne D. Voegtline appeals a circuit court order denying his motion to have his sentence modified. He was convicted in 2008 of homicide by intoxicated use of a vehicle with one or more prior convictions for operating while intoxicated, contrary to WIS. STAT. § 940.09(1)(a) and (1)(1c)(b) (2007-08).[1] 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. We affirm the order.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

The State charged Voegtline in 2008 with one count of

> caus[ing] the death of Connie A. Obry, by the operation of a vehicle while under the influence of an intoxicant, and has one or more prior convictions, suspensions, or revocations ... a Class C Felony, and upon conviction may be fined not more than One Hundred Thousand Dollars ($100,000), or imprisoned not more than forty (40) years, or both.

The information also included six other counts, one count each of homicide by intoxicated use of a vehicle with a prohibited alcohol concentration, operating while intoxicated (OWI) 4th offense, prohibited alcohol concentration 4th offense, disorderly conduct, resisting an officer, and possession of tetrahydrocannabinols (THC). Count 1 of the Information charged Voegtline with "homicide by intoxicated use of a vehicle, alcohol fine enhancer—repeat offender."

At the plea hearing, the circuit court noted Count 1 of the Information included the words "repeat offender" and stated, "All I know is it stays repeat offender. I don't know why. There is no supporting language." The circuit court then struck the language "repeat offender" from the information, wrote "error by State" in the margin, and initialed the corrections. The language concerning prior convictions and the designation of Class C felony were not changed. The circuit court then commented that the complaint contained information on prior drunk driving convictions that would be "take[n] into consideration for sentencing purposes."

Pursuant to a plea agreement, Voegtline then pled no contest to Count 1. The six remaining counts in this case and one count in a separate case, 2008CT331, were dismissed and read in. A presentence investigation report (PSI) was prepared and submitted prior to the sentencing hearing. The report included dates, locations and dispositions of Voegtline's three

prior OWI cases and stated that the information was taken from the Crime Information Bureau, National Crime Information Center and local law enforcement agencies.

At the sentencing hearing, the circuit court asked Voegtline if he had any objections to the PSI. Voegtline, through counsel, requested three changes in the sections related to family history and alcohol use, but he did not challenge the three prior OWI convictions. The circuit court noted the significance of Voegtline's three prior OWI convictions. Voegtline was sentenced to twenty years of initial confinement and fifteen years of extended supervision.

Voegtline filed a postconviction motion in 2014 arguing that he had been incorrectly sentenced for a Class C felony when he had pled to a Class D felony.[2] He based his argument on the fact that the circuit court had struck the word "repeater" from the heading of Count 1 in the information. The circuit court denied the motion, noting that the complaint, information, and plea questionnaire stated that the maximum penalty for the crime was forty years in prison. The circuit court found that Voegtline "clearly agreed that he was pleading to a Class C felony," and so did the circuit court, the State, and defense counsel. Voegtline appealed the denial of his motion.

[2] Voegtline characterizes the motion as one pursuant to WIS. STAT. § 973.13. He contends that as a sentence modification motion, it does not waive his right to bring a WIS. STAT. § 974.06 motion at a later date, a proposition he supports by citing to ***State v. Starks***. *See* ***State v. Starks***, 2013 WI 69, ¶49, 349 Wis. 2d 274, 833 N.W.2d 146 ("Our reading of these statutes makes clear that a [***State v.***] ***Cherry***, [2008 WI App 80, 312 Wis.2d 203, 752 N.w.2d 393] motion, or any sentence modification motion, plainly does not waive a defendant's right to bring a § 974.06 motion at a later date."). The State characterizes it as a § 974.06 motion on the grounds that it alleged that the sentence exceeded the maximum penalty allowed by law. The State makes no argument that Voegtline's motion is untimely or procedurally barred. Because the motion is properly before us, we address its merits without deciding what kind of motion it is.

Wisconsin statutes provide mechanisms for prior criminal conduct to create more severe penalties for a subsequent conviction. Some statutes include within the statutes themselves specific enhanced penalties based on prior convictions. *See, e.g.*, WIS. STAT. §§ 940.09(1c)(b) (homicide by intoxicated use of a motor vehicle is elevated from a Class D felony to a Class C felony if person who committed it has specified prior offenses) and 940.32(2m)(a) (Class I felony stalking is elevated to Class H felony if actor has a previous conviction for a violent crime). Sentences can also be increased on the basis of prior convictions under the general repeater statute, which provides that "the maximum term of imprisonment prescribed by law … may be increased" for a defendant who is convicted of any crime for which prison can be imposed if the defendant was also convicted of a felony or three misdemeanors during the preceding five-year period. WIS. STAT. § 939.62.

The proof required to establish prior convictions for the purpose of enhanced penalties for motor vehicle crimes such as OWIs is "less imposing" than proof required for the purpose of general repeater enhancements. ***State v. Saunders***, 2002 WI 107, ¶¶32-33, 255 Wis. 2d 589, 649 N.W.2d 263. For purposes of the general repeater statute—and, it follows, for less imposing requirements for motor vehicle crimes—this proof can be provided by presentence investigation reports, which should "include the specific dates of any prior convictions still of record and specify dates of incarceration if they are to be relied upon." ***Id.***, ¶57. "[A] defendant's failure to object operates as a stipulation to the mode of proof that the State has chosen to use …." ***State v. Bonds***, 2006 WI 83, ¶44, 292 Wis. 2d 344, 717 N.W.2d 133 (summarizing principles established in ***Saunders***, 225 Wis. 2d 589).

Voegtline argues that when the circuit court deleted the words "repeat offender" from the heading of Count 1 of the information, the circuit court deleted the legal basis for any enhancer

to his charge.[3] He misunderstands what the circuit court did. It simply recognized that the information erroneously included language that related to one of two types of enhancers. The phrase "repeat offender" is customarily used when a defendant is charged under the repeater statute, which was not otherwise referenced in the information. The phrase "and has one or more prior convictions," along with the reference to WIS. STAT 940.09(1)(a), is relevant to the OWI penalty enhancer found within that statute. The circuit court correctly deleted the irrelevant "repeat offender" language and left in place the language for the relevant enhancer. There is thus no basis for concluding that Voegtline pled to a Class D felony. His sentence within the maximum for a Class C felony was not error.

Upon the foregoing reasons,

IT IS ORDERED that the order denying the motion is summarily affirmed. *See* WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

[3] Voegtline also raises two issues in his appellate brief that he did not raise in his postconviction motion at the circuit court and, therefore, we do not address those issues. "It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727.