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CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

No. 2021AP0957-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES J. SOCHA,

Defendant-Appellant-Petitioner.

SUPPLEMENTAL RESPONSE
OPPOSING PETITION FOR REVIEW

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INTRODUCTION

James J. 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.) In 2020, he moved for sentence modification. (R. 192.) The circuit court denied his motion (R. 205), and the court of appeals summarily affirmed. *State v. James J. Socha*, 2022 WL 6856114, 2021AP0957-CR (Wis. App. Oct. 12, 2022) (unpublished). Socha petitioned this Court for review, and the State filed a response opposing Socha's petition. This Court has now ordered the State to file a supplemental response addressing the impact of the court of appeals' decision in case numbers 2021AP1083-CR and 2021AP2116-CR¹ on the issues raised in the petition in this case. The State's position is that while the court of appeals' decision in case numbers 2021AP1083-CR and 2021AP2116-CR does not have a significant impact on the issue Socha has raised in his petition for review in case number 2021AP957-CR, it supports denying Socha's petition.

BACKGROUND

A. Socha's 2005 Ozaukee County Case

In case number 2021AP0957-CR, Socha pled no contest in Ozaukee County to operating a motor vehicle while under the influence of an intoxicant (OWI) as a fifth or subsequent offense. *Socha*, 2022 WL 6856114 at 1. He "acknowledged that the ten prior convictions stated in the charging documents were correct." *Id.* In 2020, Socha moved for sentence modification, asserting that six of the ten prior convictions he admitted at sentencing have been vacated and that his 2005 Milwaukee County conviction should not have counted to enhance his sentence because he was sentenced in Milwaukee

¹ The cases were consolidated.

County after he was sentenced in this case. *Id.* at 1–2. The circuit court denied Socha’s motion for sentence modification. *Id.* at 1.

The court of appeals affirmed. The court did not address whether the six convictions that Socha claims have been vacated were properly counted to enhance his sentence in this case. And it did not address the State’s argument that Socha’s claim is really one for resentencing, rather than sentence modification. Instead, the court addressed only Socha’s claim that his 2005 Milwaukee County conviction was improperly counted as a prior conviction in this case. The court of appeals recognized that Socha and his counsel knew that Socha had been found guilty in his Milwaukee County case but had not been sentenced, but they wanted to go forward with sentencing in Ozaukee County, and Socha acknowledged having ten convictions, including the 2005 Milwaukee County case. *Id.* at 1–2. The court concluded that any error in counting the 2005 Milwaukee County conviction in this case was invited error, which “prohibits a defendant from creating an error by deliberate choice or strategy and then receiving the benefit of that error on appeal.” *Id.* at 2 (citing *State v. Slater*, 2021 WI App 88, ¶ 40, 400 Wis. 2d 93, 968 N.W.2d 740).

B. Socha’s 2005 and 2008 Milwaukee County Cases

In case numbers 2021AP1083-CR and 2021AP2116-CR, Socha moved to modify his sentences for OWI in Milwaukee County in 2005 and 2008. *State v. James J. Socha*, 2023 WL 3064514, 2021AP1083-CR, 2021AP2116-CR (Wis. App. April 25, 2023) (unpublished). Socha was convicted of OWI as a fifth or subsequent offense in 2005 based on nine prior convictions listed on his Wisconsin Department of Transportation driving record. *Id.* ¶¶ 2–3. Socha’s 2005 Ozaukee County conviction was not listed on his driving

record. *Id.* ¶ 3. While the trial court was aware of the Ozaukee County conviction, that conviction was not treated as a prior conviction to enhance Socha's 2005 Milwaukee County conviction. *Id.*

Socha was convicted of OWI as a tenth or subsequent offense in 2008. *Id.* ¶¶ 7–8. Both his 2005 Ozaukee County conviction and his 2005 Milwaukee County conviction were counted as prior convictions. *Id.* ¶ 7 n.8.

Socha moved to modify his sentences for OWI as a fifth offense and OWI as a tenth or subsequent offense, asserting that six of his convictions counted as priors in his 2005 case and four of his convictions counted in his 2008 case have been vacated. *Id.* ¶ 14. The circuit courts denied Socha's motion in each case. *Id.* ¶¶ 15–16. The court of appeals reversed. It concluded that Socha's claim could properly be raised in a motion for sentence modification rather than in a motion for resentencing, and it remanded the case to the circuit court with instructions to reopen Socha's motions for sentence modification, determine which of Socha's prior convictions have been vacated, and to resentence him. *Id.* ¶¶ 37–38.

The dissenting opinion concluded that the majority had improperly applied the law for new factor sentence modification, and that the majority's "outcome is more akin to a decision on a motion for resentencing." *Id.* ¶ 48–50. The dissent concluded that the circuit courts properly exercised their discretion in denying Socha's motions for sentence modification, so it would have affirmed their decisions. *Id.* ¶ 51.

REVIEW OF THE COURT OF APPEALS' DECISION IN CASE NUMBER 2021AP957-CR IS UNWARRANTED

In his petition for review in case number 2021AP0957-CR, Socha has set forth one issue: "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.) As the State explained in its response opposing Socha’s petition, review on that issue is unwarranted for several reasons.

First, 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 y Payette*, 2008 WI App 106, 313 Wis. 2d 39, 756 N.W.2d 423).) However, Socha did not move for resentencing. He moved for new factor sentence modification. (R. 192.) In his motion, Socha insisted that his claim not be construed as a motion for resentencing. (R. 192:1 n.1.) Then, 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, not as a motion for resentencing. (Socha’s Br. 13–15.)

Second, Socha did not “unknowingly admit[]” his Milwaukee County conviction. (Pet 3.) He was represented by counsel when he admitted to his Milwaukee County conviction. *Socha*, 2022 WL 6856114 at 1–2; (R. 3:10–11.) And he did so after his counsel told the court that Socha had not yet 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 those prior convictions?” (R. 3:10–11.) Socha answered “Yes, sir.” (R. 3:11.)

Third, the State did not misrepresent Socha’s Milwaukee County conviction in the amended criminal complaint. (Pet 3.) 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.) And as the court of appeals recognized at sentencing, “The State was surprised to learn” that Socha’s sentencing in his Milwaukee County case had been adjourned. *Socha*, 2022 WL 6856114 at 2. The State did not misrepresent anything.

Fourth, if Socha was sentenced on inaccurate information in his 2005 Ozaukee County case, it is because he wanted his 2005 Milwaukee County case to count as a prior to enhance the sentence for his 2005 Ozaukee County conviction, rather than having his 2005 Ozaukee County conviction count as a prior to enhance the sentence for his 2005 Milwaukee County conviction. Socha was convicted of OWI in Ozaukee County and in Milwaukee County in a short period of time in 2005. One of the two convictions would of course properly be counted as a prior conviction to enhance the other. Socha wanted his Milwaukee County conviction to enhance his Ozaukee County conviction, not vice versa, and he got exactly what he wanted. He is now arguing for something neither the law, logic, justice, nor common sense entitles him to, i.e., to have neither 2005 conviction count as “prior” with respect to the other because both convictions occurred before he was sentenced for either. That result is chronologically impossible.

The State does not believe that the court of appeals’ decision in case numbers 2021AP1083-CR and 2021AP2116-CR has a significant impact on the sole issue Socha has raised in his petition for review in case number 2021AP0957-CR. The court of appeals recognized in case number 2021AP0957-CR that Socha invited any error in counting his 2005

Milwaukee County conviction to enhance the sentence for his 2005 Ozaukee County conviction. The decision in case numbers 2021AP1083-CR and 2021AP2116-CR does not address invited error. It had no reason to do so because Socha's 2005 Ozaukee County conviction was properly counted as a prior in his 2008 Milwaukee County case, and it was not counted as a prior in his 2005 Milwaukee County case.

To the extent the court of appeals' decision in case numbers 2021AP1083-CR and 2021AP2116-CR has any impact on the petition for review in this case, it supports denying the petition. The court of appeals in case numbers 2021AP1083-CR and 2021AP2116-CR remanded the cases to the circuit court "to reopen Socha's motions for sentence modification and determine which, if any, of Socha's prior OWI convictions were lawfully vacated and to exercise their discretion in imposing sentences within the range of the applicable subsections of § 346.65(2) based on Socha's correct number of prior OWI convictions." *Socha*, 2023 WL 3064514, ¶ 38. In his motion for sentence modification in case number 2021AP1083-CR, his 2005 Milwaukee County conviction, Socha did not allege that his 2005 Ozaukee County conviction should be counted as a prior to enhance his Milwaukee County conviction. He never even mentioned his Ozaukee County conviction. That conviction was not counted in Milwaukee County. And Socha claimed in his Ozaukee County case that the Milwaukee County conviction should not be counted in Ozaukee County.

Under the court of appeals' decision in case numbers 2021AP1083-CR and 2021AP2116-CR, if the circuit court reopens Socha's motions for sentence modification, it will be addressing which convictions have been vacated. It will not be holding a new sentencing hearing at which the court determines how many prior convictions Socha had when he was sentenced in this case, because that would require

resentencing. And like in this case, Socha has expressly rejected resentencing. Since Socha's Ozaukee County conviction will not be counted to enhance his sentence in his Milwaukee County case, his Milwaukee County conviction should be counted to enhance his sentence in his Ozaukee County case. Review by this Court in this case is therefore unwarranted.

CONCLUSION

This Court should deny Socha's petition for review.

Dated: July 18, 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 1909 words.

Electronically signed by:

Michael C. Sanders
MICHAEL C. SANDERS
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 Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

I further certify that a copy of the above document was mailed on July 18, 2023 to:

James J. Socha #446226
Waupun Correctional Institution
PO Box 351
Waupun, WI 53963-0351

Dated this 18th day of July 2023.

Electronically signed by:

Michael C. Sanders
MICHAEL C. SANDERS
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