

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 28, 2002

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. 01-0867-CR
STATE OF WISCONSIN**

Cir. Ct. No. 95-CF-1825

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRIS R. HOWARD,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for La Crosse County:
JOHN J. PERLICH, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Chris Howard appeals orders denying his motions for sentence modification and reconsideration. Howard claims the State failed to present sufficient evidence to prove that he was a repeater and that defense counsel performed ineffectively by failing to bring the omission to the court's attention. He also contends that the prosecutor made unsupported statements at

sentencing which should have been challenged by counsel and that the trial court erred in denying his motions without a hearing. However, we conclude that the trial court properly denied Howard's motions without a hearing because Howard did not allege any facts which, if true, would have entitled him to relief. *See State v. Bentley*, 201 Wis. 2d 303, 308, 548 N.W.2d 50 (1996).

¶2 Howard was initially charged in 1995 with reckless endangerment, operating a motor vehicle without the owner's consent, possession of a device for entry into a locked coin box, and two counts of possession of drug paraphernalia. All the charges stemmed from an incident in which he fled from police on a stolen motorcycle, was arrested, and was then searched. The State amended the complaint to add repeater allegations. The parties eventually negotiated a plea agreement under which Howard pled guilty to reckless endangerment without the repeater allegation and to operating a motor vehicle without the owner's consent as a repeater in exchange for dismissal of the other charges as well as another pending charge of eluding an officer. Pursuant to the agreement, the dismissed charges were read in and the parties were free to argue at sentencing.

¶3 Howard claims the State failed, at the plea hearing, to present sufficient evidence that he had a prior conviction within the past five years to support the repeater allegation. Even if that were true,¹ however, the omission would be harmless error because the trial court did not invoke the repeater provision by sentencing Howard in excess of the maximum sentences otherwise provided for the underlying crimes. *State v. Harris*, 119 Wis. 2d 612, 619-20,

¹ The State contends that Howard admitted all of the facts necessary to support the allegation.

350 N.W.2d 633 (1984). There was no repeater charge attached to Howard's reckless endangerment conviction. *See* WIS. STAT. §§ 941.30(1) and 939.50(3)(d) (1993-94).² And the court sentenced Howard to six years less than the maximum without repeater enhancement on his conviction for operating without consent. *See* WIS. STAT. §§ 943.23(3) and 939.50(3)(e). Howard received just two years on that conviction. Therefore, because Howard was not actually sentenced as a repeater, his counsel's failure to raise the issue did not cause prejudice.

¶4 Howard also argues that the State made several remarks at the sentencing hearing regarding Howard's past conduct which were unsupported by evidence or which mischaracterized the evidence. However, all of the prosecutor's comments involved reasonable inferences from the presentence report. The record shows that Howard reviewed the presentence report prior to the sentencing hearing, was present when the prosecutor made her comments, and subsequently addressed the court personally. Howard does not claim that there was any information about his own past conduct which was unknown to him at the time of sentencing. He therefore had a proper opportunity to dispute or correct any statements by the State that he believed were inaccurate. Moreover, Howard's claims in this regard do not appear to fall within the proper scope of a motion brought under WIS. STAT. § 974.06 (1999-2000), and therefore should have been raised within ninety days of sentencing under WIS. STAT. § 973.19(1)(a). They are, quite simply, five years too late.

² All references to the Wisconsin Statutes are to the 1993-94 version, unless otherwise noted.

¶5 Because Howard failed to allege facts which would entitle him to relief, the trial court properly denied his motions for sentence modification and reconsideration without a hearing.

By the Court.—Orders affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

