COURT OF APPEALS
DECISION
DATED AND FILED

July 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0265-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DALE R. WIEGERT,

DEFENDANT-APPELLANT.

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

SNYDER, P.J. Dale R. Wiegert stands convicted of two Class A misdemeanor counts of battery contrary to § 940.19(1), STATS., as a repeat offender. At sentencing the trial court applied the § 939.62(1)(a), STATS.,[1] repeater enhancement to each conviction and sentenced Wiegert to prison for six

[1] Section 939.62(1)(a), STATS., allows the maximum term of imprisonment to be increased from one year to three years.

years. Wiegert moved the trial court for release on bail pending appeal and the trial court set cash bail at $20,000. The trial court denied Wiegert's postconviction motions for relief from cash bail and for modification of his sentence. On appeal, Wiegert argues that the enhanced sentence was void, that the trial court wrongly relied upon the prosecution's memorandum during sentencing and that the setting of cash bail pending appeal was contrary to law.[2] We disagree and affirm the judgment and the orders.

Repeater Enhancement

Wiegert was convicted on December 16, 1997, of two Class A misdemeanors, each of which would subject him to imprisonment not to exceed nine months.[3] The criminal complaint alleged that Wiegert was a repeat offender based upon his prior convictions of battery, resisting an officer and disorderly conduct. Section 973.12(1), STATS., provides in relevant part:

> 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 .... An official report ... of this or any other state shall be prima facie evidence of any conviction or sentence therein reported.

Section 939.62(1)(a), STATS., allows the maximum term of imprisonment of nine months for a Class A misdemeanor to be increased to not more than three years.

[2] Wiegert's notice of appeal, filed on January 22, 1999, relates "Defendant is Requesting A 3-PANEL Judge." In his brief, Wiegert renews his request that "an Order be made that this case be made a three-judge appeal pursuant to § 809.41(3), STATS." Misdemeanor appeals are decided by one court of appeals judge unless the appellant successfully moves the chief judge to have the case decided by a three-judge panel. *See* § 752.31(2)(f), (3), STATS. Failure to timely file a three-judge panel motion waives the right. *See* § 809.41(1). The appellate file contains no order from the chief judge that this case be decided by a three-judge panel. Wiegert has waived his right to file a motion for a three-judge panel.

[3] *See* § 939.51(3)(a), STATS.

Wiegert received the maximum consecutive prison sentence on each count for a total prison term of six years.

Wiegert did not admit to the prior convictions. He contends that the enhanced penalties are void because the convictions were not proven by the State as required by § 973.12(1), STATS., and that "[t]here is no evidence [any]where in the record to prove that I was a repeater." We review the trial court's use of penalty enhancers by applying §§ 939.62 and 973.12, STATS., to the undisputed facts of this case. *See* ***State v. Theriault***, 187 Wis.2d 125, 131, 522 N.W.2d 254, 257 (Ct. App. 1994). Whether the penalty enhancers are void as a matter of law presents a question of law which we review independently. *See* ***id.***

A defendant may be charged as a repeater if he or she was convicted of three misdemeanors during the prior five years of the present crime, and those convictions remain of record and unreversed. *See* § 939.62(2), STATS. Sentencing occurred on March 27, 1998. On March 6, 1998, the State filed a "Sentence Memo" containing a copy of a June 30, 1994 Milwaukee county battery conviction contrary to § 940.19(1), STATS.; a copy of an August 24, 1993 Waukesha county obstructing an officer conviction contrary to § 946.41(1), STATS.; and a copy of a February 22, 1994 Shawano county conviction for disorderly conduct contrary to § 947.01, STATS.

Wiegert objected to the copy of the battery conviction in the district attorney's memo as lacking certification. The State related that the original certifications were in the trial record as sealed exhibits from an earlier

proceeding.[4] The trial court then noted that at trial, exhibits were received into evidence of a certified copy of the June 30, 1994 battery conviction,[5] a certified copy of the August 24, 1993 obstructing an officer conviction[6] and a certified copy of the February 22, 1994 disorderly conduct conviction.[7] The trial court noted that all three of the convictions remained of record and received the convictions into the sentencing record. We are satisfied that the State has proven the repeater convictions as required by § 973.12(1), STATS.

Wiegert cites to ***Block v. State***, 41 Wis.2d 205, 163 N.W.2d 196 (1968), contending that the trial court violated a due process requirement in relying on evidence of prior convictions introduced during his trial. ***Block*** states that "[d]ue process requires the court not to hear evidence of prior convictions to determine recidivism prior to a finding or conviction of guilty on the crime charged." ***Id.*** at 211-12, 163 N.W.2d at 199. The trial court responded to Wiegert's reliance on ***Block*** by stating, "I did not hear [the prior conviction evidence] for purposes of recidivism" but "[f]or purposes of your taking the stand and being asked the questions of whether or not you had been convicted of a crime, and if so, how many crimes you had been convicted of ... and a

[4] The certified conviction exhibits were offered at a § 906.09, STATS., hearing to determine Wiegert's correct number of convictions if he testified. The exhibits are not included in the appeal record and we must assume that the exhibits support the trial court's decision. *See* ***State v. Smith***, 55 Wis.2d 451, 459, 198 N.W.2d 588, 593 (1972); *see also* ***Suburban State Bank v. Squires***, 145 Wis.2d 445, 451, 427 N.W.2d 393, 395 (Ct. App. 1988).

[5] Exhibit 33 as marked and received into the trial record.

[6] Exhibit 32 as marked and received into the trial record. This conviction occurred in Waukesha county and the trial judge also took judicial notice during the sentencing procedure that he had signed the judgment of conviction. *See* § 902.01(6), STATS. (allowing judicial notice to be taken "at any stage of the proceeding").

[7] Exhibit 36 as marked and received into the trial record.

determination had to be made as to what your answer would be based upon all the various evidence that was furnished to the court at that time."[8]

We agree with the trial court that it heard evidence of Wiegert's prior convictions during the trial in order to establish the number of his convictions prior to his testifying before the jury, a purpose different than that of determining recidivism. We also agree with the trial court that it was obligated to hear such evidence during the jury trial.[9] Therefore, the ***Block*** due process requirement was not violated. Because the repeater proofs required by § 973.12(1), STATS., were already in the court record for reasons not prohibited under ***Block***, they were properly offered to and considered by the trial court prior to Wiegert's sentencing. *See* ***State v. Koeppen***, 195 Wis.2d 117, 130, 536 N.W.2d 386, 391 (Ct. App. 1995).

Wiegert further argues that the trial court failed to state on the record that Wiegert was a § 939.62, STATS., repeater, thereby precluding the imposition of the sentence enhancements. In ***State v. Harris***, 119 Wis.2d 612, 619-20, 350 N.W.2d 633, 637 (1984), our supreme court stated:

> If the trial court in its discretion determines that incarceration is warranted for the defendant which is greater than that prescribed by law for the substantive offense, it is incumbent, prior to an imposition of a sentence in excess of the maximum, that the court make a finding that the defendant is a repeater, which authorizes it to increase the sentence pursuant to sec. 939.62(1), STATS.

[8] The § 906.09, STATS., hearing concluded with the court finding, and counsel agreeing, that Wiegert had been convicted of seven prior misdemeanor crimes.

[9] At the postconviction hearing, Wiegert posited to the trial court, "So, you heard evidence prior to me being found guilty." The trial court responded, "It's my responsibility under the 906 statute to make that determination that we made during the course of the trial. [I]t was outside of the presence of the jury at that time."

The trial court accepted the proofs of the prior convictions at the sentencing hearing by stating, "The court does receive all three of these judgment[s] of convictions into the record for purposes of sentencing at this time." This statement satisfies the ***Harris*** requirement that the court make a finding that Wiegert is a repeater under § 939.62(1), STATS.

Sentencing Memorandum

Wiegert next contends that his sentence of six years is excessive because it was the product of the trial court relying upon an improper and erroneous sentencing memorandum submitted by the district attorney. At sentencing, the district attorney is allowed to make a statement with respect to any matter relevant to sentencing. *See* § 972.14(2), STATS. Sentencing is a discretionary act and this court presumes that the sentencing court acted reasonably. *See* ***State v. Scherreiks***, 153 Wis.2d 510, 517, 451 N.W.2d 759, 762 (Ct. App. 1989).

We agree with Wiegert that the sentencing memorandum submitted to the trial court by the district attorney is extensive.[10] It is not, however, a § 972.15(1), STATS., presentence investigation report (PSI) as contended by Wiegert in this appeal. The district attorney admitted authorship of the document, timely filed it with the sentencing court, and Wiegert's attorney conceded at sentencing that he had received a copy of the district attorney's memorandum and had reviewed it with Wiegert. In response to the memorandum, Wiegert submitted his own sentencing memorandum that the trial court noted "for the most part,

[10] The sentencing memorandum consists of 20 sections, 310 pages and is 1.75 inches thick.

attacks the 3 hundred page memorandum, sentencing memorandum that I received from the district attorney's office."

Our review of the sentencing record reveals that, excepting the validity of the copies of the convictions contained in the district attorney's memorandum for repeater enhancement purposes, Wiegert never formerly objected to the trial court's consideration of the memorandum. The court read the documents submitted by both Wiegert and the district attorney. To fulfill its responsibility to a defendant and to society, "a sentencing court must have considerable latitude in obtaining and considering all information which might aid in forming an intelligent and informed judgment regarding the appropriate penalty under the circumstances." ***State v. Heffran***, 129 Wis.2d 156, 163, 384 N.W.2d 351, 354 (1986).

We conclude that the trial court's review of the district attorney's memorandum, as well as Wiegert's memorandum, was consistent with the fulfillment of its sentencing responsibility. In addition, during sentencing the court stated, "I would further point out that my [sentencing] decision in this case would be exactly the same as it will be if I had not received this 3 hundred page document ...." We conclude that Wiegert's claim that the trial court's use of the district attorney's memorandum at the sentencing hearing was improper or an erroneous exercise of discretion is unfounded.

Cash Bail Requirement

Lastly, Wiegert complains that the trial court's bail order pending his appeal was contrary to the law and was excessive because it required cash. The trial court revoked bail after Wiegert was convicted of the battery charges after concluding, inter alia, that in facing a six-year prison sentence Wiegert was "not

only a risk to flee" but was a danger to the community. Wiegert, alleging indigency, then filed a motion for bail pending appeal. After hearing Wiegert's testimony on April 2, 1998, the trial court found Wiegert to be indigent, that cash bail was appropriate, that Wiegert was unable to post any cash bail and that cash bail of $10,000 per conviction, for a total of $20,000, was warranted.[11]

Section 969.01(2)(b), STATS., states that "[i]n misdemeanors, release shall be allowed upon appeal."[12] However, a court may impose cash bail against a misdemeanant as a condition of release pending appeal. *See* ***State v. Barnes***, 127 Wis.2d 34, 37, 377 N.W.2d 624, 625 (Ct. App. 1985). Cash bail is not prohibited as a matter of law against a convicted indigent misdemeanant who takes an appeal. *See* ***State v. Taylor***, 205 Wis.2d 664, 673, 556 N.W.2d 779, 783 (Ct. App. 1996). Where there is no risk that an indigent defendant will not appear for further proceedings, however, the imposition of cash bail as a condition of release pending appeal is inappropriate. *See* ***id.***

Wiegert argued at his postconviction motion hearing that Wisconsin Correctional Services had found that he was a moderate risk to flee, and therefore the cash bail order was excessive. In addition, Wiegert argued that he was determined to be a low-risk prisoner by the Wisconsin prison system. The trial

[11] The court also ordered that if Wiegert posted the cash bail that he be supervised by Wisconsin Correctional Services, that he not leave the state of Wisconsin, that he have no contact with any of the witnesses who appeared throughout the course of the trial or with any of the jurors who found him guilty, that he neither possess nor consume any alcohol or illegal drugs, that he be involved in no further violations of the law, that he have no contact with Dupy's Bar, that he attend all future court hearings and that he be electronically monitored. The court further ordered that Wiegert have no contact with three members of the victim's immediate family.

[12] Section 969.01(2)(b), STATS., has since been amended to state, "In misdemeanors, release may be allowed upon appeal in the discretion of the trial court." The change applies to offenses committed on or after May 13, 1998. *See* 1997 Wis. Act 232, § 2.

court denied Wiegert's motion for bail modification, stating that "as to bail I stand upon what I said at the initial bail hearing" and that "[i]t is also true that it was indicated that you were a risk." Because the trial court made a finding that Wiegert was a risk to flee and to not appear at further court proceedings if released, we conclude that the setting of cash bail was appropriate.[13]

By the Court.—Judgment and orders affirmed.

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

[13] After setting cash bail on April 2, 1998, the trial court ordered that Wiegert be transported from the Waukesha county jail facility to the reception center at Dodge Correctional Institution. Wiegert's attorney objected to the transfer but could not cite any authority to the trial court in support of the objection. While the issue was preserved for appellate review in the trial court, Wiegert fails to brief the issue on appeal. Consequently, we decline to review the issue. *See* ***Vesely v. Security First Nat'l Bank***, 128 Wis.2d 246, 255 n.5, 381 N.W.2d 593, 598 (Ct. App. 1985).