COURT OF APPEALS
DECISION
DATED AND FILED

JANUARY 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2635-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STEPHEN E. LEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: JOSEPH E. WIMMER, Judge. *Affirmed.*

ANDERSON, J. Stephen E. Lee contends that the trial court lacked jurisdiction to proceed against him because the State failed to timely file a criminal complaint. Lee also takes issue with his sentence. First, he asserts that two of his three prior convictions were uncounseled and the trial court erred in using them as a basis for enhancing the prison term imposed. Second, he insists that the trial court failed to follow a two-step sentencing script required when

sentencing a repeater. Because we conclude that Lee's issues are not supported in the record or in the law, we affirm.

Lee was arrested on July 5, 1997, in front of the Farm & Fleet store in the city of Waukesha on suspicion of retail theft. After his arrest, he was taken directly to the police station and subsequently held in the Waukesha County Jail by order of his probation agent. Five days after his arrest, Lee was released to his agent. The police report on the retail theft was referred to the district attorney's office for review and a summons and complaint were issued on November 3, 1997. The State charged Lee with one count of retail theft in violation of § 943.50(1m), STATS., and as a repeater under § 939.62(1)(a), STATS. Because the summons and complaint were mailed to the wrong address, Lee did not make his initial appearance and an arrest warrant was issued. Lee was picked up on the warrant on February 6, 1998.

Lee represented himself throughout the proceedings. He filed at least nine motions in the trial court. One of the motions sought dismissal for lack of personal jurisdiction and alleged that Lee was held in the county jail for a week without being brought before a magistrate for a probable cause determination. The trial court denied the motion. The trial court held that Lee was in custody pursuant to a probation hold, not because of the alleged retail theft, and a probable cause hearing was not required. Following the denial of all of his motions, Lee entered an ***Alford*** plea to the single count of retail theft.[1] During the plea colloquy, the State presented the court with certified copies of convictions to

[1] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

support the repeater allegation. The court sentenced Lee to an eighteen-month prison term, concurrent to a sentence he was then serving.

Lee filed a postconviction motion seeking the vacation of that portion of his sentence attributable to the repeater allegation on the ground that in two of his three prior convictions he was "uncounseled" because he chose to appear pro se. Relying upon ***Baldasar v. Illinois***, 446 U.S. 222 (1980), *overruled by* ***Nichols v. United States***, 511 U.S. 738 (1994), Lee argued that because he was not represented by a licensed attorney, the prior convictions had been uncounseled and he had served time on all three. The trial court denied Lee's motion, reasoning that because he chose to appear pro se in the prior cases he was not "uncounseled," as that term was used in ***Nichols,*** and it was proper to use Lee's three most recent convictions under the repeater statute.

Lee also argued that the court failed to sentence him for the retail theft offense because it imposed an eighteen-month sentence. He reasoned that the trial court must pronounce a specific sentence on the substantive offense, and if it was the maximum allowed, then it must pronounce the enhanced sentence. The court also rejected this argument, commenting that if Lee's repeater status would not have applied, the sentence would have been the maximum allowed by law.

In this appeal, Lee first contends that because he was arrested without a warrant and held in custody for five days without a criminal complaint being issued, the court was without jurisdiction under §§ 968.02(2), 968.03(1) and 968.04, STATS. In interpreting the statutes as requiring the immediate issuance of a criminal complaint when he was taken into custody, Lee ignores the fact that he was held in custody upon the request of his probation agent.

> [Lee], however, was not under arrest. He was in custody on a probation hold. The DOC may take a probationer into physical custody to investigate whether the individual has violated the terms of probation. ***State v. McKinney***, 168 Wis.2d 349, 354, 483 N.W.2d 595, 597 (Ct. App. 1992). This is pursuant to WIS. ADM. CODE § DOC 328.22(2). Action under this section does not commence a criminal prosecution. ***McKinney,*** 168 Wis.2d at 354-55, 483 N.W.2d at 598.

State v. Martinez, 198 Wis.2d 222, 233-34, 542 N.W.2d 215, 220 (Ct. App. 1995). The criminal prosecution against Lee was instituted on November 3, 1997, when a summons and complaint were issued. *See* ***McKinney***, 168 Wis.2d at 354, 483 N.W.2d at 598; § 968.04(2), STATS.

Lee's challenge to the court's personal jurisdiction over him also fails because, even if he were correct, he would not be entitled to a dismissal of the charges against him. It is elementary that "[t]he complaint is the statutory procedure for acquiring personal jurisdiction over the defendant." ***State v. Smith***, 131 Wis.2d 220, 238, 388 N.W.2d 601, 609 (1986). Our supreme court has held that the statutory procedure "indicates that the essential element of personal jurisdiction in a criminal action is the sufficiency of the complaint, rather than the process by which the defendant's presence in court is secured." ***Id.*** at 239, 388 N.W.2d at 609. In ***Smith***, the supreme court held that an illegal arrest does not deprive the court of personal jurisdiction entitling a defendant to a dismissal of the charges; rather, the only remedy available would be the exclusion of evidence obtained as a result of the illegal arrest. *See* ***id.*** at 240, 388 N.W.2d at 610. Similarly, if Lee had been held in custody immediately after his arrest, without the existence of a probation hold, and a complaint had not been issued in a timely manner, his only relief would be the exclusion of illegally obtained evidence.

We now turn to Lee's challenge to the use of prior convictions, which he claims were uncounseled, to enhance his sentence. Lee argues that under ***Baldasar*** and ***Nichols***, uncounseled convictions that result in incarceration cannot be used to enhance a subsequent sentence. He points out that he appeared pro se in two of the three convictions—where prison terms were imposed—serving as the basis for the repeat offender allegations. He concludes that he was uncounseled because he was not represented by a licensed attorney.

Lee's reliance upon ***Baldasar*** and ***Nichols*** is misplaced. First, ***Nichols*** overruled ***Baldasar.*** *See* ***Nichols***, 511 U.S. at 748. ***Nichols*** stands for the proposition that "consistent with the Sixth and Fourteenth Amendments of the Constitution … an uncounseled misdemeanor conviction, valid under ***Scott*** [***v. Illinois***, 440 U.S. 367 (1979)] because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." ***Nichols***, 511 U.S. at 748-49.

Second, ***Nichols*** is of no help to Lee because of the facts in ***Scott.*** In ***Scott***, the Supreme Court held that where no prison sentence is imposed a defendant charged with a misdemeanor has no constitutional right to an attorney. *See* ***Scott,*** 440 U.S. at 373-74. The facts of the case show that Aubrey Scott was charged with shoplifting and at his initial appearance he appeared without counsel. *See* ***People v. Scott***, 369 N.E.2d 881, 881-82 (Ill. 1977). The trial court informed Scott of the charge and asked if he was ready for trial. Scott responded that he was ready, pled not guilty, waived his right to a jury trial and was found guilty after a bench trial. *See* ***id.*** at 882. The significant fact in ***Scott*** was that "[a]t no time during the proceeding was defendant advised of a right to have the assistance of counsel or, if indigent, the right to have counsel appointed." ***Id.*** This fact separates ***Scott*** and ***Nichols*** from this case; here, Lee was never denied his

constitutional right to the assistance of counsel; rather, he exercised his constitutional right to decline counsel and to represent himself.

"The right to counsel has been recognized as one of the most important elements of constitutional due process." ***Pickens v. State***, 96 Wis.2d 549, 555, 292 N.W.2d 601, 604 (1980), *overruled on other grounds by* ***State v. Klessig***, 211 Wis.2d 194, 564 N.W.2d 716 (1997). ***Scott*** provides a starting point for the right to counsel; where no confinement is imposed, a defendant does not have a right to the assistance of counsel. ***Nichols*** provides protection for those convicted after being denied their right to counsel; uncounseled convictions resulting in confinement cannot be used to enhance subsequent penalties.

It is also of constitutional proportions that a "defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so." ***Faretta v. California***, 422 U.S. 806, 807 (1975). Where a defendant avails himself or herself of the right of self-representation, the starting point in ***Scott*** and the protection in ***Nichols*** are not available to the pro se defendant. Lee chose to waive his right to assistance of counsel and exercise his right of self-representation. He is not in a position to now claim that the State is barred from enhancing his sentence because he was not represented by an attorney.

Finally, Lee asserts that the trial court erred in passing sentence by failing to specifically state the term attributable to the underlying charge and the term attributable to the enhancer. He claims it was error for the trial court to state, "The court, therefore, is going to sentence you to an indeterminate period not to exceed 18 months in the Wisconsin State Prison system."

Lee argues that ***State v. Harris***, 119 Wis.2d 612, 350 N.W.2d 633 (1984), mandates a two-step process when sentencing a repeat criminal. In ***Harris***, the supreme court concluded that the repeater statute, § 939.62(1), STATS., does not apply to a defendant's sentence unless the maximum sentence is imposed for the crime for which the defendant is convicted. *See* ***Harris***, 119 Wis.2d at 616-17, 350 N.W.2d at 636. The court noted that by adding the repeater time to less than the maximum sentence for the substantive crime, the trial court improperly treated the additional time as another sentence, not as an enhancer to the substantive offense, thereby thwarting the purpose of the repeater statute which is to "increase the punishment of persons who fail to learn to respect the law after suffering the initial penalties and embarrassment of conviction." *See* ***id***. at 618-19, 350 N.W.2d at 636-37 (quoting ***State v. Banks***, 105 Wis.2d 32, 49, 313 N.W.2d 67, 75 (1981)). As implied in ***Harris*** and as explicitly stated in § 973.12(2), STATS., the sentence of a repeat criminal is a single term, rather than one sentence for the substantive offense and an additional term for being a repeat offender. Therefore, neither ***Harris*** nor § 973.12(2) stands for the proposition that sentencing of a repeat criminal must be a two-step process.

The maximum penalty for retail theft is nine months in prison, but if found to be a repeat criminal, the sentence may be enhanced to a maximum of three years. By sentencing Lee to eighteen months in prison, a time period greater than the maximum penalty for retail theft alone, the court clearly pronounced that it was enhancing the sentence for the substantive crime. Therefore, the trial court properly enhanced Lee's sentence in accordance with ***Harris*** and § 973.12(2), STATS., and without exceeding the three-year maximum sentence for battery as a repeat criminal.

Harris cannot be read as requiring the trial court to follow a script in imposing sentence. A trial court is not required to use "magic words" in effectuating its adjudication. *See* ***State v. Echols***, 175 Wis.2d 653, 672, 499 N.W.2d 631, 636 (1993) ("A trial court is not required to recite 'magic words' to set forth its findings of fact."); ***Michael A.P. v. Solsrud,*** 178 Wis.2d 137, 151, 502 N.W.2d 918, 924 (Ct. App. 1993) ("[T]he trial court's failure to use the 'magic words' does not amount to reversible error."); ***Creighbaum v. State***, 35 Wis.2d 17, 28-29, 150 N.W.2d 494, 499 (1967) ("And it would clearly be a triumph of form over substance were this court to hold that a reversal as a matter of law was compelled because 'all elements of a formula' were not precisely followed.").

By the Court.—Judgment and order affirmed.

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