STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Appeal No. 2021AP1083-CR

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CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondant,

v.

JAMES J. SOCHA,

Defendant-Appellant.

ON APPEAL FROM A DECISION AND ORDER DENYING A POSTCONVICTION MOTION FOR SENTENCE MODIFICATION IN THE MILWAUKEE COUNTY CIRCUIT COURT THE HONORABLE MILTON L. CHILDS, SR., PRESIDING

REPLY BRIEF OF DEFFENDANT-APPELLANT

BY: JAMES J. SOCHA
Defendant-Appellant
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I. THE RECORD DOES NOT SHOW THAT THE STATE MET ITS BURDEN OF PROVING PRIOR CONVICTIONS.

Pursuant to Wis. Stat. § 346.65(2)(am)2, the State was required to prove that Mr. Socha had been convicted of Operating While Intoxicated (OWI) twice within a 10-year period, before the circuit court could impose enhanced criminal penalties. The State argues on appeal that it was "only required to prove that Socha had four prior convictions after January 1, 1989," and it "was not required to prove that he had a prior conviction within ten years of the conviction for which he is being sentenced." (State Resp. Br. p.15-16) The State is correct that if it had proved four prior OWI convictions actually existed, there would be no need to show two within a 10-year period under § 346.65(2)(am)2, however, the record shows it failed to prove any prior convictions, much less four.

All parties agree that the only document in the record which could potentially prove prior convictions actually occurred is the presentence report (PSI), and that it is absent conviction dates for all nine alleged. Mr. Socha cites **State v. Farr**, 119 Wis.2d 651, 658 (1984), as authority requiring a PSI to list both offense and conviction dates of <u>each</u> prior conviction alleged in order for it to be considered an official report by the court. The State and circuit court contend that **Farr** does not apply here because it dealt with Wis. Stat. §§ 973.12(1) and 939.62(2), which mandates that repeat felony convictions occur within a 5-year period of the current conviction, before it can be used to escalate penalties.

However, under Wis. Stat. § 346.65(2)(am)2, the State was obligated to prove Mr. Socha was convicted of OWI twice within a 10-year period, before the court could impose enhanced penalties. Our supreme court like this Court in **Farr**, held that "documentary corroboration <u>must</u> describe the dates of <u>each</u> prior [OWI] offense and <u>conviction</u>." **State v. Spaeth**, 206 Wis.2d 135, 152-153 (1996) (emphasis added). Even without **Farr**, **Spaeth** explicitly mandates that each prior conviction alleged by the State must have corresponding offense and conviction dates of record affixed before a court can enhance a sentence based thereupon. The PSI here does not meet the standard set, and is likewise unreliable to prove Mr. Socha has ever been convicted of OWI previously.

The State concedes, that: "[t]he conviction dates may have been important had Socha and his counsel wished to challenge any of the convictions," (State Resp. Br. p.16), but that is exactly what the appellant is doing now. This begs the question of just why the State believes that a defense challenge to the lack of conviction dates substantiating any exist would be of any less importance postconviction than at the original sentencing? When it comes to proving prior convictions, the burden rests with the State at all levels, not just at the circuit court, where it was compelled under **Spaeth** to make a record of offense and conviction dates which would sustain the test of time, and this includes postconviction challenges.

Perhaps most important, the circuit court granted Mr. Socha postconviction access to the PSI because the record supports that he had not ever had the opportunity to review its content for accuracy prior to sentencing. (55:1) In **State v. Loomis**, 2016 WI 68, it was found that there is no better person to refute, explain, or supplement a PSI, than the defendant himself. "Accordingly, until the defendant reviews the PSI, its accuracy cannot be verified." Id. at ¶49 (S.Ct. 2016)(citations omitted). Because Mr. Socha was denied pre-sentencing access to the PSI as demonstrated by the court's order and record, he did not ever confirm its accuracy as mandated by **Loomis**, and all of its import is consequently excluded as evidence.

The State is seemingly aware of the PSI's unreliability as it concedes that "it made no difference whether the presentence report was an official record under Wis. Stat. § 973.13," as it "did not rely on the PSI to prove those offenses." (State Resp. Br. p.15) It claims that if it did have to prove two convictions within 10-years, it met the burden because it is the violation and not the conviction date which is needed to make its showing. The State then conjecturally argues that since the two Illinois violations were within 10-years of the instant conviction, a court can then surmise that convictions stemming from those violations were as well. (Id. at p.16)

This is an elusive misrepresentation of the facts and law. First, nowhere does a violation (or offense) automatically equate to a conviction, and without a conviction date, a reviewing court can not just assume when or if one actually occurred. Second, Wis. Stat. § 346.65(2c) reads: "the time period shall

be measured from the dates of the refusals or violations that resulted in the convictions." Under the plain text of the statute, the Illinois violation(s) had to result in a conviction before consideration by a court. And without the State providing dates showing convictions for the violations actually occurred, it has not substantiated when or if any did under § 346.65(2)(am)2.

Because it is cognizant that the record lacks documentary evidence to prove its allegation of prior convictions, the State, without manifest support in the record, tirelessly argues in its brief that although not personally, Mr. Socha admitted to nine prior convictions via his counsel's statements at sentencing. This alleged admission consists of only a blanket reference to prior offenses and lacks specificity as to each one as required by **Spaeth**. The State takes the position that if counsel references a blanket number of prior offenses in passing, and without competent spoken or documentary proof of each one in the record for corroboration, it is still considered a sufficient admission. The State's interpretation of exactly what constitutes a competant and lawful verbal admission of a prior conviction is not consistant with applicable law.

The **Spaeth** bench unequivocally articulated what it considered to be a competent verbal admission of a prior conviction when the record is not supported by documentary evidence of each one alleged:

> [C]ompetent proof can be established through an admission by the defendant or defense counsel. A direct question from either the prosecutor or the circuit court asking whether the defendant admits to the existence of each prior conviction should resolve this issue. We urge the court to include such a question in its colloquy with the defendant at the plea hearing or sentencing.

Spaeth, supra, Id. at 155.

In **Spaeth**, the court found that because the State did not provide competent documentary evidence of priors, and the circuit court did not engage either Mr. Spaeth or his counsel in a direct colloquy specifically detailing the particulars (i.e., offense & conviction dates) of <u>each</u> prior conviction it intended for sentence enhancement, he could not be found to have admitted any.

The supreme court most certainly could not have intended for a competent spoken admission of prior convictions to be any less specific than a competent documentary one, and this is expressed in its aforesaid language. In Mr. Socha's

case, his attorney's blanket reference in passing to prior offenses (not convictions), without any particularity as to the existence of each one and no documentory record of conviction dates in support, cannot be considered a competent admission under **Spaeth**. "Without supplemental corroborating documentation, a sentencing court has no means of verifing the assertions in the complaint." Id. at 154.

In **State v. Wideman**, 206 Wis.2d 91 (1996), the complaint properly documented offense and conviction dates and the court engaged both counsel and Mr. Wideman personally while reciting the priors from the complaint and advising that prior convictions were being used to enhance sentence. The supreme court found only "marginally" that there was a valid admission by counsel. Id. at 110. Here, there is no competent proof of prior convictions in the record other than those shown to be vacated, and at no point did the State or circuit court diectly engage with the defense to obtain an admission, with "particularity," as to each prior conviction alleged. There is no record of prior convictions the court used to enhance Mr. Socha's sentence.

Where the admission of prior convictions in **Wideman** was found to be only marginally sufficient, even with offense and conviction dates in the complaint and direct engagement by the court, it certainly cannot be sufficient here with far less of a record to work with. There was no direct engagement by the court in the case at bar; the PSI is deficient and ineligible as evidence; the complaint does not list offense and conviction dates; and there is no other documentary evidence corroborating prior convictions actually exist. Therefore, a competent admission with uttered specificity, and/or one supported by competent documentary evidence as required by both **Wideman** and **Spaeth**, is not found in this record.

The circuit court found that it is not required to engage with the defense to make a record of prior convictions, that "the parties stipulated to the accuracy of the PSI, and defense counsel admitted to nine prior OWI convictions, there was no need for the court to make such findings prior to imposing sentence for a tenth offense."[1] (72:6, n.5) This is a mistake of law.

The record by law is required to show offense and conviction dates for each prior conviction the court relied on to enhance sentence, whether spoken or documentary. The record here does not. Contrary to the circuit court's order, defense counsel did not ever stipulate to the accuracy of the PSI. The senten-

cing court merely asked if the attorney's had any corrections or changes to make to it—it is a stretch to construe that as counsel conceding to its accuracy, which is literally impossible because it has been shown as listing offense dates purportedly as conviction dates, and is inaccurate. One cannot concede to a PSIs accuracy, when it is not accurate.

It was the State who alleged the prior convictions and maintained the burden of proof, if the PSI was insufficient to prove its case, it alone was responsible with attempting to correct it. Defense counsel's responsibility rested solely with assuring Mr. Socha's right were protected, and was not to assist the State in properly pleading and proving its case. Even if the PSI was stipulated to (which it was not), it is of no consequence as under **Spaeth** it was still required to list conviction dates to prove any actually occurred; and it is inadiquate under **Loomis**, as the appellant had not seen it before sentencing.

Mr. Socha further argues that his circumstance is distiguishable from **Wideman**, where the supreme court found that counsel can admit prior convictions on behalf of a misdemeanant offender, because he was sentenced as an OWI felon and was exposed to substantially higher penalties than those discussed in **Wideman.** The State's burden of proving prior convictions and the circuit court's responsibilities prior to administering enhanced felony penalties can be no less stringent for repeat felony OWI defendants under Wis. Stat. § 346.65(2) than repeat felony defendants for other crimes under §§ 973.12(1) and 939.63(2), or else constitutional equal protection and due process considerations take center stage.[2] **Wideman's** underlying rationale of less protection for misdemeanor repeat OWI offenders can no longer logically apply years later to felony OWI offenders due to statute revisions with substantially higher penalties.

Wideman concluded "that the difference between the two statutes rests upon a rational basis. The nature of OWI offenses and the penalties under § 346.65(2) justify the legislatures imposing on the State different proof requirements than those prescribed by § 973.12(1). Large numbers of OWI offenses are prosecuted. Moreover, in contrast to § 973.12(1), the enhanced penalties under § 346.65(2) are penalties for misdemeanors, with relatively short periods of incarceration and moderate fines. The efficient administration of the

justice system militates in favor of the legislature's choice not to require the same method of establishing repeat offenses under § 346.65(2) as under § 973.12(1)." **Wideman**, supra, at 106-07.

Essentially, **Wideman** afforded repeat misdemeanor OWI offenders sentenced under Wis. Stat. § 346.65(2) less protection under the law than those with felonies sentenced under § 973.12(1), because of the lessor penalty structure and amount of cases in the courts. When general repeaters are sentenced, a court is required to engage personally with the defefendant in order to assure he is aware that his sentence is being enhanced due to prior convictions. The court must also obtain a direct and specific admission from the defendant personally, as to each prior conviction intended for enhancement, with offense and conviction dates recorded. This is not so with misdemeanor OWI defendants, where counsel can admit prior offenses on their behalf.

Wisconsin's statute 346.65(2) penalties have substantially increased since **Wideman's** antiquated 1996 decision was rendered. Fifth or subsequent OWI offenders in 2005 when Mr. Socha was sentenced no longer faced a minimal 1-year sentence as relevant in **Wideman**. Under the appellant's circumstance and the way **Wideman** is structured, he is entitled to the same protections afforded to repeat felony offenders sentenced under Wis. Stat. § 973.12(1) and § 939.62(2), because he faced felony not misdemeanor penalties. Mr. Socha was convicted of felony OWI and recieved a 6-year term of imprisonment, which is greater than what many repeat offenders sentenced under the general repeater statute receive. Therefore, any admission of prior convictions here had to be direct and specific between the court and the appellant, not his attorney. This argument was raised in Mr. Socha's brief-in-chief at p.19, n.7, but the State did not acknowledge or counter it in its brief, and has therefore conceded the issue. See Charolais Breeding Ranches Ltd. v. FPC Sec. Corp., 90 Wis.2d 97, 109 (1997)(Unrefuted arguments are deemed conceded).

Finally, both the circuit court and State claim that the PSI issue is barred by **State v. Escolana-Narajno**, 185 Wis.2d 169 (1994), and Wis. Stat. § 974.06(4). However, Mr. Socha's postconviction motion invoked Wis. Stat. § 973.13 and brings a faulty repeater claim. This Court acknowledged "that

neither the procedural bar in WIS. STAT. § 974.06 nor the public discussion contained in **Escolana-Naranjo** precludes criminal defendants from seeking relief from faulty repeater sentences under WIS. STAT. § 973.13." **State v. Mikulance**, 2006 WI APP 69, ¶14. (relying on **State v. Flowers**, 221 Wis.2d 20,22-23). Pursuant to **State v. McAllister**, 107 Wis.2d 532, the OWI penalty enhancer Mr. Socha was sentenced under is structured similar to a repeater statute. Id. at 535. Accordingly, **Mikulances'** reliance on **Flowers** applies here.

II. THE TRIAL COURT ERRED IN NOT RECOGNIZING THAT SEC. 973.13 WIS. STATS. AND STATE V. HAHN COMPEL POSTCONVICTION COMMUTATION OF THE REPEATER SENTENCE IN THIS CASE.

Mr. Socha presented pleadings in the circuit court and now on appeal which rely on Wis. Stat § 973.13; this Court's opinion in **State v. Flowers**, supra; and our supreme court's holding in **State v. Hahn**, 2000 WI 118. The aforesaid statute and cases control the outcome here, because they authoritatively sanction mandated relief from the excessive and void portion of the enhanced sentence originally imposed in this case.

The State argues on appeal that Mr. Socha is not entitled to relief under Wis. Stat. § 973.13 because the circuit court did not impose a maximum sentence or one in excess of that authorized by statute, (State Resp. Br. p.9-11), when in reality, that is unquestionably what happened. Without citing proper legal authority, the State attempts to circumvent § 973.13's strict mandate by inferring that it cannot be applied retroactively when invalid prior convictions were unknowingly used to enhance sentence, but are not presented to the circuit court for relief until after such sentence wrongly founded on them is imposed.

Wisconsin law strongly opposes the State's position in its response, and commands that all enhanced criminal penalties be based on prior convictions which are proven to actually exist. When an enhanced sentence is found to be reliant on nonexistant, unproven prior convictions which were used to escalate penalties beyond that permitted by statute, it is excessive, and claims for relief are governed by Wis. Stat. § 973.13. It simply makes no difference if the nonexistant and unproven convictions are made known to the court after the sentence founded on them was imposed.

> 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.
>
> Section 973.13, Stats.
>
> Thus, given the significant liberty interest at stake and the demand that enhanced penalties br based on 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... It would raise the specter of a defendant being incarcerated for a term (possibly years) in excess of that prescribed by law simple because he or she failed to raise the issue earlier. Such a result is in direct conflict with the explicit language of § 973.13.

Flowers, supra, at 29 (emphasis original).

Nowhere does Wis. Stat. § 973.13, **Flowers**, or any other germane law hold as contended by the State, that a defendant cannot seek postconviction relief under the statute when penalty enhancing convictions are not found to be invalid until after sentencing; nor that any infirmity in this context had to occur before a sentence was imposed. Contrarily, relevant law says the opposite when using the quantifiers "any" and "all" sentences in exccess of a statutes maximum term are void as a matter of law and subject to commutation when based on invalid prior convictions. Id.

State v. Mikulance, 2006 WI APP 69, ¶18, is cited by the State as supporting that Mr. Socha does not raise a proper claim for sentence commutation. (States Resp. Br. p.9) "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." Id. (citations omitted).

Mikulance as cited above favors Mr. Socha over the State. The former wording cited does not preclude this challenge because the State could not have possibly obtained a valid, competent admission of prior convictions proven to not exist. And, under the latter wording above, Wis. Stat. § 973.13 is a proper claim and remedy here because "the penalty given is longer than permitted by law for a repeater." The appellant was sentenced under the wrong statute with higher maximum penalties than those he was truly exposed to.

The State claims that it did not fail to prove prior convictions and it does not matter if they actually exist or not because the information was not known to the circuit court at sentencing. It further claims that its burden of proof as to prior convictions was satisfied through a defense counsel admission thereof. However, as shown earlier, it has not ever proven its alleged prior convictions and fails to point to where in the record an admission was done with "particularity" as to each one as required by **Spaeth**—nor where documentory evidence of same lies in the established sentencing record to support a competent admission. The State pushes away the fact that six of its nine priors alleged were vacated void ab initio,[3] and three others it was seemingly relying on from the deficient PSI were not ever lawfully admitted or substantiated to exist. These were all prior convictions wrongly used to enhance sentence.

The claim by the State that **State v. Finley**, 2016 WI 63, ¶74, mandates that relief under Wis. Stat. § 973.13 applies only when a court "imposes a maximum penalty," is offered out of context and is easily refuted. First, **Finley** as quoted by the State speaks of the "sentence initially imposed." (State's Resp. Br. p.9) The sentence initially imposed in this case was a 6-year term of imprisonment, which is the maximum Mr. Socha could recieve. It does not matter that the circuit court initially imposed an illegal sentence and it was commuted over 9-years later by one less year. What is of consequence, is that due to his showing after sentencing that invalid, nonexistant, and unproven prior convictions were wrongly used against him, Mr. Socha was therefore sentenced under a statute with higher maximum penalties than he is rightfully exposed to. As a result of being sentenced under an improper statute, "the court impose[d] a maximum penalty in excess of that authorized by law," because a felony sentence with higher maximum penalties cannot apply here.

Second, in contending that Wis. Stat. § 973.13 is inapplicable, the State at the circuit court and on appeal argues that resentencing and not commutation is the cure, as "the circuit court could not simply modify the sentence for a fifth offense—a felony—to make it appropriate for a first offense—a civil forfieture." (State Resp. Br. p.18) However, the State ignores Mr. Socha's cite of our supreme court's holding in **State v. Hanson** which is tantamount to this situation in finding that criminal penalties for motor vehicle

offenses can indeed be commuted to a civil forfieture, and a resentencing is not appropriate when a postconviction showing of invalid prior convictions is found to exist, and the defendant was sentenced under the wrong statute.

In **Hanson**, 2001 WI 70, the defendant was subject to criminal penalties after entering a plea and admitting up to five prior section 343 motor vehicle convictions for the same offense. The trial court sentenced Mr. Hanson as an Habitual Traffic Offender (HTO) and imposed enhanced criminal penalties. On appeal, our supreme court concluded that dispite Mr. Hanson's admission to prior convictions and HTO status, the record did no support enhanced penalties and found that his sentence was "in excess of that authorized by law and invalid under Wis. Stat. § 973.13." Id. at 2. This defeats the State's assertion that a criminal sentence cannot be commuted to a civil forfieture.

At the circuit court and on appeal the State also argues that a resentencing as oppposed to commutation and sentence modification is the remedy. Its pleadings go as far as conceding that the inaccurate information in the PSI is a new factor; that the court relied on an inaccurate number of alleged prior convictions at sentencing; and that the circuit court's reliance on inaccurate information was harmful to the appellant, all in an attempt to argue that a resentencing is the appropriate cure. (66:3-4; State's Resp. Br. p.18)

Though it changes its tune somewhat on appeal, the State's concessions and arguments for resentencing are nothing more than a furtive attempt to get a second bite at the apple in terms of providing evidence to uphold Mr. Socha's sentence, because it did not and could not do it at the original sentencing. The State's ship to prove prior convictions has sailed long ago however, as the circuit court found in its order that the State was illegally attempting to prove prior convictions "more than fifteen years after sentencing;" and that resentencing as a "remedy is not warranted in this case." (79:9-10)

Resentencing in this case could only be appropriately considered after Mr. Socha's sentence is commuted to the maximum permitted by law pursuant to the correct subsection of Wis. Stat. § 346.65(2) in which he is pertinently exposed to. (See **State v. Holloway**, 202 Wis.2d 694 (1996), wherein this Court concluded that resentencing may be appropriate in some instances, but only after the original sentence is commuted under § 973.13, to "within that permitted by

law." Id. at 701. See also, **State v. LeBlanc**, 2021 WI App 63 (unpublished), where this Court agreed with the State's argument based on **Holloway**, "that where an excessive sentence is imposed, the court has no discretion but to commute the sentence to the maximum penalty "authorized by law"' under § 973.13; and that resentencing afterward is optional. Id. at ¶12.) Mr. Socha's sentence as initially imposed was: 1) the maximum permitted for a Class H felony, and 2) in excess of that permitted by law, because due to vacated, invalid, nonexistant, and unproven prior convictions, he was sentenced under the wrong statute.

Should the Court decide that Wis Stat. § 973.13 alone does not provide Mr. Socha access to relief from the portion of his sentence that is founded on prior convictions which do not actually exist; he submits that the Wisconsin supreme court's opinion in **State v. Hahn**, 2000 WI 118, and other state and federal authorities, in tandem with Wis. Stat. § 973.13, most certainly do provide the mechanism for relief from his illegal sentence.

Though **Hahn's** applicability was presented by the appellant in the trial court and it found that it does not apply, the State made reference to it in only a short—shrift in its brief, simply claiming that **Hahn** is not relevant here because Mr. Socha "is not entitled to commutation of his sentence or sentence modification." (State's Resp. Br. p.18-19) The State is clearly reluctant to now address **Hahn** although it is central to this appeal. It make absolutely no attempt to argue against its compelling weight which is telling, as it is presumably aware of **Hahn's** significance not only here, but to all defendants state wide who successfully attack prior convictions used to increase their sentence, after it is imposed. The State is required to only seek lawful justice, to include penalties. Here, it acts with contempt when not acknowledging the import of **Hahn's** bright-line rule and its force in this case, in an apparent attempt to deprive Mr. Socha relief from the excessive sentence imposed.

Hahn's bench created a "bright-line rule that applies to all cases." Id. at ¶28;

> [T]he offender may use whatever means available under state law to challange 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.

Several months later our supreme court decided State v. Peters, 2001 WI 74, and pronounced the following when referring to Hahn's above passage:

> That is, a defendant may directly rather than collaterally challenge a prior conviction used to enhance a subsequent sentence, and if successful, apply to the court to have his sentence adjusted.

Id.

The supreme court's language is unambiguous and its wording plain. If Mr. Socha desired to challenge a prior conviction relied on to increase his penalties in a subsequent prosecution on any ground other than the denial of the right to a lawyer in the previous proceedings, he could pursue such a challenge under any remedy available by law in a forum other than that of the current prosecution where the State seeks to use the alleged prior conviction to obtain an enhanced sentence. When successful, he has the right to petition the trial court for sentence commutation.

The appellant did exactly as instructed by our supreme court. His counsel in Wisconsin and Ohio directly attacked six prior convictions successfully, that were used to enhance his sentence in this case, in their original forums using whatever lawful means available by law. He then applied to have his sentence adjusted under Hahn and Wis. Stat. § 973.13, by showing that the six convictions where vacated and removed from his drivers record; and that the State did not prove additional OWI convictions it alleged. The circuit court denied relief.

If Wis. Stat. § 973.13 is not a stand alone postconviction mechanism, and the compelled procedural cure here, it certainly should be in conjunction with Hahn. Hahn would then be the vehicle to get back into the circuit court after successfully having one or more prior convictions vacated that were wrongly relied on to increase penalties. The next logical progression would be for the court to determine precisely how many penalty enhancing prior convictions in the established record actually exist as proven by the State, and if found to not be enough to sustain the current sentence, it should be found in excess of that prescribed by statute as a matter of law, the excess portion declared void, and commutation pursuant to § 973.13 to the maximum term available by law implemented.

The State's contention that only a resentencing is appropriate is visably not consistant with Hahn, and Peters where the supreme court specifically said above: "if successful, apply to the court to have the sentence adjusted." The

supreme court did not use langauge commanding the circuit court to resentence a defendant when prior convictions are successfully attacked postconviction. Instead, the court directed that the sentence be "adjusted." Adjustment of a sentence is in-line with Wis. Stat. § 973.13's, relief from an excessive sentence.

It has been twenty plus years since **Hahn** and **Peters** were decided, and there is to date no subsequent Wisconsin case law, published or not, which discusses exactly what avenue a defendant must take and how a trial court is mandated to proceed when a defendant such as Mr. Socha applies to have his sentence adjusted after successful vacatur of a penalty enhancing conviction that deems his sentence excessive by statute.

Many other state and federal jurisdictions have decided this issue as cited by the appellant previously, but Wisconsin has not and needs to so all parties are well informed of how to proceed now and in the future. This is why Mr. Socha believes this is a matter of first impression in this state and requires publication so there is clarity in the law.

Moreover, the State would have been wise to stipulate to sentence commutation here as he arguably could move for plea withdrawal. The supreme court's decision in **State v. Chamblis**, 2015 WI WI 53, an OWI case found:

> The bottom line is that a plea made in ignorance of its direct consequences is not knowing, intelligent, and voluntary. In such situations, the plea "has been obtained in violation of due process and is therefore void."

Id. at ¶27 (citation omitted).

The assistant attorney general in this case whom also represented the State in **Chamblis**, argued that: "any problem that result[s] from counting convictions after entry of a plea could easily be remedied by a motion to withdraw the plea." Id. at n.12. Consequently, if commutation is not the remedy here, plea withdrawal is, not resentencing as claimed by the State.

"The adequacy of a criminal complaint is restricted by due process and by art. I, sec. 7 of the Wisconsin Constitution and by the Sixth amendment to the United States Constitution which guarantees to an accused the right to be informed of the 'nature and cause of the accusation.'" **State v. Mudgett**, 99 Wis. 2d 525, 532 (1980). The prosecutor has the duty and not the discretion to inform the court and defendant of the specific charge and resultant penalties. Id. at n.2.

The State's complaint alleged that Mr. Socha had nine prior OWI convictions and was subject to Class H felony penalties consisting of fines and imprisonment of six months to six years. (2:1) Because postconviction evidence presented in the circuit court demonstrates that the State did not prove the nine priors alleged actually exist and six have been vacated, the complaint was deficient in advising the appellant of the correct statutory minimum and maximum penalties applicable, and his plea is consequently subject to withdrawl.

Mr. Socha to date has not sought plea withdrawl nor does he wish to avoid all consequences of his OWI conviction, rather, only to be relieved of the excessive portion of the sentence illegally imposed because it is founded on nine prior convictions which have either been vacated and/or were never substantiated. The available cure is found in Wis. Stat. § 973.13 which compels relief from sentences imposed in excess of that prescribed by law. The appellant believes that this case presents a matter of law that may be summarily decided in his favor based on the facts and record available to this Court, as § 973.13 is intended to be carried out "without further proceedings."

CONCLUSION

For the foregoing reasons and those covered in the Deffendant-Appellant's brief-in-chief, he respectfully moves the Court to grant the requested relief.

Dated this 14th day of June, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief meets the requirements as to form/length and does not exceed the amount of pages under Rule 809.19(8)(b)&(c).

James J. Socha

footnotes.

1. The predecessor court's in this action offer conflicting views as to the record of prior convictions in this case and how or if they were proven. Prior to entering the motion resulting in this appeal, Mr. Socha filed one seeking a "Definitive Record of Prior Convictions Used to Enhance Sentence." (56) Judge David A. Hansher found that: "the record of prior OWIs in this case is limited to the PSI. The court cannot provide the defendant with a more definitive record..." Judge Hansher reviewed the entire record at the request of the appellant and did not find as his predecessor Judge Milton L. Childs, Sr. did in the order appealed from now, that Mr. Socha's attorney had stipulated to and admitted alleged prior convictions on his behalf. (57)

2. Wisconsin statute section 939.62(2), §§ (a) thru (c), covers increased imprisonment for general repeaters other than OWI offenders. Its enhanced penalties range from less than two years up to a maximum of six. The repeat OWI sentencing statute Wis. Stat. § 346.65(2), §§ (b) thru (e) (2004-05), allows for enhanced imprisonment of not less than five days in jail nor more than six years in prison. Because of statute revisions since **Wideman** and **Spaeth**, supra, were decided, its underlying logic of lessor duties on the circuit court and State in substantiating alleged prior convictions because of § 346.65(2)'s former maximum penalties, can no longer be upheld. Fifth offense felony OWI defendants are now exposed to the equivalent maximum sentence as general repeaters under § 939.63(2). Therefore, it violates Due Process and Equal Protection rights of OWI defendants who are subject to relaxed standards over general repeaters, as to how alleged prior convictions are proven and recorded.

3. The State claims that two of the six convictions vacated here were not determined void ab initio; speculates that they were vacated because they should have been tried criminally; and that the "two Wisconsin convictions were valid" when Mr. Socha was sentenced in this case so they can still count today. (State's Resp. Br. p.13) First, the State mereley guesses as to why the Wisconsin convictions were vacated. The orders themselves do not indicate the reasoning behind vacatur, nor does anthing else in the record. The State seemingly pulls this out of thin air. Second, the supreme court has previously held that when a conviction is vacated, it places a defendant back into the position as if it never existed. **State v. Lamar**, 2011 WI 50, ¶¶39-40, n.10. Accordingly, the two Wisconsin convictions are as good as void ab initio and invalid, and were from the start of proceedings unreliable for sentencing consideration.

At the end of the State's brief it goes into a whirlwind of ungrounded and insignificant assertions of unproven prior convictions, speaks of a DOT document not present in the established sentencing record, and speculates as to why Mr. Socha may not want to be resntenced. All in an apparent attempt to muddy the waters and prejudice him. It further claims that an unsubstantiated Ozaukee County OWI offense can be counted against Mr. Socha now. (State's Resp. Br. p. 19-20) The State's above conjecture of why the appellant does not want to be resentenced, is irrelevant to this appeal as it is not the proper cure, and is pure speculation. As to the Ozaukee County OWI alleged, the circuit court did make a record of it with specificity as required and did not inform the defense that it was being used to enhance sentence. In fact, the court made no mention whatsoever to an Ozaukee OWI. Moreover, like the other priors alleged by the State, the record does not contain both offense and conviction dates for an Ozaukee conviction as mandated by **Spaeth**, supra, Id. at 152-53.

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