COURT OF APPEALS
DECISION
DATED AND FILED

SEPTEMBER 29, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 99-1107-CR
99-1108-CR
99-1109-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BERNHARDT C. THOMPSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: MARY KAY WAGNER-MALLOY, Judge. *Affirmed.*

ANDERSON, J. In this consolidated appeal Bernhardt C. Thompson asserts the trial court erred when it found he was a repeater under § 939.62(2), STATS., without having either a direct admission of his repeater status or other competent evidence of his status in the record. We affirm since the presentence investigation report was available to the court and it constituted

sufficient proof of Thompson's repeater status. Thompson also objects to the trial court's exercise of its sentencing discretion, arguing that it focused on only one factor when it imposed the maximum penalty available. Again, we affirm because the trial court appropriately discussed all of the relevant sentencing factors.

Three separate criminal complaints are consolidated for this appeal. We will pass over the initial charges and circumstances surrounding the issuance of the three separate complaints and go immediately to the plea agreement between the State and Thompson. Thompson entered no contest pleas to numerous charges: criminal damage to property, § 943.01, STATS.; obstructing an officer, § 946.41, STATS.; theft, § 943.20(1)(a), STATS.; bail jumping, § 946.49(1)(a), STATS., all as a repeat offender under § 939.62(1)(a), STATS., as well as operating after revocation, second offense, § 343.33, STATS.; and obstructing an officer, § 946.41. The trial court invoked the repeater allegation and imposed total prison time of four years, followed by three years of probation.[1]

Thompson brought two postconviction motions. His first motion challenged the trial court's use of the repeater allegation because of the lack of a competent record to support the allegation. The trial court denied the motion, stating that the repeater allegation was proven when, during the plea colloquy, Thompson made a specific admission of his previous felony conviction. With leave of the trial court, Thompson filed a second motion complaining that the trial court misused its sentencing discretion when it limited its reasons for the sentence imposed to the character of the defendant and ignored the other factors that make

[1] The length and structure of the sentences imposed on each of the six counts are not relevant to our discussions and need not be set forth in this opinion.

up a sentencing decision. The court likewise rejected this motion, finding that it had considered the appropriate factors at sentencing. Thompson appeals.

The habitual criminality statute, § 939.62, STATS., allows an increased maximum term of imprisonment for repeat offenders. Subsection (2) defines a repeat offender as one who "was convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced … which convictions remain of record and unreversed." For a defendant to be sentenced under § 939.62, the prior convictions must be either "admitted by the defendant or proved by the state." Section 973.12(1), STATS. If admitted, the admission must be a "direct and specific admission by the defendant."[2] ***State v. Farr***, 119 Wis.2d 651, 659, 350 N.W.2d 640, 645 (1984). Thompson contends that he did not directly and specifically admit to being a habitual criminal and the State did not directly prove the allegation; therefore, his enhanced sentence is void.

Whether the imposed penalty enhancer was in violation of §§ 939.62 and 973.12, STATS., is a question of law which we decide de novo. *See* ***State v. Theriault***, 187 Wis.2d 125, 131, 522 N.W.2d 254, 257 (Ct. App. 1994).

We agree with Thompson that the plea colloquy does not constitute a direct and specific admission to the habitual criminal allegation. The only

[2] Section 973.12(1), STATS., provides in relevant part:

> If the prior convictions are admitted by the defendant or proved by the state, [the defendant] shall be subject to sentence under s. 939.62 …. An official report of the F.B.I. or any other governmental agency of the United States or of this or any other state shall be prima facie evidence of any conviction or sentence therein reported.

exchange between the trial court and Thompson concerning the habitual criminal allegation is ambiguous:[3]

> THE COURT: Okay. You understand on all those cases where they're misdemeanors where you're charged as a repeater the state would have to prove that you had previously been convicted of a felony occurring–from Judge Bastianelli's court as party to the crime of operating a motor vehicle without owner's consent occurring in 95-CF-450?
>
> MR. THOMPSON: Yes, Your Honor.
>
> THE COURT: Is that correct?
>
> MR. THOMPSON: Yes, Your Honor.

The exchange is not an admission of habitual criminality. At most, Thompson acknowledges that the State has the burden of proving his prior felony conviction. This exchange did no more than alert the State to its obligation to prove the repeater allegation beyond a reasonable doubt. *See* ***id***. at 127, 522 N.W.2d at 255.

However, we do not agree with Thompson that the PSI cannot serve as proof of his habitual criminal status because it was never introduced into evidence. There is no requirement that the PSI be formally introduced into

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[3] The Criminal Jury Instruction Committee has prepared special material on the proper method of taking a plea. The Committee suggests that the trial court directly ask the defendant, "Were you convicted of (name offense) on (date) ?" WIS JI—CRIMINAL SM-32, "Accepting a Plea of Guilty." Adding a direct question was suggested in ***State v. Goldstein***, 182 Wis.2d 251, 261, 513 N.W.2d 631, 636 (Ct. App. 1994):

> One simple and direct question to the defendant from either the prosecutor or the trial judge asking whether the defendant admits to the repeater allegation will, in most cases, resolve the issue. We suggest that trial judges include this question in their colloquy with the defendant at the plea hearing (if there is one) or, otherwise, at the time of sentencing.

evidence.[4] In ***State v. Caldwell***, 154 Wis.2d 683, 694, 454 N.W.2d 13, 18 (Ct. App. 1990), we held that a presentence investigation report could be used as an official governmental report under § 973.12(1), STATS., in order to prove a defendant's conviction. The use of such a report depends on the satisfaction of certain requirements which include: (1) checking court files to confirm information in the presentence report; (2) providing a synopsis of the prior conviction relied upon in the information for repeater status; and (3) stating the date of conviction for the prior offense and relevant information regarding the issue of repeater status. *See* ***Farr***, 119 Wis.2d at 658, 350 N.W.2d at 644-45.

We conclude that Thompson's presentence investigation report satisfies these requirements. The author of the report lists a felony conviction of operating a vehicle without the owner's consent; the date the offense charged was listed as July 8, 1995; and the disposition occurred on November 16, 1995, and included eighteen months in prison. The author also noted that Thompson was paroled on May 21, 1996, and discharged from supervision on May 14, 1997. In addition, the author lists sources of information that included the Wisconsin Crime Information Bureau and Department of Corrections files. We are satisfied that the PSI is an official report under § 973.12(1), STATS., and it contains critically relevant information regarding the issue of Thompson's repeater status. *See* ***Farr***, 119 Wis.2d at 658, 350 N.W.2d at 644-45.

[4] Thompson and his attorney had access to the PSI. In fact, during the sentencing hearing, defense counsel corrected the criminal record entry of this felony by noting that Thompson had been convicted as a party to a crime of operating a vehicle without the owner's consent. We also note that Thompson sought to correct other entries in his criminal record but did not discuss the felony serving as the basis of the repeater allegation.

Thompson's second grievance focuses on his sentencing. He argues that the trial court erroneously exercised its sentencing discretion by only considering his character and ignoring all the other sentencing factors.

Sentencing is within the sound discretion of the trial court and we will not reverse absent a misuse of that discretion. *See* ***State v. Tarantino***, 157 Wis.2d 199, 221, 458 N.W.2d 582, 591 (Ct. App. 1990). There exists a strong policy against interference with the discretion of the trial court in passing sentence. The trial court must articulate the basis for the sentence imposed. *See* ***State v. Kourtidias***, 206 Wis.2d 574, 588, 557 N.W.2d 858, 864 (Ct. App. 1996). The primary factors to be considered are the gravity of the offense, the character of the defendant and the need for the protection of the public. *See* ***id***. The weight to be attributed any factor is for the trial court to determine in the exercise of its judicial discretion. The imposition of a particular sentence can be based on any one or more of the three primary factors. While an element of weighing or balancing is involved, this is for the trial court to perform. Such determination will not be reweighed or rebalanced by this court since "weight which is to be attributed to each factor is a determination which appears to be particularly within the wide discretion of the sentencing judge." ***Anderson v. State***, 76 Wis.2d 361, 367, 251 N.W.2d 768, 771 (1977) (quoted source omitted).

Our review of the sentencing transcript shows that the trial court started by commenting on Thompson's character and his long criminal history. The court then discussed why it believed Thompson's alcohol and drug problems excluded him as a candidate for probation—because he required treatment that he has avoided. The court then concluded that because of the defendant's character,

it was necessary to protect the public. We are satisfied that this constitutes a proper exercise of the court's sentencing discretion.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.