COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3254

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CARL E. VINES, SR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed.*

NETTESHEIM, J. Carl E. Vines, Sr. appeals from an order denying his motion for postconviction relief and sentence modification. Vines was convicted of two counts of knowingly violating a domestic abuse restraining order as a repeat offender and three counts of bail jumping as a repeat offender. The judgment was entered following Vines' entry of a no contest plea. On appeal, Vines asserts that the State failed to establish that he was a repeat offender and

that the trial court failed to make a finding that he was a repeat offender. We reject Vines' arguments. We therefore affirm the order denying postconviction relief.

On March 19, 1996, the State filed a complaint charging Vines with one count of criminal trespass to a dwelling, two counts of violation of a domestic abuse restraining order, and five counts of bail jumping. Vines was charged on all counts as a repeat offender. On May 29, 1996, Vines pled no contest to two counts of knowingly violating a domestic abuse restraining order and three counts of bail jumping. As part of a plea agreement, the State dismissed the remaining three counts, and the trial court stayed the entry of judgment, modified Vines' bond, and placed Vines in a ninety-day inpatient drug and alcohol treatment program. The plea agreement further provided that upon Vines' successful completion of the program, he would be returned to court for entry of judgment and sentencing, and the State would recommend a term of probation with county jail confinement. If Vines failed the program, the State would not be limited in its recommendation at sentencing. Vines failed the program and was sentenced to six-years' imprisonment and four-years' consecutive probation.

Vines appeals. He claims that the State failed to establish either at the plea hearing or at the later sentencing that he was a repeat offender. In addition, he claims that the trial court failed to find that he was a repeat offender.

Section 973.12, STATS., governs proof of prior convictions for purposes of a repeater enhancement at sentencing. It provides that:

> **(1)** Whenever a person charged with a crime will be a 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.... 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 ....

Section 973.12(1). Thus, the prior convictions must be admitted by the defendant or proved by the State. *See* ***id***. Whether Vines' prior convictions were proved as required by § 973.12(1) presents a question of law which we decide independently of the trial court. *See* ***State v. Koeppen***, 195 Wis.2d 117, 126, 536 N.W.2d 386, 389-90 (Ct. App. 1995).

Vines first argues that the State failed to carry its burden of proof as to the repeater allegation because he "neither admitted to any convictions nor did the State offer 'any' proof during the defendant's plea hearing." Based upon our review of the record, we conclude that Vines sufficiently admitted to the prior convictions at the plea hearing.

In order to employ a repeater enhancement at sentencing pursuant to § 939.62, STATS., the convictions underlying the repeater allegations must be admitted by the defendant or proven by the State. *See* § 973.12, STATS. In ***State v. Rachwal***, 159 Wis.2d 494, 504, 465 N.W.2d 490, 494 (1991), the trial court, in the course of taking the defendant's plea, drew the defendant's attention to the repeater provision. However, the court did not directly ask the defendant whether the specified prior convictions existed. Nor did the defendant specifically acknowledge the prior convictions and the State did not offer proof of any prior conviction of the defendant. *See* ***id.*** The defendant challenged his sentence on appeal. The supreme court rejected the challenge, stating:

> The trial judge expressly drew the defendant's attention to the repeater nature of the charge and to the fact that the possible penalties the defendant was facing might be enhanced, pursuant to the repeater statute, as a result of the defendant's being found guilty pursuant to his no contest plea. After informing the defendant of his constitutional

> rights and repeatedly questioning him so as to ascertain that he was submitting his plea freely, voluntarily and intelligently, the trial judge accepted the defendant's unequivocal affirmative answer as to his understanding of his situation. In this light, the colloquy into the defendant's understanding of the meaning of the allegations he was facing can be said to have produced a direct and specific admission.

Id. at 509, 465 N.W.2d at 496.

We have reviewed the plea colloquy in this case. The trial court identified each charge against Vines—expressly stating that he was charged as a repeat offender and setting forth the potential penalties. When asked by the court whether he understood each charge and its accompanying penalty, Vines responded, "[y]es," and proceeded to enter his plea. At the close of this hearing, the trial court expressly informed Vines that "the possible punishment if you fail to successfully complete the KTAP program is a total of 15 years in prison and fines totaling … $32,000 or both." Again, Vines responded that he understood. This procedure comports with that approved in ***Rachwal.***

Moreover, Vines' understanding and admission of his repeater convictions at the plea hearing are supported by the later proceedings at the sentencing hearing when he again admitted to the repeater allegations. At that time, the court confirmed that it had accepted the pleas on counts one, three, four, seven and eight. The court then found Vines guilty on each of those counts. Subsequently, the court reviewed each count and stated that Vines was charged as a repeat offender. Next, the court stated: "Because of the passage of time, I want to make sure … that … [Vines] admits that he is a repeat offender. I am just going to ask him that again." The court then listed the dates and file numbers of the convictions underlying the repeater portion of Vines' sentence before inquiring, "Mr. Vines, do you admit to those convictions?" Vines replied that he did. Under

the statute, Vines' admission freed the State from its burden of proof. The court then was able to sentence Vines in accordance with § 939.62, STATS. On this additional ground, we reject Vines' contention that the State failed to carry its burden of proof as to the repeater allegations.

Finally, Vines argues that the trial court failed to make a finding that he is a repeat offender. In support, Vines cites to ***State v. Harris***, 119 Wis.2d 612, 619-20, 350 N.W.2d 633, 637 (1984), in which the supreme court stated: "[I]t is incumbent, prior to an imposition of a sentence in excess of the maximum, that the trial court make a finding that the defendant is a repeater …." We conclude that the trial court implicitly did so in this case. At the sentencing hearing, the trial court asked whether Vines admitted to being a repeat offender and identified the convictions underlying the repeater allegations. Vines did admit to the prior convictions. Although the trial court did not explicitly state its finding that Vines was a repeat offender, it is evident from the trial court's other remarks and from the actual sentence imposed that the court had determined that Vines was a repeat offender. Vines' argument places form over substance. *See* ***Creighbaum v. State***, 35 Wis.2d 17, 28-29, 150 N.W.2d 494, 499 (1967).

Based on our review of the record, we conclude that Vines admitted to the offenses underlying the repeater enhancers both by the entry of his no contest plea and by his responses to the trial court's inquiries at the sentencing prior to the entry of judgment. We are further satisfied that the trial court implicitly found Vines to be a repeat offender. We affirm the order denying postconviction relief.

By the Court.—Order affirmed.

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