



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

October 12, 2022

To:

Hon. Paul V. Malloy
Circuit Court Judge
Electronic Notice

Marylou Mueller
Clerk of Circuit Court
Ozaukee County Justice Center
Electronic Notice

Adam Y. Gerol
Electronic Notice

Michael C. Sanders
Electronic Notice

James J. Socha, #446226
Waupun Correctional Inst.
P.O. Box 351
Waupun, WI 53963-0351

You are hereby notified that the Court has entered the following opinion and order:

2021AP957-CR

State of Wisconsin v. James J. Socha (L.C. #2005CF55)

Before Gundrum, P.J., Neubauer and Grogan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

James J. Socha, pro se, appeals from an order denying his motion for sentence modification and an order denying his motion for reconsideration. Socha argues that his 2005 sentence in this case for operating while intoxicated as a fifth or subsequent offense should be commuted because certain previous "counting" convictions were vacated and he no longer has five or more offenses. Based upon our review of the briefs and record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We affirm.

The amended charging documents from 2005 identified ten prior counting convictions for purposes of ascertaining the applicable penalty enhancer: five that occurred between 1989 and 1992 in Ohio; two that occurred in Milwaukee County in 1993; two that occurred in Illinois in 1999; and one that occurred in Milwaukee County on February 17, 2005, about one week before the criminal complaint in this case was filed. Socha pled no contest to operating while intoxicated as a fifth or subsequent offense in this case and was sentenced to a bifurcated term of imprisonment consisting of three years' initial confinement and three years' extended supervision.² During the plea hearing, Socha acknowledged that the ten prior convictions stated in the charging documents were correct. He was subsequently released on extended supervision, revoked, and ordered reconfined for a substantial period of time.

In 2020, Socha sought sentence modification—which he now casts as a motion for commutation of his sentence—because he claimed that six of the ten prior counting offenses had been vacated and declared void after his sentencing in this Ozaukee County case. Specifically, he argued that courts in their respective jurisdictions had vacated four of the five Ohio convictions and the two Milwaukee County convictions from 1993. He additionally argued that the 2005 conviction in Milwaukee County should not have been counted as a prior conviction because he had not yet been sentenced in that case at the time of his sentencing here. Socha

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

² Socha also pled no contest to other crimes, for which consecutive sentences were imposed.

asserted that without those seven convictions, he would have been guilty of operating while intoxicated only as a fourth offense and could not lawfully receive the six-year sentence the circuit court imposed.³

The circuit court denied Socha's motion, and we conclude it was proper to do so. Regardless of whether the issue is framed as one of commutation or sentence modification, Socha has not demonstrated he is entitled to relief. For purposes of this appeal, it is necessary to address only one of Socha's contentions: that the sentencing court improperly counted his 2005 conviction in Milwaukee County.

At the time of Socha's sentencing in this case, the parties and the sentencing judge were acutely aware that Socha was awaiting sentencing in the 2005 Milwaukee County case. The PSI in the Milwaukee County case had been completed. The sentencing was scheduled to occur prior to the plea and sentencing hearing here, but it was adjourned for unknown reasons. The State was surprised to learn this fact; the prosecutor had made it known that she would be recommending a sentence in this case consecutive to the Milwaukee County sentence, and she preferred that the Milwaukee County sentencing occur first to keep the convictions in "time line order" based on when the offenses occurred.

Socha opposed delaying the plea and sentencing in this case. In fact, he insisted on "sentencing now," adding, "I don't see a need to adjourn this for two months or three months, however long it be for the Milwaukee [County case]. Milwaukee can run their sentence however

³ Fourth-offense operating while intoxicated at the time of the offense was punishable by a maximum of one year of imprisonment. WIS. STAT. § 346.65(2)(d) (2003-04). Fifth and subsequent offenses were Class H felonies punishable by up to six years. Sec. 346.65(2)(e) (2003-04); WIS. STAT. § 939.50(3)(h) (2003-04).

they wish.” When the circuit court pointed out that the PSI was recommending two years’ initial confinement in the Milwaukee County case and that any such sentence could be made to run consecutive to the sentence in this case, Socha’s counsel responded, “Right. And he’s aware of that, and he just wishes to get this moving and rather than just sitting here for months and not having anything happen. He’s aware of the State’s recommendation. He wanted to just proceed.”

Socha made this request to proceed knowing that the State was alleging that the Milwaukee County violation was the tenth offense and that this offense was Socha’s eleventh. As stated above, Socha then confirmed during his plea that he had ten prior convictions, including the 2005 Milwaukee County offense. Under these circumstances, we conclude that any error was the result of Socha’s decision to move forward. The doctrine of invited error prohibits a defendant from creating an error by deliberate choice or strategy and then receiving the benefit from that error on appeal. *State v. Slater*, 2021 WI App 88, ¶40, 400 Wis. 2d 93, 968 N.W.2d 740.

This conclusion obviates the need to further consider Socha’s claim that he received an unlawful sentence. Socha could be convicted in this case of operating while intoxicated as a fifth offense because he had four prior counting convictions: the one uncontested conviction in Ohio, the two uncontested convictions in Illinois, and the 2005 Milwaukee County conviction. Under the circumstances, we need not, and do not, reach Socha’s contention that it was improper to consider the four contested Ohio convictions and the two contested 1993 Milwaukee County convictions. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (holding that when there is one sufficient ground to support the circuit court’s decision, others need not be addressed).

Based upon the foregoing,

IT IS ORDERED that the orders of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals