STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2021AP957-CR

RECEIVED

JUL 27 2021

CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES J. SOCHA,

Defendant-Appellant.

ON APPEAL FROM AN AMENDED JUDGMENT OF CONVICTION AND TWO DECISIONS AND ORDERS DENYING POSTCONVICTION RELIEF ENTERED IN THE OZAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JOSEPH D. MCCORMACK, AND HONORABLE PAUL V. MALLOY PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

BY: JAMES J. SOCHA

Defendant-Appellant

Post Office Box 351

Waupun, Wisconsin 53963-0351

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES

STATEMENT OF THE ISSUES PRESENTED

The threshold question on appeal is whether the Postconviction Court was compelled to commute Mr. Socha's sentence in this case without further proceedings pursuant to sec. 973.13, Wis. Stats. upon a showing that seven of the ten alleged prior OWI convictions used to enhance his sentence were either vacated post-sentencing and/or did not actually exist at his 2005 sentencing?

The Postconviction Court Answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not thought to be necessary in this case as briefing should fully develop and explain the issues. However, the primary issue on appeal is believed to be one of first impression in Wisconsin and publication should be given consideration on that basis.

STATEMENT OF THE CASE AND FACTS

This is an appeal from an Amended Judgment of Conviction entered on February 17, 2015, in the Circuit Court for Ozaukee County, the Hon. Joseph D. McCormack, presiding, wherein the Defendant-Appellant, James J. Socha (Mr. Socha), was convicted, *inter alia*, of operating while intoxicated (OWI) 5th or subsequent offense, contrary to Wis. Stat. § 346.63(1)(a). And, also, from two Orders of the postconviction court, the Hon. Paul V. Malloy, presiding, which denied both Mr. Socha's motion for relief from an excessive sentence, and subsequent motion for reconsideration.

On February 23, 2005, Mr. Socha was cited for OWI in the city of Mequon in Ozaukee County, Wisconsin. As relevant here, the State's criminal complaint charged him with OWI and alleged nine prior OWI convictions contrary to sec. 346.63(1)(a) & 346.65(2)(e), 939.59(3)(h), 346.65(2)(g) Wis. Stats., a Class H felony. (3) The complaint was amended to include a tenth prior conviction, allegedly emanating from the Milwaukee County Circuit Court. (7; App.100) Five of the prior OWI convictions recorded in the State's 2nd amended criminal complaint allegedly stemmed from Ohio; two were alleged to occur in Illinois; and the remaining three allegedly took place in Wisconsin. (Id.)

On May 17, 2005, Mr. Socha pled no contest to one count OWI-fifth or subsequent offense, and was sentenced to a bifurcated term of imprisonment consisting of three years initial confinement, and three years extended supervision, consecutive to any other sentence. (118; App.104)

Following completion of the Department of Corrections Earned Release Program in 2008, Mr. Socha was released from prison early and his extended supervision time adjusted; none of his sentences in this case were complete as implied by the court in its decision on reconsideration. (172:2) Mr. Socha was reconfined for just short of all the remaining time available on his sentence later that year, due to new charges in Milwaukee County. (64) He is presently incarcerated on this case and others.

A postconviction motion was filed by Mr. Socha on November 30, 2020, seeking relief from an excessive sentence. (158; App.106) The motion exhibited evidence showing seven of the ten prior OWI convictions relied on by the State and trial court for enhancing his sentence, had either been vacated, and/or did not actually exist at the time his original sentenced was imposed in 2005. Mr. Socha's motion argued, that as a result of the sustaining evidence exposing the fact that seven of the prior OWI convictions utilized to increase his penalties in this case, did not actually exist; the imposed sentence was excessive by five years imprisonment and void, requiring immediate mandatory commutation pursuant to Wis. Stat. § 973.13.

The postconviction court issued a written Decision and Order denying Mr. Socha's postconviction excessive sentence motion, on February 15, 2021. (166; App.129) The court also denied his motion seeking reconsideration of the denied motion, on March 15, 2021. (172; App.151) This appeal from the amended judgment of conviction and the court's two orders denying postconviction relief follows.

ARGUMENT

MR. SOCHA'S ENHANCED SENTENCE IS EXCESSIVE AND ILLEGAL, AND THE POSTCONVICTION COURT ERRED WHEN NOT COMMUTING IT IN ACCORD WITH WIS. STAT. SEC. 973.13.

A. Introduction and Standard of Review.

Mr. Socha filed a motion in the circuit court seeking commutation of an excessive sentence, and submitted substantial documentary evidence proving that seven of the ten prior convictions used to enhance his OWI sentence, did not actually exist. The postconviction court found that the evidence available and relied on at the time of both his original sentencing and his re-confinement hearing, showed that Mr. Socha was not entitled to a resentencing, and denied his motion and a subsequent one for reconsideration.

The rulings were incorrect because the court did not recognize that when a defendant brings evidence, post-sentencing, demonstrating that his enhanced sentence is based in whole or in part on prior convictions which do not actually exist, the sentence must be commuted, it is not discretionary. The postconviction court's rulings deprived Mr. Socha of warranted relief from an excessive and illegal sentence. This Court should reverse the lower court orders without remand, and commute the sentence pursuant to Wis. Stat. § 973.13.

Whether the record is sufficient to sustain the penalty enhancer Mr. Socha received is a question of law that this Court reviews *de novo*. See *State v. Spaeth*, 206 Wis.2d 135, 148 (1996).

B. A total of six predicate OWI convictions alleged in the State's 2nd amended criminal complaint and used to enhance Mr. Socha's sentence, were vacated postconviction.

As pertinent here, following an arrest in 2005, the State filed a 2nd amended criminal complaint in the Ozaukee County Circuit Court charging Mr. Socha with felony OWI-fifth or subsequent offense, and averred that he had ten predicate OWI convictions the court could consider for sentencing purposes under Wis. Stat. § 346.65(2)(e), the escalating penalty enhancer statute for those convicted of OWI-fifth or subsequent offense. (7:1-4; App.100-03) Mr. Socha subsequently entered a plea of no contest to the charge, was found guilty, and a bifurcated sentence of six years imprisonment was imposed. (118:1-2; App.104-05)

The ten prior OWI convictions recorded in the State's 2nd amended criminal complaint are as follows:

*1) 10/23/89 — 11/07/89 — State of Ohio
2) 10/22/90 — 01/09/91 — State of Ohio
*3) 11/28/91 — 01/21/92 — State of Ohio
*4) 02/24/92 — 04/28/92 — State of Ohio
*5) 04/04/92 — 04/28/92 — State of Ohio
*6) 02/16/93 — 03/31/93 — Milw. County [Village of Whitefish Bay]
*7) 03/25/93 — 04/28/93 — Milw. County [Village of River Hills]
8) 10/03/98 — 02/23/99 — State of Illinois
9) 02/14/99 — 04/16/99 — State of Illinois
*10) 12/26/04 — 02/17/05 — Milw. County [Circuit Court]

(7:2; App.101) (Asterisks' represent vacated and/or nonexistent OWI convictions).

In late 2020, Mr. Socha filed a postconviction motion in the circuit court requesting relief from an excessive sentence, via commutation under Wis. Stat. § 973.13. (158; App.106) Attached to the motion was evidence consisting of certified court Orders and other germane documents showing that six of the prior OWI convictions alleged in State's 2nd amended criminal complaint had been formally vacated by their respective courts, after sentencing in this case.

More specifically, Mr. Socha presented to the court as documentary evidence: two Certifications and court Orders vacating Wisconsin OWI conviction numbers, 6 and 7, above. (Id. at 9, 11, 13, 15, and 114, 116, 118. 120); two 'Conviction Status Reports' verifying that these same two OWI convictions were reported to the Wisconsin Department of Transportation (DOT) in error, circa 1993. (Id. at 10, 14, and 115, 119); one Certified court Order from the Mason Municipal Court in Mason, Ohio, vacating OWI conviction numbers, 1, 3, 4, and 5, supra. (Id. at 18-19, 123-24); and, finally, two DOT email inquires relating to OWI conviction numbers 1, 3-7, and 10 above, which confirm that the convictions were either removed and/or do not appear on Mr. Socha's driving record. (Id. at 16-17, 20, and 121-22, 125)

Although Mr. Socha's motion distinguished that he was seeking sentence commutation under Wis. Stat. § 973.13 due to the six vacated OWI convictions; and that he was also accusing the State of unlawfully recording an OWI conviction in its complaint from Milwaukee County Circuit Court which did not actually exist, the State chose to remain silent and not dispute or argue against the substantive merits of his postconviction motion. (160:1-3; App.126-28)

A written Decision and Order denying the postconviction motion was issued on February 15, 2021. (166; App.129) And on March 15, 2021, a defense motion asking for reconsideration of the court's decision was also denied. (172; App.151) The court viewed Mr. Socha's motion as

one alleging the existence of a new factor, and found that the evidence submitted did in fact show that six of the penalty enhancing OWI convictions were vacated, however, the court did not "believe" that vacatur of the six convictions, post-sentencing, were 'new factors' warranting relief via a 'resentencing.' (166:1, 5-6; App.129, 133-34)

The Decision and Order advanced multiple grounds for denying Mr. Socha relief. With respect to the four vacated Ohio convictions, the court accepted that they "were vacated in 2020 and dismissed." (Id. at 5, and 133) But held that because the same four vacated convictions were on Mr. Socha's record when sentenced in 2005, and at his re-confinement hearing in 2009, his "sentence was appropriate and based on accurate information." The court reasoned, "it is hard to say that the four Ohio convictions were highly relevant to his sentence in this case." (Id. at 6, and 134)

Judge Malloy also found, that the four Ohio OWI convictions were vacated for "unexplained reasons" some twenty five years after the fact, and Mr. Socha was burdened with showing the court exactly why. (Id. at 7, and 135) Furthermore, the court took the position that because Mr. Socha admitted the vacated OWI convictions, and they were of record at his 2005 sentencing and his 2009 re-confinement hearing, a 'new factor' had not been established. (Id. at 7-8, and 135-36) The court went on to apply Laches when stating, Mr. Socha should have brought these claims "much earlier when the records were fresh." (Id. at 8, and 136)

Vacatur removes the fact of conviction. See *State v. Lamar*, 2011 WI 50, ¶¶39-40 & n.10, 334 Wis.2d 536. (stating that when a judgment has been vacated, "the matter stands precisely as if there had been no judgment," and that vacating a judgment renders it "nullified and no longer in effect."). A court is not permitted to accept a conviction as vacated, and then challenge its validity and apply contingencies.

Other than providing the certified Order from the Ohio court as evidence of the four vacated OWI convictions, no Wisconsin or Federal law compelled Mr. Socha to produce the reasoning behind why the foreign court vacated its own convictions, even if 25 plus years after the fact. The Fauntleroy Doctrine mandates that a judgment of a state court shall have full faith and credit in "every other court in the United States." *Fauntleroy v. Lum*, 210 U.S. 230, 236 (1908). Wisconsin courts are mandated to recognize Ohio's vacating judgment as valid and binding.

Though not required to, Mr. Socha did submit a copy of the pleading his attorney filed in Ohio which explains in detail why the court there vacated its convictions. In spite of that, Judge Malloy's Decision and Order states: "the paucity of evidence" did not show why the convictions in Ohio were vacated. (Id. at 8, and 136) The court's statement here is simply not factual, as the pleading necessitating the Ohio vacations was literally at its hands (166:13-19); and, was acknowledged to be in the record. (Id. at 4, and 132)

The postconviction court also erred in conflating Mr. Socha's original sentencing in 2005 with his re-confinement hearing in 2009; and when invoking Laches, stating, Mr. Socha's arguments were not timely and records are stale. Neither of the court's aforementioned positions are allowed under Wis. Stat. § 973.13 review:

> Claims for § 973.13, STATS., review, unlike a claim for infective assistance of counsel, for example, are reviewed by simply examining the record as it appeared before the sentencing court—the deteriorating effect of time on memory and evidence is simply not a concern in these cases. Because a prisoner has nothing to gain by delaying a claim for § 973.13 relief, we seriously doubt the need or any rule to discourage prisoners from "strategically waiting" years to ask for relief from a sentence imposed in excess of the maximum term authorized.

State v. Flowers, 221 Wis.2d 20, 29-30 (1998).

Flowers arguably set the standard for Wis. Stat. § 973.13 review, and though it is cited in both Mr. Socha's chief and reconsideration motions, the court did not acknowledge it. Nonetheless, only the 2005 sentencing record is germane here; and Laches cannot exist.

In regards to the two Wisconsin OWI convictions vacated in 2010, this Court and the State have previously recognized them as vacated in Appeal No. 2013AP281-CR, p.10-11, therefore, Law of the Case applies; and the postconviction court has acknowledged them as 'dismissed.' (Id. at 5-10, and 133-38) However, the court attaches conditions again, as with the four vacated Ohio convictions, and takes the position, without citing legal authority, that because Mr. Socha did not submit a current copy of his driving abstract or other evidence to "clear up any doubt" that the same vacated violations were not later criminally prosecuted, "Socha has not met his burden of proof to show the [municipal] citations are new factors. As a result, this Court will not find the dismissal of those citations, is a basis for a sentence modification." (Id. at 6-7, and 134-35)

The court's aforementioned stance is not supported by, and is contrary to Wisconsin law. Even if Mr. Socha's vacated civil violations were subsequently prosecuted and criminal convictions resulted, they would have occurred after sentencing in this case, and therefore, could not apply. It is the State, at all times, who carries the burden to substantiate the existence of prior OWI convictions, and it must be done before the original sentence is imposed. *See State v. Wideman*, 206 Wis.2d 91, 95 (1996) (relying on *State v. McAllister*, 107 Wis.2d 532, 539 (1982)). Moreover, the State does not get a second kick at the can, postconviction, to prove up prior OWI offenses. See *State v. Koeppen*, 195 Wis.2d 117, 126-27 (1995).

Judge Malloy's Decision and Order states, that he "carefully reviewed Socha's filings." (Id. at 4, and 132) And that the record shows that Mr. Socha had been "communicating" with the DOT. (Id. at 7, and 135) The Judge then stated that the "information [Socha] filed shows that" his attempts to have the vacated OWIs removed from his record were not acted on by the DOT. (172:2, App.152) Judge Malloy's statements here are in direct conflict with the established record.

Included with Mr. Socha's filings, which the court had "carefully reviewed," are two emails between DOT representatives and himself, which confirm that all six of the vacated OWI convictions were either removed from his drivers record, and/or do not appear. (158:16-17, 20; App.121-22, 125) One of the emails demonstrates that the DOT did in fact confirm that the two vacated civil OWI violations were never subsequently reported to them as convictions from another court, when replying: "The violations you listed below are not on your driving record." (Id. at 16, and 121) Accordingly, when the DOT responded that no OWI violations with the specified dates appear on Mr. Socha's record, it unambiguously confirms that subsequent criminal convictions for the same vacated civil violations do not exist.

Mr. Socha filed court Orders, Certifications, and other evidence, which affirm that the two civil OWI convictions were 'vacated' and reported to the DOT 'in error,' and he was at no time lawfully compelled to show that subsequent criminal convictions for the same vacated violations did not occur, although he did, as a courtesy to the court. The two civil Wisconsin OWI convictions have already been recognized as vacated by this Court and the State, and are required by law to be so by all courts, it is not discretionary

C. The Milwaukee County Circuit Court OWI offense alleged in the State's 2nd Amended Criminal Complaint did not actually exist when Mr. Socha was sentenced on this case in Ozaukee County, and was therefore not eligible to enhance his sentence.

In Wisconsin, the specifics of how and when to count prior OWI convictions intended to increase the penalty an OWI offender faces under Wis. Stat. §§ 346.65(2) and 343.307 has been well settled law since the early 1980's, when the Supreme Court decided *State v. Banks*, 105 Wis.2d 32, 44-50 (1981). This Court relied on *Banks* in *State v. Skibinski:*

> *Banks* emphasises that *there must be a conviction* before the graduated penalties can be used. A conviction under WIS. STAT. § 343.307 must meet the requirements of WIS. STAT. § 972.13(3). In order to be a valid judgment of conviction, a sentence must have been imposed. Therefore, under *Banks*, before a judgment of conviction can properly be used to justify an OWI penalty enhancer, the offender must have been sentenced.

Skibinski, 2001 WI App 109, ¶10 (2001) (emphasis original; citation omitted).

This Court further entrenched the soundness of its interpretation of *Banks* found in the *Skibinski* opinion, when a few years later it held in *State v. Matke:*

> We expressly relied on the supreme court's analysis in *Banks* to conclude that a past OMVWI offense cannot be used to enhance the penalty for a later conviction unless there has been a conviction for the prior offense. We then explained that a conviction does not occur until a sentence is imposed.

Matke, 2005 WI App 4, ¶12 (2004) (relying on *Skibinski*, supra).

The crux of the confusion surrounding the factual basis of this issue stems directly from the State's 2nd amended criminal complaint, which was specifically amended to include a Milwaukee County OWI offense which did not actually exist, number 10 above. (7:2; App.101)

On May 17, 2005, defense counsel notified the trial court that Mr. Socha wished to enter a plea and be sentenced that day. Counsel further informed the court that he had filed for its consideration, a recent copy of the Presentence Investigation Report (PSI), intended for an OWI case Mr. Socha had pending in the Milwaukee County Circuit Court, and that the case had not been sentenced. (195:5-6, App.154-55)

The State, upon hearing that the Milwaukee County OWI case had not been finalized, requested that the trial court only accept entry of Mr. Socha's plea on that date, and for sentencing to take place at a later time, so the Ozaukee County OWI case could be run consecutive to an anticipated sentence in Milwaukee County, to wit:

> I had indicated that this would have to occur after the Milwaukee sentencing, I assumed the Milwaukee sentencing had already occurred. So I would just ask then if we take the pleas today that he set it over [sic] after the Milwaukee sentencing.
> ...
>
> I had just anticipated that Milwaukee sentencing would go in first because the tenth would make more sense in terms of the time line order....

(Id. at 5-7, and 154-56)

The prosecutor's backpedaling above infers her awareness that a conviction for OWI in the Milwaukee County case did not actually exist, when asking the court to only accept Mr. Socha's pleas that day, and to sentence him at a later time. The State's attempt to delay sentencing in this case until after one anticipated in Milwaukee County, was inapposite to *Banks* interpretation of the legislature's goals in distinguishing the penalty structure of Wis. Stat. § 346.65(2), from that of the general repeater statute § 973.12. Id. at 45.

The *Banks* court analyzed the OWI penalty statute, and noted that the provisions of Wis. Stat. § 346.65(2) require criminal penalties be imposed if there is more than one OWI conviction at the time of sentencing, regardless of the order in which the convictions were entered. Id. at 47. The court further stated it would be contrary to the legislative intent of removing drunk-drivers from the highways, if convictions had to be entered in order of offense, and recognized that a contrary holding would "serve the interests of habitual drunken drivers to delay the trial of an offense through the filing of timely substitution of judge motions, and through controlled adjournments, etc. Such a result would clearly frustrate the obvious legislative intent." Id. at 49.

Banks reasoned that when an OWI offender had more than one case pending simultaneously, the legislature did not want the offender maneuvering via adjournments to gain advantage, and therefore found, that one court was not mandated to wait for an offense prior-in-time to be resolved in another court before it could proceed.

In the instant case, it was the State, not Mr. Socha, that tried to manipulate the outcome and delay proceedings when seeking to adjourn sentencing so the Milwaukee case would "go in first"—which was inverse to—and flew directly in the face of *Banks* and the legislature's objectives that OWI cases be timely resolved. The State essentially sought the benefit of an accepted plea, but with sentencing at a time of only its convenience, so that its tracks would be covered in terms of the nonexistent Milwaukee County OWI offense, which should not have been in it's 2nd amended complaint. Criminal complaints are not meant to be speculative, and most certainly cannot be predicting future OWI convictions, as attempted by the State here.

The trial court ultimately decided that no procedural bar prohibited it from proceeding to dispose of the case that day, ahead of a final disposition in the Milwaukee County case, and overruled the State's argument for plea and sentencing on separate dates, all of which is consistent with *Banks*, supra. The State was advised that it could notify the District Attorney's office and court in Milwaukee County, that the PSI was no longer accurate in terms of the amount of prior convictions. (195:5-8; App.154-57)

The motion Mr. Socha presented to the postconviction court cited *Matke*, and argued that because there was not a sentence and conviction in the Milwaukee County OWI case when he was sentenced on this case in 2005, it was at no time eligible for sentencing consideration in this

case. (158:2, 6-7; App.107, 111-12) *Banks* was also cited wherein that court opined that OWI convictions need not occur in sequential order of offense. (Id. at 2, and 112)

In the opening of Judge Malloy's Decision and Order, he acknowledged that the sentencing court was fully aware that a plea had been entered in the Milwaukee County OWI case and that a sentence had not been imposed prior to sentencing in this case, and that over objection of the State, the trial court proceeded to dispose of the case that day. (166:2-3; App.130-31) In the second to last paragraph of the postconviction court's decision, it addressed the validity of the pending Milwaukee County OWI offense in a seemingly short-shrift:

> Socha argues that [the sentencing court] erred in sentencing him before his sentencing in his pending Milwaukee County case. I find that if there is any error on [the sentencing court's] part, Socha invited it.
> ...
>
> Regardless of the reason why Socha wanted to proceed in that order, I believe in doing so he waived his right to argue that point now. I also find that the [sentencing court's] acquiescence in Socha's request for sentencing in Ozaukee county was harmless.

(Id. at 9, and 137)

There is no dispute that Mr. Socha did request to be sentenced in Ozaukee County knowing that he had a pending OWI case in Milwaukee County. However, at no juncture does the record reflect that he argued prejudice by being sentenced in Ozaukee County while another OWI case was pending in Milwaukee County.

Instead, Mr. Socha has strictly argued, that when he was sentenced in Ozaukee County, the unsentenced Milwaukee County OWI was not a conviction, and therefore could not be used to enhance his sentence in this case. (158:2, 6-7; App.107, 111-12) And, if it was, that would be the point of harmful prejudicial error. (169:4-8; App.142-46) There is a distinction here with a difference, other than what the postconviction court portrayed in its decision. Moreover, Mr. Socha could not possibly "invite" the sentencing court to use a prior conviction against him, which did not actually exist; as set forth by Judge Malloy. (Id.)

Because only four prior OWI convictions were needed to sustain the State's felony charge, the record is ambiguous as to if the trial court actually relied on the pending Milwaukee County OWI offense when imposing sentence. The trial court was aware that the Milwaukee County OWI case was not-final; should have known it was ineligible for enhancement purposes; and plainly used the word "if" when referring to it, which demonstrates uncertainty of its eligibility existed:

> [Y]ou find yourself in a state where you've commited this offense nearest I can figure out thee times ***if*** you consider that conviction in Milwaukee...

(195:20-21) (emphasis added).

Other than the PSI, the record is absent documentary evidence such as DOT records or other competent proof of each prior OWI conviction alleged by the State and considered by the trial court. The PSI does not show a conviction for an OWI in Milwaukee County as alleged in the State's complaint, with the same dates as number 10 above (12); and the JOC is of no help deciphering precisely what number offense Mr. Socha was convicted of, as it simply says OWI-5th+. (118; App.104)

When the postconviction court was presented with Mr. Socha's motion claiming an excessive sentence, it was at that time tasked with, *inter alia,* reviewing his argument that the Milwaukee County OWI offense alleged in the State's criminal complaint was not a conviction and considerable for sentence enhancement. The court should have examined and compared the particulars of the case, claim, and evidence, with applicable law such as *Banks* and *Matke,* but did not. An analysis under Wis. Stat. § 973.13 was never performed by the reviewing court to determine precisely what alleged prior OWIs were or were not legitimately reliable. These questions were left unanswered by the postconviction court, and are now placed before this Court on *de novo* review.

The postconviction court's immediate role was not to determine if the trial court relied on the State's fictitious Milwaukee County OWI offense at sentencing, *per se;* but was instead to remedy and ensure that it was not now considered under Wis. Stat. § 973.13 review, as it is not legally eligible to enhance Mr. Socha's sentence. All of the postconviction court's decisions, and the State's responses, conspicuously fail to reference—*Banks; Matke;* Wis. Stat. § 973.13; or the word commutation, in any form.

The record shows Judge Malloy acknowledged that six of the ten prior OWI convictions alleged by the State were shown to be vacated, post-sentencing—that is factual. The record further supports that he paid scant attention to the the pending Milwaukee County OWI offense's illegitimacy, and did not make a manifest decision on its validity for use as a penalty enhancer—that is also factual.

Judge Malloy seemingly recognized that by avoiding and not negating the pending Milwaukee County OWI offense, it remained the linchpin between being able to consider Mr.

Socha's motion as one seeking sentence modification, where it could be denied for a host of reasons—or; one seeking relief from an excessive sentence under Wis. Stat. § 973.13, where past behavioral conduct cannot be a determining factor, and the court would be compelled to commute, as there are not enough prior convictions to support a felony OWI-fifth or subsequent offense sentence. The court chose the former which was illegal, because commutation here is not discretionary.

The State has also dodged this issue, and did not contest Mr. Socha's challenge to the Milwaukee County OWI offense which did not actually exist. Its response brief "denotes" the six vacated convictions—and ignores the explicit challenge to the nonexistent one. (160; App.126) The State's inability to recognize this argument can only be seen as deliberate avoidance, so it can continue to contend Mr. Socha "was still properly convicted of OWI 5th or subsequent." (Id. at 2, and 127)

The State's role is to represent the commonwealth and to only seek lawful justice. A part of that responsibility entails assuring that no offender suffers from excessive penalties; and where an injustice is found, it is the State's sworn duty to correct it. See *O'Neil v. State*, 189 Wis. 259 (1926). Here, the State is aware that its alleged Milwaukee County conviction is compromised and invalid—and with the six vacated convictions—results in Mr. Socha being erroneously sentenced as a felon. However, rather than logically conceding error, it flagrantly argues to maintain the void sentence by pretending the issue has not been raised, directly contradicting ***O'Neil.***

The bottom line is, the Milwaukee County OWI offense illegally recorded in the State's 2nd amended criminal complaint should not have been there, and cannot under any circumstance be considered a prior conviction under *Banks* and *Matke*. Therefore, it is not reliable to enhance the penalty in this case, either then or now. When combined with the other six vacated OWI convictions, Mr. Socha's sentence is manifestly void and and excessive, and he is entitled to sentence commutation relief under Wis. Stat. § 973.13, consistent with penalties applicable to a misdemeanor OWI-4th offense.

D. The postconviction court erred when it misconstrued Mr. Socha's motion as cognizable under new factor analysis, when it should have been recognized as seeking relief from an excessive sentence under Wis. Stat. § 973.13.

Wisconsin law requires that enhanced criminal penalties be based on prior convictions which actually exist. When a sentence is excessive, claims for relief are governed by Wis. Stat. Sec. 973.13, and are to be strictly construed:

> Excessive sentence, errors cured. ***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 (emphasis added).

The motion submitted by Mr. Socha postconviction was denominated as a 'Motion for Sentence Modification (New Factor),' and did argue that vacated OWI convictions considered for sentence enhancement were new factors highly relevant to his imposed sentence, which were unknown to the trial judge at his original sentencing. See *Rosado v. State*, 70 Wis.2d 280, 288 (1975).

Mr. Socha maintains to date that new factors do exist, and that the words modification and commutation were sometimes entwined in his motion, however, a new factor need not be found here to grant relief, as he nevertheless sought the correct remedy; that "Sec. 973.13 Stats. mandate that his sentence be commuted without further proceedings to the maximum penalty permitted by statute for the underlying offense." (158:5; App.110)

In fact, when the postconviction court issued its Decision and Order, and Mr. Socha discovered that it had not performed an analysis of his excessive sentence claim under Wis. Stat. § 973.13, he immediately found it imperative that a reconsideration motion be filed which made clear from the onset, that his denied motion "was brought pursuant to sec. § 973.13 Wis. Stats.," and that "the court visibly did not follow guidelines germane to a motion presented under § 973.13, as established by *State v. Flowers.*" (169:1; App.139)

The postconviction court denied said reconsideration motion, writing: "Socha fails to established [sic] either a manifest error or new evidence." (172:2, App.152) The reconsideration motion submitted, specifically drew the court's attention to the fact that Mr. Socha was arguing an excessive sentence under Wis. Stat. § 973.13, and that in addition to the court not performing the proper analysis, it failed to even acknowledge his claim. At no point does Judge Malloy in either of his decisions mention Wis. Stat. § 973.13, or that an excessive sentence claim was before him.

Although Mr. Socha titled his motion as one seeking new factor sentence modification, the postconviction court was required to exercise a liberal standard in judging the sufficiency of his *pro se* complaint filed by an unlettered and indigent prisoner. A court presented with a prisoners *pro se* document seeking relief must look to the facts stated in the document to determine whether the petitioner may be entitled to any relief if the facts alleged are proved. Neither a trial nor appellate court should deny a prisoners pleading based on its label rather than on its allegations. See ***bin-Rilla v. Israel,*** 113 Wis.2d 514 (1983).

Mr. Socha's motion unequivocally sought Wis. Stat. § 973.13 relief, and if misconstrued by the court originally, it should have been reevaluated upon receipt of the subsequently filed reconsideration motion, advising the court it did not perform an analysis of an excessive sentence claim under the applicable statute.

E. Postconviction law to be applied when prior convictions used to increase the penalty for an underlying offense are found to not actually exist after a sentence is imposed.

In a 2001 sec. 346 motor vehicle case concerning a Habitual Traffic Offender (HTO) who had that status rescinded, the Wisconsin Supreme Court found that because the HTO status was no longer in effect, it could not be used to increase penalties, and because it was, the sentence was in excess of that authorized by law and invalid under Wis. Stat. § 973.13. See *State v. Hanson*, 2001 WI 70, 244 Wis.2d 405, ¶47 (2001).

This Court concluded in *State v. Flowers*, that "given the significant liberty interest at stake and the demand that enhanced penalties be based upon prior convictions which actually exist, ***all*** sentences imposed in excess of their maximum term are void. And the legislature's decision to use the quantifier "any" in the opening clause "in any case" forcefully states that there are no exceptions to this rule." (emphasis original) Id. at 221 Wis.2d 20, 29 (1998).

A few years later, the Wisconsin Supreme Court in *State v. Hahn*, was presented with the question of whether a defendant had a constitutionally protected right to simultaneously collaterally attack the validity of a prior conviction intended for sentence enhancement, on grounds other than the constitutional right to counsel, during an enhanced sentencing proceeding.

The *Hahn* court opined that such a challenge was not constitutionally guaranteed, however, concluded that considerations of judicial administration favored a bright-line rule that ***applies to all cases.*** The new rule held that a trial court cannot entertain collateral challenges to prior convictions themselves intended for penalty enhancement, at the enhanced sentencing itself, unless it invokes the constitutional right to counsel;

> 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.

Hahn, 2000 WI 118, 238 Wis.2d 889, ¶28 (footnote omitted).

This appeal presents a matter of first impression in Wisconsin, because, although *Hahn* promulgated "a bright-line rule that applies to all cases," analogous to Wis. Stat. § 973.13's "[i]n any case," and encourages defendants, where applicable, to attack penalty enhancing convictions in their original forums—there is no subsequently published Wisconsin case from which to extrapolate the mechanism an offender must engage to procure relief from an excessively enhanced sentence, after successfully achieving post-sentencing vacatur of some or all of the prior convictions relied on to escalate his penalties.

Multiple other jurisdictions have addressed postconviction vacatur of penalty enhancing convictions, and their effect on the legality of a sentence imposed which was founded on them. The Supreme Court of Hawai'i resolved the question in their state, of whether a defendant is entitled to relief when prior convictions used to support enhanced penalties are vacated and/or are found to not actually exist, post-sentencing. The Hawaiian court cited Wisconsin's *Hahn* opinion in its decision; along with *Custis v. United States*, 511 U.S. 45 (1994), which was *Hahn*'s primary case relied on when forming its opinion:

> A defendant is entitled...to move for correction of an enhanced sentence once the defendant has successfully attacked a prior conviction on which the sentence was based in whole or in part because that conviction no longer constitutes a proper basis for increased punishment for a subsequent offense.

State of Hawai'i v. Kido, 109 Hawai'i 458, 467 (1996).

Other relevant state court examples include, *Garcia v. Superior Court*, 14 Cal.4th 953 (1997) (stating that, after successfully attacking a prior conviction, a defendant "may obtain a reduction of a sentence that was imposed on the basis of that prior invalid conviction") (citation omitted); *State v. Prince*, 781 S.W.2d 846, 851 (Tenn.1989) (holding that once a prior conviction has been invalidated in the proper forum, the defendant, "then exposes the enhanced sentence on the subsequent conviction to...attack as well") (citation omitted).

In *Lee v. State of Florida*, the defendant pled no contest to a charge which classified him as a habitual offender despite the fact that his prior record failed to support his enhanced sentenced. The Florida court of appeals, held:

> [I]f a defendant who has been sentenced as a habitual offender can prove that his prior offenses do not qualify him as a habitual offender, he will have established that his sentence is illegal... A defendant cannot authorize the trial court to impose an illegal sentence.

Lee, 731 So.2d 71, 73, 24 Fla. Law W.D. 917 (1999).

Federal courts have not been silent on the effect a vacated conviction has on an enhanced sentence. The 11th circuit found in *United States v. Walker,* 198 F.3d 811 (11th Cir.1999):

> Since Custis was decided in 1994, seven other circuits, all of which have considered the issue, have also held, or indicated without expressly deciding, that pursuant to...habeas corpus, a [trial] court may reopen and reduce a [subsequent] sentence, once a ... defendant has ... successfully attacked a prior ... conviction, previously used in enhancing the ... sentence. We agree and follow suit.

Id. at 813-14. (citations omitted) (internal ... and brackets are original).

Federal courts have opined that to deny relief to an offender who's enhanced sentence was based on prior convictions obtained in violation of constitutional law, could itself be a constitutional violation. See *Gonzalez v. United States,* 135 F.Supp.3d 112, 126 (D.Mass.2001).

The United States Supreme Court in *Johnson v. United States,* stated:

> Our cases applying [the enhancement provision of the federal Sentencing Guidelines and the Armed Career Criminal Act, 18 U.S.C. § 924(e)] assume ... that a defendant given a sentence enhanced for a prior conviction is entitled to a reduction if the earlier conviction is vacated.

Id. 544 U.S. 295, 125 S.Ct.1571, 1577 (2005) (internal parallel citations omitted).

Wisconsin's *Hahn* court stopped short of prescribing the precise remedy available to a defendant who successfully challenges prior penalty enhancing convictions in their proper forum, post-sentencing. However, this Court has a plethora of law available from other state and Federal jurisdictions in which to find as they have, that a defendant is entitled to relief from an enhanced sentence, when it is later shown that it was based on a prior conviction proven to be set aside and/or does not actually exist.

Of importance here, is although six of Mr. Socha's convictions were not 'formally' vacated until after his sentencing in 2005, they were ordered vacated as 'void ab initio,' and/or were reported to the DOT in error, which logically concludes that they never actually existed, and is inline with the definition of 'vacatur,' supra. The vacating orders themselves were just formalities. Any argument that these convictions were lawfully valid when the sentence was imposed in this case, is simply, moot.

F. Mr. Socha was improperly sentenced as an OWI-fifth or subsequent offense felony offender, when his countable number of convictions warrants only a sentence for an OWI-forth offense misdemeanant offender.

A defendant has a constitutionally protected due process right to be sentenced upon accurate information. See *State v Johnson*, 158 Wis.2d 458, 468 (1990) (citing *United States v. Tucker*, 404 U.S. 443, 447 (1972)).

Applicable law under *Banks*, *Skibinski*, and *Matke*, hold that the State's alleged OWI offense that was pending in the Milwaukee County Circuit Court at the time of Mr. Socha's sentencing in this Ozaukee County case, number 10 above, did not actually exist, and was therefore never considerable to enhance his sentence in 2005. Additionally, Mr. Socha is entitled to relief from the six *void ab initio* OWI convictions vacated post-sentencing, which never actually existed, and cannot be considered for increased penalties. Wisconsin law holds his available remedy in the form of Wis. Stat. § 973.13's, relief from an excessive sentence.

The State charged Mr. Socha with violating Wisconsin's OWI statute, Wis. Stat. § 346.63(1)(a); and he was sentenced to the maximum term available for a Class H felony offender, six years imprisonment, pursuant to Wis. Stat. § 346.65(2)(e), the OWI penalty enhancer statute for offenders who's prior convictions total five or more:

> (e) Except as provided in pars. (f) and (g), is guilty of Class H felony and shall be fined not less than $600 and imprisoned for not less than 6 months if the number of convictions under ss. 940.09(1) and 940.25 in the person's lifetime, plus the total number suspensions, revocations and other convictions counted under s. 343.307(1), equals 5, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.

Wis. Stat. § 346.65(2)(e) (2005).

The record as evinced now finds a total of three prior OWI convictions lawfully eligible to enhance Mr. Socha's sentence; with the inclusion of the instant conviction, it raises the sum total to four. Therefore, the penalty available in this case is no longer a felony which falls under Wis. Stat. § 346.65(2)(e), rather, a misdemeanor, under § 346.65(2)(d), with maximum confinement exposure of one year in the county jail:

> (d) Except as provided in pars. (f) and (g), shall be fined not less than $600 nor more than $2,000 and imprisoned for not less than 60 days no more than one year in the county jail if the number of convictions under

> ss. 940.09(1) and 940.25 in the person's lifetime, plus the total number suspensions, revocations and other convictions counted under s. 343.307(1), equals 4, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.

Wis. Stat. § 346.65(2)(d) (2005).

The current sentence in this case is void because it exceeds the maximum penalties allowed by statute. Mr. Socha asks that it be commuted without further proceedings pursuant to this Court's authority given under Wis. Stat. § 973.13, to no more than the maximum term permitted by Wis. Stat. § 346.65(2)(d). Remand to the circuit court is not necessary. See *State v. Spaeth*, 206 Wis.2d 135, 155-156 (S.Ct.1996).

CONCLUSION

For all the reasons set forth above, the Defendant-Appellant respectfully request that this Court reverse the lower court's Orders denying relief, and commute the sentence in this case without further proceedings.

Dated this 23 day of July, 2021.

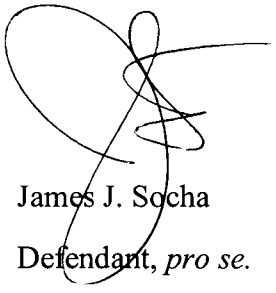
Respectfully submitted,

James J. Socha
Defendant-Appellant, pro se.
Waupun Correctional Institution
Post Office Box 351
Waupun, Wisconsin 53963-0351

CERTIFICATION AS TO FORM /LENGTH

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The total length of the brief is 6719 words. Line spacing, margin setting, and size 13 font are not available on word processor's at Waupun Correctional Institution, therefore, size 12 and 11 font was used.

Dated this 23 day of July, 2021.



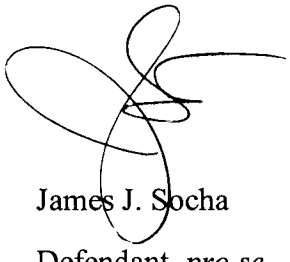
James J. Socha

Defendant, *pro se.*

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with sec, 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

Dated this 23 day of July, 2021.



James J. Socha

Defendant, *pro se.*