

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

June 4, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**No. 97-2397-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**KENNETH GOLDEN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed.*

Before Vergeront, Deininger and Jones,<sup>1</sup> JJ.

PER CURIAM. Kenneth Golden appeals a judgment of conviction and a postconviction order denying his motion to modify his sentence for theft

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<sup>1</sup> Circuit Judge P. Charles Jones is sitting by special assignment pursuant to the Judicial Exchange Program.

from an individual as a habitual criminal (repeater) in violation of §§ 943.20 and 939.62, STATS. Golden contends that there was insufficient evidence in the record to establish the repeater allegations because there was no evidence of the length of his previous incarceration from which it could be determined whether his prior conviction had occurred within five years of the present offense under § 939.62(2). He therefore claims that his sentence must be reduced accordingly. The issue is whether the trial court properly found Golden to be a habitual criminal under § 939.62. We conclude that it did, and thus we affirm.

### **BACKGROUND**

Golden was charged with theft from the person as a repeater. The criminal complaint dated August 16, 1996, and the information dated September 24, 1996, both alleged that Golden's sentence could be increased by not more than six years because he had been convicted of a felony within the last five years, "to-wit: robbery on January 5, 1989, in Rock County Circuit Court, Beloit, Wisconsin, and was sentenced to the Wisconsin State Prison and was incarcerated until September 9, 1991, when he was paroled from prison." A plea hearing was held on October 8, 1996. At the hearing the following exchanges took place between Golden and the court concerning the repeater portion of the charge:

THE COURT: Your plea of guilty also permits the Court to find that you are a repeater within the meaning of the law for the reason that you were within the five-year period provided for by Wisconsin Statute 939.62(1)(b) convicted of a felony, robbery. You understand that?

MR. GOLDEN: Yes, I understand.

THE COURT: Specifically, robbery on January 5th, 1989, in Circuit court in Rock County, in the Beloit Courthouse; and you were, in fact, so convicted at that time and place?

MR. GOLDEN: That is correct, Your Honor.

....

[THE PROSECUTOR]: Your Honor, also on the issue of the repeater enhancer, I believe the Court also has to inquire of the defendant whether or not the defendant was incarcerated in Wisconsin State Prison until September of 1991.

THE COURT: I did refer to the statutes because that makes provision any period of time which he was incarcerated was tolled. So, you understand that the five-year period before this offense is computed by subtracting from the five-year period any time you were incarcerated. You understand that, Mr. Golden?

MR. GOLDEN: I understand, Your Honor.

....

[THE PROSECUTOR]: Your Honor, I believe the defendant was paroled from prison on September 9th, 1991, it is alleged in the repeater statute. If the defendant admits to this fact I believe that would be sufficient.

THE COURT: So the five-year period has been computed by subtracting any period of time you were confined in prison and under that formula you are a repeater. You understand, Mr. Golden?

MR. GOLDEN: I understand.

THE COURT: And you admit that you were convicted, that you were incarcerated for the period of time that [the prosecutor] has stated; is that correct?

MR. GOLDEN: That is correct, Your Honor.

Golden faced a maximum sentence of five years imprisonment on the theft conviction, plus an additional six years under the repeater enhancement, for a potential maximum of eleven years imprisonment. The court imposed a seven-year term of imprisonment.

## ANALYSIS

The question of whether Golden's conviction and sentence as a repeater are proper involves the interpretation and application of §§ 939.62 and 973.12, STATS., to undisputed facts. This is a question of law which we review de novo. *State v. Zimmerman*, 185 Wis.2d 549, 554, 518 N.W.2d 303, 304-05 (Ct. App. 1994).

Section 973.12(1), STATS., requires that prior convictions be admitted by the defendant or proven by the State before an enhanced sentence can be imposed under § 939.62, STATS. In *State v. Rachwal*, 159 Wis.2d 494, 512-13, 465 N.W.2d 490, 497 (1991), the supreme court held that a plea of guilty or no contest to a criminal complaint containing a "repeater provision" alleging a prior conviction constitutes an admission by the defendant of the prior conviction. In that case, the trial court had explained to the defendant the repeater nature of the charge without having the defendant specifically admit to the prior conviction. *Id.* at 503-04, 465 N.W.2d at 493-94. The supreme court found that, while this was the bare minimum necessary for a valid admission, it was sufficient to constitute an admission of the repeater status. *Id.* at 513, 465 N.W.2d at 497.

In this case, there is more than the bare minimum necessary to constitute a valid admission. Golden pled guilty to an offense which contained a repeater allegation. Furthermore, he specifically admitted during the plea colloquy to having committed the prior offense and to having been incarcerated within the past five years. The trial judge also explained how the tolling provision worked and Golden stated that he understood. This is more than sufficient to meet the requirements of *Rachwal*.

Golden argues, however, that this case is controlled by *State v. Goldstein*, 182 Wis.2d 251, 513 N.W.2d 631 (Ct. App. 1994), and *State v. Zimmerman*, 185 Wis.2d 549, 518 N.W.2d 303 (Ct. App. 1994). *Goldstein* involved a situation in which the defendant had not admitted to repeater status. *Goldstein*, 182 Wis.2d at 260, 513 N.W.2d at 635. This court stated that absent a proper admission, the State is charged “with proving not only the prior conviction, but also that the conviction falls within the five-year window of § 939.62(2), STATS.” *Id.* We noted that the defendant had not admitted to the prior conviction, and we stated: “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.” *Id.* at 261, 513 N.W.2d at 636. In this case, Golden was asked specifically whether he admitted to the repeater allegation and he answered that he did. Therefore, the trial court met the requirements set forth in *Goldstein*.

In *Zimmerman*, the defendant did not admit that his prior conviction was less than five years from the date of the present conviction. He was never asked about his incarceration, and he did not admit to a period of incarceration which would place the conviction within the tolled five-year period. *See Zimmerman*, 185 Wis.2d at 557, 518 N.W.2d at 306. We concluded that because the defendant had not admitted “to facts necessary to establish the repeater penalty enhancer,” the State had to prove them. *Id.* We distinguished *Rachwal* because *Zimmerman* had not expressly acknowledged his repeater status. *Id.* at 556, 518 N.W.2d at 305. We also concluded that the State had failed to prove that the prior conviction was within five years because it did not establish *Zimmerman*’s “actual period of confinement.” *Id.* at 558, 518 N.W.2d at 306.

Golden, however, admitted to both the prior conviction and the period of confinement.<sup>2</sup> Therefore, the State did not have to prove the period of incarceration, and *Zimmerman* is not applicable on the present facts.

We conclude that Golden's admissions regarding his repeater status, his prior conviction and his period of incarceration, were sufficient to support his conviction as a repeater under § 939.62, STATS. Therefore, we affirm the sentence imposed by the circuit court.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See RULE.809.23(1)(b)5, STATS.

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<sup>2</sup> Golden argues that he did not specifically admit to being paroled from prison for the prior conviction on September 9, 1991. However, as set forth above in the Background section of this opinion, the prosecutor stated the parole date at the plea hearing. The court then asked Golden if he admitted to being incarcerated for the dates that the prosecutor stated. Golden did admit to this. Therefore, he admitted being paroled on September 9, 1991.

