COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1056-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

HENRY A. PHILLIPS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: JOSEPH M. TROY, Judge. *Affirmed.*

CANE, C.J. Henry Phillips appeals both the judgment of conviction for bail jumping as a repeat offender, contrary to §§ 946.49(1) and 939.62, STATS., and the postconviction order. On appeal, Phillips argues that the trial court erred when it enhanced his sentence under § 973.12(1), STATS., because he did not admit, and the State failed to prove, his prior convictions. This court concludes

that under the circumstances in this case, Phillips' admission was sufficient. Therefore, this court affirms the judgment of conviction and postconviction order.

I. BACKGROUND

A criminal complaint filed on August 14, 1997, charged Henry Phillips with one count of misdemeanor bail jumping contrary to § 946.49(1), STATS., and two counts of disorderly conduct contrary to § 947.01, STATS. Additionally, the complaint charged Phillips as a repeat offender contrary to § 939.62, STATS., and listed his four previous misdemeanor offenses, the nature of the convictions, the dates of conviction for each, and the maximum possible penalty Phillips could face as a repeat offender.

On September 12, 1997, Phillips entered a no-contest plea to the charge of misdemeanor bail jumping. Phillips and the State entered into a plea agreement involving Phillips' plea to the bail jumping charge as a repeat offender. Under the agreement, the State agreed to dismiss the remaining charges and recommend three years' probation. Before sentencing, the court engaged in the following colloquy with Phillips:

> THE COURT: And, Henry [Phillips], do you understand the possible, maximum penalties? The potential penalty if you enter a plea to these charges, you could face three years in prison.
>
> THE DEFENDANT: Yes, I understand it, yes. This repeater stuff, you know, I just don't really understand it, you know. You know, I'm a little--it seems like little charges. … I don't understand that, you know.
>
> ….
>
> THE COURT: Yeah, three misdemeanors within five years, then you are subject to this greater penalty, because you are considered to be a repeat offender.
>
> THE DEFENDANT: Uh-huh (meaning yes).

> THE COURT: So even if it is a relatively minor crime, it's the fact that it's another one, and you have already been convicted of other misdemeanors. Do you understand that?
>
> THE DEFENDANT: Okay, I understand what you are saying now. Even the real small ones, you know, they add up to big ones.
>
> THE COURT: Even if it's a real small crime, if it's one more after you have had three already, actually after you have had two already within five years, then they say, well, this guy, even though he's committing small crimes, he's doing it too much, so we are going to increase the penalty for up to three years.
>
> THE DEFENDANT: Okay, I understand what you are saying now.

The court pointed out that it had previously sentenced Phillips as a repeater, and Phillips recalled the previous sentencing and said that he understood he was currently in the same situation. The court then turned to a discussion of the charges. Phillips again acknowledged that he could be incarcerated for three years and ninety days. Before pleading no contest, Phillips expressed his understanding that if he entered a plea of no contest or guilty, he gave up his right to a jury trial. Further, Phillips showed that he understood the definition of a jury trial. The court found that Phillips entered his plea freely, intelligently, and voluntarily.

Additionally, Phillips' counsel stated that the allegations in the complaint about prior convictions were accurate. After the court sentenced Phillips to a three-year stayed sentence and eighteen months' probation, Phillips filed a postconviction motion to modify his enhanced sentence to an unenhanced sentence of nine months. He claimed, as in this appeal, that he had not admitted the prior convictions and that the State had not proven them.

II. ANALYSIS

The court's use of a penalty enhancer to the undisputed facts here presents a question of law we review de novo. ***State v. Zimmerman***, 185 Wis.2d 549, 554, 518 N.W.2d 303, 304 (Ct. App. 1994). Thus, we do not review for misuse of discretion, but determine whether the penalty enhancer imposed was void as a matter of law. ***Id***. at 554, 518 N.W.2d at 305. Under § 973.12, STATS., a court may enhance a repeater's penalty pursuant to § 939.62, STATS., if: (1) the defendant admits the prior convictions; or (2) the State proves the prior convictions. ***State v. Rachwal***, 159 Wis.2d 494, 505-06, 465 N.W.2d 490, 494 (1991). The court cannot rely on an inference of admission, and the defendant's attorney cannot make the admission on behalf of his client. ***State v. Farr***, 119 Wis.2d 651, 659, 350 N.W.2d 640, 645 (1984).

However, our supreme court has rejected an overly formalistic definition of what constitutes a defendant's admission. *See generally* ***Rachwal***, 159 Wis.2d at 505-06, 465 N.W.2d at 494. A court need not directly ask the defendant if the prior convictions exist. *See* ***id***. at 504, 465 N.W.2d at 494. Rather, under ***Rachwal***, the touchstone of the admission component of § 973.12(1), STATS., is whether the colloquy between the court and the defendant demonstrates the defendant's express understanding that the repeater allegations increase the possible penalties. ***State v. Goldstein***, 182 Wis.2d 251, 256-57, 513 N.W.2d 631, 634 (Ct. App. 1994). Accordingly, when a court conducts proper questioning so as to ascertain the meaning and potential consequences of a no-contest or guilty plea, the plea constitutes a sufficient and direct admission to a repeater allegation. *See* ***State v. Theriault***, 187 Wis.2d 125, 131, 522 N.W.2d 254, 257 (Ct. App. 1994); *accord* ***State v. West***, 179 Wis.2d 182, 197, 507 N.W.2d 343, 349 (Ct. App. 1993).

In this case, it is undisputed that the State did not prove the prior convictions, but the issue is whether the no contest plea and the colloquy between the court and Phillips produced an admission. Based on our reading of the record, this court is satisfied that the colloquy into Phillips' understanding of the meaning of the repeater allegation he was facing produced a direct and specific admission. *See* ***Rachwal***, 159 Wis.2d at 505-06, 465 N.W.2d at 494.

Rachwal is directly on point. In ***Rachwal***, the court concluded that the defendant had directly, specifically, and affirmatively admitted his prior convictions when he pled no contest to a charge in a criminal complaint containing both a repeater provision and an accurate listing of the prior convictions. ***Id***. at 496-97, 512-13, 465 N.W.2d at 490, 497. The ***Rachwal*** court explained why an admission can be sufficient when a court does not directly ask a defendant if the prior convictions exist:

> The defendant's position is incredible insofar as it argues that he had reason to expect that despite his no contest plea, the state still was required to prove the existence of the prior convictions before he could be sentenced as a repeater. Clearly the defendant knew his plea would constitute an admission of his prior convictions. … Presumably, he did so [entered a no-contest plea] because he honestly knew the allegations as to his prior convictions to be true and because he considered it futile to require proof by the prosecution.

Id. at 511, 465 N.W.2d at 497.

While Phillips correctly points out that the no-contest plea in ***Rachwal*** constituted a specific admission *under the circumstances* in the case, the circumstances in ***Rachwal*** are sufficiently analogous to this case. Like ***Rachwal***, the trial court expressly drew Phillips' attention to the repeater nature of the charge and to the fact that, under the repeater statute, the possible penalties facing him

might be enhanced as a result of being found guilty per his no-contest plea. *See* ***Rachwal***, 159 Wis.2d at 509, 465 N.W.2d at 496. Moreover, the court made sure that Phillips understood that he was waiving his constitutional right to a jury trial and repeatedly questioned him to determine if the plea was freely, intelligently, and voluntarily given. Phillips repeatedly stated that he understood. Similar to ***Rachwal***, the court accepted Phillips' unequivocal, affirmative answer regarding his *understanding of his situation*. Under ***Rachwal***, the colloquy into Phillips' understanding of the meaning of the allegations he was facing produced a direct and specific admission. *See* ***id***.

Phillips attempts to distinguish ***Rachwal***. This court is not persuaded. First, Phillips claims that under ***Farr***, 119 Wis.2d at 659, 350 N.W.2d at 645, there was no admission because the court never drew Phillips' attention to the factual allegations in the repeater provision. This court has already rejected this argument in its discussion of ***Rachwal***. In addition, as ***Rachwal*** points out, the defendant in ***Farr*** pled not guilty and therefore did not admit all the well-pleaded facts. ***Rachwal***, 159 Wis.2d at 508, 465 N.W.2d at 495. Phillips pled no contest. Second, Phillips maintains that his circumstances are similar to ***Theriault.***[1] In that case, the defendant pled no contest and signed a plea questionnaire, but the court concluded that the defendant had not admitted his prior convictions because at the plea hearing, the defendant "left no doubt" that he

[1] Specifically, he argues that, under ***State v. Theriualt***, 187 Wis.2d 125, 522 N.W.2d 254 (Ct. App. 1994), the court's reliance on the signed questionnaire was misplaced. Even without considering the plea questionnaire, the admission is sufficient under ***State v. Rachwal***, 159 Wis.2d 494, 465 N.W.2d 490 (1991).

disputed the State's allegation that he was repeat offender.[2] ***Theriault***, 187 Wis.2d at 131-32, 522 N.W.2d at 257. Indeed, the defendant in ***Theriault*** put the trial court and the State on notice that the State would have to prove his repeater status at sentencing. ***Id***. at 132, 522 N.W.2d at 257. In contrast, there is no evidence in the record that Phillips disputed his status as a repeat offender. Further, unlike in ***Theriault***, there was no confusion here regarding the nature of the plea agreement.

This court recognizes its previous admonitions that properly pleading and proving repeater allegations are not difficult tasks and that the case law applying § 973.12(1), STATS., has reintroduced a degree of formal proof requirements for repeater allegations. *See, e.g.,* ***State v. Koeppen***, 195 Wis.2d 117, 131, 536 N.W.2d 386, 391 (Ct. App. 1995); ***Theriault***, 187 Wis.2d at 132 n.1, 522 N.W.2d at 257 n.1. While a guilty plea is not a sufficient admission per se, under ***Rachwal*** and its progeny, the admission here was sufficient because the court conducted the proper questioning during which Phillips expressed his understanding that the repeater allegations subjected him to possible increased penalties.

By the Court.—Judgment and order affirmed.

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

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[2] During the plea hearing, the defendant in ***Theriault*** objected to the sentences the court outlined, stating: "[A]s far as I'm concerned, there's been no showing of any previous criminal record in my behalf at this point and it might be a matter to take up with the sentencing hearing. However, I make no admissions regarding that." ***Id.*** at 129, 522 N.W.2d at 256.