WISCONSIN COURT OF APPEALS
District III

STATE OF WISCONSIN

Plaintiff-Respondent

v. Appeal No. 2021AP000843 CR
Circuit Court Case No. 2017CF000256

STEVEN M. NELSON

Defendant-Appellant

On appeal from a Judgment Entered
in the Circuit Court for Barron County,
the Honorable Maureen D. Boyle, Circuit Judge, presiding.

DEFENDANT-APPELLANT'S BRIEF

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ISSUE PRESENTED

1. Whether defendant was properly sentenced as a repeater.

Answered by the trial court: Yes.

STATEMENT ON ORAL ARGUMENT

Because the briefs should fully cover the issues in this appeal, oral argument is not recommended.

STATEMENT ON PUBLICATION

Publication is not recommended. The case presents no issues that have not been clarified by existing law.

STATEMENT OF THE CASE

On June 20, 2019, the State charged defendant, Steven M. Nelson, with one count of possession of methamphetamine, a Class I Felony. (R1). He was charged as a repeater. (R1). On January 17, 2020, the Barron County Circuit Court, following Nelson's guilty plea, withheld sentence and placed Mr. Nelson on three years of probation for this crime. (R59:14).

On June 2, 2020, DOC revoked Nelson's probation and on June 30, 2020 the court sentenced him to six years of imprisonment, bifurcated three and three. (R61:35). Insofar as the maximum sentence for possession of meth is three-and-a-half years (bifurcated one-and-a-half and two), the repeater statute, § 939.62(1)(b), permitted the court to enhance Nelson's term of imprisonment by four years. Wis. Stats. § 936.62(1)(b). In this instance the court enhanced Mr. Nelson's confinement

time by one-and-a-half years and his supervision time by one year, for a total sentence of three plus three. (R61:35).

The issue in this case is that all parties were mistaken about the crime that served as the basis for the repeater enhancement. In fact, all parties were mistaken right up to and through the sentencing after revocation hearing.

The complaint in this matter alleged that Nelson had been convicted of Possession of Methamphetamine in Barron County Case No. 17CF307 in November 15, 2017. (R1). This was the conviction that anchored the repeater charge. It appeared again in the Information filed on August 6, 2019. (R12). The problem was Nelson had never been convicted of Possession of Methamphetamine in 17CF307. In 17CF307 he had been convicted of a completely different crime – Possession of a Firearm by a Felon. (Index 17CF307 – R18).

To add to the confusion, at his plea hearing Nelson acknowledged that he had been convicted of possession of meth in 17CF307:

> THE COURT: And do you acknowledge that you have previously been convicted of Possession of Methamphetamine, in Barron County Case 17-CF-307, on November 15, 2017?
>
> DEFENDANT: Uh, yes, Your Honor. (R58:4).

In fact, the court made two additional references to Nelson's prior conviction for possessing methamphetamine at the plea hearing that Nelson also acknowledged. (R58:7, 10).

The confusion continued at the sentencing after revocation hearing. When DOC revoked Nelson's probation in this case, it also revoked his probation in two other cases

where his sentences also had been withheld. (R61:3-4). In both of these other cases he had been convicted of being a felon in possession of a firearm and, as one might guess, one of these cases was 17CF307, the case that anchored the repeater enhancer in this case. (R61:13).

Now all three cases came before Branch 3 for sentencing after revocation on June 30, 2020. (R61). But it appears from reviewing the hearing transcript that no one still had figured out that the conviction anchoring the repeater enhancer in this methamphetamine case was incorrect. (R61). Although the prosecutor talked about how the two other cases involved firearms, as did the court, no one picked up on the fact that 17CF307 was not the methamphetamine conviction alleged in the complaint or the information in this case, Case No. 19CF197. (R61:13, 24). Thus, when all was said and done the court wound up sentencing Nelson as a repeater for a crime he had never committed.

LEGAL STANDARD

The Wisconsin Supreme Court has created a bright-line rule that when a prosecutor intends to seek a penalty enhancer the prosecutor must allege any prior convictions at or before the time the defendant pleads to the charges. *State v. Gerard*, 189 Wis.2d 505, 514, 525 N.W.2d 718 (1995). When the State intends to include a penalty enhancement to satisfy § 973.12(1), Stats., and the notice required by due process, it must allege any prior convictions at or before the time the defendant pleads to the charges. *Id* at 514.

The defendant pleads to the information rather than the complaint, and therefore the information is the charging document that will ordinarily include the repeater allegation. *State v. Fields*, 2001 WI App 297, ¶7, 249 Wis.2d 292, 638

N.W.2d 897. The information should identify the specific repeater offense, the date of the conviction for that offense, and the nature of that offense – whether for a felony or misdemeanor. *Gerard*, 189 Wis.2d at 516.

The burden lies with the State to plead a repeater allegation with clarity and precision. *State v. Wilks*, 165 Wis.2d 102, 110, 477 N.W.2d 632 (Ct. Appl. 1991). When a defendant challenges the pleadings, the court must resolve any ambiguous charging language against the State. *Id.* If the State fails to adequately plead the prior conviction supporting the repeater, prejudice to the defendant is an irrelevant consideration under § 973.12(1), Stats. *Gerard*,189 Wis.2d at 517. The legislature has established a rule, period. *State v. Martin*, 162 Wis.2d 883, 902, 470 N.W.2d 900 (1991).

The State must carry the burden to make good the charge in the essential particulars. *State v. Flowers*, 221 Wis.2d 20, 28, 586 N.W.2d 175 (Ct. App. 1998). The prior conviction is an essential element of proof to be satisfied at sentencing if the State is to secure the additional punishment it seeks. *Id.* If the State does not meet the proof requirements of § 973.12(1), the trial court is without authority to sentence the defendant as a repeater. *Id.*

The State must make a specific allegation of the preceding conviction and incarceration dates so as to permit the court and the defendant to determine whether the dates are correct and the five-year statutory timeframe is met. *State v. Zimmerman*, 185 Wis.2d 549, 558, 518 N.W.2d 303 (Ct. App. 1994). At the plea hearing, the court must conduct proper questioning so as to ascertain the meaning and potential consequences of a plea involving a repeater enhancer. *Id.* at 555.

Given the significant liberty interests at stake and the demand that enhanced penalties be based upon prior convictions which actually exist, all sentences imposed in excess of their maximum terms are void. *Flowers*, 221 Wis.2d 29, 29. There are no exceptions to this rule.[1] *Id.*

ARGUMENT

There is no dispute in this case that the State failed to properly identify the conviction that anchored the repeater charge. It mistakenly referred to Nelson's 2017 conviction in Barron County Case No. 17CF307 as a conviction for Possession of Methamphetamine, not as a conviction for Possession of a Firearm by a Felon. In other words, the State had failed to plead the repeater allegation with the requisite clarity and precision the law requires.

Given the error, Nelson moved the circuit court to commute the enhanced portion of his sentence. (R41). As he argued below, the enhanced portion of his sentence, pursuant to *State v. Flowers*, 221 Wis.2d 20, 29, 586 N.W.2d 175 (Ct. App. 1998), was void as a matter of law because it was not based on a prior conviction that actually existed. (R41). Because the State had failed to make good the repeater charge in its essential particulars, the court lacked authority to sentence Nelson as a repeater and the enhanced sentence was void.

The court did not see it that way. According to the trial court, the purpose of the statute that requires the State to set forth the conviction that supports the repeater allegation is to

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[1] **973.13** In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings.

provide notice to the defendant that the State is seeking an enhanced penalty under § 939.62. (R63:15). The court misspoke when it referred to § 939.62, because § 939.62 sets forth the repeater penalties, not the pleading requirements. Wis. Stats. § 939.62. Rather, § 973.12 sets forth the requirements the State must follow when putting the defendant on notice that the State is seeking an enhanced penalty. [2]

Be that as it may, because the court felt notice was the appropriate inquiry, it searched the record to investigate whether Nelson had been put on sufficient notice that he would be sentenced as a repeater. (R63). Ultimately, it found that he had. (R63:20).

The court proceeded in this fashion believing that *Rachwal* and *Liebnitz* dictated how it should proceed. (R63:16, 18). In *Rachwal* the defendant appealed the enhancement portion of his sentence on the basis that he had not admitted the anchoring conviction, nor had the State proved it up as required by § 973.12(1). *State v. Rachwal*, 159 Wis.2d 494, 497 n.1, 504, 485 N.W.2d 490 (1991). The court looked to the totality of the record to determine that Rachwal had indeed admitted to the underlying conviction. *Id.* at 512 (*Under the circumstances of this case, for purposes of sec. 973.12, the defendant's plea of no contest constituted an admission … .*).

We find the same result in *Liebnitz* where the defendant also claimed on appeal that he had never admitted to the underlying conviction and that the State had never proved it

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[2] **973.12(1)** Whenever a person charged with a crime will be a repeater or a persistent repeater under s. 939.62 or subject to a penalty under s. 939.6195 if convicted, any applicable convictions may be alleged in the complaint, indictment, or information or amendments so alleging at any time before or at arraignment, and before acceptance of any plea.

up. *State v. Liebnitz*, 231 Wis.2d 272, 283, 603 N.W.2d 208 (1999). The *Liebnitz* court took the same approach as the *Rachwal* court and looked to the totality of the record to find an admission. *Id.* at 284 (*we find that the record presents sufficient facts to find that Liebnitz's plea to the information constitutes an admission*).

But what distinguishes *Rachwal* and *Liebnitz* from Nelson's case is that in *Rachwal* and *Liebnitz* the underlying convictions were sufficiently plead. *Rachwal*, 159 Wis.2d at 498 (*There is no issue as to whether the "prior convictions" of which sec. 973.12(1) speaks were specifically and accurately set forth within in the "repeater provision."*); *Liebnitz*, 231 Wis.2d at 276 (*Each repeater charge in the criminal complaint set forth facts supporting its application to Liebnitz. Liebnitz does not challenge the accuracy or specificity of the repeater provisions … .*).

As the *Fields* court instructed, the totality of the record test set forth in *Liebnitz* has no application when a defendant challenges the accuracy or specificity of the repeater provisions in the information. *State v. Fields*, 2001 WI App 297, ¶7 n.3. To the contrary, when a challenge to the pleadings is raised, the court looks to the pleading, more specifically the information, to see if it complies with § 973.12(1). *Fields*, 2001 WI App 297, ¶8. If the information fails to do so, then the court has no authority to enhance the sentence. *Flowers*, 221 Wis.2d at 28.

The defendant in the *Fields* case challenged the information just as Nelson does here. *Fields*, 2001 WI App 297, ¶5. While the *Fields* court found the information to be woefully inadequate, it nonetheless found that the State had cured the inadequacy by submitting a certified copy of the prior conviction prior to Fields changing his plea. *Id.* ¶8. Hence, it upheld the enhanced penalty in *Fields*. *Id.* ¶15.

Such was not case, however, in *Wilks*. The *Wilks* case is factually similar to Nelson's case and is the case that should guide the court's decision in this appeal. In *Wilks*, the State charged Wilks as a repeater based on a forgery conviction in May 1986. *State v. Wilks*, 165 Wis.2d 102, 104, 477 N.W.2d 632 (Ct. App. 1991). The trouble was that Wilks had no forgery conviction in May of 1986. *Id.* at 106. To the contrary, he had a forgery conviction in July of 1985. *Id.* When the State discovered its error it attempted to amend the charging document. *Id.* at 106. Insofar as the trial court allowed the State to amend, the court of appeals reversed as the court of appeals found the amendment to be untimely under the statute. *Id.* at 108.

> [T]he legislature has established the time of arraignment and of any plea acceptance as the cut-off point after which time a defendant can no longer face exposure to repeater enhancement for the crime set forth in the charging document and pleaded to by the defendant at arraignment.

Id.

Thus, because Wilks had already entered his plea, the court would not allow the State to amend the pleadings to cure the error. *Id.* at 108-09.

In reaching its conclusion, the court of appeals considered that the amendment, instead of alleging a wholly different offense, might merely state a different conviction date for the forgery offense. *Id.* at 111. But it rejected this approach, concluding that the burden lies with the State to plead a repeater allegation with relative clarity and precision. *Id.* It remarked that the statute even allows the trial court to grant the State additional reasonable time to investigate possible prior convictions before acceptance of a plea. *Id.* In

light of this accommodation, it said, we properly resolve any ambiguous charging language against the State. *Id.*

This, Nelson submits, must be the result here. In Nelson's case the State simply did not do what the statute requires it to do. The prior conviction is an essential element of proof to be satisfied at sentencing if the State is to secure the additional punishment it seeks. *Flowers*, 221 Wis.2d at 22. If the State does not meet the proof requirements of § 973.12(1), the trial court is without authority to sentence the defendant as a repeater. *Id.*

Granted, notice to defendants lies at the heart of § 973.12, *Gerard*, 189 Wis.2d at 514, but evidence in the record that a defendant knew the State was seeking an enhanced sentence does not cure the State's error when the information is defective. *Wilks*, 165 Wis.2d at 111. In this instance, the postconviction court simply applied the wrong analysis. *Wilks* and *Fields* make it abundantly clear that when a defendant challenges the pleadings, the court must examine the pleadings for compliance. *Fields*, 2001 WI App 297, ¶8.

Moreover, in this case, the State has never cured the defective pleading. Insofar as a defendant is entitled to be sentenced on accurate information, *State v. Tiepelman*, 2006 WI 66 ¶¶9, 26, 291 Wis.2d 179, 717 N.W.2d 1, the circuit court sentenced Nelson on wholly inaccurate information, believing that his prior crime was possession of methamphetamine.

CONCLUSION

Wilks should guide this Court's decision in this appeal. Mr. Nelson's enhanced penalty is not based on

any conviction that actually exists. Therefore, pursuant to Rule 973.12, his enhanced penalty is void as a matter of law. He respectfully asks this court to follow *Wilks* and to amend his judgment of conviction to one-and-a-half years of initial confinement followed by two years of extended supervision.

Dated this 20th day of July 2021.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b), (bm), and (c) for a brief. The length of the brief is 2,369 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(8g)

I hereby certify that filed with this brief is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of person, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 20th day of July 2021.

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