

FILED
06-27-2023
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Nos. 2021AP843-CR; 2021AP844-CR & 2021AP845-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN M. NELSON,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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The State of Wisconsin opposes Steven M. Nelson’s petition for review. The court of appeals’ unpublished, authored decision concerns a fact-specific issue that is not likely to recur, and was merely an application of well-settled precedent to the facts. *State v. Nelson*, Nos. 2021AP843-CR; 2021AP844-CR; 2021AP845-CR, 2023 WL 2770178 (Wis. Ct. App. April 4, 2023) (unpublished) (Pet-App. 3–15). Because the criteria for review are not satisfied, there is no compelling reason to disturb the court of appeals’ decision.

**THIS COURT SHOULD DENY THE PETITION FOR
REVIEW BECAUSE IT DOES NOT SATISFY THE
CRITERIA IN WIS. STAT. § (RULE) 809.62(1r)**

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. *State v. Stynes*, 2003 WI 65, ¶ 13, 262 Wis. 2d 335, 665 N.W.2d 115; Wis. Stat. § 939.62(1). 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. *Stynes*, 262 Wis. 2d 335, ¶ 10; Wis. Stat. § 973.12(1).

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.

These well-settled principles were applied to the facts of this case. Nelson was charged with possession of methamphetamine as a repeater in 2019. *Nelson*, 2023 WL 2770178, ¶ 3. In support of the repeater allegation, the complaint’s probable cause section correctly stated that Nelson was convicted of a felony charge of possession of a

firearm in Barron County case no. 2017CF307 2017. *Id.* ¶¶ 4–5. However, the complaint’s charging language incorrectly stated that Nelson was a repeater because he was convicted of possession of methamphetamine in 2017. *Id.* ¶¶ 4–5. The information contained the same error as the complaint. *Id.* ¶ 5. Nelson and his counsel did not dispute the accuracy of the complaint or the information.

Nelson pleaded guilty to possession of methamphetamine as a repeater. *Id.* ¶ 6. Nelson acknowledged the repeater allegation at the plea hearing, and neither the court nor the parties caught the error regarding the nature of the repeater conviction as alleged in the information. *Id.* Nelson’s guilty plea was accepted.

The court withheld sentence and placed Nelson on probation. *Id.* ¶ 6. His probation was later revoked. *Id.* ¶ 7. At the revocation hearing, both the prosecutor and the court correctly observed that Nelson’s prior conviction involved a firearm, and the paperwork filed with the revocation warrant accurately described Nelson’s prior conviction. *Id.* The court imposed sentences on Nelson’s various cases, and recognized that he was a repeater. *Id.* ¶ 8.

Nelson moved to void the repeater portion of his sentence, asserting that the complaint and information inaccurately described his underlying conviction. *Id.* ¶ 9. “The court denied Nelson’s motion, concluding there was ‘sufficient notice’ of the repeater allegation and that the record supported the allegation.” *Id.*

Nelson appealed, and the court of appeals affirmed, relying primarily on relevant sentencing statutes and this Court’s reasoning in *Stynes*. *Id.* ¶¶ 15–16. Although the complaint’s charging language misstated the description of Nelson’s repeater offense, “the remaining information about the conviction unambiguously described one of Nelson’s actual convictions—possession of a firearm as a convicted felon.” *Id.*

¶ 15. Further, the probable cause portion of the complaint accurately confirmed “what the charging language already communicated.” *Id.* Given the facts, the State’s repeater allegation satisfied the notice requirement in Wis. Stat. § 973.12(1). *Nelson*, 2023 WL 2770178, ¶ 15.

Nelson’s petition does not present a valid reason to disturb the court of appeals’ decision. This Court has already held that, while the State must plead the repeater allegation “with relative clarity and precision,” *Stynes*, 262 Wis. 2d 335, ¶ 15 (citation omitted), this requirement does not mandate perfection. In *Stynes*, there was no question that the State intended 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.

Here, the court of appeals simply applied the facts to *Styne*’s rationale. *Nelson*, 2023 WL 2770178, ¶¶ 16–17. Nelson’s complaint and information were sufficient to put him on notice of the prior conviction that formed the basis of the repeater allegation. *Id.* ¶ 17.

There is no dispute that Nelson had an existing prior conviction of felon in possession of a firearm in Barron County Case No. 2017CF307, dated November 15, 2017. Consistent with *Stynes*, the complaint and information correctly listed the county of conviction, cited the correct case number, and stated the correct date of the conviction. In one place on the complaint, the correct name of the prior conviction was stated,

but a different page stated the wrong name of the conviction, as did the information. Like *Stynes*, the complaint and information show that the State intended to refer to Nelson's existing 2017 conviction of felon in possession of a firearm in Barron County. *Stynes*, 262 Wis. 2d 335, ¶ 28.

Because the court of appeals' decision amounts to a mere application of well-settled principles to the factual situation, it does not merit this Court's review. Wis. Stat. § (Rule) 809.62(1r)(c)1.

Nelson argues that 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." (Pet. 4.) He argues that this Court should "clarify[] or limit[] the reach of *Stynes* to de minimis or scrivener errors." (Pet. 4.) It is unclear how taking this case would clarify anything. As shown in *Stynes*' reasoning, Wisconsin law does not embrace a bright light rule regarding perfection in a repeater allegation, and for good reason. Different facts will inform whether a defendant is sufficiently put on notice as to the basis of a repeater allegation. *Nelson*, 2023 WL 2770178, ¶ 19. *Stynes* and its progeny provide proper guidance regarding the minimal information necessary for a repeater allegation to be sufficiently established. Limiting *Stynes* in the way Nelson suggests would focus litigants and lower courts on what constitutes a scrivener's or de minimis error. Such an approach would only muddy the waters, because it would remove the focus from whether proper statutory notice was accomplished.

In reality, Nelson's true complaint seems to be that the court of appeals misapplied settled precedent. (Pet. 10 (arguing that the court of appeals' ruling that the facts of this case are similar to *Stynes* is "simply wrong.")) He provides no good reason for disturbing *Stynes* or other settled precedent.

Nelson also argues that the repeater allegation in this case was based on a crime that did not exist, which is not accurate. (Pet. 4, 8.) It is indisputable that the repeater allegations were based on one of Nelson's prior convictions that actually existed, namely, his conviction for possession of a firearm as a convicted felon in 2017. *Nelson*, 2023 WL 2770178, ¶ 20. All of the essential information that *Stynes* requires was included in the complaint. The fact that there was an error in the name of the prior conviction in another part of the complaint (and the information) did not negate that he had a valid prior conviction that qualified.

Nelson asserts that if the court of appeals' reasoning was correct, then the State for repeater purposes could have alleged Nelson "guilty of kidnapping the Lindbergh baby, or not listed any specific crime at all." (Pet. 10.) This hyperbole reflects a flawed reading of the court of appeals' carefully reasoned decision, which was grounded in the factual indicia of sufficient notice:

the repeater allegations in the complaint and in the Information were based on one of Nelson's prior convictions that actually existed—i.e., his Barron County conviction on November 15, 2017, for possession of a firearm as a convicted felon. The case number, date of conviction, and county of conviction all suggested that the State would use that particular conviction to establish Nelson's repeater status. Further, the probable cause portion of the complaint correctly described Nelson's repeater offense. Nelson's repeater status was therefore based on a conviction that did exist and was accurately described in a portion of the complaint.

Nelson, 2023 WL 2770178, ¶ 20. Nelson does not explain how this reasoning would logically extend to the outlandish hypothetical he poses.

Nelson's flawed arguments aside, his petition does not meet this Court's criteria for review. For the reasons explained, the court of appeals' decision creates no conflict or

need for this Court to clarify the law. Wis. Stat. § (Rule) 809.62(1r)(c). Nelson’s petition does not demonstrate a need for this Court to “consider establishing, implementing or changing a policy within its authority.” Wis. Stat. § (Rule) 809.62(1r)(b). Similarly, Nelson’s petition does not demonstrate a need to reexamine current law. Wis. Stat. § (Rule) 809.62(1r)(e). Finally, Nelson’s petition presents no significant question of state or federal constitutional law. Wis. Stat. § (Rule) 809.62(1r)(a).

CONCLUSION

This Court should deny Nelson’s petition for review.

Dated this 27th day of June of 2023.

Respectfully submitted,

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Electronically signed by:

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 1,646 words.

Dated this 27th day of June 2023.

Electronically signed by:

Jennifer L. Vandermeuse
JENNIFER L. VANDERMEUSE
Assistant Attorney General

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 Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 27th day of June 2023.

Electronically signed by:

Jennifer L. Vandermeuse
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