WISCONSIN COURT OF APPEALS
District III

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**STATE OF WISCONSIN**

Plaintiff-Respondent

v.

Appeal No. 2021AP000843 CR
Appeal No. 2021AP000844 CR
Appeal No. 2021AP000845 CR

**STEVEN M. NELSON**

Defendant-Appellant

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

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# DEFENDANT-APPELLANT'S REPLY BRIEF

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ZICK LEGAL LLC
Vicki Zick
State Bar No. 1033516
Attorneys for Defendant-Appellant

PO Box 325
475 Hartwig Boulevard
Johnson Creek, WI 53038
920-699-9900

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

WISCONSIN CASES



Wisconsin Statutes

To reiterate, 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 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.*

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.*

Significantly, the State wants this Court to disregard the rule that enhanced penalties must be based on prior convictions that actually exist. (Resp. Br. at 13-14). Here, obviously, Nelson's alleged prior methamphetamine conviction does not actually exist, yet the State does not explain why this is simply okay. This rule is found in *Flowers*, 221 Wis.2d at 29 (*enhanced penalties be based upon prior convictions which actually exist.*). Although the State cites to the *Flowers* decision several times in its response, it never discusses this rule or why it should not apply in this case.

Similarly, although it acknowledges that, at a minimum, our case law requires the State to identify the repeater offense in the repeater allegation, it simply fails to explain why this rule does not apply here as well. (Resp. Br. at 14). As above, this rule is found in *State v. Stynes*, 2003 WI 65, ¶15, 262 Wis.2d 335, 665 N.W.2d 115 (*A repeater allegation should identify the repeater offense* … .). The State does not discuss this rule or why it should not apply.

In Part A (2) of its response, it states that the charging error that occurred in this case did not affect Nelson's ability to assess the potential extent of his punishment at the time he pled. (Resp. Br. at 16). Yet our case law holds that prejudice to a defendant is not a relevant consideration in a challenge to the repeater pleadings. *State v. Wilks*, 165 Wis.2d 102, 110 n.9,

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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.

477 N.W.2d 632 (Ct. App. 1991). This rule is found in the *Wilks* decision. *Id.* at 110 n.9 (*Proof of prejudice is an irrelevant consideration under sec. 973.12(1), Stats*.). Again, the State does explain why prejudice, or the lack thereof, is even relevant to the discussion.

In Part A (3) of its response, the State attempts to distinguish the cases Nelson cited in his brief in chief. In particular, it contends that the *Wilks* case, which Nelson urged this Court to follow, (Br. at 11), is not on all fours with Nelson's case. (Resp. Br. at 18). In *Wilks*, says the State, Wilks pled no contest because he did not believe the State could prove his prior conviction because he knew it did not exist. (Resp. Br. at 18). Here, the State reasons there is no evidence that Nelson would have plead differently absent the error. (Resp. Br. at 19).

This is pure conjecture on the State's behalf. No less than in *Wilks*, it is entirely possible that Mr. Nelson pled guilty knowing that the State could not prove he had previously been convicted of possession of methamphetamine. In other words, this is not a distinguishing factor at all.

In Part B of its response the State addresses the State's burden to prove the defendant's repeater status at sentencing. (Resp. Br. at 19). It contends that Nelson focused somewhat on this burden in his postconviction motion, which is why the postconviction court looked to the totality of the record. (Resp. Br. at 19). But this is not entirely true.

In his postconviction motion Nelson did argue to the circuit court that the fact that he had admitted to a prior conviction for possession of methamphetamine would not relieve the State from proving up his prior conviction under

the circumstances of this case. (R14:4-6). But then he went on to qualify that assertion by stating:

> In any case, regardless of fault, one immutable fact remains – Mr. Nelson's enhanced penalty in this case is not based on any conviction that actually exits. Therefore, pursuant to Rule 973.13, his enhanced penalty is void as a matter of law. (R41:6).

Nelson's position has not changed in this appeal. He is not arguing that the State failed to meet its burden of proving up the repeater conviction at sentencing, although this fact is true. Rather, his postconviction motion raised a challenge to the pleadings:

> Mr. Nelson submits that, per statute, the extra two-and-a-half years of his enhanced sentence in this case is void as a matter of law because it is not based on a conviction that actually exists. The State flat out failed to make good the repeater charge in its essential particulars. (R41:5).

As he argued in his brief-in-chief, the postconviction court should not have applied the "totality of the record" test. (Br. at 10). The totality of the record test has no application when a defendant challenges the accuracy or specificity of the repeater provisions. *State v. Fields*, 2001 WI App 297, ¶7 n.3, 249 Wis.2d 292, 638 N.W.2d 897. If a defendant challenges the pleadings the court looks to the pleadings to see if they comply with § 973.12(1). *Id*. ¶8. If they fail to do so, then the court has no authority to enhance the sentence. *Flowers*, 221 Wis.2d at 28.

Determined to apply the totality of the record test, the State goes on to argue that it met its sentencing burden because Nelson pled guilty. (Resp. Br. at 20, *When a defendant chooses not to contest the allegations in the complaint … a guilty or no contest plea constitutes an admission of the prior conviction … .*). It cites to the guilty-plea-waiver rule contending that when Nelson entered his plea, he forfeited his right to raise claims of

error that may have occurred prior to the entry of his plea. (Resp. Br. at 23).

The guilty-plea-waiver rule does not apply here. In his postconviction motion Nelson challenged the enhancement of his sentence. While the basis for his challenge arises from defective pleadings, it is the court's authority to impose an enhanced sentence that he questions. The guilty-plea-waiver rule only waives claims of error prior to the entry of a plea. *State v. Lasky*, 2003 WI App 126, ¶11, 254 Wis.2d 789, 646 N.W.2d 53. It does not waive claims of error at sentencing.

In further support of its argument, the State cites to the *Liebnitz* case to argue that Nelson forfeited his right to challenge the pleadings. (Resp. Br. at 21). But as argued in his main brief, Nelson submits that *Liebnitz* does not apply here. *Liebnitz* was not a challenge to the pleadings. (Br. at 9-10). Nor was *Rachwal* for that matter. (Br. at 9-10). In both cases, the pleadings correctly set forth the repeater conviction. (Br. at 9-10). Thus, under the totality of the record test the *Liebnitz* court could conclude that Liebnitz admitted to the repeater conviction because in *Liebnitx* the prior conviction was correctly pled.

But this same result cannot be reached here because the conviction alleged in the complaint and the information did not exist. Nelson could not admit to it. At best, his admission was a blunder. It goes without saying that our focus at a plea hearing is on whether a particular defendant enters his plea knowingly and intelligently. *State v. Bangert,* 131 Wis.2d 246, 389 N.W.2d 12 (1986). Here everybody involved was mistaken as to the offense that anchored the repeater charge. It will not do to say Nelson knowingly and intelligently admitted the prior conviction when clearly this was not the case.

Nelson's admission really bothered the postconviction court. At the hearing held on February 25, 2021, the court wondered aloud about the court's role in exacerbating the problem.

> I believe the fact that I specifically asked Mr. Nelson about this prior conviction which didn't exist creates the problem. (R62:12-13).

The court was obviously less quick to write off Nelson's admission as a true admission.

Finally, the State contends that the revocation summary and the pre-sentence report were before the court at the sentencing after revocation and both contained references to Nelson's prior felon-in-possession conviction. (Resp. Br. at 25). This, the State says, was ample evidence to prove up the true prior conviction. (Resp. Br. at 25).

This fact may be true, but no one at sentencing referred to these documents to prove Nelson was a repeater because he had a prior felon-in-possession conviction. In fact, everyone, including the postconviction court, acknowledged that all were mistaken right up to and through the sentencing after revocation hearing. (R62: *you know, three different times that we could have addressed it; and we didn't … .*). The documents are not relevant.

## CONCLUSION

Again, *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 13th day of September 2021.

ZICK LEGAL LLC
Attorneys for defendant

*Electronically signed by Vicki Zick*
Vicki Zick
SBN 1033516

475 Hartwig Boulevard
P.O. Box 325
Johnson Creek, WI 53038
920 699 9900
920 699 9909 F
vicki@zicklegal.com

## 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 1,737 words.

Dated this 13th day of September 2021.

ZICK LEGAL LLC
Attorneys for defendant-appellant

*Electronically signed by Vicki Zick*
Vicki Zick
State Bar No. 1033516

PO Box 325
475 Hartwig Boulevard
Johnson Creek, WI 53038
920-699-9900
920-699-9909 (F)
vicki@zicklegal.com