COURT OF APPEALS
DECISION
DATED AND RELEASED

SEPTEMBER 24, 1996

No. 96-0417-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BENJAY E. KOHANSKI,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Reversed.*

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. Benjay Kohanski appeals the application of the penalty enhancer for habitual criminality (§ 939.62, STATS., the repeater statute) to his sentence on convictions on multiple charges and the subsequent denial of his postconviction motions. Kohanski argues that he did not admit, and that the State did not prove, that his prior felony conviction was less than five years from the date of his present offenses and therefore the application of the repeater statute to his sentence was improper. He further challenges the trial court's failure to make a specific finding that he was a repeater. We agree that the record contains insufficient evidence to invoke the repeater statute. We

therefore reverse the repeater component of Kohanski's sentence and commute the sentence to the maximum provided on the underlying charges.

The relevant facts in this case are not in dispute. Pursuant to a plea agreement, Kohanski in November 1994 pled no contest to multiple charges, including one count of battery to a law enforcement officer.[1] Kohanski's information included a repeater provision that alleged that Kohanski was previously convicted of a felony in April 1989. The repeater provision, however, was silent as to the amount of time Kohanski spent in actual incarceration since his 1989 conviction.[2] At the plea hearing, the court questioned Kohanski at length regarding his plea and the factual basis therefore. The plea colloquy included the following exchange regarding the repeater allegation:

> THE COURT: And in this case, there are proposed pleas to the several charges and there is a plea agreement and the State's saying that they're not going to recommend anything more than 15 years of incarceration, but the fact is the potential penalties are greater than that; do you understand that?
>
> [KOHANSKI:] Yes, Your Honor.
>
> THE COURT: I believe that Counts 1, 3, 4, and 5 are something that we call class D felonies and therefore, each of them has a potential penalty of five years.
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> [KOHANSKI:] Yes, Your Honor.
>
> THE COURT: And in this case, the information also alleges that you have a prior felony conviction. And that because

[1] *See* § 940.20(2), STATS.

[2] According to § 939.62(2), STATS., a defendant "is a repeater if the actor was convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the actor is presently being sentenced ...." In addition, time that the defendant spent in actual confinement serving a criminal sentence is excluded from the five-year computation period. ***Id.***

of that felony conviction, you're subject to some additional penalties; do you understand that?

[KOHANSKI:] Yes, Your Honor, I do.

THE COURT: Now, they would have to, if you contested this matter, they would have to establish, of course, to the Court's satisfaction that you were really convicted for and that if it's outside of five years, the only reason it's outside of five years is that you were in prison for a period of time and the time that you were free is less than five years?

[KOHANSKI:] Yes, Your Honor.

THE COURT: Okay. And in fact, the amount of enhancement is up to six years on each of these counts?

[KOHANSKI:] Yes, Your Honor.

THE COURT: So, the potential penalty really for each of these is up to 11 years and I can impose a penalty up to the maximum if I think it's the right thing to do.

[KOHANSKI:] Yes, Your Honor.

THE COURT: So, the potential penalty if you add them all together could be up to 44 years in prison.

[KOHANSKI:] Yes, Your Honor.

At sentencing, the court announced a sentence that included a seven-year prison term on the battery to law enforcement officer charge. This sentence included the statutory maximum of five years for the underlying offense plus two years under the repeater statute. After sentencing, Kohanski filed a motion for postconviction relief seeking that part of his sentence attributable to the repeater provision be commuted. The trial court denied the motion and Kohanski appeals.

It is undisputed that Kohanski's prior conviction occurred more than five years prior to his crimes in this case. Kohanski argues that he did not admit, and the State did not prove, that he was actually incarcerated during a portion of that period. *See* § 939.62(2), STATS. The State argues that Kohanski admitted his repeater status during the above plea colloquy. It does not contend that it proved his repeater status. The application of the repeater statute to an undisputed set of facts presents a question of law that we review de novo. ***State v. Zimmerman***, 185 Wis.2d 549, 554, 518 N.W.2d 303, 304 (Ct. App. 1994). We agree that Kohanski did not admit sufficient facts to establish his repeater status.

Our supreme court in ***State v. Farr***, 119 Wis.2d 651, 659, 350 N.W.2d 640, 645 (1984), stated that an "admission [of repeater status] may not by statute be inferred ... but rather, must be a direct and specific admission by the defendant." However, in ***State v. Rachwal***, 159 Wis.2d 494, 508, 465 N.W.2d 490, 496 (1991), the court stated that "***Farr***'s prescription for determining an admission is not necessarily exclusive." The court went on to find an admission in that case where the defendant pled no contest to a criminal complaint containing a repeater provision. The court held that Rachwal's plea constituted an admission of every fact contained in the complaint, and since the complaint included allegations of prior convictions within the statutory period, admission of those convictions constituted admissions of his repeater status.[3] ***Id***. at 512, 465 N.W.2d at 497. In this respect ***Rachwal*** is inapposite to the facts of the instant case.

We conclude that the instant case is governed by ***Zimmerman***. In that case, the defendant pled guilty to charges contained in an information, including allegations contained in a repeater provision. However, as in this case, that provision alleged a prior conviction outside the statutory period and was silent as to any periods of incarceration. The court noted as follows:

> It is true that Zimmerman did admit to being convicted of aggravated battery in Texas in 1983 and did admit to the facts as stated in the criminal information.

[3] The court also noted that the circumstances described in ***State v. Rachwal***, 159 Wis.2d 494, 513, 465 N.W.2d 490, 497 (1991), "approach the absolute bare minimum necessary for a valid admission."

> However, at no time did Zimmerman admit that the prior conviction was less than five years from the date of the present conviction. Further, he was never asked about his confinement, and there was no admission by Zimmerman to a period of incarceration that would bring his 1983 conviction within the five-year statutory period. Therefore, we cannot conclude that Zimmerman gave a direct and specific admission to facts necessary to establish the repeater penalty enhancer.

Id. at 557, 518 N.W.2d at 306. As in ***Zimmerman***, Kohanski in this case admitted the facts contained in the criminal information, including the facts alleged in the repeater provision. However, those facts alone do not implicate the repeater statute, because the prior conviction fell outside of the five-year statutory period and there is no allegation of an intervening period of actual incarceration.

We also agree that the above plea colloquy does not establish Kohanski's repeater status. The exchange between the court and Kohanski reveals that the court's questions established Kohanski's understanding of the significance of the repeater provision. It did not elicit Kohanski's admission that the repeater allegations were properly applicable to his case. The court's explanation that the State "would have to establish" the five-year period and Kohanski's affirmative response amounted to an acknowledgement of his understanding of the *proof* necessary. It was not a "direct and specific" *admission* of repeater status. ***Farr***, 119 Wis.2d at 659, 350 N.W.2d at 645. We refer to the following language from ***Zimmerman***:

> The State must make a specific allegation of the preceding conviction and incarceration dates 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. In addition to asking the question "whether the defendant was convicted on a particular date of a specific crime" the trial court could simply ask the follow-up question "what

> period of time was the defendant incarcerated as a result of the conviction."

Id. at 558-59, 518 N.W.2d at 306 (citation omitted).

Where a court imposes a penalty in excess of that permitted by law, the excess portion of the sentence is void. See § 973.13, STATS. We therefore reverse the repeater component of Kohanski's sentence and commute the sentence to the maximum on the underlying charge. *See* ***Zimmerman***, 185 Wis.2d at 559, 518 N.W.2d at 306 (citing ***State v. Wilks***, 165 Wis.2d 102, 112, 477 N.W.2d 632, 637 (Ct. App. 1991)). We also reverse the trial court's order denying Kohanski's postconviction motion. Because of our disposition above, we do not address Kohanski's argument that the trial court must make a specific finding that he is a repeater before imposing a sentence in excess of the statutory maximum.

By the Court.—Judgment and order reversed.

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