STATE OF WISCONSIN

IN SUPREME COURT

Case Nos. 2021AP000843-CR, 2021AP000844-CR & 2021AP000845-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN M. NELSON,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUE PRESENTED

When the government seeks to curtail a person's liberty and impose an enhanced penalty on the basis of a repeater allegation, does the government have to identify the crime upon which repeater allegation is based, or is it sufficient to identify a crime for which the defendant was not charged or convicted?

The circuit court ruled: the allegation in the complaint, information, and plea colloquy that Mr. Nelson "is a repeater, having been convicted of possession of methamphetamine in Barron County case 17-CF-307, on November 15, 2017," is a sufficient basis to impose an enhanced repeater sentence, even though Nelson was not charged with or convicted of that crime in that case, but was instead convicted of unlawful possession of a weapon by a felon. (1:1, 12:1, 55:1) (App. 16, 39, 43).

The court of appeals ruled: the "circumstances [here] are similar to those in *Stynes*"[1] wherein this court upheld a repeater sentence "when the repeater allegation in the complaint misstated the date of convictions by one calendar day," and affirmed Mr. Nelson's repeater sentence. (COA opinion ¶ 16) (App. 10).

[1] *State v. Stynes*, 2003 WI 65, 262 Wis. 2d 335, 665 N.W.2d 115.

CRITERIA FOR REVIEW

This court should grant review to clarify and harmonize the law regarding what the state must allege and prove before a court can impose an enhanced penalty based upon repeater status. The law is seemingly clear that before a court can impose an enhanced repeater sentence, the state must "allege in the complaint, indictment or information," or get the defendant to admit, the qualifying conviction "before acceptance of any plea." Wis. Stat. § 973.12(1). A repeater allegation must "identify the repeater offense, the date of conviction for that offense, and the nature of the offense—whether for a felony or misdemeanor conviction." *State v. Gerard*, 189 Wis. 2d 505, 515-16, 525 N.W.2d 718 (1995). In *State v. Stynes*, 262 Wis. 2d 335, this court declined to extend or adopt a strict bright-line rule, and ruled misstating the date of conviction by one calendar day does not render a repeater sentence invalid. This court should accept review to establish reasonable, common-sense due process guardrails for lower courts, clarifying or limiting the reach of *Stynes* to de minimis or scrivener errors, and hold a repeater allegation made in the complaint, information, and during the plea colloquy for a crime or conviction that does not exist is beyond a bridge too far, and is insufficient to establish or uphold a repeater sentence.

STATEMENT OF FACTS

On June 20, 2019, in Barron County case 19-CF-197, the state charged Mr. Nelson by complaint with one count of possession of methamphetamine, as a repeater, possession of cocaine and possession of THC. (1:1-2). Specifically, with respect to repeater enhancement the complaint alleges "because the defendant is a repeater, having been convicted of Possession of Methamphetamine in Barron County 17-CF-307 on November 15, 2017," the maximum term of imprisonment upon conviction can be increased by two years if the prior was a misdemeanor and four years if a felony. (1:1) (App. 39). On August 6, 2019, the complaint was supplanted by an Information charging the identical offense, with the identical repeater claim—a prior conviction for possession of methamphetamine in Barron County case 17-CF-307, on November 15, 2017. (12:1) (App. 43).

On November 8, 2019, Mr. Nelson pleaded guilty to count 1, possession of methamphetamine, with the other two counts dismissed but read in. (58:3). During the plea colloquy, the following exchange occurred:

> 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 15th, 2017?
>
> THE DEFENDANT: Uh, yes, Your Honor.

(58:4).

Twice more during the plea hearing the court referenced a prior drug conviction as the basis for the repeater enhancement. The court told Mr. Nelson regarding the repeater:

> THE COURT: … They [the state] would have 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: And you have previously acknowledged your prior conviction occurring for Possession of Methamphetamine. Is that true?
>
> THE DEFENDANT: Yes.

(58:7, 10).

On January 16, 2020, the court withheld sentence and placed Mr. Nelson on probation for three years. Thereafter, Mr. Nelson's probation was revoked in 19-CF-197, and in two other Barron County cases, 17-CF-256 (unlawful possession of a weapon by a felon) and 17-CF-307 (unlawful possession of a weapon by a felon).

On June 30, 2020, for Mr. Nelson's 19-CF-197 drug conviction the court imposed a repeater-enhanced sentence of three years initial confinement and two years of extended supervision, to be served

consecutively to concurrent eight-year terms (four years IC and four years ES), imposed in 17-CF-256 and 17-CF-307 (the erroneously-referenced repeater case).[2]

Mr. Nelson timely filed notices of intent to pursue postconviction relief and requested public defender representation. At the postconviction stage Mr. Nelson argued the repeater enhancement based upon the state's allegation that Nelson, in Barron County case 17-CF-307, was convicted of possession of methamphetamine, was invalid because no such charge or conviction for that crime exists. (41:2). The state argued on the basis of *State v. Stynes*, 2003 WI 65, 262 Wis. 2d 335, 665 N.W.2d 115, the repeater sentence was valid. (63:4-5). The circuit court ruled the sentence valid based on Mr. Nelson's erroneous admission he had been convicted, when he had not, of the drug possession charge alleged as a basis for the repeater, and he had been convicted of a different crime not alleged in the complaint, information or plea colloquy. (63:11-12) (App. 16, 27-28).

The court of appeals ruled the "circumstances [here] are similar to those in *Stynes*," wherein this court upheld a repeater sentence "when the repeater allegation in the complaint misstated the date of convictions by one calendar day," and it affirmed the repeater sentence here. (COA opinion ¶ 16) (App. 10).

Mr. Nelson now seeks review in this court.

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[2] The maximum penalty for a Class I felony without a repeater enhancement is 3 ½ years. Wis. Stat. § 939.50(3)(i).

ARGUMENT

The repeater-enhanced portion of a repeater sentence that is based upon an allegation of, or admission to, a crime or conviction that does not exist, is invalid and must be vacated.

The state when charging Mr. Nelson in 19-CF-197 with possession of methamphetamine invoked the provisions of Wis. Stat. § 939.62(1)(b), and alleged "because the defendant is a repeater, having been convicted of Possession of Methamphetamine in Barron County 17-CF-307 on November 15, 2017," Nelson was subject to an enhanced repeater penalty. (1:1; 12:1) (App 39, 43). On that basis, at sentencing the court imposed a repeater-enhanced sentence. However, because the repeater allegation the state identified or noticed in its charging documents and referenced during Mr. Nelson's plea hearing was for a crime or conviction that does not exist, the repeater aspect of Mr. Nelson's sentence is invalid and must be vacated.

When the state in its charging documents seeks to have a court impose a repeater-enhanced penalty pursuant to Wis. Stat. § 939.62(1)(b), Wis. Stat.

§ 973.12(1) requires that the state allege the predicate conviction within the charging document "before or at arraignment, and before acceptance of any plea." This court for purposes of satisfying due process concerns established a repeater allegation must "identify the repeater offense, the date of conviction for that offense, and the nature of the offense—whether for a felony or misdemeanor conviction." *State v. Gerard*, 189 Wis. 2d 505, 515-16, 525 N.W.2d 718 (1995). Later, in *State v. Stynes*, 2003 WI 65, 262 Wis. 2d 335, 665 N.W.2d 115, this court declined to adopt a bright-line rule, and held that where the repeater allegation in the complaint misstated the date of the convictions by one calendar day for "convictions that actually existed," notice was sufficient and no due process error occurred. *Stynes*, *id.* at ¶¶ 2, 28.

The state here sought to obtain a repeater-enhanced penalty alleging in its complaint, that Mr. Nelson, "having been convicted of Possession of Methamphetamine in Barron County 17-CF-307 on November 15, 2017," was a repeater. (1:1) (App. 39). The state alleged the same qualifying offense "Possession of Methamphetamine in Barron County 17-CF-307 on November 15, 2017," in the information it filed which supplanted the complaint. (12:1) (App. 43). The only qualifying conviction referenced during the plea colloquy during which Mr. Nelson accepted responsibility for his current possession offense, was the prior drug possession offense, which did not exist. While Mr. Nelson did have prior convictions, which if alleged and proven could have formed the basis for a repeater charge, he had no prior

conviction in Barron County case 17-CF-307 for possession of methamphetamine.

The court of appeals ruling here that "[t]he circumstances of this case are similar to those in *Stynes*," is simply wrong, and underscores why this court should accept review to establish due process guidelines or boundaries for lower courts. Alleging as a basis for a repeater sentence a crime or conviction that does not exist is qualitatively different from alleging a prior conviction that actually exists, but being off on the date of conviction by one calendar day. Though not expressly stated, and needs to be now, the import of *Stynes* was or should have been that a scrivener or de minimis error (e.g. a spelling error such as alleging the county of conviction as Baron County instead of Barron or, as actually occurred in *Stynes*, mistyping the date of conviction by one day), does not establish a lack of the notice component necessary satisfy due process, and does not invalidate an otherwise proper repeater sentence. The state alleging as a basis for an enhanced penalty a prior possession of methamphetamine conviction where no such conviction exists, cannot be saved by the state later, long after the fact, establishing Mr. Nelson had a prior for possession of a weapon by a felon.

If the state and court of appeals are correct here, then it would seem the state for repeater purposes could have alleged Mr. Nelson to have been guilty of kidnapping the Lindbergh baby, or not listed any specific crime at all, and still have obtained a repeater sentence based upon an after-the-fact showing of a

crime of conviction not alleged in the charging documents or presented prior to the plea. To be clear, Mr. Nelson is not disputing the state is entitled to its punishment in imposing a sentence within the standard range established by the legislature for the crime to which Mr. Nelson pled guilty. What is at stake is whether the state can exact or impose and enhanced punishment on Nelson based upon a repeater allegation it brought for a crime or conviction that does not exist. This type of close-enough-for-government-work prosecution argument or lower court ruling in imposing and affirming an enhanced sentence based upon a conviction that does not exist subverts the notice component necessary to satisfy due process, undermines or breeds disrespect for the criminal justice system, and undermines confidence in notions of fair play or equal treatment for the people—i.e. the rules or laws apply to the people whose liberty the government seeks to curtail by means of a criminal prosecution, but not to the government or its prosecutors in that prosecution.

To be clear, again, what is at stake here is not Mr. Nelson disputing his conviction for the crime to which he pled guilty, or a sentence imposed within the normal range the legislature established for that crime. What is at stake is whether the government can obtain an enhanced penalty based upon an allegation of a prior conviction for a crime that does not exist. The state failed to allege and prove a prior qualifying crime of conviction that actually existed at a time the law required it to do so. Consequently, the repeater-enhanced portion of the sentence imposed on

Mr. Nelson is or should be invalid and must be vacated.

CONCLUSION

For the above-stated reasons, Mr. Nelson asks that this court grant review to establish reasonable, common sense due process guidelines when the state seeks to have a court impose a repeater-enhanced sentence, and to hold the repeater sentence imposed on Mr. Nelson based upon the state's allegation of a prior conviction that does not exist is invalid and must be reversed or vacated.

Dated this 31st day of May, 2023.

Respectfully submitted,

Electronically Signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 2,072 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition is an appendix that complies with s. 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 s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules 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 or 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 persons, 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 31st day of May, 2023.

Signed:
Electronically signed by Joseph N. Ehmann
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