COURT OF APPEALS
DECISION
DATED AND FILED

December 19, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-1636-CR
01-1637-CR
01-1638-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM H. ROBERTS,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Kenosha County: MICHAEL S. FISHER, Judge. *Reversed and cause remanded with directions.*

¶1 BROWN, J.[1] William H. Roberts pled no contest to bail jumping as a repeater. He seeks relief from the plea on the grounds that he never admitted his repeater status at the time of the plea nor did the State prove his repeater status. Roberts also seeks relief from his pleas to operating a motor vehicle while intoxicated (OWI), fourth offense, and operating that vehicle after revocation (OAR), fifth offense, on similar grounds—that he never admitted his prior convictions nor did the State prove them. We agree with Roberts on both issues. We reverse and remand with directions.

FACTS

¶2 On January 31, 1999, in the town of Salem, a deputy stopped Roberts' vehicle. Upon approaching the vehicle, the deputy smelled intoxicants on Roberts' breath, his speech was slurred, and his eyes were bloodshot and glassy. Roberts did not cooperate and refused to take any chemical test to determine if he was intoxicated. Looking at Roberts' driving record, the deputy saw that Roberts had been convicted of OWI on three previous occasions. Roberts was arrested and charged with OWI, fourth offense.

¶3 The deputy also noticed that Roberts' driving privileges had been suspended/revoked and that Roberts had not reinstated them. Further, Roberts had been convicted of OAR on three prior occasions. Roberts was then arrested and charged with OAR, fourth offense by a habitual traffic offender. He was released on signature bond in both cases.

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

¶4 On February 11, 1999, Roberts was seen driving by a different deputy. This deputy stopped Roberts and Roberts was again cited for OAR, this one a fifth offense by a habitual traffic offender. Along with the OAR charge, the district attorney brought four additional charges of bail jumping as a repeat offender. The bail jumping as a repeat offender charge arose because Roberts allegedly had been convicted of three counts of bail jumping on October 19, 1997.

¶5 Thus, as of March 17, 1999, Roberts faced four bail jumping as a repeater charges, an OWI (fourth offense) and two OAR charges (fourth offense and fifth offense). On that date, Roberts pled no contest to the OWI charge and the fourth offense OAR charge. He also pled no contest to two of the four bail jumping as repeat offender charges. The remaining two bail jumping charges were dismissed as was the fifth offense OAR charge.

¶6 The trial court imposed 360 days in jail for the OWI, along with a fine and costs, to be served immediately. On the OAR, Roberts received six months in jail, concurrent with the OWI, plus a fine and costs.[2] As for the two bail jumping as a repeater convictions, the court fined him on one and withheld sentence on the other. The court placed Roberts on probation for eighteen months, consecutive to the jail sentences imposed for the OWI and OAR convictions.

¶7 Roberts' probation was revoked on May 4, 2000. Thereafter, he returned to the sentencing court on the bail jumping as a repeater. On June 30, 2000, the trial court sentenced him to two years in prison. He filed a

[2] When imposing this sentence, the trial court referred to the fifth offense OAR charge. Because the trial court had dismissed this charge pursuant to the plea agreement dated March 9, 1999, we presume this sentence applied to the fourth offense OAR charge.

postconviction motion on February 9, 2001, challenging the bail jumping as a repeater and the OWI and OAR convictions.

STANDARD OF REVIEW

¶8 We will address the bail jumping issue first and then the OWI/OAR convictions. With regard to the bail jumping, the issue is whether Roberts admitted to the prior convictions of bail jumping or, alternatively, whether the State proved those convictions in accordance with WIS. STAT. § 973.12(1). The second issue is whether Roberts or his attorney admitted his prior convictions for OWI and OAR, and if they did not, whether the State proved those prior convictions. Both issues present questions of law which we review de novo. ***State v. Liebnitz***, 231 Wis. 2d 272, 283, 603 N.W.2d 208 (1999).

BAIL JUMPING

¶9 Under WIS. STAT. § 973.12(1), an individual may only be sentenced as a repeater if that individual either admits the prior convictions or the convictions are proved by the State. The State did not offer any proof of Roberts' October 1997 convictions for bail jumping. We thus focus on whether, at any time, Roberts admitted the prior bail jumping convictions or whether the record presents sufficient facts to find that Roberts' plea to the complaint constituted an admission.

¶10 Under certain circumstances a no contest plea to a criminal complaint can constitute an admission to prior convictions. ***State v. Rachwal***, 159 Wis. 2d 494, 512-13, 465 N.W.2d 490 (1991). In ***Rachwal***, the trial court failed to directly ask the defendant whether he had been convicted of the prior offenses, and the defendant never volunteered that he had been convicted of them. ***Id***. at 504.

However, during the plea colloquy with the defendant, the trial court drew the defendant's attention specifically to the repeater allegations explaining the *additional* penalty he would face with the repeater provision. ***Id***. at 502-03. Our supreme court ruled that this part of the colloquy gave Rachwal notice not only that a repeater was being alleged, but also of the potential enhanced exposure over and above the underlying charge. ***Id***. at 509. Because of this specific colloquy, the court concluded that the trial judge had sufficiently informed the defendant that he was being asked to admit to the prior convictions contained in the charging document and that the admission would increase his exposure by a certain amount. ***Id***. By the defendant's explicit response that he understood what the trial court was telling him, the supreme court concluded that there was both an understanding and an admission in the record. ***Id***. But the supreme court also gave a warning: "In the future, it may be that his plea of guilty or no contest would not constitute an admission, *e.g.*, if the judge does not conduct the questioning as did the judge here so as to ascertain the defendant's understanding of the meaning and potential consequences of such a plea." ***Id***. at 512. The court also stated that the circumstances in ***Rachwal*** approached the bare minimum required. ***Id***. at 513.

¶11 The State posits that the colloquy in this case is on all fours with the colloquy in ***Rachwal***. We do not agree. To its credit, the trial court's colloquy in this case went beyond the colloquy conducted in ***Rachwal***, at least in part. Rather than simply informing Roberts of the prior convictions contained in the complaint, the trial court specifically asked Roberts whether he had been arrested and convicted of the prior bail jumping offenses contained in the complaint. Unfortunately for the State, Roberts only replied that he had been arrested, never admitting that he had been convicted. No one picked up on that.

¶12 Further, unlike the colloquy in ***Rachwal***, at no time during Roberts' plea colloquy did the trial court explain the increased penalty that Roberts would be facing in addition to the underlying charge. The plea colloquy must obtain the defendant's "express understanding that the repeater allegations increased the possible penalties." ***State v. Goldstein***, 182 Wis. 2d 251, 256, 513 N.W.2d 631 (Ct. App. 1994). Express understanding is the "touchstone of the admission component of § 973.12(1), STATS., and of ***Rachwal***." ***Goldstein***, 182 Wis. 2d at 256-57. Having never received Roberts' express understanding or admission about the increased penalty with the repeater allegation at the plea colloquy, the "bare minimum" standard established in ***Rachwal*** has not been met.

¶13 We acknowledge that in 1999, our supreme court revisited the repeater provision of WIS. STAT. § 973.12 and developed the "totality of the record" test, expanding on what an appellate court can look to when deciding whether the record establishes an admission by the defendant regarding the defendant's prior conviction. ***Liebnitz***, 231 Wis. 2d at 285-87. In ***Liebnitz***, the defendant argued that he had not admitted the prior convictions nor had the State proved them. ***Id***. at 283. Also at the plea hearing, the circuit court judge never advised Liebnitz of the increased penalties he would face as a repeat offender. ***Id***. at 284. However, on appeal the supreme court looked at the totality of the record and concluded that Liebnitz understood the nature and consequences of the charges against him and the consequences of his plea. ***Id***. at 287.

¶14 In reviewing the record in ***Liebnitz***, the supreme court was convinced that Liebnitz had an understanding of the charges against him. First, the record showed that Liebnitz was charged as a repeater in both the criminal complaint and the information. ***Id.*** at 276, 280. Both documents set forth the nature of his previous convictions, the dates of convictions, 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 was applied. ***Id***. at 285-86. Second, when Liebnitz appeared at his preliminary hearing, the judge read each count against him. ***Id***. at 276-80. After every count the judge asked if Liebnitz understood and Liebnitz answered in the affirmative. ***Id***. Further, the judge read the repeater charge associated with every count, including a description of the previous conviction including dates, and explaining to Liebnitz the increased penalty he faced as a repeater. Liebnitz stated that he understood. ***Id***. at 286. Finally, Liebnitz completed a plea questionnaire and initialed next to a section 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***.

¶15 Unlike the facts in ***Liebnitz***, and as we have already stated, the record here reveals that at no time did the trial court ever explain to Roberts the increased penalty he was facing, particularly for the repeater allegation. The record shows that the trial court did explain the maximum penalty Roberts faced, but the trial court never explained how the repeater adds to the normal maximum penalty, the key component to understanding the seriousness of the repeater charge. Having reviewed the totality of the record, there is no way to ascertain that Roberts knew for certain that the repeater provisions attached to each count of bail jumping would increase his sentence beyond the statutory maximum for bail jumping.

¶16 To conclude our analysis of the first issue, the record as a whole, particularly the colloquy, does not meet the "bare minimum" standard set forth in ***Rachwal***, the "touchstone of the admission" requirement under ***Goldstein***, nor the "totality of the record" standard established in ***Liebnitz***. It cannot be said that

Roberts had an express understanding of the repeater provision attached to each count, nor the increased penalty he faced because of those repeater provisions.

THE OWI/OAR CONVICTIONS

¶17 The procedural requirements of the general repeater statute, WIS. STAT. § 973.12(1), generally do not apply to repeat offenders under WIS. STAT. chs. 341-349. ***State v. Wideman***, 206 Wis. 2d 91, 101, 556 N.W.2d 737 (1996). In ***Wideman***, the court noted that in the 1950 revision of the criminal procedure code, motor vehicle offenses were removed from the general repeater statute, currently § 973.12(1). *See* ***Wideman***, 206 Wis. 2d at 101. Thus, the court had to establish what burden of proof was going to be needed to validate the repeater allegation in traffic complaints.

¶18 The court made it clear that a complaint by itself is not enough to establish prior traffic convictions. *See* ***id.*** at 109; *see also* ***State v. Spaeth***, 206 Wis. 2d 135, 152-53, 556 N.W.2d 728 (1996). ***Wideman*** teaches that the State must prove the prior offenses by providing the certified copies of conviction or other component proof offered by the State before sentencing. ***Wideman***, 206 Wis. 2d at 104-05. The phrase "component proof" was explained in ***Spaeth*** to mean "(1) an admission; (2) copies of prior judgments of convictions for OAR; or (3) a teletype of the defendant's Department of Transportation (DOT) driving record." ***Spaeth***, 206 Wis. 2d at 153. Further, as explained in ***Wideman***, the admission of prior convictions may be made by either the defendant or the defendant's counsel. ***Wideman***, 206 Wis. 2d at 105.

¶19 The record is clear that during that part of the colloquy relating to the OWI and OAR charges, at no time did Roberts ever admit the prior convictions; he only admitted having been arrested. Equally clear is that the State

did not prove the prior convictions for either the OWI or the OAR priors. The State did not provide any copies of judgments of conviction against Roberts, nor did it attach a teletype of Roberts' DOT driving record to the complaint. The only admission of any prior OWI or OAR conviction came from Roberts' attorney during a colloquy with the judge admitting that Roberts had a prior OWI conviction. Roberts' attorney never admitted to any prior OAR conviction or more than one OWI conviction. Thus, the most Roberts could be sentenced for would be OWI, second offense.

MANDATE

¶20 Regarding the bail jumping charge, the law requires that Roberts is entitled to a commutation of his sentence to the maximum for each offense without the repeat enhancer. The maximum is nine months. His sentence is commuted to nine months. As for the OWI/OAR convictions, we remand for resentencing. Roberts requests that the balance of the jail time that he served in those cases be credited to the bail jumping sentence. He does so on the premise that the credit statute, WIS. STAT. § 973.155, is remedial. *See* ***State v. Gavigan***, 122 Wis. 2d 389, 392, 362 N.W.2d 162 (Ct. App. 1984). There, we held that the statute should be construed broadly to achieve its purpose. Roberts argues that equity favors crediting the time spent on unlawful portions of his traffic offense sentences to the related bail jumping sentence because he would otherwise get no credit for that jail time. He asserts that the requirement that the custody be in connection with a "course of conduct" for which sentence is imposed should be read broadly and the bail jumping charge, which was predicated on the bond in effect in the traffic cases, should be considered part of the same course of conduct as the traffic offenses.

¶21 We decline the request. Sentencing is the province of the trial court. Credit issues are therefore properly before the trial court as well. Roberts can take up his request with the trial court.

By the Court.—Judgments and orders reversed and cause remanded with directions.

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