

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-0791

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JIMMY THOMAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: JAMES E. WELKER, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Vergeront, JJ.

PER CURIAM. Jimmy Thomas appeals from an order denying a § 974.06, STATS., postconviction motion. Thomas entered a guilty plea on a robbery charge, and received an enhanced sentence of fifteen years as a repeater. His motion sought a reduced sentence. He based it on his contention that the State

failed to adequately prove his repeater status. We reject that contention and affirm.

A defendant may be sentenced as a repeater if convicted of a felony within five years of the present offense. Section 939.62(2), STATS. The burden is on the State to prove the defendant is a repeater, but that burden is met by a direct and specific admission by the defendant. Section 973.12(1), STATS.; *State v. Farr*, 119 Wis.2d 651, 659, 350 N.W.2d 640, 644 (1984). A knowing and voluntary plea of guilty to a complaint with a repeater allegation may constitute a sufficient admission, thereby relieving the State of its burden. *State v. Rachwal*, 159 Wis.2d 494, 509, 465 N.W.2d 490, 496 (1991). In such cases the record must establish the defendant's express understanding that his or her prior record, as alleged, increased the maximum potential penalty. *State v. Goldstein*, 182 Wis.2d 251, 256-57, 513 N.W.2d 631, 634 (Ct. App. 1994).

Here the complaint and information alleged that Thomas was subject to an enhanced sentence of up to six years, based on a prior felony conviction within five years. The documents also identified the date of conviction and the specific offense. Thomas' signed waiver of rights form also informed him of the enhanced maximum sentence, as did the trial court at the plea hearing. The court specifically asked if he understood that in a trial the State would have to prove his repeat offender status, and Thomas stated that he did. The court then asked him how he pleaded to the charge of robbery, as a habitual criminal, and Thomas answered "guilty." He also acknowledged the date of his prior felony conviction. His repeater status was therefore sufficiently proved to support the enhanced sentence.

As part of its argument, the State challenged Thomas' right to bring a § 974.06, STATS., motion on this issue, in light of the holding in *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994). As the State concedes, however, this court has held that a defendant may use § 974.06, STATS., to challenge a conviction and sentence as a repeater. *State v. Flowers*, 221 Wis.2d 20, 22-23, 586 N.W.2d 175, 176-77 (Ct. App. 1998). We are bound by the *Flowers* decision, and decline the State's request to certify the issue.

By the Court.—Judgment and order affirmed.

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

