COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2095

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

VONNIE D. DARBY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County: WALTER J. SWIETLIK, Judge. *Reversed and cause remanded with directions.*

SNYDER, P.J. Vonnie D. Darby appeals from a postconviction order denying his § 974.06, STATS., motion for relief from the sentences imposed on five counts of misdemeanor theft in violation of § 943.20(1)(a) and (3)(a), STATS. Darby was sentenced under § 939.62(1)(a) and (2), STATS., as a habitual criminal with enhanced penalties (ranging from nine months to three years) on each theft count. Darby contends that the sentences imposed were void as a matter

of law because the habitual criminality was not established, that he was denied his right to allocution and that his postconviction counsel was ineffective in not raising these issues.[1]

Darby failed to raise this sentencing issue in his prior postconviction motion based on strategic reasons known to and approved by him after consultation with his postconviction counsel. Because of this failure, the trial court concluded that Darby was precluded by § 974.06(4), STATS., from requesting additional postconviction relief and denied his motion. However, we conclude that Darby is entitled to a commutation of the excessive sentence imposed and reverse the order. We remand the cause, directing the trial court to correct the sentencing in accordance with this decision.

Darby was convicted of five misdemeanor thefts subjecting him to a maximum sentence of forty-five months. Because each theft charge alleged that Darby was a habitual offender, the maximum sentence increased from forty-five months to fifteen years pursuant to § 939.62(1)(a) and (2), STATS. The trial court imposed consecutive sentences totaling seven and one-half years.[2] Darby filed a prior postconviction motion to withdraw his pleas of guilty or, in the alternative, for a modification of the sentences based on new sentencing factors and on a claimed misuse of sentencing discretion; he did not raise the issue of invalidity

[1] From the record before us it appears that Darby's counsel failed to elicit testimony at the ***Machner*** hearing on the allocution issue. *See* ***State v. Machner***, 101 Wis.2d 79, 303 N.W.2d 633 (1981). Because our decision on the penalty enhancement portion of Darby's sentence affords him relief, we need not address his claims of ineffective assistance of counsel. *See* ***Sweet v. Berge,*** 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (if a decision on one point disposes of an appeal, we need not decide other issues raised).

[2] Darby was sentenced to two years on count one, two years on count two, eighteen months on count three, one year on count four and one year on count five, all to run consecutively.

that he raises here. The trial court denied Darby's prior postconviction motion and he appealed. We affirmed the judgments of conviction and the postconviction orders in ***State v. Darby,*** Nos. 94-1284-CR and 94-1285-CR, unpublished slip op. (Wis. Ct. App. Sept. 28, 1994).

On January 4, 1997, Darby filed a § 974.06, STATS., postconviction motion requesting commutation of the sentence pursuant to § 973.13, STATS., or, in the alternative, he argued that he had received ineffective assistance of counsel at the prior postconviction motion hearing for counsel's failure to raise the issue of his sentence being invalid. The trial court denied the motions, reasoning that because Darby had not raised these claims in his prior postconviction pleadings, he could not now raise these claims on the merits. We view the dispositive appellate issue as whether the trial court was obligated to address Darby's § 973.13 excessive sentence claim on the merits.

Darby moved "for an order commuting the sentence of the defendant pursuant to Wis. Stat. 973.13" and argued at the motion hearing that the sentence imposed "was in excess of the maximum authorized by law" and that the court "was without jurisdiction to impose the sentence." Darby also notes that because he was charged as a habitual criminal under § 939.62, STATS., the court must also consider the requirements of § 973.12, STATS., "Sentence of a repeater or a persistent repeater." Under that section, in order for the court to sentence a defendant as a habitual criminal, the State must either prove the fact of the prior conviction(s) or the defendant must admit to being a habitual criminal. *See* § 973.12(1). Because neither one occurred in Darby's case, he argues that his sentence is invalid and should be corrected. *See* § 973.13, STATS.

Although Darby's motion directly invoked § 973.13, STATS., to cure a sentencing error, the trial court did not address his motion on the merits; rather, it held that he was precluded by § 974.06(4), STATS., from raising an issue when he lacked a sufficient reason for not raising the issue previously. Although the State argued at the motion hearing that Darby had waived this claim, it concedes on appeal that Darby's excessive sentence argument has merit: "[I]f the issue of the excessive sentence had been raised by [Darby] on his first postconviction motion to the trial court, he may well have been successful in having his sentence reduced [to the misdemeanor maximum] … *because a proper admission was not taken and/or proper proof of the previous felony conviction was not submitted prior to [Darby's] plea."* (Emphasis added.) Our review of the record supports the State's concession and our independent conclusion that the State failed to comply with the applicable enhanced sentence law.

A review of the trial court's use of the penalty enhancer requires the application of §§ 939.62 and 973.12, STATS., to an undisputed set of facts. We review this issue de novo. *See* ***State v. Zimmerman,*** 185 Wis.2d 549, 554, 518 N.W.2d 303, 304 (Ct. App. 1994). An enhanced penalty may be imposed only where a defendant admits to the previous criminal conviction(s) or the State submits proof of those convictions. *See* § 973.12(1). *See also* ***State v. Coolidge,*** 173 Wis.2d 783, 796, 496 N.W.2d 701, 708 (Ct. App. 1993). The issue is whether the penalty enhancer imposed is void as a matter of law. *See* ***Zimmerman,*** 185 Wis.2d at 554, 518 N.W.2d at 304. We conclude that neither requirement mandated by § 973.12(1) was established in this case and Darby's sentence is invalid.

The State nonetheless argues that Darby is barred from bringing this action because it is a § 974.06, STATS., motion and he has failed to offer a

compelling reason for not raising the issue earlier. *See* § 974.06(4). The trial court agreed with this reasoning in denying Darby's motion. The trial court also referred to our decision in ***State v. Tolefree,*** 209 Wis.2d 421, 563 N.W.2d 175 (Ct. App. 1997), in which we stated that a claim that a repeater enhancement was invalid was barred because the defendant in that case "offered no reason for his failure to bring [the] alleged error[] to the trial court's attention at the time of the original postconviction motion." ***Id.*** at 426, 563 N.W.2d at 177. In that case, Tolefree brought a claim pursuant to § 974.06, *see* ***Tolefree,*** 209 Wis.2d at 424, 563 N.W.2d at 176, and attempted to collaterally attack the validity of a prior conviction which had provided the basis for the repeater enhancement.

The trial court interpreted our language in ***Tolefree*** as preventing it from making a correction in a sentence that is in error. This case, however, is not analogous. In ***Tolefree***, we foreclosed a defendant from litigating a repeater enhancement in a successive § 974.06, STATS., postconviction motion. *See* ***Tolefree,*** 209 Wis.2d at 424-25, 563 N.W.2d at 176-77. Tolefree's claim, however, did not allege a § 973.13, STATS., error, nor did he invoke this as a remedy. In the instant case, Darby argues that his sentence is invalid and requests § 973.13 relief. That section permits the granting of relief if the imposed sentence is "in excess of that authorized by law" and also provides that such relief can be granted "without further proceedings." *See* § 973.13.

Furthermore, the importance of the State following the requirements of § 973.12(1), STATS., has been stressed in prior cases because of the increasing number of appeals we see concerning procedural irregularities for repeater convictions. *See* ***Zimmerman,*** 185 Wis.2d at 558, 518 N.W.2d at 306; ***Coolidge,*** 173 Wis.2d at 795-96, 496 N.W.2d at 707-08. Additionally, applying the restrictions of § 974.06(4), STATS., to bar relief in this case would limit the

otherwise broad relief that is intended by § 973.13, STATS. It would subject the express relief offered by § 973.13 to a procedural rule of exclusion, in essence, allowing the procedural rule of ***Escalona-Naranjo***[3] to "trump" statutory mandates. Finally, compliance with § 973.12(1) is not only mandatory, but it can be satisfied by the prosecution with minimal effort. Because the State did not adhere to the requirements of § 973.12(1) and prove Darby's prior convictions or have him admit to them, the enhanced sentence imposed is void as a matter of law. We conclude that the trial court erred when it failed to address Darby's straightforward claim that § 973.12(1) had not been complied with and that the resulting sentence was excessive.

In sum, § 973.13, STATS., provides that where a court imposes a maximum penalty in excess of that permitted by law, the excess portion of the sentence is void. *See* ***State v. Wilks,*** 165 Wis.2d 102, 112, 477 N.W.2d 632, 637 (Ct. App. 1991). In such a case, the sentence will be commuted without further proceedings to the maximum permitted by law. *See* ***id.*** Therefore, we commute Darby's sentence to forty-five months, the maximum permitted on the five misdemeanor convictions of theft. We do not address his claims of ineffectiveness of counsel. *See supra* note 1. All other provisions of the sentence are confirmed. Upon remand, the trial court is directed to enter amended judgments of conviction in accord with this decision.

By the Court.—Order reversed and cause remanded with directions.

[3] ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 517 N.W.2d 157 (1994).

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