COURT OF APPEALS
DECISION
DATED AND FILED

February 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP683 **Cir. Ct. No. 2006CF165**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL L. DISHMAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. This case involves the proof requirements for invoking the sentence enhancement provisions of the repeater statute, WIS. STAT.

§ 939.62 (2011-12).[1] Daniel L. Dishman appeals from an order denying his motion for postconviction relief requesting that the period of his commitment be commuted to twenty months. He argues that the circuit court lacked the authority to enhance the length of his commitment under § 939.62 because the qualifying prior convictions were neither proved nor admitted. We disagree and affirm.

¶2 Dishman was charged in February 2006 with one count of assault by a prisoner, a felony, and one count of disorderly conduct, a misdemeanor, both as a repeat offender. He entered a no-contest plea and the court accepted the parties' stipulation to a finding that Dishman was not responsible by reason of mental disease or defect (NGI). In October 2006, the court ordered Dishman committed to institutional care for seven years and six months, calculated by the parties to be the maximum period of commitment based on the penalties for the charged offenses plus the time authorized by the repeat-offender enhancer.

¶3 Dishman moved for postdisposition relief under WIS. STAT. § 974.06. He contended that the repeater enhancer was illegally applied because the qualifying prior offenses were neither proved nor admitted. Therefore, he argued, the commitment period had to be commuted because it was beyond what the circuit court was authorized to order. He argued in the alternative that, even if the repeat-offender enhancer applied, the maximum period of commitment was miscalculated by eight months and must be reduced by that amount.

¶4 The circuit court granted the motion in part and denied it in part. The court concluded that the repeater allegation was sufficiently admitted, but

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

agreed that the commitment period had been miscalculated. Accordingly, the court granted Dishman's request to reduce the period of commitment to six years, ten months but denied the request to commute it to twenty months. Dishman appeals only the denial of the commutation request.

¶5 WISCONSIN STAT. § 939.62 increases the maximum penalty for habitual criminals. As one of the "applicable penalty enhancement statutes," it also operates to increase the commitment period of a person found not guilty by reason of mental disease or defect. *See* WIS. STAT. § 971.17(1)(b) and (d). A court may apply § 939.62 only if the defendant personally admits to qualifying prior convictions or if the State proves their existence beyond a reasonable doubt. ***State v. Saunders***, 2002 WI 107, ¶19, 255 Wis. 2d 589, 649 N.W.2d 263. If a defendant received an enhanced term later determined to be based on faulty proof, the remedy is to commute the length of commitment to the maximum for the convicted offenses without the repeater enhancer. *See* ***State v. Goldstein***, 182 Wis. 2d 251, 262, 513 N.W.2d 631 (Ct. App. 1994). The State tacitly concedes that it did not prove the existence of qualifying prior convictions. Accordingly, we turn to whether Dishman personally admitted to them.

¶6 Dishman argues that he did not sufficiently admit to qualifying prior convictions. A defendant's admission "may not 'be inferred nor made by defendant's attorney, but rather, must be a direct and specific admission by the defendant.'" ***Saunders***, 255 Wis. 2d 589, ¶22 (citation omitted). Dishman was not specifically asked during the plea about the predicate offenses and the dates of conviction and incarceration. *See* ***id.***, ¶22 (stating that the admission "must contain specific reference to the date of the conviction and any period of incarceration if relevant to applying [WIS. STAT.] § 939.62"); *see also* ***Goldstein***, 182 Wis. 2d at 261 (stating that a simple and direct question to the defendant

during the plea colloquy can satisfy the requirement that the prior conviction be admitted by the defendant or proved by the State). We are satisfied, however, that the record demonstrates Dishman's admission and proof of being a repeat offender.

¶7 Dishman entered a no-contest plea, after which the parties agreed to a stipulated finding of NGI. "A plea of not guilty by reason of mental disease or defect closely parallels a plea of no contest." ***State v. Shegrud***, 131 Wis. 2d 133, 137, 389 N.W.2d 7 (1986). A no-contest plea is an admission to all the material facts alleged in the complaint. ***State v. Liebnitz***, 231 Wis. 2d 272, 287-88, 603 N.W.2d 208 (1999). A defendant who pleads no contest can be held to have admitted to a prior conviction for enhancement purposes, even if the defendant never expressly admitted to the conviction. *See* ***State v. Rachwal***, 159 Wis. 2d 494, 509, 465 N.W.2d 490 (1991). Finally, we are to consider "the totality of the record." *See* ***Liebnitz***, 231 Wis. 2d at 288.

¶8 The complaint detailed Dishman's prior convictions and the resultant penalties, reflecting that the charged offenses occurred within five years of the prior convictions. At his initial appearance, the court drew his attention to the fact that he was being charged as a repeater and how that status increased his potential exposure. Dishman acknowledged that he understood the maximum penalties he faced. The repeater allegations were reiterated in the information.

¶9 In addition, the plea questionnaire Dishman signed for his stipulated no-contest plea recited the enhanced penalty and also expressly stated: "I understand that if the judge accepts my plea, the judge will find me guilty of the crime(s) to which I am pleading based upon the facts in the criminal complaint and/or the preliminary examination and/or as stated in court." Dishman confirmed

that his counsel had gone over the questionnaire with him. During the plea colloquy, the maximum penalties were set forth on the record and counsel confirmed that he "explained all of this" to Dishman. Psychiatrist Dr. Sangita Patel evaluated Dishman to determine his criminal responsibility. Dr. Patel's report described the nature and dates of Dishman's prior offenses, as told to her by Dishman. The parties stipulated to the admission of the report. The predisposition investigation report also set forth Dishman's prior convictions; no corrections were made to the report at disposition. At disposition, Dishman's counsel explained:

> [T]he complaint is accurate. On the felony matter, the enhancements are in addition to the penalties; whereas, for the misdemeanor, the enhancement is the penalty. So the maximum—the increase of the penalty to two years on the Count 2 should just be a total of two years, not two years plus the underlying offense; whereas, the penalty enhancement of six years is six years plus the underlying max penalty of three-and-a-half years.

¶10 Dishman complains that throughout the proceedings the enhancement for the felony was incorrectly stated to be greater than he actually faced and he thus did not fully understand the nature of the repeater charge. To the contrary, this argument persuades us that Dishman pled fully cognizant of the predicate charges allowing application of the repeater statute.

¶11 While the plea colloquy was minimally adequate, we conclude that "the only inference possible" under the totality of the record is that Dishman understood the nature and consequences of the charges against him and the consequences of his plea. *See* ***Liebnitz***, 231 Wis. 2d at 287. On the facts of this case, Dishman's admission to the prior convictions alleged in the complaint was sufficient to permit application of the repeater statute.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.