STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case Nos. 2021AP843-CR, 2021AP844-CR, 2021AP845-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

STEVEN M. NELSON,

Defendant-Appellant.

ON APPEAL FROM JUDGMENTS OF CONVICTION AND A DECISION AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE BARRON COUNTY CIRCUIT COURT, THE HONORABLE MAUREEN D. BOYLE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Under Wisconsin law, a criminal defendant may be subject to a longer sentence if he is a "repeater," that is, if he has a prior felony conviction in the five years immediately preceding the crime for which he is being sentenced. The State must give the defendant notice of the prior conviction upon which a repeater enhancement is based, so the defendant understands the potential extent of his sentence before pleading. For the court to use the repeater enhancement at sentencing, the defendant must either admit the prior conviction, or the State must prove it.

Nelson was charged with Possession of Methamphetamine as a repeater. There is no dispute that the criminal complaint correctly described the prior conviction in the probable cause section. However, the charging portion of the complaint contained an error regarding the name of the prior conviction (it stated possession of methamphetamine instead of possession of a firearm), but all other information, including the date of the prior conviction, was correct. Nelson chose not to contest the complaint or the information, which contained the same error. He pleaded guilty to the charge as a repeater after the court ascertained he understood the possible extent of his sentence with the repeater enhancement. Before sentencing him as a repeater, the circuit court reviewed numerous documents that established the prior conviction, including a document containing a copy of an amended judgment of conviction for the prior offense.

Was Nelson properly sentenced as a repeater?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because the briefs adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case. Wis. Stat. § 809.23(1)(b)1.

STATEMENT OF THE CASE

Nelson pleads guilty to Possession of Methamphetamine as a repeater; his sentence is withheld.

In the early morning of June 19, 2019, an officer found Nelson's car backed into a ditch. (R. 1:2.)[1] Nelson was in the driver's seat and appeared to be sleeping. (R. 1:2.) According to the complaint, the officer had a conversation with him, and Nelson told the officer that he was on probation for possession of a firearm by felon. (R. 1:2.) Nelson permitted the officer to search his vehicle, and the officer found methamphetamine in the car. (R. 1:2–3.)

Nelson was charged with Possession of Methamphetamine, repeater, a Class I Felony. (R. 1; 12.) In support of the repeater allegation, the complaint's probable cause section stated that Nelson was convicted of a felony charge of possession of a firearm on November 15, 2017, in Barron County case number 17CF307; that conviction remained of record and was unreversed. (R. 1:3.) However, page 1 of the complaint stated that Nelson was a repeater because he was "convicted of Possession of Methamphetamine in Barron County 17CF307 on November 15, 2017." (R. 1:1.) There is no dispute that page one erroneously stated the name of the prior conviction; the correct name of the prior conviction

[1] Unless otherwise indicated by footnote, record citations are to the record in consolidated Appeal No. 21AP845.

was a felony possession of a firearm. The information contained the same error as the complaint. (R. 12:1.)

Nelson pleaded guilty to Possession of Methamphetamine as a repeater. (R. 13:2; 19; 58:3, 11.) He signed a Plea Questionnaire/Waiver of Rights form that acknowledged he was pleading guilty to the charge as a repeater. (R. 13:2.) In that document, he affirmed his understanding that the maximum penalty he faced upon conviction was three years and six months, plus four years as a repeater, and a $10,000 fine. (R. 13:1.)

At the plea hearing, neither the parties nor the court appeared aware of the error in the complaint or the information. The judge asked Nelson, "do you acknowledge that you have previously been convicted of Possession of Methamphetamine, in Barron County Case 17-CF-307, on November 15th, 2017?" (R. 58:4.) Nelson responded, "Uh, yes, Your Honor." (R. 58:4.) Nelson made two similar acknowledgments later in the hearing. (R. 58:7, 10.)

Notwithstanding the error, the court ascertained that Nelson was aware of the significance of the repeater portion of his plea:

> THE COURT: Additionally, they have alleged here that you are a "repeater," and you've acknowledged that you're a "repeater." They would have had to prove to the Court that you were indeed previously convicted of this felony-level drug offense, and that that record still remains of record and is unreversed. Do you understand that?
>
> THE DEFENDANT: I do.

> THE COURT: The maximum penalty, because of the "repeater" allegation, for this offense is a fine … or imprisonment for not more than seven and a half years, or both ... [d]o you understand those are the maximum penalties the Court can consider at the time of your Sentence?
>
> THE DEFENDANT: I do.

(R. 58:7–8.) Based on Nelson's statements, the court found him guilty of Possession of Methamphetamine as a repeater.[2] (R. 58:11.)

The Wisconsin Department of Corrections prepared a presentence investigation report, which included a description of Nelson's prior conviction in Case No. 17CF307. (R. 15:6.) The report listed the offense as "Possess Firearm-Convicted of Out-of-State Felony…17CF307." (R. 15:6.) On a different page, the report contained the same error as the complaint and the information. (R. 15:2.)

Nelson and his attorney reviewed the presentence investigation report and submitted one factual correction related to a conviction for bail jumping. (R. 59:4–5.) The parties had no other corrections to the report. (R. 59:3–5.) Accepting the Department of Corrections' recommendation, the court withheld Nelson's sentence and placed him on three years of probation. (R. 59:13–14; 15:23–24.) The court reminded Nelson that he was charged as a repeater, and the maximum sentence he was facing was seven-and-a-half years in prison and a $10,000 fine. (R. 59:12.)

[2] Several other counts, not relevant here, were dismissed but read in. (R. 12; 58:11.)

Nelson's probation is revoked, and the court sentences him on the possession of methamphetamine case, and two felon-in-possession cases.

Nelson's probation was later revoked on the ground that he consumed methamphetamine, heroin, and THC on about four occasions. (R. 22:4.) His probation was also revoked in his felon-in-possession-of-a-firearm case, No. 17CF307, as well as another felon-in-possession case, No. 17CF256. (R. 22:4; 61:1.) The circuit court held a sentencing after revocation hearing on all three cases. (R. 61:1–4.)

The court verified that the parties reviewed the revocation packets that had been filed. (R. 61:7–8; 22.) The revocation packet contained the correct name of the conviction for Barron County Case 17CF307. (R. 22:15.) It also contained a copy of an amended judgment of conviction for Barron County Case 17CF307. (R. 22:19–20.)[3] The court read the presentence investigations in each of the cases, as well as the revocation packet. (R. 61:24–25; 15; 22; *see also* R. 16;[4] 15.[5])

Nelson's attorney reviewed the revocation order and warrant, and the presentence investigation reports. (R. 61:8.) The court asked if Nelson wished to state any factual corrections, and his attorney stated he was not aware of any. (R. 61:8.) During argument, the State's attorney discussed the "-307 file" and explained the circumstances surrounding law enforcement's discovery of the firearm. (R. 61:11.) At no point did Nelson ever dispute the existence and validity of the conviction in Barron County Case No. 17CF307. (R. 61.)

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[3] (*See also* R. 23, Appeal No. 21AP844.)

[4] Appeal No. 21AP843.

[5] Appeal No. 21AP844.

The court proceeded with sentencing. Among other things, the court noted Nelson's history of firearm offenses, substance possession offenses, and prior armed robberies, as well as the need to rehabilitate Nelson and protect the public. (R. 61:24–25, 32–33.) The court told Nelson that when the second firearm was located, "you were just so high on meth you didn't even know what you were doing. You were hallucinating. I mean, that's a really scary [*sic*] situation, and obviously one that requires the Court to consider the protection of the public." (R. 61:32–33.)

The court imposed an eight-year bifurcated sentence in the first felon-in-possession case, No. 17CF256. (R. 61:34; 29.[6]) It imposed an eight-year bifurcated sentence in the second felon-in-possession case, No. 17CF307, to run concurrently with the sentence in Case No. 17CF256. (R. 61:35; 32.[7])

On the possession of methamphetamine, repeater case, No. 19CF197, the court ultimately imposed a five-year bifurcated sentence, to run consecutive to the sentences in the other two cases. (R. 51; 52; 61:35.)[8] The court used the enhancement provided by the repeater allegation, which effectively increased his confinement by 1.5 years. (R. 52; 61:34–35.) The court entered judgments of conviction in all three cases. (R. 29; 52; 29;[9] 32.[10])

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[6] Appeal 21AP843-CR.

[7] Appeal No. 21AP844.

[8] The court initially imposed a six-year sentence, with three years initial confinement and three years extended supervision. (R. 61:35.) The court later corrected the sentence to reflect the maximum extended supervision available, which was two years. (R. 51; 52.)

[9] Appeal No. 21AP843.

[10] Appeal No. 21AP844.

Nelson seeks to void the repeater portion of his sentence on the Possession of Methamphetamine, repeater conviction.

Nelson moved to modify his sentence in Case No. 19CF197 by voiding the repeater portion. (R. 41.) Nelson claimed that the repeater portion was erroneously based on the complaint and information's statement that he had a prior conviction of Possession of Methamphetamine in Case No. 17CF307, when in fact he had been convicted of Possession of a Firearm by Outstate Felon in Case No. 17CF307. (R. 41:2.) He argued that the State failed to make a correct and specific allegation with respect to the prior conviction, which voided the repeater portion of the sentence. (R. 41:4–5.) He further argued that his admission to the repeater charge at sentencing did not relieve the State of its burden of proof. (R. 41:5.)

After briefing and a hearing, the circuit court denied the motion to modify his sentence. (R. 42; 43; 46; 62; 63.) Among other things, the court noted that there was no dispute Nelson had a prior felony conviction in Case No. 17CF307, that his prior conviction occurred within five years of the possession of methamphetamine crime in Case No. 19CF197, and that Nelson had adequate notice of the correct prior conviction that formed the basis of his repeater status. (R. 63:4, 14–21.) Further, because Nelson had admitted his status as a repeater, the State was not required to prove the prior conviction at sentencing. (R. 63:8.) Nevertheless, evidence in the record sufficiently established the conviction, including the fact that Case No. 17CF307 was before the court when Nelson was sentenced in Case No. 19CF197. (R. 63:14–15.)

Nelson appealed the judgment of conviction, as well as the denial of his motion to modify his sentence. (R. 47.) He also appealed the judgments of conviction in the two felon-in-possession cases. (R. 39;[11] 42.[12])

Because his appellant briefs pertained solely to the possession of methamphetamine case, the State moved to dismiss the appeals related to the felon-in-possession cases, or, alternatively, to consolidate them with the appeal related to the possession of methamphetamine case. (Mot. to Dismiss, or, Alternatively, Consolidate Appeals, dated Aug. 11, 2021.)[13] This Court granted consolidation of the three appeals on August 19, 2021.

STANDARD OF REVIEW

Whether the notice of repeater status complied with Wis. Stat. § 973.12(1) presents a matter of statutory interpretation, which is a question of law subject to independent appellate review. *State v. Stynes*, 2003 WI 65, ¶ 11, 262 Wis. 2d 335, 665 N.W.2d 115. Compliance with the notice requirement also raises constitutional due process concerns. *Id*. The application of constitutional principles to the facts of a case is subject to independent appellate review. *Id*.

Review of the trial court's use of the penalty enhancer requires the application of Wis. Stat. §§ 939.62 and 973.12 to an undisputed set of facts. The issue of whether the state provided adequate proof of a defendant's status as a repeat offender is therefore a question of law which this Court reviews de novo. *State v. Flowers*, 221 Wis. 2d 20, 31, 586 N.W.2d 175 (Ct. App. 1998). While the question is reviewed

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[11] Appeal No. 21AP843.

[12] Appeal No. 21AP844

[13] Appeal Nos. 21AP843–845.

de novo, this Court benefits from the circuit court's analysis. *State v. Liebnitz*, 231 Wis. 2d 272, ¶ 14, 603 N.W.2d 208 (1999).

ARGUMENT

Nelson was properly sentenced as a repeater.

In his brief to this Court, Nelson argues that the State failed to sufficiently plead the prior conviction prior to his guilty plea. However, in certain places, he appears to suggest that the State also failed to *prove* the prior conviction at sentencing. (Nelson Br. 12 ("[t]he prior conviction is an essential element of proof to be satisfied at sentencing …[i]f 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").); (*see also* Nelson Br. 7.) The State's duty to give notice at the pleading stage is a distinct concept from the State's burden to prove the defendant's repeater status at the sentencing stage and is governed by a different legal standard. *Stynes*, 262 Wis. 2d 335, ¶ 18. For the sake of completeness, the State addresses why the repeater enhancement was sufficiently pled and sufficiently proven in this case.

A. The charging documents gave Nelson adequate notice of his status as a repeater.

1. Proper notice allows a defendant to assess the extent of punishment at the time he or she pleads to the charges.

The repeater penalty enhancement allows for an increase in the maximum term of imprisonment imposed as the result of a criminal conviction. *Stynes*, 262 Wis. 2d 335, ¶ 12; Wis. Stat. § 939.62(1). A "repeater" is an actor who was "convicted of a felony during the 5-year period immediately

preceding the commission of the crime for which the actor presently is being sentenced." Wis. Stat. § 939.62(2).

Relevant here, possession of methamphetamine is normally a Class I Felony, which carries a maximum prison sentence of three-and-a-half years. (R. 61:34); Wis. Stat. §§ 939.50(3)(i); 973.01(2)(b)9.; 973.01(2)(d)6. However, if an actor is a repeater, the maximum term of imprisonment may be increased by four years if the prior conviction was for a felony. (R. 61:34); Wis. Stat. § 939.62(1)(b). In Nelson's case, that meant that he could face a sentence of up to seven-and-a-half years for possession of methamphetamine as a repeater. (R. 61:34.)

The State must give a defendant notice of any prior convictions that form the basis of repeater penalty enhancements. *Stynes*, 262 Wis. 2d 335, ¶ 10. Prior convictions "may be alleged in the complaint, indictment or information." Wis. Stat. § 973.12(1). The State must allege the prior convictions within the applicable charging document "before or at arraignment, and before acceptance of any plea." *Stynes*, 262 Wis. 2d 335, ¶ 10 (quoting Wis. Stat. § 973.12(1)). This ensures that when the defendant is asked to plead, he or she has notice of the extent of the potential punishment. *Id*. ¶ 13.

Case law governs the minimum level of specificity required of a repeater allegation. *Stynes*, 262 Wis. 2d 335, ¶ 14. At a minimum, a repeater allegation should identify the repeater offense, the date of conviction for that offense, and the nature of the offense—whether for a felony or misdemeanor conviction. *Id*. ¶ 15. The date of conviction is important because the repeater status depends on whether the conviction falls within the five-year period. *Id*.

While the State must plead the repeater allegation "with relative clarity and precision," *Id.* (citation omitted), this requirement does not mandate perfection in pleading prior convictions. In *Stynes*, the repeater allegation in the complaint misstated the date of the convictions by one calendar day. *Id.* ¶ 16. Stynes did not assert that there was any error in the description of the offenses, the identification of the county where the convictions occurred, or the case number. *Id.*

The Wisconsin Supreme Court held that the error did not render the repeater allegation ineffective. *Id.* ¶ 21. There was no question that the State was intending to refer to Stynes' convictions that actually existed, notwithstanding the error in the date. *Id.* ¶ 28. The fact that the convictions existed was apparent because the complaint described the offenses, stated the correct county of conviction, cited the case number, and included a date of the convictions that was misstated by only one calendar day. *Id.* Because Stynes was informed of his repeater status and the case involved "an error that did not affect Stynes' ability to assess meaningfully the extent of the punishment at the time he pleaded to the charges," the complaint provided Stynes with the required notice of the predicate convictions on which his repeater status was based. *Id.* ¶ 32; *see also Id.* ¶¶ 29–34.

2. Nelson had sufficient notice of the prior conviction on which his repeater status was based.

Here, Nelson's complaint and information were sufficient to put him on notice of the prior conviction that formed the basis of the repeater allegation. There is no dispute that Nelson had a prior conviction of Felon in Possession of a Firearm in Barron County Case No. 17CF307, dated November 15, 2017. The complaint and information correctly listed the county of conviction, cited the correct case

number, and stated the correct date of the conviction. (R. 1:3; 12:1.) In one place on the complaint, the correct name of the prior conviction was stated, (R. 1:3), but a different page stated the wrong name of the conviction, as did the information. (R. 1:1; 12:1). Like *Stynes*, the complaint and information show that the State intended to refer to Nelson's existing conviction of Felon in Possession of a Firearm in Barron County Case No. 17CF307, dated November 15, 2017. *Stynes*, 262 Wis. 2d 335, ¶ 28.

By the face of these documents, this error did not affect Nelson's ability to assess the potential extent of punishment at the time he pleaded to the charge.[14] *Id.* ¶¶ 32, 34. Further, Nelson signed a Plea Questionnaire/Waiver of Rights form that acknowledged he was pleading guilty to the charge as a repeater. (R. 13:2.) In that document, he affirmed his understanding that the maximum penalty he faced upon conviction was three years and six months, plus four years as a repeater. (R. 13:1.) The court thoroughly discussed what it would mean for him to be sentenced as a repeater, and Nelson knew the extent of his potential punishment with the repeater enhancement. (R. 58:7–8; 63:10–13.)

Nelson has never disputed that he was convicted of a felony on November 15, 2017. Nelson had the information necessary to identify which of his prior convictions would be used to establish his repeater status, and most importantly, he was able to meaningfully assess the potential extent of his sentence. *See Stynes*, 262 Wis. 2d 335, ¶ 34. The charging documents provided Nelson with the required notice of the predicate convictions on which his repeater status was based.

[14] To be clear, Nelson has never challenged the entry of his plea as defective. His postconviction motion was a request to void the repeater portion of his sentence, not to withdraw his plea. (R. 41.)

3. Nelson's arguments to the contrary are incorrect.

Nelson argues that the State failed to plead the repeater allegation "with the requisite clarity and precision the law requires" because the prior conviction identified "was not based on a prior conviction that actually existed." (Nelson Br. 7–8.) Nelson is mistaken.

As an initial matter, Nelson has never disputed that he was convicted of a felony on November 15, 2017. Nor does he dispute that the charging documents identify a prior felony conviction of November 15, 2017. Rather, he essentially contends that if the document does not perfectly state the charge, his enhanced sentence is void. But that is not the law, as explained above. *Stynes*, 262 Wis. 2d 335, ¶¶ 14–21.

Nelson cites *State v. Fields* for the proposition that the information must include the repeater allegation. (Nelson Br. 6–7.) In that case, the information was defective because it failed to identify any specific details for the repeater charge, namely, the date and nature of the offense. *State v. Fields*, 2001 WI App 297, ¶¶ 2, 8, 249 Wis. 2d 292, 638 N.W.2d 897. Here, in contrast, the information *did* include specific details of the repeater allegation, but with an error in the title of the offense. The error was not fatal because the other details alerted Nelson to the extent of his punishment at the time he pled to the charges, as explained above. *Fields*, 249 Wis. 2d 292, ¶ 7.

Nelson argues that the information was never corrected; therefore, he was sentenced on "wholly inaccurate information." (Nelson Br. 12.) This argument misses the mark. At no point prior to sentencing did Nelson ever contend that the information was defective, and his postconviction motion was a request to void the repeater portion of his sentence. That is what this appeal is about. Further, the error did not change the basis upon which Nelson entered his plea,

as explained above, nor did it alter the court's analysis at sentencing.[15] And finally, the error did not implicate the accuracy of his conviction for Possession of Methamphetamine, which has never been in dispute.

Nelson also relies on *State v. Wilks*, 165 Wis. 2d 102, 477 N.W.2d 632 (Ct. App. 1991), but that case is not on all fours with this case. (Nelson Br. 11–12.) There, the State charged a defendant with misdemeanor retail theft, and the complaint alleged that he was previously convicted of forgery in May 1986. *Id.* at 104. The defendant pleaded no contest but indicated that the State would be unable to prove the alleged prior conviction because it did not exist. *Id.* at 105. The State later conceded that the prior conviction did not exist but asked for leave to use a July 1985 forgery conviction as the basis for Wilks' repeater status. *Id.* at 106.

The court of appeals concluded that this amendment was not permissible. *Id.* at 111. The court read the supreme court's language in *State v. Martin/Robles*[16] "to bar post-plea repeater amendments which meaningfully change the basis upon which the defendant assessed the extent of possible punishment at the time of plea." *Id.* The repeater amendment changed the basis upon which Wilkes pleaded. *Id.* Wilks pleaded no contest in part because he did not believe the State could prove the prior conviction. *Id.* at 110. At the time he pleaded, Wilks had no notice of a July 1985 forgery conviction. *Id.*

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[15] An information may be amended after the plea to correct a clerical error in the sentence portion of a repeater allegation if the amendment does not prejudice the defendant. *Stynes*, 262 Wis. 2d 335, ¶ 29 (citing *State v. Gerard*, 189 Wis. 2d 505, 509, 525 N.W.2d 718 (1995)).

[16] 162 Wis. 2d 883, 891–92, 470 N.W.2d 900 (1991).

Unlike in *Wilkes*, Nelson did have notice of the prior felon-in-possession conviction because it was properly stated in the probable cause section of the complaint. (R. 1:3.) The complaint and information contained an error in naming the prior conviction, but there is no evidence that the basis upon which Nelson pleaded would have been changed absent the error. Nelson knew and understood that he was a repeater, and he never contended that his prior conviction did not exist.

The *Wilks* court observed that, in applying *Martin/Robles,* it was important to avoid absurd results. *Id*. at 111–12. That is, when an amendment does not meaningfully change the basis upon which a defendant enters his plea, such an amendment is permissible. *Id*. That is the situation here.

Further, as the *Stynes* court noted, there was some confusion in *Wilks* regarding whether the State, when it listed a conviction that occurred in May 1986, was attempting to refer to the conviction that occurred in July 1985. *Stynes*, 262 Wis. 2d 335, ¶ 27. The State may have been alleging a wholly different offense, or even a nonexistent offense. *Id*. Because of the confusion, the court concluded that Wilks was not fairly put on notice of the actual conviction. *Id*. There was no ambiguity of this kind here – the record shows that the State intended to plead the felon-in-possession conviction, not a completely different one or one that did not exist. (R. 1:3.)

Nelson had the information he needed to know the extent of his punishment as a repeater and plead accordingly.

B. The prior conviction was properly proven at sentencing.

Nelson focused somewhat on the state's burden to prove the repeater status in his postconviction motion, (R. 41:3–5; 62:8), and the circuit court addressed that argument in its oral decision. (R. 42; 43; 62; 63). Specifically, the court looked to the totality of the record to conclude that Nelson had

admitted the prior conviction, and further concluded that ample record evidence proved the prior conviction.[17] (R. 63:8, 14–16, 18–20.)

It appears Nelson has abandoned any argument that the State failed to prove the conviction. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491–92, 588 N.W.2d 285 (Wis. Ct. App. 1998) (arguments not raised on appeal in the appellant's main brief are deemed abandoned). To the extent he is raising this argument, it is not developed, and this Court need not consider it. *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (declining to review issues that are not briefed).

That aside, and for the sake of completeness, the prior conviction was sufficiently established at sentencing for two independent reasons. First, based on the totality of the record, Nelson's guilty plea constitutes an admission to the prior conviction prior to sentencing, which relieved the State of its burden to prove it. Second, the circuit court had adequate proof of the prior conviction at sentencing.

1. The State must establish the prior conviction through the defendant's admission or by sufficient proof.

The repeater statute, Wis. Stat. § 939.62(2), requires the prior conviction to fall within "the 5-year period immediately preceding the commission of the crime for which [the defendant] presently is being sentenced." Under

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[17] Nelson argues that the circuit court's reliance on *Rachwal* and *Liebnitz*'s "totality of the record test" is misplaced, primarily because those cases did not concern an alleged error in the charging documents. (Nelson Br. 9–10.) But in his postconviction motion, Nelson argued (at least in part) that Nelson's admission to the conviction was insufficient, and the State was not relieved of its burden to prove the prior conviction. (R. 41:3–5; 62:8.) The totality of the record test is relevant to this argument.

Wis. Stat. § 973.12(1), an individual may be sentenced as a repeater if he either admits the prior convictions or the State proves the convictions beyond a reasonable doubt. *Liebnitz*, 231 Wis. 2d 272, ¶ 15; *see also Flowers*, 221 Wis. 2d at 31; *State v. Saunders*, 2002 WI 107, ¶ 51, 255 Wis. 2d 589, 649 N.W.2d 263.

a. Standard for admission.

"A charge of being a repeater is not a charge of a crime and, if proved, only renders the defendant eligible for an increase in penalty for the crime of which he is convicted." *Liebnitz*, 231 Wis. 2d 272, ¶ 15 (citation omitted). If the requirements of § 973.12 are satisfied, "the defendant is subjected to the possibility of a sentence longer than the maximum one provided by law for the offense for which the defendant is convicted." *Id*. (citation omitted).

When a defendant chooses not to contest the allegations in the complaint, and when the totality of the record establishes that the defendant understood the nature and consequences of the charges against him and the consequences of his plea, a guilty or "no contest" plea constitutes an admission of the prior conviction under Wis. Stat. § 973.12; *Liebnitz*, 231 Wis. 2d 272, ¶¶ 15–16, 19–24; *see also State v. Rachwal*, 159 Wis. 2d 494, 509, 513–14, 465 N.W. 2d 490 (1991).

Liebnitz is instructive on this point. There, the circuit court did not explicitly verify that Liebnitz was a repeat offender, nor did the State prove the repeater allegation at sentencing. *Id*. ¶¶ 11, 15. However, given the record, the Wisconsin Supreme Court held that Liebnitz's plea to the information constituted an admission for purposes of Wis. Stat. § 973.12. *Id*. ¶ 24. This was true for four reasons. First, both the criminal complaint and the information charged Liebnitz as a repeat offender. *Id*. ¶ 19. Second, the judge read each count and its possible penalties, asked if

Liebnitz understood those penalties, and received an answer in the affirmative. *Id.* ¶ 20. Third, Liebnitz reached a plea agreement and filled out a plea questionnaire and waiver of rights form, which acknowledged that the basis for his plea was established by the criminal complaint and transcript of his preliminary exam. *Id.* ¶ 21. Fourth, Liebnitz chose not to contest the allegations in the complaint. *Id.* ¶ 22. "[I]t is a well-established rule 'that what is admitted by a guilty or no contest plea is all the material facts alleged in the charging document.'" *Id.* (citation omitted). The court observed that the criminal complaint set forth the repeater charge, and Liebnitz specifically stated on the record that he would not contest any allegation in the complaint. *Id.*

This concept is similar to the guilty-plea-waiver rule. Generally, "a guilty, no contest, or *Alford* plea 'waives all nonjurisdictional defects, including constitutional claims.'" *State v. Kelty*, 2006 WI 101, ¶ 18, 294 Wis. 2d 62, 716 N.W.2d 886 (footnote omitted) (citation omitted). Courts call this "the guilty-plea-waiver rule," although it is more accurately described as a rule of forfeiture. *Id.* ¶ 18 & n.11. "Like the general rule of waiver, the guilty-plea-waiver rule is a rule of administration and does not involve the court's power to address the issues raised." *Id.* ¶ 18.

The guilty-plea-waiver rule has its genesis in a series of Supreme Court decisions known as the "Brady trilogy." *See Tollett v. Henderson*, 411 U.S. 258, 262–67 (1973). In those cases, the defendants' "guilty pleas . . . were found to foreclose direct inquiry into the merits of claimed antecedent constitutional violations." *Id.* at 266. The rationale for the rule is that "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." *Id.* at 267. "Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims in order to take the benefits, if any, of a plea of guilty, the State acquires

a legitimate expectation of finality in the conviction thereby obtained." *Lefkowitz v. Newsome*, 420 U.S. 283, 289 (1975).

"When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims" of constitutional error that occurred before the entry of the plea. *Henderson*, 411 U.S. at 267. As this Court explained, "[t]he idea underlying the waiver rule is that a guilty plea itself constitutes both an admission that the defendant committed past acts and a consent that a judgment of conviction be entered against him without a trial." *Racine Cty. v. Smith*, 122 Wis. 2d 431, 437, 362 N.W.2d 439 (Ct. App. 1984).

b. Standard for proof.

To prove the conviction in the absence of an admission, "[a]n official report of a government agency is prima facie evidence of any conviction or sentence reported therein." *Flowers*, 221 Wis. 2d at 32. To be an official report on which reliance may be placed for sentencing, the report must contain relevant information regarding the issue of repeater status and must specifically include the date of conviction for the previous offense. *State v. Farr*, 119 Wis. 2d 651, 658, 350 N.W.2d 640 (1984). While a certified copy of a judgment of conviction is often considered the best kind of evidence, uncertified copies may be used as well. *Saunders*, 255 Wis. 2d 589, ¶¶ 24, 28.

2. Nelson's plea constitutes an admission to the prior conviction; regardless, the record documents sufficiently proved the prior conviction at sentencing.

Similar to *Liebnitz*, the totality of the record shows that Nelson admitted the prior conviction that forms the basis of the repeater allegation. The complaint and information both

stated that he was a repeater, and the complaint set forth the correct charge in the probable cause section. (R. 1:3.) All information was correct except for the title of the prior conviction.

Pursuant to a plea agreement, Nelson pleaded guilty to Possession of Methamphetamine as a repeater. (R. 13:2; 19; 58:3, 6.) He signed a Plea Questionnaire/Waiver of Rights form that acknowledged he was pleading guilty to the charge as a repeater. (R. 13:2.) In that document, he affirmed his understanding that the maximum penalty he faced upon conviction was three years and six months, plus four years as a repeater. (R. 13:1.)

Notwithstanding the error in the name of the prior conviction, the court ascertained that Nelson was aware of the significance of the repeater portion of his plea. (R. 58:7–8.) The court asked Nelson, "do you acknowledge that you have previously been convicted of Possession of Methamphetamine, in Barron County Case 17-CF-307, on November 15th, 2017?" (R. 58:4.) Nelson responded in the affirmative. (R. 58:4.) The court asked Nelson if he understood the consequences of his repeater status, and he indicated yes. (R. 58:7–8.) The court also reviewed with him the maximum penalty that was applicable, given the repeater allegation. (R. 58:7–8.) Nelson stipulated that there were additional facts regarding the prior conviction that would support the factual basis for his plea. (R. 58:7–8, 10.) And finally, the court asked Nelson if he understood that by pleading guilty, he was relieving the State of its burden to prove the prior felony conviction. (R. 58:7–8.) Nelson indicated yes. (R. 58:7.)

While the State, the circuit court, and Nelson made a mistake as to the name of the prior conviction, this does not change the fact that Nelson chose not to contest the allegations in the complaint and information. The totality of the record establishes that Nelson admitted his status as a

repeater. *Liebnitz* and the guilty-plea-waiver rule (or at the very least, its core principles) foreclose Nelson's arguments.

Because of Nelson's admission, the State was not put on notice that it needed to prove the prior conviction at sentencing. Nevertheless, ample evidence in the record proved the prior conviction. (R. 63:8.) The revocation summary and the pre-sentence investigation report were before the court at the sentencing after revocation hearing, and the court read those documents. (R. 61:24–25; 15; 22.) Indeed, the revocation packet included a copy of one of the amended judgments of conviction for the felon-in-possession case, No. 17CF307. (R. 15; 22:19–20.) This more than adequately fits the criteria for proof under *Farr, Saunders* and *Flowers*. And again, Nelson does not dispute that his conviction in Case No. 17CF307 exists or that it can serve as the basis for a repeater enhancement.

Further, at the sentencing on revocation hearing, Nelson was sentenced on his felon-in-possession conviction in Case No. 17CF307, the very conviction upon which the repeater allegation was based. (R. 63:14.) In case No. 17CF307, he pleaded guilty to Possession of a Firearm and was convicted on November 15, 2017, just as the criminal complaint alleged. (R. 63:14.) That information was before the court when it sentenced him in the instant case.

* * *

Nelson has never disputed that he is guilty of Possession of Methamphetamine in Case No. 19CF197. He has never disputed that he has a prior felony conviction that falls within the time period that allows for a repeater enhancement to his sentence. While the State is cognizant of the error in the charging documents, those documents provided Nelson with adequate notice of the conviction on which his repeater status was based, and Nelson was able to assess the extent of his sentence when he decided to plead

guilty as a repeater. And further, the prior conviction was sufficiently proven prior to sentencing. This Court should affirm the circuit court.

CONCLUSION

The State respectfully requests that the Court affirm the circuit court's decision and order denying Nelson's postconviction motion in Appeal No. 21AP845, as well as the judgments of conviction in Appeal Nos. 21AP843–845.[18]

Dated: August 30, 2021.

Respectfully submitted,

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[18] As the State noted in its Motion to Dismiss or, Alternatively, Consolidate Appeals, Nelson does not contest the validity of his judgments of conviction in Appeal Nos. 21AP843 and 21AP844.

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6075 words.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 30th day of August 2021.

Electronically signed by:

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