COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1581-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT FRITSCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed.*

¶1 CANE, C.J.[1] The sole issue on appeal is whether the five-year period in the habitual criminality enhancer statute, WIS. STAT. § 939.62(2),[2]

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] WISCONSIN STAT. § 939.62(2), provides:

(continued)

begins to run from the date a defendant is found guilty by a jury or from the date of the judgment of conviction. The trial court found that the five-year period began to run when Robert Fritsch's judgment of conviction for the prior felony was entered, which in this case was the sentencing date. This court agrees and affirms the judgment.

¶2 The relevant facts are undisputed. On February 26, 1992, a jury found Fritsch guilty of the felony, battery to a police officer. On March 26, the trial court sentenced him to eight months in the county jail, but stayed the sentence and placed him on probation for three years. The judgment of conviction states that Fritsch was convicted on February 26 and sentenced March 26. This judgment was entered on the day of sentencing.

¶3 Subsequently, Fritsch was charged with committing misdemeanor crimes of disorderly conduct and battery that occurred on March 21, 1997. The complaint enhanced the penalty under the habitual criminality statute and listed the date of conviction for the felony as March 26, 1992. Fritsch pled guilty to the charges with the repeater enhancer and was sentenced to three years' imprisonment. The sentence was stayed and he was placed on probation. However, his probation was revoked in July 1998. He then filed a motion

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Increased penalty for habitual criminality.

….

(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.

challenging the imposed repeater portion of the sentence, contending that the date of conviction for the felony should have been on February 26, 1992, the date on which the jury found him guilty. He argues that the date of conviction was therefore outside the five-year period for enhancement purposes. The trial court denied his motion and he appeals.

¶4 The repeater statute, WIS. STAT. § 939.62(2), requires the prior conviction to fall within "the 5-year period immediately preceding the commission of the crime for which [the defendant] presently is being sentenced." Fritsch argues that the date a finding of guilt is made, not the date of sentencing, is the conviction contemplated by WIS. STAT. § 973.12(1), which provides in relevant part:

> If the prior convictions are admitted by the defendant or proved by the state, [the defendant] shall be subject to sentence under s. 939.62 …. An official report of the F.B.I. or any other governmental agency of the United States or of this or any other state shall be prima facie evidence of any conviction or sentence therein reported.

¶5 In support of his argument, Fritsch cites ***State v. Wimmer***, 152 Wis. 2d 654, 664, 449 N.W.2d 621 (Ct. App. 1989), for the proposition that once he was found guilty by the jury on February 26, 1992, that is the date of conviction for purposes of the repeater statute. He also reasons that because the judgment refers to the date of conviction as February 26 and the date of sentencing as March 26, this court must accept the date of conviction as February 26. This court is not persuaded.

¶6 ***Wimmer*** held that if a written judgment of conviction is unavailable or has not yet been prepared, the court will refer to other sources to determine whether an individual has been convicted. ***Id.*** at 664-65. As held in ***State v.***

Goldstein, 182 Wis. 2d 251, 258-59, 513 N.W.2d 631 (Ct. App. 1994), and again in ***Mikrut v. State***, 212 Wis. 2d 859, 689-70, 569 N.W.2d 765 (Ct. App. 1997), ***Wimmer*** does not apply in a case such as this where a formal conviction has been entered. Instead, Wimmer is limited to those situations in which the judgment of conviction has not yet been prepared. ***Mikrut***, 212 Wis. 2d at 869. Once the defendant has been formally convicted, the court need not look at the date of the guilty finding. ***Goldstein***, 182 Wis. 2d at 258-59. The formal conviction, once entered, is controlling for purposes of the repeater statute. ***Id.*** at 258.

¶7 This court acknowledges that the judgment refers to separate dates for conviction and sentencing, and that WIS. STAT. § 972.13(1) states "[a] judgment of conviction shall be entered upon a verdict of guilty by the jury …." However, subsec. (3) of this statute sets forth what a judgment of conviction must recite: "A judgment of conviction shall set forth the plea, the verdict or finding, the adjudication and sentence …." As this court observed in ***Mikrut***, 212 Wis. 2d at 869:

> Obviously, a judgment of conviction cannot be entered until these events have occurred. Indeed, subsec. (6) of the statute sets out a model form for a judgment of conviction and it includes all of the provisions required by subsec. (3). *See* § 972.13(6), STATS.
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> Reading all of the subsections of § 972.13, STATS., in context and in harmony, we conclude that: (1) § 972.13(1) authorizes and directs the entry of a judgment of conviction if a jury or court finds a defendant guilty following a trial or if the defendant has pled guilty or no contest; (2) § 972.13(3) recites what a judgment must include; and (3) § 971.13(6) sets out a model judgment of conviction form. Thus, a valid judgment of conviction cannot be entered against a defendant until all of these necessary ingredients exist.

¶8 Therefore, the trial court correctly determined that the judgment of conviction entered on March 26, 1992 is controlling and that the principles announced in ***Goldstein*** and ***Mikrut*** apply. Consequently, the trial court was also correct when it applied the habitual criminality statute.

By the Court.—Order affirmed.

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