COURT OF APPEALS
DECISION
DATED AND FILED

May 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP881-CR **Cir. Ct. No. 2012CF2604**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS DEONDRE FOWLER, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed*.

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. The question here is whether Fowler admitted a prior conviction for purposes of sentence enhancement as a repeat offender. We conclude that Fowler did and, therefore, affirm the circuit court.

Background

¶2 In October 2012, Fowler was charged with four crimes arising from a domestic incident in which Fowler punched a woman hard with a closed fist, causing her to fall backward and hit her head on a curb. Fowler was charged with felony substantial battery—domestic abuse and the following three misdemeanors: disorderly conduct, child neglect, and obstructing an officer. All charges added a repeater enhancer and gave the following specifics of the alleged underlying conviction: "felony ... [d]elivery of THC on May 13, 2008 in Rock County Circuit Court." Because the prior conviction was for a felony, the complaint specified that the maximum term of imprisonment for the new felony battery could be increased by 4 years. The maximum term for each of the misdemeanor charges could be increased by or up to 2 years, depending on the particular underlying penalty. A subsequent information was similarly detailed.

¶3 In January 2013, pursuant to a plea agreement, the disorderly conduct and child neglect charges were dismissed. Fowler entered pleas to the felony battery, carrying a possible maximum enhanced sentence of seven and one-half years, and the misdemeanor obstructing, carrying a potential maximum enhanced sentence of two years. The circuit court followed the joint sentencing recommendation, imposing six months of jail time on the obstructing conviction and withholding sentence on the substantial battery charge with a term of probation of three years, consecutive to the jail sentence.

¶4 Approximately two years later, in January 2015, Fowler's probation was revoked, in part, for battering the victim in the 2012 incident and damaging property at her residence. Accordingly, in April 2015, Fowler was sentenced on the felony conviction. The circuit court imposed the maximum sentence, seven

and one-half years total, consisting of five and one-half years of initial confinement and two years of extended supervision.

¶5 About nine months later, in January 2016, Fowler filed a postconviction motion to vacate the repeater enhancement portion of his sentence. The circuit court denied that motion in an order filed April 11, 2016.

¶6 Further facts will be discussed below as necessary to our analysis.

Discussion

¶7 The only conviction at issue here is Fowler's felony battery conviction. Fowler maintains that the 4-year enhanced portion of his sentence on that conviction must be vacated.

¶8 Under WIS. STAT. § 973.12(1), repeater sentence enhancement is permitted if the State proves a qualifying prior conviction or the defendant admits to a qualifying conviction. *See* ***State v. Kashney***, 2008 WI App 164, ¶8, 314 Wis. 2d 623, 761 N.W.2d 672. Here, the State acknowledges that it did not prove a prior conviction. The issue is whether Fowler admitted the prior conviction that was listed in the charging documents within the meaning of § 973.12(1).[1]

¶9 Prior to ***State v. Rachwal***, 159 Wis. 2d 494, 465 N.W.2d 490 (1991), and ***State v. Liebnitz***, 231 Wis. 2d 272, 603 N.W.2d 208 (1999), the supreme court had interpreted the admission requirement in WIS. STAT. § 973.12(1) to mean that an "admission may not ... be inferred nor made by defendant's attorney, but rather,

[1] All references to the Wisconsin Statutes are to the 2015-16 version. Because there have been no significant changes, we cite the current version for ease of reference.

must be a direct and specific admission by the defendant." ***State v. Farr***, 119 Wis. 2d 651, 659, 350 N.W.2d 640 (1984). In ***Rachwal*** and ***Liebnitz***, however, our supreme court explained that a direct and specific admission by a defendant is not the exclusive means of satisfying the statutory admission requirement. *See* ***Liebnitz***, 231 Wis. 2d at 287; ***Rachwal***, 159 Wis. 2d at 508. Indeed, under ***Rachwal*** and ***Liebnitz*** an admission may be inferred where (1) the totality of the record reveals that the defendant understood the nature of the repeater charge and (2) the defendant entered a plea to the charge carrying a repeater enhancement. *See* ***Liebnitz***, 231 Wis. 2d at 275; ***Rachwal***, 159 Wis. 2d at 508-09. Applying this test, we agree with the State that the facts here are comparable to those in ***Liebnitz***, where the court concluded that the admission was sufficient.

¶10 In ***Liebnitz***, the State did not prove a prior qualifying conviction. Rather, as here, the question was whether the defendant admitted the prior conviction. Notably, Liebnitz did not expressly or directly admit to any prior conviction. The plea hearing in ***Liebnitz*** was similar to the one here. The circuit court did not inquire into Liebnitz's understanding of the repeater enhancer, did not mention the prior convictions, and did not differentiate what part of the maximum penalties that Liebnitz faced were attributable to repeater enhancement. ***Liebnitz***, 231 Wis. 2d at 281-82. Nonetheless, the ***Liebnitz*** court concluded that the totality of the record showed that Liebnitz sufficiently understood the nature of the repeater charge and that that understanding, combined with Liebnitz's plea, was an admission under the statute. ***Id.*** at 287-88. The ***Liebnitz*** court focused on the following four circumstances.

¶11 First, in ***Liebnitz***, "[b]oth the complaint and information set forth in detail the nature of [Liebnitz's] previous convictions, the dates of conviction, the number of years added to the underlying charge as a result of his repeater status,

and the maximum possible term of imprisonment for each count when the repeater provision is applied." ***Id.*** at 285-86.

¶12 Second, when Liebnitz made his initial appearance, "the judge read each count and its possible penalties to Liebnitz, asked if Liebnitz understood the nature of the charge, and received an affirmative answer from Liebnitz. The judge also read the repeater charge associated with each count, including the description of when and of what Liebnitz had been convicted previously, and explained specifically how the repeater charge increased the possible penalties associated with the underlying charge. After reviewing each repeater provision with Liebnitz, the judge asked Liebnitz if he understood the possible enhancement of the penalty. Each time Liebnitz replied in the affirmative." ***Id.*** at 286.

¶13 Third, Liebnitz completed a "plea questionnaire and waiver of rights form." ***Id.*** Liebnitz initialed the part of the form stating "'I acknowledge that a factual basis for my plea of no contest is established by the criminal complaint and transcript of preliminary exam [sic].'" ***Id.***

¶14 Fourth, when establishing a factual basis at the plea hearing, the court asked Liebnitz, "'is it correct that by your pleas you've chosen not to contest the allegations contained in the complaint that was provided to you when you first appeared in court?' [and] Liebnitz replied 'yes.'" ***Id.***

¶15 The circumstances here are comparable to those in ***Liebnitz***. Fowler's complaint and information detailed the repeater charge, the prior conviction, and the possible sentence enhancement. While not in the same detail, the circuit court here referred to the repeater at Fowler's initial appearance, at his preliminary hearing, and at his arraignment. Like Liebnitz, Fowler completed a plea questionnaire form that acknowledged that Fowler was pleading to a repeater-

enhanced crime. And, like Liebnitz, at the plea hearing Fowler acknowledged his understanding that the charge included a repeater allegation with the particular resulting maximum sentence.

¶16 As Fowler suggests, the most significant distinction between ***Liebnitz*** and Fowler's case is that in ***Liebnitz*** the circuit court personally engaged Liebnitz at his initial appearance. The court did not obtain an admission from Liebnitz as to whether the prior convictions at issue there were correct. But the court did inform Liebnitz of the specific alleged prior convictions and the particulars of the penalty enhancement and ask him whether he understood the nature of the charges and the penalties. *See* ***id.*** at 277-80. This exchange, albeit not an admission, provided evidence that Liebnitz understood the particular alleged prior convictions and what effect the enhancer had on the possible penalty.

¶17 Here, we acknowledge that there was no personal engagement by the court with Fowler with respect to the prior conviction and its effect on the possible penalty. But the record does show that Fowler's trial counsel, at the time of Fowler's plea, explained the effect the enhancer had on the possible penalty and "[m]ost likely" verified with Fowler the particular prior conviction.[2]

[2] Fowler's counsel said that he could not "with a hundred percent verification" say that he asked Fowler about the prior conviction. All counsel knew for sure was that he had satisfied himself that the prior conviction existed.

We also note here that Fowler takes the position that his trial counsel's postconviction testimony was improper under ***State v. Koeppen***, 195 Wis. 2d 117, 536 N.W.2d 386 (Ct. App. 1995), because that case holds that a repeater allegation may not be proved after sentencing. We agree with the State that Fowler's reliance on ***Koeppen*** is misplaced. Trial counsel's testimony was not an after-the-fact attempt to supply proof of Fowler's prior conviction; it was evidence that, before his plea, Fowler understood the repeater allegation.

¶18 ***Rachwal*** and ***Liebnitz*** teach that a defendant's plea can be considered an admission to a prior conviction if the record shows that the defendant understood the particular alleged prior conviction and the effect of the repeater on the possible penalty. Applying this approach, we conclude that the facts here are sufficiently comparable to those in ***Liebnitz*** that the result should be the same. We conclude that Fowler admitted the prior qualifying conviction within the meaning of WIS. STAT. § 973.12(1).

¶19 Fowler suggests that it is inappropriate to consider, or at least inappropriate to place significant weight on, the plea questionnaire and the testimony of Fowler's trial counsel because the circuit court did not question Fowler about any particulars of the questionnaire or Fowler's interaction with counsel. Fowler, looking to ***State v. Hoppe***, 2009 WI 41, 317 Wis. 2d 161, 765 N.W.2d 794, states that the plea questionnaire cannot be a substitute for a court's personal colloquy with a defendant. Fowler's reliance on ***Hoppe*** is misplaced. ***Hoppe*** is part of the body of case law governing the obligation of courts to comply with ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). This case law is distinct from the law governing whether a record shows that the State has proved or a defendant has admitted to a prior conviction for repeater enhancement purposes. Under ***Liebnitz***, the inquiry looks to the totality of the record to discern whether the defendant "understood the nature of the repeater charge." *See* ***Liebnitz***, 231 Wis. 2d at 275. We find no indication in ***Liebnitz*** of the need for the sort of personal interaction between the court and the defendant that is required in assessing whether there is a ***Bangert*** violation. And, Fowler does not direct our attention to any repeater enhancer case law imposing the same personal colloquy requirement.

¶20 Fowler argues that "what the State is really advocating for [here] is a rule that *any* no contest or guilty plea to a conforming criminal complaint or information, where there is a plea questionnaire, constitutes a *per se* admission to the repeater allegation." This criticism is similar to the ***Liebnitz*** dissent's complaint that: "The [***Liebnitz***] majority's new standard apparently is that if the complaint containing allegations of prior convictions is read to the defendant at the initial appearance, then that is good enough to establish six months later at the plea hearing a direct and specific admission by the defendant to those allegations." ***Liebnitz***, 231 Wis. 2d at 288 (Ann Walsh Bradley, J., dissenting).

¶21 We acknowledge that our decision reflects what the ***Liebnitz*** dissent refers to as the "lower[ed] standard" employed by the ***Liebnitz*** majority. *See* ***id.*** But of course, the majority opinion is controlling. And, we reject the suggestion that we have effectively adopted a per se rule. As directed by ***Liebnitz***, we have considered the totality of the circumstances. As is true with many applications of legal tests, such as the application of the reasonable suspicion test in drunk driving cases, the fact that some circumstances are recurrent does not convert a totality of the circumstances test into a per se rule.

¶22 In sum, none of Fowler's arguments persuade us that reversal is required.

¶23 Before concluding, we comment briefly on the parties' dispute about what the remedy should be if we were to conclude that Fowler did not admit to his prior conviction.

¶24 The State argues that the remedy should be plea withdrawal, rather than vacating the enhanced portion of Fowler's sentence, because Fowler's failure to challenge the repeater portion of his sentence deprived the State of the benefit

of the plea agreement in this case. Before the circuit court, the prosecutor argued that there was an additional problem here. According to the prosecutor, Fowler benefited in a separate subsequent prosecution and sentencing in which a plea agreement was based on the assumption that Fowler would be confined in this case for five and one-half years.

¶25 Fowler replies that the State concedes in a footnote that we lack the power to impose any remedy other than vacating the enhanced portion of his sentence. Fowler contends that the remedy he requests is based on "long-standing" law and that the State's position is shortsighted.

¶26 We are uncertain whether the State means to argue that the remedy of plea withdrawal would carry with it an opportunity for the State to again prove a prior qualifying conviction. But, if so, that makes little sense. It is hard to understand why the remedy should include giving the State a second chance to do what the State failed to do the first time around. But it does not necessarily follow that the only appropriate remedy is a simple and automatic reduction in the sentence imposed.

¶27 We have briefly reviewed the cases the parties cite that address remedy.[3] It does not appear that any of the cases involved consideration of how simply vacating part of a sentence might undercut sentencing goals that could have

[3] *See* ***State v. Bonds***, 2006 WI 83, ¶4, 292 Wis. 2d 344, 717 N.W.2d 133 (no plea agreement); ***State v. Spaeth***, 206 Wis. 2d 135, 142, 556 N.W.2d 728 (1996) (no plea agreement); ***State v. Koeppen***, 195 Wis. 2d 117, 122, 536 N.W.2d 386 (Ct. App. 1995) (no plea agreement); ***State v. Theriault***, 187 Wis. 2d 125, 127-29, 131-32, 522 N.W.2d 254 (Ct. App. 1994) (plea agreement, but defendant contested his prior conviction); ***State v. Zimmerman***, 185 Wis. 2d 549, 553, 555, 518 N.W.2d 303 (Ct. App. 1994) (plea agreement); ***State v. Wilks***, 165 Wis. 2d 102, 105, 477 N.W.2d 632 (Ct. App. 1991) (plea agreement).

been achieved had the circuit court been aware that the sentence enhancement was unavailable. And, it appears to us that, in at least some circumstances, rotely vacating the illegal enhancement portion of a sentence thwarts appropriate sentencing goals that could have been achieved had the court and parties been aware that enhancement was unavailable. That is, it may undercut the ability of a circuit court to impose an appropriate unenhanced sentence in the case at hand and, perhaps, an appropriate sentence in separate cases that assume the validity of a previously imposed enhanced sentence.

¶28 We readily acknowledge that this is a complicated topic and that Fowler may be correct that a simple remedy rule is superior to one that reopens proceedings. Still, in a future case, the remedy topic may be appropriate for further consideration by the supreme court or certification by this court.

Conclusion

¶29 For the reasons above, we affirm the circuit court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).