**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**September 4, 2002**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 02-1143-CR** **Cir. Ct. No. 00-CM-199**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ROBERT J. STYNES,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Judgment modified and, as modified, affirmed; order reversed.*

¶1 SNYDER, J.[1] Robert J. Stynes appeals from a judgment of conviction for two counts of disorderly conduct and two counts of resisting an officer and from an order denying his motion for postconviction relief. Stynes

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All statutory references are to the 1999-2000 version unless otherwise noted.

argues that the State's failure to comply with the notice requirements of Wisconsin's repeat offender statute requires the commutation of his sentence to the maximum allowed by law without the penalty enhancer. We agree. We affirm the judgment as modified by this decision and reverse the order denying postconviction relief.

## FACTS

¶2 On March 31, 2000, Stynes was charged with two counts of disorderly conduct and two counts of resisting an officer; the complaint alleged that on March 28, 2000, a police officer observed an apparently intoxicated Stynes lying in the grass in front of a private residence. The officer identified himself as a police officer and asked Stynes if he was okay; Stynes did not reply. After the officer requested a rescue squad, he continued to try to talk to Stynes, noticing a strong odor of intoxicants coming from him. Stynes eventually opened his eyes, swore at the officer and refused to provide his name. Shortly after the ambulance arrived, Stynes got up and began to walk away. When the officer attempted to follow Stynes, Stynes turned around and approached the officer, swearing at him and threatening to kill him. The police officers ordered Stynes to the ground but he refused; he was eventually forced to the ground by the officers, all the while struggling, pushing, kicking and swearing. Stynes was then taken to Lakeland Medical Center where he was abusive to the hospital personnel. Stynes continued to struggle and spit on the officers, all while threatening them and using obscene language.

¶3 The criminal complaint also alleged that Stynes was a habitual offender within the meaning of WIS. STAT. § 939.62. As the basis for the repeater statute, the complaint alleged that Stynes was "convicted of damage to property

and disorderly conduct on 3/18/98 in Walworth County case 98CM118; and bail jumping on 4/21/97 in Walworth County case 97CM83." The repeater allegation increased the potential maximum penalty for the four offenses alleged in the complaint from a term of twenty-four months to twelve years' imprisonment.

¶4 On July 24, 2000, a jury found Stynes guilty of all the charged offenses. The trial court ordered a presentence investigation (PSI) which provided Stynes's criminal history and noted that he had been convicted of criminal damage to property and disorderly conduct in Walworth county on March 17, 1998. A sentencing hearing was held on September 22, 2000. The trial court sentenced Stynes to four consecutive terms of three years in prison, a total of twelve years' imprisonment; this sentence reflects the imposition of enhanced penalties imposed pursuant to the repeater statute.

¶5 On January 14, 2002, Stynes filed a postconviction motion seeking commutation of the penalties imposed because the State failed to comply with the notice requirements of WIS. STAT. § 973.12(1). Stynes argued that although there was evidence of convictions dated March 17, 1998, there was no evidence in the record for any predicate convictions dated March 18, 1998, as alleged in the criminal complaint. Stynes contended that this lack of evidence resulted in the State's failure to satisfy the statutorily mandated notice requirements.

¶6 The trial court denied the postconviction motion by an order dated April 18, 2002, after a February 14, 2002 hearing. Stynes appeals.

## DISCUSSION

¶7 Trial courts are empowered to increase the sentences of all defendants they find to be repeat offenders. WIS. STAT. § 939.62(1). Someone is a repeater if he or she was convicted of one felony or three misdemeanors during the five-year period immediately preceding the offense for which he or she now stands for sentencing. Sec. 939.62(2).

¶8 Whether the State has met its burden of proving the essential particulars of a charge and whether an enhanced sentence is authorized in this situation are questions of law. *See* ***State v. Coolidge***, 173 Wis. 2d 783, 792-93, 496 N.W.2d 701 (Ct. App. 1993). WISCONSIN STAT. § 939.62 allows for increased penalties for repeat or habitual criminal offenders. Section 939.62(2) delineates how a criminal defendant achieves the status of repeat offender for purposes of enhancing maximum sentences. WISCONSIN STAT. § 973.12(1) articulates the requirements for proving the prior conviction and reads in pertinent part:

> 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.

¶9 Thus, in order for a defendant to be sentenced under WIS. STAT. § 939.62, the defendant must admit the prior convictions or the State must prove them. The Wisconsin Supreme Court stated that the policy behind WIS. STAT.

§ 973.12(1) is to satisfy due process by assuring that a defendant explicitly comprehends the extent of the possible penalties. ***State v. Wilks***, 165 Wis. 2d 102, 109, 477 N.W.2d 632 (Ct. App. 1991). The State concedes that Stynes made no admissions regarding the repeater allegations and therefore the burden is on it to prove the repeater allegations.

¶10 Here, the PSI indicated that the prior conviction was on March 17, 1998; however, the complaint charged that the prior conviction occurred on March 18, 1998. The State contends that the PSI was sufficient under the facts of this case to be a basis for the repeater allegation despite the "clerical error." We disagree.

¶11 The prior conviction is not an element of the charged offense in the literal sense but must be satisfied at sentencing if the State is to obtain the enhanced punishment. *See* ***State v. McAllister***, 107 Wis. 2d 532, 537-38, 319 N.W.2d 865 (1982). The State has the burden of establishing the repeater allegation with clarity and precision. ***Wilks***, 165 Wis. 2d at 111. Additionally, a PSI is considered an official governmental report under WIS. STAT. § 973.12(1) and may satisfy the requirements of proving a prior conviction. ***State v. Caldwell***, 154 Wis. 2d 683, 693-94, 454 N.W.2d 13 (Ct. App. 1990).

¶12 Minimum due process requires that the complaint put the defendant on notice of the repeater claim. *See* ***State v. Trammel***, 141 Wis. 2d 74, 80, 413 N.W.2d 657 (Ct. App. 1987). If the March 17, 1998 date of the PSI is correct, the State failed to provide Stynes with adequate notice of the repeater claim.

¶13 In ***Wilks***, the complaint alleged that the defendant had been previously convicted for a forgery on May 24, 1986, as a basis for the repeater charge. ***Wilks***, 165 Wis. 2d at 104-05. After the defendant had pled to the

underlying charge, but before sentencing, the State conceded that the May 24, 1986 forgery conviction did not exist. ***Id.*** at 106. The State sought permission to use a July 3, 1985 forgery conviction as the basis for the defendant's repeater status. ***Id.*** The trial court determined that amending the date of the forgery did not prejudice the defendant because he was put on notice of an enhanced sentence. ***Id***. at 110. One of the issues on appeal was whether WIS. STAT. § 973.12(1) bars a postplea repeater amendment when the charging document to which the defendant pleads contains a repeater allegation. ***Wilks***, 165 Wis. 2d at 109. Comparing the supreme court's holding in ***State v. Martin***, 162 Wis. 2d 883, 470 N.W.2d 900 (1991), with the underlying policy of the statute, we concluded that "to satisfy due process, the defendant must know the extent of the potential punishment at the time of the plea." ***Wilks***, 165 Wis. 2d at 110.

¶14 We next concluded in ***Wilks*** that the trial court's reasoning overlooked the fact that the defendant was not put on notice of the real forgery conviction and that he entered his plea on the basis of the forgery articulated in the charging document, a conviction that did not exist. ***Id***. We also concluded that repeater amendments that meaningfully change the basis upon which the defendant assessed the extent of possible punishment should be barred. ***Id***. at 111. Finally, we concluded that changing the forgery as a basis for the repeater was a meaningful change and therefore not permissible. ***Id***.

¶15 Stynes's circumstances are similar. Stynes was found guilty of all four charges as alleged in the complaint with the repeater allegation being damage to property and disorderly conduct on March 18, 1998, in Walworth county. The State contends that changing these convictions to March 17, 1998, due to a clerical error, does not meaningfully change the basis on which Stynes assessed his possible punishment. However, the State failed in its burden to plead the repeater

allegation with relative clarity and precision, thus denying Stynes notice of the proper basis of the repeater. The conviction on which the repeater allegation was alleged in the complaint did not exist. Stynes's assessment of the possible punishment at the time of sentencing is meaningfully changed due to another conviction being substituted for the one set forth in the charging documents. Allowing for this change of the basis of the repeater violates Stynes's due process rights.

¶16 The State cites to ***State v. Edwards***, 2002 WI App 66, 251 Wis. 2d 651, 642 N.W.2d 537, *review dismissed*, 2002 WI 23, 250 Wis. 2d 560, 643 N.W.2d 96 (Wis. Feb. 15, 2002) (No. 01-0612), in arguing that Stynes waived the right to challenge the admission of the PSI by failing to object to its admission at the time of sentencing. The State's reliance on ***Edwards*** is misplaced; as the State implicitly acknowledges, ***Edwards*** dealt with the admissibility of two documents used to establish the defendant's repeater status and his failure to object to their admission. ***Id.*** at ¶1. Here, Stynes does not challenge the admissibility of the PSI. He argues that because the complaint's basis for the repeater allegation does not exist, he was not provided sufficient notice to satisfy due process. We agree.

> In recent times, this court has seen a substantial number of cases involving pleading and proof issues under the repeater statute. We are aware of the heavy burdens and caseloads confronting prosecutors. However, correctly pleading and proving a prior conviction for purposes of obtaining an enhanced sentence does not strike us as a particularly onerous or complicated prosecutorial task.
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> 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 this issue. We suggest that trial judges include this question in their colloquy with the defendants at the plea hearing ... or ... at the time of sentencing. If the defendant denies the allegation or stands mute, the State should provide evidence of the prior conviction via any of

> the alternative forms of proof contemplated under § 973.12(1), STATS.
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> [W]e again urge the adoption of these practices by trial courts and prosecutors. These procedures will reduce the number of postconviction challenges, including appeals, to enhanced sentences. More importantly, these procedures will assure that enhanced sentences are based on convictions that actually exist and which otherwise qualify under the repeater statute.

***State v. Goldstein***, 182 Wis. 2d 251, 261, 513 N.W.2d 631 (Ct. App. 1994).

¶17 WISCONSIN STAT. § 973.13 states: "In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings." Here, the maximum term authorized by statute for the crimes for which Stynes was convicted was twenty-four months. We therefore commute his sentence to twenty-four months.

## CONCLUSION

¶18 The State's failure to comply with the notice requirements of Wisconsin's repeat offender statute requires the commutation of Stynes's sentence to the maximum allowed by law without the penalty enhancer. We therefore commute Stynes's sentence to twenty-four months and the judgment of conviction should be modified to reflect this sentence. We therefore affirm the judgment as modified and reverse the order denying postconviction relief.

*By the Court.*—Judgment modified and, as modified, affirmed; order reversed.

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