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March 29, 2019

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

2018AP745 State of Wisconsin v. Jerry Harden (L.C. # 2000CF75)

Before Lundsten, P.J., Kloppenburg and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jerry Harden, pro se, appeals a circuit court order that denied Harden's motion challenging his September 2000 judgment of conviction and sentence as void. 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 (2017-18).[1] We summarily affirm.

Harden was initially charged in June 1999 with two counts of armed burglary and two counts of criminal damage to property. After Harden entered not guilty pleas, the State moved to dismiss the charges without prejudice so that it could refile the charges with a repeater allegation. The court granted the motion to dismiss and ordered Harden detained until the next day for an initial appearance on the new charges. The State then filed the complaint in this case, which included a persistent repeater allegation. Harden was found guilty at trial, and the court entered a judgment of conviction and sentence in September 2000.

On February 23, 2018, Harden moved to reverse his September 2000 judgment of conviction and sentence. Harden argued that the judgment of conviction and sentence were void because: (1) the prosecutor improperly refiled the charges with the persistent repeater allegation; (2) the circuit court lacked authority to enter a judgment in the case initiated by the new complaint; and (3) the circuit court judge was biased. The circuit court denied the motion.

Harden contends first that his judgment of conviction and sentence are void on grounds that the prosecutor was prohibited from refiling the charges with the added repeater allegation. Harden contends that, under WIS. STAT. § 973.12(1), a repeater allegation must be asserted in the complaint or information prior to the court's acceptance of any plea. Harden argues that, under § 973.12(1), the prosecutor was prohibited from adding the repeater allegation to the charges after Harden entered a not guilty plea. He contends that the prosecutor was therefore prohibited

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

from moving to dismiss the original charges so that he could refile the charges with the repeater allegation. Harden argues that, in ***State v. Martin***, 162 Wis. 2d 883, 470 N.W.2d 900 (1991), the supreme court held that a prosecutor may not move to dismiss charges and then refile them with an added repeater allegation after the defendant has entered a plea to the original charges. We do not share Harden's reading of ***Martin***.[2]

In ***Martin***, the supreme court held that the State may not add a repeater allegation after the defendant has entered a not guilty plea. ***Id.*** at 888. However, the court did not hold, as Harden asserts, that the State may not dismiss the charges and then refile them in a new case with the repeater allegation. Rather, the court expressly recognized that a prosecutor has "other remedies when there are significant problems in investigating a defendant's prior convictions." ***Id.*** at 903 n.15. The court noted that, in a prior case, the court "allowed a prosecutor to dismiss a complaint, with the consent of the judge exercising appropriate discretion, after the defendant's entry of a not guilty plea and then reissue a complaint with a repeater allegation." ***Id.***

Following ***Martin***, we addressed the argument that Harden asserts here in ***State v. Larsen***, 177 Wis. 2d 835, 503 N.W.2d 359 (Ct. App. 1993). After Larsen's not guilty plea was entered, the State moved to dismiss the complaint and refile the charges with an added repeater allegation. ***Id.*** at 836-37. The court granted the dismissal without prejudice and accepted the

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[2] Harden also contends that, under WIS. STAT. § 973.12(1), the prosecutor was required to show cause for an extension of time to file a late amended information prior to Harden's entering a plea. He then challenges the prosecutor's stated reason for seeking to add the repeater allegation, which was that the prosecutor had not been previously aware of Harden's prior convictions. Harden asserts that the prosecutor was, in fact, previously aware of those prior convictions, and that he therefore did not show good cause for an extension, even if the request had been timely. However, the question of whether the prosecutor would have had good cause to seek an extension under § 973.12(1) is not before us in this appeal.

new complaint with the repeater allegation. ***Id.*** at 837. Larsen, like Harden, argued that WIS. STAT. § 973.12(1) and ***Martin*** prohibited the State from seeking to dismiss the original complaint so that it could file a new complaint with a repeater allegation because Larsen had already entered a not guilty plea. ***Id.*** at 837-38. We rejected Larsen's reading of ***Martin*** as prohibiting the State from dismissing the charges and refiling them with the repeater allegation. ***Id.*** at 838-40. We explained that "[i]n ***Martin***, the issue was whether [§ 973.12(1)] permitted an *amendment* to an information to add a repeater allegation after a plea had been entered," while in ***Larsen*** "the [S]tate did not seek to *amend* the original complaint. Rather, the [S]tate sought to *dismiss* the original complaint and to issue a new complaint." ***Id.*** at 838-39. We explained that "[t]his is a subtle, but important, distinction," because when the original complaint was *dismissed* the State did not seek to "bind [Larsen] to his previous plea to the original complaint." ***Id.*** at 839-40. We held that dismissal of an original complaint and filing of a new complaint with the repeater allegation are permissible "because the slate has been wiped clean: the original complaint and [the defendant's] plea to it are no more" so that the defendant may "fully consider his plea options and … enter a fresh plea with full awareness of the possible punishment." ***Id.*** at 840. We explained that this process served the purposes of the repeater statute. ***Id.*** Such was the case here.[3]

[3] Harden argues in his reply brief that ***State v. Larsen***, 177 Wis. 2d 835, 503 N.W.2d 359 (Ct. App. 1993), is distinguishable because, there, the State had checked Larsen's criminal record but was unaware that Larsen had prior convictions because it used a misspelling of his name. Harden argues that, here, the State knew of Harden's criminal history when it filed the original complaint. He contends that the State "sandbagged" him by using its knowledge of his priors to dismiss and reissue the charges with a repeater allegation. However, the issue in this appeal is whether Harden's conviction and sentence are void on grounds that WIS. STAT. § 973.12(1) prohibited the refiling of the charges against Harden with the added repeater allegation. The State's knowledge of Harden's criminal history is not relevant to this issue. *See* ***Larsen***, 177 Wis. 2d at 840 (after "conclud[ing] as a matter of law that [***State v. Martin***, 162 Wis. 2d 883, 470 N.W.2d 900 (1991)] and [§ 973.12(1)] do not preclude a dismissal without prejudice

(continued)

Next, Harden contends that issue and claim preclusion barred the State from asserting the repeater allegation in this case. He asserts that the State could have included the repeater allegation in the original complaint, and that its failure to do so precluded it from asserting the repeater allegation in the second complaint. However, neither issue preclusion nor claim preclusion applies to these facts. The first complaint was dismissed without prejudice, without a final decision on the merits of the charges. Accordingly, neither doctrine applies. *See* ***State v. Miller***, 2004 WI App 117, ¶27, 274 Wis. 2d 471, 683 N.W.2d 485 (claim preclusion did not apply following dismissal of charges without prejudice because "no decision on the merits had been made and the State was therefore free to refile the same charges to obtain a judgment on their merits"); ***Hlavinka v. Blunt, Ellis & Loewi, Inc.***, 174 Wis. 2d 381, 396, 497 N.W.2d 756 (Ct. App. 1993) (issue preclusion applies only if the issue of fact was "actually litigated and determined by a valid and final judgment, and the determination [was] essential to the judgment") (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. LAW INST. 1982)).

Next, Harden contends that the circuit court lacked subject matter jurisdiction and competency to enter a judgment in this case. He argues that the complaint itself was barred for the reasons set forth above, depriving the circuit court of jurisdiction and competency. Because we have rejected Harden's arguments that the second complaint was improperly filed, we reject

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and the issuance of a new complaint alleging repeater status," turning to the separate issue of "whether the trial court properly exercised its discretion in permitting such action"; the second issue, not first, involved consideration of prosecutor's actions in searching Larsen's criminal history).

In the alternative, Harden asks this court to overrule ***Larsen***. However, only the supreme court may overrule a court of appeals decision. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

his arguments that the circuit court lacked subject matter jurisdiction or competency to act in this matter.

Harden also asserts that the circuit court lacked subject matter jurisdiction in this case because no warrant or summons was issued following the filing of the complaint. *See* WIS. STAT. § 968.02(2). However, in ***State v. Jennings***, 2003 WI 10, ¶27, 259 Wis. 2d 523, 657 N.W.2d 393, the supreme court held that "the filing of a criminal complaint, without the issuance of a warrant, is sufficient to commence prosecution of a defendant who is already in custody." Here, Harden does not dispute that he was in custody when the second complaint was filed, following the court's order that Harden be detained until the initial appearance on the new charges.[4] Thus, the filing of the complaint was sufficient to commence the prosecution.

Next, Harden argues that the judgment and conviction are void because, he asserts, the circuit court judge was biased. Harden contends that the judge exhibited bias when, at sentencing, the judge stated that, during his childhood, he had lived in the neighborhood where the burglaries occurred, and that the neighborhood had been safe at that time. Harden asserts that the judge's comments exhibited both subjective and objective bias. We are not persuaded.

We review a claim of judicial bias for both subjective and objective bias. *See* ***State v. McBride***, 187 Wis. 2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994). The question of subjective bias is whether the judge has determined that he or she cannot be impartial. ***Id.*** The question of objective bias is whether a reasonable person could conclude that the average judge with

[4] In reply, Harden argues that his continued detention was illegal. However, he does not dispute that he was, in fact, in custody when the new complaint was filed.

ordinary human tendencies and weaknesses could not be trusted to remain neutral under the circumstances. ***State v. Goodson***, 2009 WI App 107, ¶9, 320 Wis. 2d 166, 771 N.W.2d 385. Here, the circuit court judge determined that he was not biased, and thus Harden cannot show subjective bias. As to objective bias, the fact that the judge had, during his childhood, lived in the neighborhood where the burglaries occurred, and believed the neighborhood to be safe at that time, would not cause a reasonable person to conclude that the judge could not be trusted to remain neutral. Accordingly, we reject Harden's claim of judicial bias.

Finally, Harden contends that the refiling of the charges against him in this case violated the Double Jeopardy Clause. However, jeopardy did not attach because the original complaint was dismissed prior to the jury being sworn, *see* ***State v. Seefeldt***, 2003 WI 47, ¶16, 261 Wis. 2d 383, 661 N.W.2d 822, or the court's acceptance of a guilty or no-contest plea. *See* ***State v. Poveda***, 166 Wis. 2d 19, 25, 479 N.W.2d 175 (Ct. App. 1991). Accordingly, there was no double jeopardy violation in this case.[5]

[5] Harden cites ***State v. Antes***, 74 Wis. 2d 317, 246 N.W.2d 671 (1976), for the proposition that new evidence is required for the State to reissue charges. However, the ***Antes*** court did not state that new evidence is required when the State moves to dismiss a complaint without prejudice and reissue those charges with a repeater allegation. Rather, the ***Antes*** court stated that "after the discharge of a defendant at a preliminary examination the [S]tate may reissue a complaint if it has or discovers additional evidence." ***Id.*** at 323. Accordingly, ***Antes*** does not apply here.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals