COURT OF APPEALS
DECISION
DATED AND FILED

July 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0269

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHARLES W. RANDLE,

DEFENDANT-APPELLANT.

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

¶1 ANDERSON, J.[1] Charles W. Randle contends that the State failed to prove that he was a repeater under WIS. STAT. § 939.62 and his sentence must be reduced by vacating the portion of the sentence attributable to the repeater

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

allegation. We affirm the conviction because, under the totality of the record, we conclude that Randle's plea, in conjunction with a plea agreement incorporating enhanced prison sentences, constitutes an admission under WIS. STAT. § 973.12.

¶2 Randle was charged in a criminal complaint with sixteen misdemeanor counts of issuing worthless checks in violation of WIS. STAT. § 943.24(1). In addition, the complaint alleged that Randle was a repeater because of previous felony and misdemeanor convictions within five years and that the maximum term of imprisonment for each count would be increased from nine months to three years.

¶3 The State and Randle reached a plea agreement. Under the terms of the agreement, Randle would enter a no contest plea to counts one, two and three; in exchange, counts four through sixteen would be dismissed but "read in" for restitution purposes. The State agreed to recommend an imposed and stayed sentence of three years on each of the three counts, with the sentences to run concurrent with a parole release on a previous burglary sentence. Further, the State agreed to recommend a probation term of four years.

¶4 At the plea hearing, Randle and the State fulfilled their obligations under the plea agreement. The circuit court accepted Randle's plea, found him guilty, and imposed and stayed consecutive sentences of two years on each of the three counts. The circuit court placed Randle on probation for four years consecutive to any parole time he would serve on the prior burglary sentence.

¶5 Randle filed a pro se motion to vacate the portion of the sentence enhanced by the repeater allegation because of the State's failure to prove the allegation prior to sentencing. The circuit court denied the motion:

> The record confirms that the Defendant had a full and complete understanding of the circumstance under which he was being sentenced as a repeat offender. In viewing the record in its entirety the Defendant admitted his very recent felony conviction for which he was currently serving a sentence at the time of this sentencing. The Court bases this opinion on the transcript at sentencing and the recent decision of the Wisconsin Supreme Court of State of Wisconsin v. David C. Liebnitz Case No. 98-2182 released December 21, 1999 and State v. Rachwal, 159 Wis. 2d 494 (1991).

On appeal, Randle continues to insist that the State failed to satisfactorily prove the repeater allegation and that therefore the portion of his sentence attributable to the repeater allegation must be vacated.

¶6 The only issue presented by Randle's appeal is whether the requirements of WIS. STAT. § 973.12(1) have been satisfied. Section 973.12(1) governs sentencing of a repeater and requires that the defendant admit or the State prove the prior convictions that serve as the basis for the repeater allegation.[2] The

[2] WISCONSIN STAT. § 973.12 provides:

> **Sentence of a repeater or persistent repeater. (1)** Whenever a person charged with a crime will be a repeater or a persistent repeater under s. 939.62 if convicted, any applicable prior convictions may be alleged in the complaint, indictment or information or amendments so alleging at any time before or at arraignment, and before acceptance of any plea. The court may, upon motion of the district attorney, grant a reasonable time to investigate possible prior convictions before accepting a plea. If the prior convictions are admitted by the defendant or proved by the state, he or she shall be subject to sentence under s. 939.62 unless he or she establishes that he or she was pardoned on grounds of innocence for any crime necessary to constitute him or her a repeater or a persistent repeater. 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. Any sentence so reported shall be deemed prima facie to have been fully served in actual confinement or to have been served for such period of time as is shown or is consistent with the report. The court shall take judicial notice of the statutes of the United States and foreign states in determining whether the prior conviction was for a felony or a misdemeanor.

application of § 973.12(1) to undisputed facts presents a question of law that we review de novo. *See* ***State v. Liebnitz***, 231 Wis. 2d 272, 283, 603 N.W.2d 208 (1999).

¶7 This appeal is governed by ***Liebnitz***. In ***Liebnitz***, the Wisconsin Supreme Court held that when a defendant accepts a plea agreement where the recommended sentence could be reached only by application of the repeater penalties and the repeater allegations are not proven, a court should look to the totality of the record to determine if the defendant's plea constitutes an admission under WIS. STAT. § 973.12(1). *See* ***Liebnitz***, 231 Wis. 2d at 281, 288. The supreme court held that in considering the totality of the record, a court should pay special attention to four parts of the record: First, whether the charging documents properly charge the defendant as a repeater under WIS. STAT. § 939.62; second, whether the repeater charge was read to the defendant at the initial appearance; third, whether the record of the plea agreement, including the plea questionnaire, contains an acknowledgement of the prior convictions; and fourth, if the defendant understood that his or her no contest plea was an admission that all material facts in the charging documents were true. *See* ***Liebnitz***, 231 Wis. 2d at 285-87.

¶8 Before applying this analysis, we first consider if the plea agreement contained a sentence recommendation that could only be reached by application of the repeater statute. Issuing worthless checks in violation of WIS. STAT. § 943.24(1) is a Class A misdemeanor punishable by a jail term not to exceed nine months. *See* WIS. STAT. § 939.51(3)(a). If the defendant is a repeater, as that term is defined in WIS. STAT. § 939.62(2), that nine-month sentence can be increased to

three years.[3] *See* § 939.62(1)(a). The plea agreement between Randle and the State permitted the State to recommend a prison sentence of three years on each count. Therefore, the recommended sentence could only be achieved by application of the repeater statute.

¶9 In analyzing the record, we first consider whether the charging document contained the repeater allegation. The criminal complaint set forth in detail one prior felony conviction and four misdemeanor convictions within five years of the issuance of the complaint. Included in the allegation was the type of crime, the dates of convictions, the case numbers, and the maximum possible term of imprisonment for each count when the repeater allegation was applied. This was sufficient notice to Randle that he was charged as a repeater and the consequences of that allegation.

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[3] The relevant portions of WIS. STAT. § 939.62 provide:

> **Increased penalty for habitual criminality.**
>
> **(1)** If the actor is a repeater, as that term is defined in sub. (2), and the present conviction is for any crime for which imprisonment may be imposed (except for an escape under s. 946.42 or a failure to report under s. 946.425) the maximum term of imprisonment prescribed by law for that crime may be increased as follows:
>
> (a) A maximum term of one year or less may be increased to not more than 3 years.
>
> ….
>
> **(2)** The actor 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 presently is being sentenced, or if the actor was convicted of a misdemeanor on 3 separate occasions during that same period, which convictions remain of record and unreversed. It is immaterial that sentence was stayed, withheld or suspended, or that the actor was pardoned, unless such pardon was granted on the ground of innocence. In computing the preceding 5-year period, time which the actor spent in actual confinement serving a criminal sentence shall be excluded.

¶10 We next consider whether the charges, the repeater allegation and the potential enhanced penalty were explained to Randle during his initial appearance. Our consideration is hampered because Randle has not supplied us with a transcript of his initial appearance. *See* ***State Bank v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986) (burden on appellant to ensure that record is sufficient to address issues raised on appeal). We must assume, therefore, that at the initial appearance the circuit court or court commissioner complied with the requirements of WIS. STAT. § 971.02, advised Randle of the charges and furnished him with a copy of the complaint which, we have found, properly charged him as a repeater. *See* ***Suburban State Bank v. Squires***, 145 Wis. 2d 445, 451, 427 N.W.2d 393 (Ct. App. 1988) (in the absence of a complete record, we will assume facts necessary to sustain the trial court's decision).

¶11 The next consideration is whether the record, including the plea questionnaire, reveals that Randle understood that he was admitting to all of the material facts supporting the repeater allegation. One section of the form completed and initialed by Randle stated, "I do not object to the Judge using the complaint in this case to find that a factual basis exists for accepting my plea of no contest."[4] In ***Liebnitz***, the supreme court reiterated that a no contest plea admits all of the material facts alleged in the charging document. *See* ***Liebnitz***, 231 Wis. 2d at 287-88. In this case, the complaint explicitly described the repeater allegation and Randle specifically acknowledged in the plea questionnaire that the complaint could serve as the factual basis to support his no contest plea.

[4] We note that while exercising his right of allocution before sentencing, Randle admitted that he had been convicted of a burglary charge. However, because this admission came after the plea was accepted, we will not include it in our analysis.

Therefore, when Randle entered his plea, he understood that the plea was an admission of the material facts constituting the repeater charge.

¶12 Finally, we also look to the record to determine if Randle understood the consequences of the repeater allegation. Another section of the plea questionnaire contained Randle's acknowledgement that the maximum penalty was three years for each count. During the course of accepting Randle's plea, the judge asked Randle if he understood "that because they are charging you as a repeater, [each count carries] three-year penalties versus nine months?" Randle replied, "Yes." The judge then asked, "You understand that? So you are facing a maximum of nine years imprisonment." Again, Randle replied, "Yes." Because of these exchanges, we conclude that Randle understood the consequences of admitting to being a repeater.

¶13 The record establishes that Randle understood the nature and consequences of the charges against him and the consequences of his no contest plea. We conclude, based upon our analysis of the record, that Randle's plea to

the three counts in the criminal complaint constituted an admission under WIS. STAT. § 973.12 that he was a repeater.[5]

By the Court.—Judgment and order affirmed.

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

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[5] This appeal would not have been necessary if the prosecutor had been prepared to prove the repeater allegation at the plea hearing. Precious judicial resources would have been saved if, at the time of the plea hearing, the prosecutor had either presented certified judgments of conviction or the case files for the felony and four misdemeanors included in the repeater allegation. In ***State v. Wideman***, 206 Wis. 2d 91, 107-08, 556 N.W.2d 737 (1996) (footnote omitted), the supreme court urged prosecutors to properly prove the repeater allegation:

> [W]e are persuaded that both the State and defense counsel are often careless in making a record about prior offenses. We urge, as did the court of appeals in the case at bar, that both the State and defense counsel adopt and follow better practices in the sentencing stage of these penalty enhancement cases.

Id.; *see also* ***State v. Theriault***, 187 Wis. 2d 125, 132 n.1, 522 N.W.2d 254 (Ct. App. 1994) ("proving a defendant's status as a habitual criminal is neither difficult nor time consuming."); ***State v. Koeppen***, 195 Wis. 2d 117, 130-31, 536 N.W.2d 386 (Ct. App. 1995) (prosecutors must understand that there are formal proof requirements as to repeater allegations).