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SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

No. 2021AP0957-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

JAMES J. SOCHA,
Defendant-Appellant-Petitioner.

RESPONSE OPPOSING PETITION FOR REVIEW

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INTRODUCTION

James J. Socha petitions this Court for review of a court of appeals' decision summarily affirming a circuit court order, which denied his motion for sentence modification. *State v. James J. Socha*, 2022 WL 6856114, 2021AP957-CR (Wis. App. Oct. 12, 2022) (unpublished). Socha was convicted of operating a motor vehicle while under the influence of an intoxicant (OWI) as a fifth or subsequent offense in Ozaukee County in 2005. (R. 56.) The State alleged in the amended criminal complaint that Socha had ten prior convictions (R. 17:2), and Socha admitted to all ten (R. 3:10–11).

One of the ten prior convictions Socha admitted was in Milwaukee County case number 2004CF007137. CCAP records indicate that in that case, Socha pled guilty on February 17, 2005. He was to be sentenced on April 25, 2005, but he was not produced, so the sentencing hearing was rescheduled for July 18, 2005.¹

Socha pled no contest to OWI as a fifth offense in his Ozaukee County case on May 17, 2005, and he was sentenced the same day. (R. 3:10–11.) At the plea/sentencing hearing, Socha's defense counsel informed the court that Socha had not been sentenced for his Milwaukee County conviction. (R. 3:5.) The State asked the court to accept Socha's no contest plea but set over sentencing until after sentencing in the Milwaukee County case. (R. 3:6.) Socha's counsel told the court that "we're asking for sentencing now." (R. 3:6.) He added, "I don't think there's any requirement that this be after the Milwaukee case." (R. 3:6.) The State again asked the court to set over the sentencing. (R. 3:8.) But Socha's defense counsel said that Socha "just wishes to get this moving and

¹ The CCAP entry for Socha's fifth-offense OWI in Milwaukee County case number 2004CF007137 is available at <https://wcca.wicourts.gov/caseDetail.html?caseNo=2004CF007137&countyNo=40&mode=details#records>.

rather than just sitting here for months and not having anything happen.” (R. 3:8.)

Socha entered no contest pleas to OWI as a fifth or subsequent offense, operating after revocation, and bail jumping. (R. 3:11.) The court read aloud the ten prior convictions listed in the criminal complaint, including Socha’s Milwaukee County conviction, and asked, “You agree you have all those prior convictions?” (R. 3:11.) Socha answered, “Yes, sir.” (R. 3:11.) Socha’s defense counsel stipulated that the probable cause section of the amended criminal complaint, which listed ten prior convictions, including the Milwaukee County conviction, provided a factual basis for Socha’s pleas. (R. 3:14.)

According to CCAP, when Socha was later sentenced for a fifth-offense OWI in his Milwaukee County case, the court counted nine prior convictions.²

Fifteen years later, in 2020, Socha moved for new factor sentence modification. (R. 192.) He claimed that six of his ten prior convictions had been voided after he was sentenced in 2005. (R. 192:3–4.) And he claimed that his Milwaukee County conviction should not have been counted. (R. 192:2.) Socha asserted that without those seven convictions, he would have been guilty of only a fourth offense in this case and could not have received the sentence that was imposed. (R. 192:5.)

The circuit court rejected Socha’s motion, concluding that he failed to show a new factor that warranted sentence modification. (R. 205:10.) Socha moved for reconsideration (R. 209), but the circuit court denied his motion (R. 212).

² The CCAP record refers to Socha being convicted of OWI (10th), but in 2005 all OWI convictions after a fourth offense were subject to the same penalty for OWI as a fifth or subsequent offense. Wis. Stat. § 346.65(2)(am)5. The statute was amended to allow for conviction for OWI as a 10th or subsequent offense by 2007 Wis. Act 111, § 4.

The court of appeals summarily affirmed the circuit court's decision. *Socha*, 2022 WL 6856114. The court of appeals did not decide whether there was any error in sentencing Socha for a fifth-offense OWI on the basis on the ten convictions he admitted. *Id.* at 4. It concluded that any possible error was invited by Socha. *Id.* The court of appeals concluded that Socha knew when he chose to plead no contest and proceed to sentencing that the State was alleging that his Milwaukee County conviction was his tenth OWI conviction, and his Milwaukee conviction was his 11th. *Id.* at 3–4. The court said, “Under these circumstances, we conclude that any error was the result of Socha’s decision to move forward. The doctrine of invited error prohibits a defendant from creating an error by deliberate choice or strategy and then receiving the benefit from that error on appeal.” *Id.* at 4.

Socha now petitions this Court for review. This Court should deny the petition.

REVIEW OF THE COURT OF APPEALS’ DECISION IS UNWARRANTED

Socha sets forth one issue for review “Does a defendant forfeit his constitutional due process right to be sentenced based only upon accurate information if he unknowingly admits a non-existent prior conviction at sentencing which was misrepresented by the State in its amended criminal complaint and the court invokes invited error.” (Pet. 3.) Review on that issue is unwarranted for the following reasons.

A. The issue that Socha sets forth is not presented in this case.

The issue Socha sets forth is not presented in this case because Socha did not raise a claim that he was sentenced on inaccurate information, he knowingly admitted his Milwaukee County conviction at sentencing, and the State did

not misrepresent the Milwaukee conviction in the amended criminal complaint.

Socha asks this Court to accept review to determine whether “his constitutional due process right to be sentenced only upon accurate information” was violated. (Pet. 3.) A claim that a sentence is invalid because it relied on inaccurate information is a claim for resentencing. *State v. Wood*, 2007 WI App 190, ¶¶ 2–4, 15, 305 Wis. 2d 133, 738 N.W.2d 81; *State v. Tiepelman*, 2006 WI 66, ¶ 2, 291 Wis. 2d 179, 717 N.W.2d 1. And the cases Socha relies on in his petition all concern resentencing, not sentence modification. (Socha’s Pet. 8–9 (citing *Tiepelman*, 291 Wis. 2d 179; *United States v. Tucker*, 404 U.S. 443 (1972); *United States ex rel. Welch v. Lane*, 738 F.2d 863 (7th Cir. 1984); *State v. Payette*, 2008 WI App 106, 313 Wis. 2d 39, 756 N.W.2d 423).

But Socha did not move for resentencing. He moved for new factor sentence modification. (R. 129.) In his motion, Socha insisted that his claim not be construed as a motion for resentencing (R. 192:1 n.1.) And on appeal, Socha asked the court of appeals to construe his motion for sentence modification as a motion for commutation of his sentence pursuant to Wis. Stat. § 973.13. (Socha’s Br. 13–15.)

Socha asserts that he “unknowingly admit[ted]” his Milwaukee County conviction. (Pet 3.) But Socha was represented by counsel when he admitted to his Milwaukee County conviction. *Socha*, 2022 WL 6856114 at 2–4; (R. 3:10–11.) And he did so after his counsel told the court that Socha had not been sentenced in his Milwaukee County case, and his counsel, the prosecutor, and the court then discussed the issue while Socha was present. (R. 3:5–6.) After Socha’s counsel insisted the Socha wanted to be sentenced, the circuit court listed the ten convictions alleged in the amended criminal complaint, including the Milwaukee County conviction that Socha now claims was invalid, and asked

Socha “You agree you have all of those prior convictions?” (R. 3:10–11.) Socha answered “Yes, sir.” (R. 3:11.)

Socha also asserts that the State misrepresented his Milwaukee County conviction in the amended criminal complaint. (Pet 3.) But the State alleged ten prior convictions and listed the dates of the offenses and the dates on which Socha was adjudged guilty of the charges. (R. 17.) It did not misrepresent anything.

For all these reasons, Socha seeks review on an issue that is not presented in this case. Review is therefore unwarranted.

B. Socha’s petition does not satisfy the criteria for review.

Socha asserts that he sets forth a “constitutional issue of a significant and recurring nature and of major importance to bench and bar and to Wisconsin jurisprudence.” (Pet. 4.) But as explained above, the issue Socha sets forth is not presented on the facts of this case. And if the issue were presented, it would be fact specific, and neither recurring nor important in any case other than the current one. Review is therefore unwarranted. Wis. Stat. § 809.62(1r)(c)3.

Socha also asserts that the court of appeals’ decision “has far reaching implications for future appellate practice, as well as defendants and courts of this state.” (Pet. 3.) However, the court of appeals’ summary disposition order is unpublished and not authored, so it is not citable, even for persuasive authority. Wis. Stat. § 809.23(3)(b). It only supports “a claim of claim preclusion, issue preclusion, or the law of the case.” Wis. Stat. § 809.23(3)(a). The court of appeals’ decision has no effect on any case except the current one. Review is therefore unwarranted. Wis. Stat. § 809.62(1r)(c)2.

Socha's petition does not satisfy any of the criteria for review under Wis. Stat. § 809.62(1r). Review by this Court would be for error correction. However, Socha has not shown that there is any error to correct.

C. Socha has not shown that the court of appeals erred in determining that he invited any error in his sentence.

The court of appeals concluded that if there was any error at sentencing, Socha invited it. *Socha*, 2022 WL 6856114 at 4. The court concluded that Socha asked the circuit court to proceed to sentencing "knowing that the State was alleging that the Milwaukee County violation was the tenth offense and that this offense was Socha's eleventh." *Id.* The court noted that "Socha then confirmed during his plea that he had ten prior convictions, including the 2005 Milwaukee County offense." *Id.* The court noted that under *State v. Slater*, 2021 WI App 88, ¶ 40, 400 Wis. 2d 93, 968 N.W.2d 740, "The doctrine of invited error prohibits a defendant from creating an error by deliberate choice or strategy and then receiving the benefit from that error on appeal." *Id.* The court concluded that "any error was the result of Socha's decision to move forward." *Id.* The court therefore summarily affirmed the circuit court order denying Socha's motion for new factor sentence modification. *Id.* at 5.

The court of appeals' decision was correct. Under the "invited error" doctrine, "A defendant cannot create his own error by deliberate choice of strategy and then ask to receive benefit from that error on appeal." *State v. Gary M.B.*, 2004 WI 33, ¶ 11, 270 Wis. 2d 62, 676 N.W.2d 475 (quoting *Vanlue v. State*, 87 Wis. 2d 455, 275 N.W.2d 115 (Ct. App. 1978) (reversed on other grounds by *Vanlue v. State*, 96 Wis. 2d 81, 291 N.W.2d 467 (1980))). Here, as the court of appeals recognized, Socha did exactly that.

Socha told the sentencing court he wanted to proceed to sentencing, and he admitted that he had the ten convictions the State alleged in the amended criminal complaint, including the Milwaukee County conviction. (R. 3:10–11.) He was therefore properly sentenced for a fifth offense. According to the CCAP entry for Milwaukee County case number 2004CF00137, when Socha was later sentenced for a fifth offense in that case, the sentencing court considered that offense Socha's tenth offense. It is not entirely clear why Socha wanted to be sentenced for a tenth offense in Milwaukee County and an 11th offense in Ozaukee County, rather than for a tenth offense in Ozaukee County and an 11th offense in Milwaukee County. When the circuit court denied Socha's motion for sentence modification, it said, "My guess is you didn't want this to be consecutive here to anything else coming out of a place in Milwaukee or another county. That's my guess." (R. 181:11.) But regardless of why Socha chose to be sentenced for a tenth offense in Milwaukee County and an 11th offense in Ozaukee County, he did just that.

Now Socha argues that the sentencing court in Ozaukee County should have counted only nine prior convictions and considered his Ozaukee County offense to be his tenth offense, even though he admitted to ten prior convictions and understood that the circuit court would consider his Ozaukee County offense to be his 11th offense. But whether the court considered Socha's conviction to be his tenth offense or his 11th offense, he was properly sentenced for a fifth offense. And as the court of appeals recognized, if there was any error at sentencing due to the court considering this an 11th offense, the error was invited by Socha wanting to be sentenced for an 11th offense in Ozaukee County rather than in Milwaukee County, and in admitting to ten prior convictions, including the Milwaukee County conviction.

Socha claims that he “is an uneducated layman of the law,” and that “when inadvertently acknowledging the Milwaukee violation as a conviction, he was unaware that it was not countable as a prior conviction.” (Pet. 15.) But Socha had been found guilty of at least ten OWIs when he was sentenced in this case. He surely had at least some understanding of how sentence enhancement for prior offenses works in OWI cases. And Socha was represented by counsel. He was present when his counsel informed the court that Socha had not been sentenced in Ozaukee County, and when the prosecutor, defense counsel, and the court discussed the issue. (R. 3:5–6.) When the circuit court listed ten convictions, including Milwaukee County conviction that Socha now claims was invalid, and asked Socha “You agree you have all of those prior convictions?” (R. 3:10–11.) Socha answered “Yes, sir.” (R. 3:11.)

As the court of appeals concluded, if there was any error in counting those ten convictions, Socha invited it. *Socha*, 2022 WL 6856114 at 4. The court of appeals correctly applied the invited error doctrine, and review of the court of appeals’ summary disposition order by this Court is unwarranted.

D. Even if Socha could show that the invited error doctrine should not have been applied, he would not be entitled to relief.

Socha asks this Court to grant review to determine whether the invited error doctrine “trumps a defendant’s due process challenge to a sentence based upon the presentation of inaccurate information by the State.” (Pet. 3.)

A claim that a sentence was based on “inaccurate information” is a claim for resentencing. *Wood*, 305 Wis. 2d 133, ¶¶ 2–4, 15; *Tiepelman*, 291 Wis. 2d 179, ¶ 2. As explained above, Socha did not move for resentencing. He moved for new factor sentence modification. (R. 192.) A court should not construe a pro se defendant’s motion for sentence modification

as a motion for resentencing “in the absence of a clear, unequivocal and knowing stipulation by the defendant.” *Wood*, 305 Wis. 2d 133, ¶ 17. Here, Socha clearly, unequivocally, and knowingly refused to have his motion for new factor sentence modification construed as a motion for resentencing. In his brief on appeal, Socha said, “The defendant seeks sentence modification not resentencing; this motion cannot be considered under another standard without his express stipulation.” (R. 192:1 n.1) (citing *Wood*, 305 Wis. 2d 133; *Hayes v. State*, 46 Wis. 2d 93, 175 N.W.2d 625 (1970) (abrogated on other grounds by *State v. Taylor*, 60 Wis. 2d 506, 523, 210 N.W.2d 873 (1973)).

In Socha’s brief on appeal, he asserted that the circuit court should have construed his motion for new factor sentence modification as a motion for commutation of his sentence under Wis. Stat. § 973.13. (Socha’s Br. 19.) Socha claimed that he is entitled under Wis. Stat. § 973.13 to have his sentence for OWI as a fifth or subsequent offense commuted to the maximum sentence for OWI as a fourth offense. (Socha’s Br. 23–24.)

In his petition for review by this Court, it appears that Socha has abandoned his claim that he is entitled for commutation of his sentence under Wis. Stat. § 973.13. he mentions commutation and the statute only in telling the court what he argued in the circuit court and the court of appeals. (Pet 5–6.) But he does not argue that if this Court were to grant review, it should determine that he is entitled to commutation of his sentence under Wis. Stat. § 973.13.

And for good reason. Wisconsin Stat. § 973.13 does not apply in this case. The statute provides that “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.” Wis. Stat. § 973.13. “Section 973.13, as

it pertains to sentencing a repeat offender, applies only when the State fails to prove the prior conviction necessary to establish the habitual criminal status (by proof or by admission) or when the penalty given is longer than permitted by law for a repeater.” *State v. Mikulance*, 2006 WI App 69, ¶ 18, 291 Wis. 2d 494, 713 N.W.2d 160 (citing *State v. Flowers*, 221 Wis. 2d 20, 28–29, 586 N.W.2d 175 (Ct. App. 1998); *State v. Spaeth*, 206 Wis. 2d 135, 155–56, 556 N.W.2d 728 (1996)).

Wisconsin Stat. § 973.13 does not apply in this case for two reasons.

First, the State did not fail to prove Socha’s prior convictions. A defendant’s admission to prior convictions is sufficient to prove them for purposes of sentence enhancement. *State v. Loayza*, 2021 WI 11, ¶ 38, 395 Wis. 2d 521, 954 N.W.2d 358; *Mikulance*, 291 Wis. 2d 494, ¶ 18. Here, Socha expressly admitted to having ten convictions, including the Milwaukee County conviction. (R. 3:10–11.)

Second, the circuit court did not impose a penalty longer than permitted by law. The maximum sentence for an OWI as a fifth or subsequent offense was six years of imprisonment. Wis. Stat. §§ 346.65(2)(am)5., 939.50(3)(h) (2005–05). After Socha admitted to ten prior offenses, the court sentenced him to six years of imprisonment, including three years of initial confinement and three years of extended supervision. (R. 3:24.) The sentence did not exceed the maximum sentence for a fifth or subsequent offense. Because Socha admitted to ten prior convictions, and the court imposed a valid sentence for OWI as a fifth or subsequent offense, Wis. Stat. § 973.13 does not apply.

Socha moved for new factor sentence modification, but he has abandoned that claim—he does not mention sentence modification or a new factor in his petition for review. He is not entitled to commutation of his sentence under Wis. Stat. § 973.13. And he has expressly disavowed a resentencing claim. Therefore, even if Socha could show that his sentence was based on inaccurate information and that the invited error doctrine should not apply, he would not be entitled to relief. Review of the court of appeals' summary disposition order is therefore unwarranted.

CONCLUSION

This Court should deny Socha's petition for review.

Dated: March 6, 2023.

Respectfully submitted,

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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 3175 words.



MICHAEL C. SANDERS
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this petition or response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic petition or response is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this petition or response filed with the court and served on all opposing parties.

Dated this 6th day of March 2023.



MICHAEL C. SANDERS
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