

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 10, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP2343

Cir. Ct. No. 1998CM12620

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICHOLAS J. BARBIAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
MARSHALL B. MURRAY, Judge. *Affirmed.*

¶1 CURLEY, J.¹ Nicholas J. Barbian, *pro se*, appeals the order denying his postconviction motion seeking to withdraw his guilty pleas convicting him of one count of misdemeanor theft by fraud, not exceeding \$1,000, one count

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

of obstructing an officer, and two counts of bail jumping, all charged with a habitual criminality enhancer except the second count of bail jumping, contrary to WIS. STAT. § 943.20(1)(d) and (3)(a), 946.41(1), 946.49(1)(a), and 939.62 (1997-98).² Barbian argues that “the State and the court failed to establish the linkage between the underlying charges, or how the repeater allegations increased them [sic] penalties.” This court interprets this to mean that Barbian did not know the penalties he faced because of the habitual criminality penalty enhancers. After reviewing the record, this court disagrees with his contention and affirms.

I. BACKGROUND.

¶2 According to the criminal complaint, Barbian met with West Allis, Wisconsin police officers on November 11, 1998, ostensibly to assist the police in making a controlled buy of cocaine. The police supplied him with \$180 of “buy money” (photocopied money to be used in the purchase of illegal drugs) and observed Barbian enter an apartment. Several minutes later, he exited the apartment building, and gave the police what was purported to be an “eight ball” of cocaine. The police then dropped Barbian off at an address he requested.

¶3 When the police officers returned to the police department, they discovered that the substance that Barbian had claimed to be cocaine was not cocaine. The police then decided to find Barbian to discuss this matter with him. Shortly thereafter, the police received a phone call from a former girlfriend of Barbian’s, who told the police that Barbian had just called her, thereby violating the “no-contact” order that had been in place since Barbian had been charged with

² All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

another crime several months earlier. She also related to the police that Barbian told her that he had just sold baking soda to the police for \$180. At some point, she also supplied the police with a tape recording of several messages that Barbian had left on her cell phone several days earlier. In one of the calls, Barbian threatened to hurt the former girlfriend's new boyfriend unless she came to his apartment.

¶4 Upon learning of this development, the police located Barbian at a local tavern, where he was found in possession of \$150 of the photocopied money. A twenty-dollar bill matching the photocopied money was also found in the tavern's cash register. Barbian was arrested and, after being advised of his *Miranda* rights,³ explained that the reason he had the controlled "buy money" was because the man from whom he had purchased the drugs was in the tavern where he was arrested, and had asked Barbian to hold the money for him. The police contacted this implicated individual, who claimed no knowledge of any drug dealing, but admitted that he had been in the tavern and saw Barbian flashing around a lot of money shortly before the police arrested him. This individual also permitted the police to search his apartment. No drugs were found. The police concluded that Barbian's explanation for why he possessed the "buy money" was false.

¶5 As a result of the aforementioned actions, Barbian was charged with theft of the "buy money," giving false information to the police, and two counts of violating the terms of his bond by calling his former girlfriend. All of the charges contained a habitual criminality penalty enhancer. He eventually pled guilty to all

³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

the charges, with the habitual criminality penalty enhancer on the fourth count. He was sentenced to three years, two years, three years and nine months in prison respectively, all to be served consecutively. He brought a postconviction motion that was denied, as well as a motion asking the trial court to reconsider its postconviction motion decision.

II. ANALYSIS.

¶6 The crux of Barbian’s complaint is his belief that the trial court failed to explain to him how the habitual criminality penalty enhancer increased the misdemeanor sentences.

¶7 The use of the repeat-offender penalty enhancers, as with most sentencing decisions, lies within the discretion of the sentencing court. *State v. Saunders*, 2002 WI 107, ¶45, 255 Wis. 2d 589, 649 N.W.2d 263. However, whether the court properly interpreted and applied the penalty enhancer requires application of WIS. STAT. §§ 939.62(2) and 971.08 to undisputed facts and presents a question of law, which we review *de novo*. See *State v. Holloway*, 202 Wis. 2d 694, 697, 551 N.W.2d 841 (Ct. App. 1996).

¶8 WISCONSIN STAT. § 939.62(2) enhances a person’s potential exposure “if the actor 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 is presently being sentenced[.]” WISCONSIN STAT. § 939.62(1)(a) reads: “A maximum term of one year or less may be increased to not more than 3 years.” Thus, if Barbian qualified for habitual criminal status, his sentencing exposure for the three misdemeanor charges would each be increased by two years, pursuant to the operation of the statute.

¶9 At a guilty plea hearing, the court is required to “[a]ddress the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.” WIS. STAT. § 971.08(1)(a). “At the time of the entry of plea, a defendant is entitled to know what might or could happen to him or her.” *State v. Mohr*, 201 Wis. 2d 693, 700, 549 N.W.2d 497 (Ct. App. 1996). With respect to knowledge of the enhanced penalties, case law has established that Barbian must have “an express understanding that the repeater allegations increased the possible penalties.” See *State v. Goldstein*, 182 Wis. 2d 251, 256, 513 N.W.2d 631 (Ct. App. 1994). After reviewing the record, this court is satisfied that Barbian acknowledged the basis for the habitual criminality penalty enhancers, and knew the penalties he faced as a result.

¶10 The guilty plea questionnaire signed by Barbian listed the charges and the maximum penalties without listing the enhancers. However, the complaint, which was used as a factual basis for the pleas, contained both the original penalties for the crimes, as well as a provision stating that the maximum penalties were increased to three years because he had been charged as a habitual criminal. Barbian admitted to the trial court that he had read the “lengthy complaint.” During the plea colloquy with Barbian, the trial court established that Barbian knew that he fell within the ambit of the habitual criminality statute. The trial court inquired:

THE COURT: Do you understand that the maximum possible – strike that. Do you understand that you’re charged with this count of theft by fraud as a habitual criminal?

THE DEFENDANT: Yes, I do.

THE COURT: Do you understand that it's alleged that you're a habitual criminal because you've been convicted of three misdemeanor crimes in March, 1998?

THE DEFENDANT: Yes.

THE COURT: Sir, do you acknowledge that on March 18, 1998 you were convicted of battery?

THE DEFENDANT: Yes, I was.

THE COURT: Do you acknowledge as well that on that date you were convicted of disorderly conduct?

THE DEFENDANT: Yes, I was.

THE COURT: Do you acknowledge as well, sir, that you were convicted on that date [of] criminal damage to property?

THE DEFENDANT: Yes, I was.

THE COURT: Do you acknowledge that because you're convicted of three misdemeanors you are in fact a habitual criminal?

THE DEFENDANT: Yes.

¶11 The trial court also specifically told Barbian of the maximum enhanced penalties he faced for the counts of theft by fraud and obstructing an officer:

THE COURT: Do you understand then that the maximum possible penalty you face as a habitual criminal on the theft by fraud count is a \$10,000 fine and three years in prison?

THE DEFENDANT: Yes.

....

THE COURT: Do you understand that you're charged with the crime of obstruction or obstructing an officer?

THE DEFENDANT: Yes.

With regard to the obstruction charge, the trial court asked:

THE COURT: Do you understand that the maximum sentence you face here, since you're also charged as a habitual criminal, is three years in prison and a \$10,000 fine?

THE DEFENDANT: Yes.

As to the bail jumping charges, the trial court failed to specifically inform Barbian of the penalties, stating only:

THE COURT: Do you understand you're charged with two counts of bail jumping?

THE DEFENDANT: Yes.

....

THE COURT: Do you understand you're charged in each of these counts as a habitual criminal? [Later, the trial court dismissed the penalty enhancer for one count due to the plea bargain.]

THE DEFENDANT: Yes, I am.

However, the trial court did advise Barbian of his collective sentencing exposure, stating:

THE COURT: And I can sentence you to nine years and nine months incarceration and a \$40,000 fine.

THE DEFENDANT: I'm fully aware of that.

THE COURT: Do you understand it can be consecutive back to back time?

THE DEFENDANT: Yes, I do.

Finally, the trial court asked Barbian's attorney if his client understood the effect of the penalty enhancers and the basis for them, and he answered affirmatively.

¶12 Thus, this record establishes that Barbian was well aware of the original penalties for the misdemeanors, as well as the enhanced penalties. The complaint listed the original penalties and alerted Barbian that those penalties would increase by two years. During questioning, Barbian admitted being a habitual criminal and acknowledged that he understood that the penalties were increased. Consequently, the record belies Barbian's contentions that no linkage was provided between his status as a habitual criminal and the increased penalties that resulted, or that he did not understand the maximum penalties he faced. Accordingly, the trial court is affirmed.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4 (2003-04).

