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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 2021AP2116-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

JAMES J. SOCHA,
Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING A MOTION
FOR SENTENCE MODIFICATION AND AN ORDER
DENYING RECONSIDERATION ENTERED IN THE
MILWAUKEE COUNTY CIRCUIT COURT, THE
HONORABLE GLENN. H. YAMAHIRO, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

A jury found James J. Socha guilty of operating a motor vehicle while under the influence of an intoxicant (OWI) in 2011. Socha admitted to having at least nine prior convictions, so the circuit court sentenced him for a tenth or subsequent offense, under Wis. Stat. §§ 346.63(1)(a), 346.65(2)(am)7. (2007–08). Socha appealed, and this Court affirmed his conviction. *State v. James J. Socha*, 2015 WL 148808, 2013AP281-CR (Jan. 13, 2015) (unpublished).¹

Socha has now moved for modification of his 2011 sentence, alleging new factors. He seeks that four of the prior convictions used to enhance his 2011 sentence were later voided, and that the State failed to adequately prove some or all of his other convictions. He seeks commutation of his sentence under Wis. Stat. § 973.13, and an amended judgment of conviction for OWI as a first or second offense.²

The circuit court denied Socha's motion, and this Court should affirm. Socha is not entitled to commutation of his sentence under Wis. Stat. § 973.13 because he did not receive a sentence that exceeds the allowable maximum for an OWI as a tenth or subsequent offense. And Socha is not entitled to sentence modification because he has not shown a new factor. If Socha were entitled to any remedy, it would be resentencing. However, he expressly rejects resentencing. Since Socha is not entitled to the relief he seeks, this Court should affirm the circuit court's order denying his motion.

¹ This Court's opinion, which is in the appellate record at (R. 113), is citable for law of the case. Wis. Stat. § 809.23(3)(a).

² Socha is making similar claims in two pending appellate cases, 2021AP0957-CR, and 2021AP1083-CR, both in District II.

ISSUES PRESENTED

1. Is Socha entitled to commutation of his sentence under Wis. Stat. § 973.13 and an amended judgment of conviction for OWI as a first or second offense?

The circuit court answered “no.”

This Court should answer “no” and affirm.

2. Is Socha entitled to new factor sentence modification?

The circuit court answered “no.”

This Court should answer “no” and affirm.

3. Did the State prove that Socha had nine prior convictions when was sentenced for a tenth or subsequent offense in 2011?

The circuit court answered “yes.”

This Court should answer “yes” and affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication, as the arguments are fully developed in the parties’ briefs, and the issues presented involves the application of well-established principles to the facts presented.

STATEMENT OF THE CASE AND FACTS

The State charged Socha with OWI as a tenth or subsequent offense in 2008. (R. 106; 252.) Socha moved to collaterally attack seven of his prior convictions (R. 233), but the circuit court denied his motion (R. 90). He was tried in 2011, and a jury found him guilty of OWI. (R. 141:118–19.) At sentencing, Socha again challenged his prior convictions. (R. 140:23–32.) The circuit court found that Socha had at least eleven prior convictions, so it entered judgment of conviction

for OWI as a twelfth offense and sentenced him for a tenth or subsequent offense. (R. 140:22, 30, 33.)

After sentencing, Socha moved for postconviction relief, again seeking to collaterally attack some of his prior convictions and alleging that the State failed to adequately prove his prior convictions. (R. 130.) The circuit court denied his motion. (R. 123.) This Court affirmed the judgment of conviction and the order denying Socha's motion for postconviction relief. (R. 113.) It concluded that the circuit court had properly denied Socha's collateral attack on his prior convictions, and that the State proved at least nine prior convictions, so Socha was properly sentenced for OWI as a tenth or subsequent offense. (R. 113:3–6.) The Wisconsin Supreme Court denied Socha's petition for review. (R. 113:6–11.)

In 2021, Socha moved to have the judgment of conviction amended to indicate that he was sentenced for OWI as a tenth or subsequent offense rather than for a twelfth offense. (R. 41.) The circuit court granted the motion, noting that "The amendment does not change the fact that the court found that the defendant had at least eleven prior convictions for operating while under the influence of an intoxicant prior to imposing a sentence." (R. 43; 44.)

Later in 2021, Socha moved for new factor sentence modification. (R. 45.) He again asserted that the State had failed to adequately prove nine or more prior convictions. (R. 45:4–5.) He also asserted that four of his prior convictions from Ohio had subsequently been declared void ab initio and had been vacated. (R. 45:6.) Socha sought sentence modification and commutation of the sentence "to penalties applicable to a misdemeanor second offense OWI." (R. 45:7–8.)

The circuit court denied Socha's motion. (R. 64.) The court noted that in this Court's 2015 decision, this Court concluded that the State proved at least nine prior convictions, and that this Court's determination is "the law of the case." (R. 64:1.) The circuit court also concluded that Socha failed to prove a new factor warranting sentence modification. (R. 64:5.)

Socha moved for reconsideration. (R. 65.) The circuit court denied the motion. (R. 67.) Socha now appeals. (R. 69.)

STANDARD OF REVIEW

Whether facts presented constitute a new factor is a question of law, reviewed independently. *State v. Harbor*, 2011 WI 28, ¶ 33, 333 Wis. 2d 53, 797 N.W.2d 828. "The determination of whether that new factor justifies sentence modification is committed to the discretion of the circuit court," and is reviewed "for erroneous exercise of discretion." *Id.*

ARGUMENT

The circuit court properly denied Socha's motion for sentence modification.

A. Introduction.

Socha moved for sentence modification, seeking commutation of his sentence under Wis. Stat. § 973.13 from OWI as a tenth or subsequent offense to OWI as a second offense. In his brief, Socha now seeks sentence modification and commutation of his sentence to one for OWI as a first offense—a civil offense. Socha has made it clear in his motion and brief that he is not seeking resentencing and does stipulate that his motion for sentence modification can be treated as a motion for resentencing.

However, as the circuit court recognized, and as the State will explain, Wis. Stat. § 973.13 does not apply in this case. And Socha has not set forth a new factor warranting sentence modification. Socha's claim that his sentence "is void as a matter of law" (Socha's Br. 7–8), would appropriately be one for resentencing for OWI under the applicable penalty statute given his prior convictions. However, Socha does not seek or agree to resentencing, so he cannot properly be resentenced. Since Socha only wants relief to which he is not entitled, the circuit court's order denying his motion for sentence modification should be affirmed.

B. Socha is not entitled to commutation of his sentence under Wis. Stat. § 973.13 because that statute and that case does not apply here.

Socha argues that his motion for sentence modification for a new factor should be construed as a motion for commutation of his sentence under Wis. Stat. § 973.13. (Socha's Br. 16.) He claims that he is entitled under Wis. Stat. § 973.13 to have his sentence for OWI as a tenth or subsequent offense commuted to the maximum sentence for OWI as a first offense. (Socha's Br. 16–19.) Socha relies on *State v. Hahn*, 2000 WI 118, 238 Wis. 2d 889, 618 N.W.2d 528, as authorizing commutation of his sentence. But neither Wis. Stat. § 973.13 nor *Hahn* help Socha.

Socha is not entitled to relief under Wis. Stat. § 973.13, which 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." "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)).

Section 973.13 does not apply in this case for two reasons. First, contrary to Socha’s assertion (Socha’s Br. 15–17), the State did not fail to prove his prior convictions. As this Court has previously determined, the State proved at least nine prior convictions. *Socha*, 2015 WL 148808, ¶ 25. As the circuit court recognized, this Court’s determination is the law of the case.

Second, the sentencing court did not impose a maximum penalty or a sentence in excess of that authorized by law. By its plain text, section 973.13 applies only when a court “imposes a maximum penalty.” *See State v. Finley*, 2016 WI 63, ¶ 74, 370 Wis. 2d 402, 882 N.W.2d 761: “Wis. Stat. § 973.13, which commutes a sentence imposed that exceeds the maximum statutory penalty, does not provide a remedy in the instant case, in which the sentence initially imposed (although at the plea colloquy the circuit court advised otherwise) did not exceed the maximum statutory penalty.” *Id.*

Here, the circuit court did not impose a maximum sentence. Socha had at least nine prior convictions, so the circuit court appropriately sentenced him for OWI as a tenth or subsequent offense, which was a Class F felony which was punishable by 12 years and 6 months of imprisonment. Wis. Stat. §§ 346.65(2)(am)7., 939.50(3)(f) (2007–08). The trial court imposed a 12-year sentence, including seven years of initial confinement and five years of extended supervision. (R. 140:36.) Socha’s sentence is not a maximum sentence because it is only 12 years long rather than 12 years and 6 months. And his sentence plainly did not exceed the

maximum penalty authorized by law. Section 973.13 therefore does not apply. *Finley*, 370 Wis. 2d 402, ¶ 74.

Hahn also does not help Socha. In *Hahn*, the Wisconsin Supreme Court held that “an offender may not use the enhanced sentence proceeding predicated on a prior conviction as the forum in which to challenge the prior conviction, except when the offender alleges that a violation of the constitutional right to a lawyer occurred in the prior state conviction.” *Hahn*, 238 Wis. 2d 889, ¶ 4. Socha acknowledges the supreme court’s holding, but seizes on the court’s statement that “Instead, the offender may use whatever means available under state law to challenge the validity of a prior conviction on other grounds in a forum other than the enhanced sentence proceeding. If successful, the offender may seek to reopen the enhanced sentence.” *Id.* ¶ 28.

Hahn said that if a defendant successfully challenges a prior conviction other than by collaterally attacking it on the ground of a denial of the right to counsel, he “may seek to reopen the enhanced sentence.” *Id.* The court did not say that a defendant who successfully challenges his conviction is entitled to commutation of his sentence or sentence modification. As explained above, a defendant like Socha who has successfully challenged a prior conviction is not entitled to sentence commutation. And as the State will explain, such a defendant is also not entitled to new factor sentence modification.

C. Socha has not shown a new factor that warrants sentence modification.

A circuit court may modify a defendant’s sentence upon a showing of a new factor. *Harbor*, 333 Wis. 2d 53, ¶ 35. A new factor consists of facts “highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it

was unknowingly overlooked by all of the parties.” *Id.* ¶ 40 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)).

A defendant seeking sentence modification “must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence.” *Harbor*, 333 Wis. 2d 53, ¶ 38. A defendant who asserts that a new factor warrants sentence modification “has the burden to demonstrate by clear and convincing evidence the existence of a new factor.” *Id.* ¶ 36 (citing *State v. Franklin*, 148 Wis. 2d 1, 8–9, 434 N.W.2d 609 (1989)).

Socha was sentenced for OWI as a tenth or subsequent offense in 2011. (R. 2; 140:1, 16.) In his motion for new factor sentence modification, Socha argued that the new factor is that only one of his prior convictions should have been counted to enhance the sentence for his 2011 OWI conviction, so he should have been sentenced for a second offense. (R. 45.) The circuit court denied Socha’s motion, concluding that he did not show a new factor that warrants sentence modification. (R. 64.)

On appeal, Socha argues that he is entitled to sentence modification because four of his convictions, from Ohio were later declared void ab initio, and the State only proved one prior conviction, from 1991, which would not count as a prior conviction because it was entered more than ten years before his current OWI. (Socha’s Br. 21.)

However, Socha has not shown a new factor that warrants sentence modification. If he is entitled to any relief, it is resentencing, not sentence modification. Socha acknowledges that “In resentencing, ‘the court imposes a new sentence after the initial sentence has been held invalid.’” (Socha’s Br. 18 (quoting *State v. Carter*, 208 Wis. 2d 142, 154, 560 N.W.2d 256 (1996) (overruled on other grounds by *Harbor*, 333 Wis. 2d 53)). And his claim is that the sentence

the circuit court entered in 2011 is invalid because none of his prior convictions should have counted. Socha is not asserting that he received too long a sentence for OWI as a tenth or subsequent offense. He is asserting that he was improperly sentenced for OWI as a tenth or subsequent offense when he should have been sentenced for OWI as a second offense or even a first offense. But although Socha is claiming that his sentence for OWI as a tenth or subsequent offense is invalid, he does not seek resentencing.

Socha seeks sentence modification. He argues that “So long as a sentence is modified within statutory confines, a court finding a new factor does not invalidate the original sentence, it merely modifies it, preserving the original integrity of the total sentence imposed.” (Socha’s Br. 18.) But here, Socha is not asking the court to modify his sentence for OWI as a tenth or subsequent offense within the statutory confines of OWI as a tenth or subsequent offense. He is asking the court to impose sentence under an entirely different penalty statute. Socha was sentenced under Wis. Stat. § 346.65(2)(am)7 (2011–12) for a tenth or subsequent offense. Socha was sentenced for a tenth offense with a maximum term of imprisonment of 12 years and 6 months, and a minimum term of imprisonment of 4 years. Wis. Stat. §§ 346.65(2)(am)7., 973.01(2)(b)6m, (d)4 (2011–12). He now wants to be sentenced for a second offense under Wis. Stat. § 346.65(2)(am)2. (2011–12), with a maximum term of imprisonment of 6 months, or for a first offense under Wis. Stat. § 346.65(2)(am)1. (2011–12), with no imprisonment and a maximum fine of \$300.

The circuit court could not simply modify the sentence for a tenth or subsequent offense—a felony with a minimum term of confinement of four years—to make it appropriate for a first offense—a civil forfeiture—or a second offense with a maximum term of imprisonment of six months. The remedy, if Socha could show that his sentence is improper, would

require the court “to completely re-do the invalid sentence.” *State v. Wood*, 2007 WI App 190, ¶ 9, 305 Wis. 2d 133, 738 N.W.2d 81. That would require resentencing, not sentence modification.

However, Socha does not seek resentencing. He made it clear in his motion for sentence modification that he seeks sentence modification or commutation of his sentence under Wis. Stat § 973.13 and does not agree to resentencing: “This motion seeks sentence modification not resentencing and cannot be considered under another standard without stipulation.” (R. 45:3, 8–9 n.1) (citing *Wood*, 305 Wis. 2d 133, ¶ 17; *Hayes v. State*, 46 Wis. 2d 93, 107, 175 N.W.2d 625 (1970) (overruled on other grounds)).

Socha is therefore refusing the only potential remedy to which he might be entitled. Since Socha steadfastly maintains that he does not agree to resentencing, he is not entitled to any relief.

D. The State proved that Socha had nine or more prior convictions when he was sentenced in 2011 and Socha has provided no sufficient reason to revisit the issue.

Socha argues that he is entitled to commutation of his sentence or sentence modification because the State failed to prove that he had nine or more prior convictions when he was sentenced in 2011. The circuit court denied Socha’s claim because it recognized that this Court already decided the issue when it affirmed Socha’s conviction in 2015. (R. 64:1–2.) The circuit court said that this Court’s “decision is the law of the case, and therefore, to the extent that the defendant alleges in his current motion that proof was lacking to substantiate the number of prior convictions, his motion is denied.” (R. 64:1–2.) Socha acknowledges that this Court has already decided this issue (Socha’s Br. 19–20) but asserts that this Court was wrong (Socha’s Br. 19–21).

However, Socha is not entitled to revisit this Court's previous determination. This Court has already decided this issue: "To the extent that Socha is more generally challenging the proof submitted to substantiate the number of prior convictions, we agree with the State's assessment that Socha admitted to at least nine prior convictions making the trial court's imposition of sentence for a tenth or subsequent offense appropriate." *Socha*, 2015 WL 148808, ¶ 25. As the circuit court recognized, this Court's determination is the law of the case.

The law of the case doctrine is a "longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal." *State v. Stuart*, 2003 WI 73, ¶ 23, 262 Wis. 2d 620, 664 N.W.2d 82 (quoting *Univest Corp. v. General Split Corp.*, 148 Wis. 2d 29, 38, 435 N.W.2d 234 (1989)). An appellate court may not disregard the law of the case "unless the evidence on a subsequent trial was substantially different, [or] controlling authority has since made a contrary decision of the law applicable to such issues." *Id.* ¶ 24 (quoting *State v. Brady*, 130 Wis. 2d 443, 448, 388 N.W.2d 151 (1986)), or unless "the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Id.* (quoting *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988)).

Socha does not argue that this Court's 2011 determination that he had at least nine prior convictions when he was sentenced in this case was clearly erroneous and worked a manifest injustice, or that the law has changed. He has provided nothing that warrants this Court disregarding its own decision that established the law of the case.

In addition, Socha's claim is barred by Wis. Stat. § 974.06(4) and *State v. Escalona-Naranjo*, 185 Wis. 2d 169, 178, 517 N.W.2d 157 (1994). Socha previously argued that the State failed to prove at least nine prior convictions when he was sentenced in 2011. The circuit court rejected his argument and this Court affirmed, explicitly concluding that the State did prove at least nine prior convictions. *Socha*, 2015 WL 148808, ¶ 25. Socha has provided no reason, much less a sufficient reason that he should be allowed to again raise the same claim here. He is therefore barred from doing so.

CONCLUSION

This Court should affirm the circuit court's order denying Socha's motion for new factor sentence modification.

Dated: May 5, 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 3246 words.

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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 of Appeals 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 May 5, 2022 to:

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Dated this 5th day of May 2022.

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