COURT OF APPEALS
DECISION
DATED AND FILED

November 25, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1288-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRETT A. BROBECK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: ROMONA A. GONZALEZ, Judge. *Affirmed.*

VERGERONT, J.[1] Brett Brobeck appeals his judgment of conviction and an order denying his postconviction motion to reduce his sentence. Brobeck contends the enhancement of his sentence under § 939.62, STATS. (increased penalty for habitual criminal), is void because, although he pleaded

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

guilty, he did not directly and specifically admit to being a habitual criminal. We conclude that Brobeck did admit to his repeater status because he knowingly pleaded guilty to a criminal charge with the habitual criminality enhancement, he agreed to allow the court to accept the criminal complaint as a factual basis for the conviction, and the complaint included specific allegations of prior convictions.

BACKGROUND

Pursuant to a negotiated plea agreement, Brobeck pleaded guilty to three misdemeanors, one of which was a bail jumping charge that included a habitual criminality enhancement under § 939.62, STATS.[2] On the date set for the plea hearing, Brobeck indicated that he did not realize until just before he entered the courtroom that the plea agreement included the repeater allegation for the bail jumping count. For this and other reasons, the plea hearing and sentencing were postponed to the next day. At the hearing on the next day, Brobeck completed a

[2] Section 939.62, Stats., provides, in part:

> **Increased penalty for habitual criminality.** (1) If the actor is a repeater, as that term is defined in sub. (2), and the present conviction is for any crime for which imprisonment may be imposed (except for an escape under s. 946.42 or a failure to report under s. 946.425) the maximum term of imprisonment prescribed by law for that crime may be increased as follows:
>
> (a) A maximum term of one year or less may be increased to not more than 3 years.
>
> ….
>
> (2) The actor is a repeater if the actor was convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced, or if the actor was convicted of a misdemeanor on 3 separate occasions during that same period, which convictions remain of record and unreversed. It is immaterial that sentence was stayed, withheld or suspended, or that the actor was pardoned, unless such pardon was granted on the ground of innocence. In computing the preceding 5-year period, time which the actor spent in actual confinement serving a criminal sentence shall be excluded.

guilty plea questionnaire and a waiver of rights document, and the court conducted a plea colloquy with Brobeck. With respect to the penalty for the bail jumping count, the court said:

> THE COURT: Okay. Now, that is a misdemeanor, classified as an "A" Misdemeanor, punishable by a fine [sic] of not more than nine months and $10,000 in fines.
>
> But, in this offense, the State has chosen to charge you as a repeater, that is, that the term of your imprisonment can be increased to not more than three years.
>
> So, because you have been convicted of three or more misdemeanors, they are now considered a repeater. And, therefore, they're asking that I enhance that penalty up to three years.
>
> Do you understand that?

Brobeck replied, "Yes, I do."

> Concerning a factual basis for the plea, the court said:
>
> THE COURT: Now, I need facts before I can accept your pleas and find you guilty. You have the right to remain silent and say nothing, you can tell me your own facts, or you can let me use the facts contained in the criminal complaint.
>
> Any objection to my using the facts contained in the complaint?

Brobeck replied, "No." The criminal complaint alleged more than three misdemeanor convictions on separate occasions within the five-year period preceding the commission of the crimes for which he was being sentenced. For each prior conviction, the complaint listed the crime, date of conviction, county and case number.

After the colloquy, the court accepted Brobeck's guilty plea as freely, intelligently and voluntarily made with an adequate factual basis. The court then sentenced Brobeck to two years in prison on the bail jumping charge. Brobeck brought a postconviction motion to reduce that sentence to nine months because he did not specifically admit to the habitual criminality enhancer.[3] The trial court ruled that Brobeck understood that he pleaded guilty to a bail jumping charge with the repeater enhancer and that he specifically acknowledged the prior convictions because they were in the criminal complaint, which he allowed the court to accept as a factual basis for the guilty plea.

DISCUSSION

The habitual criminality penalty enhancement statute, § 939.62, STATS., allows an increased maximum term of imprisonment for repeat offenders. Subsection (2) defines a repeat offender as one who "was convicted of a misdemeanor on 3 separate occasions during [the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced], which convictions remain of record and unreversed." For a defendant to be sentenced under § 939.62, the prior convictions must be either "admitted by the defendant or proved by the state." Section 973.12(1), STATS. If admitted, the admission must be a "direct and specific admission by the defendant." ***State v. Farr***, 119 Wis.2d 651, 659, 350 N.W.2d 640, 645 (1984). Becker contends that he did not directly and specifically admit to being a habitual criminal and his enhanced sentence is therefore void.

[3] The postconviction motion also argued that the habitual criminality enhancer was not listed on the judgment of conviction. The trial court concluded that was a typographical error and ordered an amendment to the judgment of conviction to correct the error.

Whether the imposed penalty enhancer was in violation of §§ 939.62 and 973.12, STATS., is a question of law, which we decide de novo. ***State v. Theriault***, 187 Wis.2d 125, 131, 522 N.W.2d 254, 257 (Ct. App. 1994).

In ***State v. Rachwal***, 159 Wis.2d 494, 509, 465 N.W.2d 490, 496 (1991), the supreme court determined that the defendant's no contest plea, along with a plea colloquy that 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, produced a direct and specific admission of the allegations in the complaint of the defendant's repeater status. We have since interpreted ***Rachwal*** and concluded that a guilty plea does not always constitute an admission to a repeater allegation. *See* ***Theriault***, 187 Wis.2d at 131, 522 N.W.2d at 257. However, in so ruling, we have reiterated that if the trial court conducts the proper questioning so as to ascertain the meaning and potential consequences of such a plea, and the prior convictions are properly alleged in a charging document to which the defendant admits, the guilty plea does represent a direct and specific admission of the repeater status. *See* ***State v. Zimmerman***, 185 Wis.2d 549, 555, 557, 518 N.W.2d 303, 305, 306 (Ct. App. 1994); ***Theriault***, 187 Wis.2d at 131, 522 N.W.2d at 257; *see also* ***State v. Goldstein***, 182 Wis.2d 251, 256-57, 513 N.W.2d 631, 634 (Ct. App. 1994) (defendant's express understanding that repeater allegation can increase possible penalties is the "touchstone of the admission component of § 973.12, STATS.").

In this case, Brobeck expressly permitted the trial court to rely on the facts in the complaint as the factual basis for the plea. The complaint specifically described more than three prior convictions by offense, date of conviction and case number. The trial court specifically addressed the repeater allegation with Brobeck during the plea colloquy and actually delayed the proceeding to ensure

that Brobeck was comfortable with agreeing to this facet of the plea. And although he had originally been confused, at the plea hearing Brobeck affirmatively stated that he understood the repeater allegation and the possible effect it would have on his sentence. We conclude Brobeck's plea was a direct and specific admission of the prior convictions specified in the complaint.

Brobeck cites ***Zimmerman***, 185 Wis.2d at 556, 518 N.W.2d at 305, for the proposition that evidence that reveals his awareness of the State's intention that he be sentenced as a repeater does not amount to a direct and specific admission of any prior convictions. Brobeck is correct that awareness of the repeater allegation alone does not constitute an admission, but ***Zimmerman*** does not support voiding the enhancement to Brobeck's sentence. In ***Zimmerman*** the timing of the prior conviction was at issue. The criminal information alleged a prior conviction that occurred almost eight years before the commission of the crime Zimmerman was being sentenced for, three years beyond the statutory limit. ***Id.*** at 552, 518 N.W.2d at 304. The State argued that because the information indicated that Zimmerman had been "released" from his previous conviction less than two years ago, the court should have assumed he was incarcerated for over six years. ***Id.*** at 558, 518 N.W.2d at 306. (Time spent in confinement does not count toward the five year restriction. *See* § 939.62(2), STATS.) We declined to make that assumption because it did not take into account whether Zimmerman had served time on probation or parole on the previous conviction. ***Id.*** We further concluded that Zimmerman did not expressly acknowledge his repeater status; in fact his counsel stated at the plea hearing that she assumed it would be dropped. ***Id.*** at 556-57, 518 N.W.2d at 305.

Here the dates of all the convictions are clearly stated in the complaint, Brobeck expressly acknowledged his repeater status and the effect it

could have on his sentence, and the trial court conducted the proper colloquy. We therefore affirm the enhanced sentence.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 908.23(1)(b)4, STATS.