

SM-35 INCREASED PENALTY FOR HABITUAL CRIMINALITY — § 939.62

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Scope

This Special Material addresses issues arising in implementing Wisconsin's "repeater" statute – § 939.62. The formal title for the provision is "increased penalty for habitual criminality," but the commonly used term "repeater" is employed here. This addresses the generally applicable repeater provisions set forth in subsections (1), (2), and (3) of § 939.62.¹ Not addressed is the "persistent repeater" provision in § 939.62(2m)² or the several crime-specific repeater provisions that now exist.³

Issues arise at several stages of the criminal prosecution: when repeater status is alleged in the charging document; when a plea of guilty is accepted; when proof of repeater status is made; when the trial court makes the formal finding of repeater status; and when the repeater-enhanced sentence is imposed. There are also substantive issues concerning the timing of offenses and convictions, how the repeater statute's time periods are affected by periods of incarceration, and how the repeater statute is applied to specific statutory violations.

I. Alleging Repeater Status

A. Before Arraignment or Plea

If the State seeks to establish that a defendant is a repeat offender and thus eligible for an enhanced sentence, it must allege the defendant's prior convictions "in the complaint, indictment or information or amendments so alleging at any time before or at arraignment, and before acceptance of any plea." § 973.12(1).

The Wisconsin Supreme Court has recognized that the time of arraignment or plea acceptance is "the cut-off point after which time a defendant can no longer face exposure to repeater enhancement for the crime" charged. State v. Martin, 162 Wis.2d 883, 900, 470 N.W.2d 900 (1991). This cut-off point is strict and applies regardless of the type of plea entered by the defendant. When a repeater allegation is improperly added after the deadline, it is of no effect and must be vacated. Proof of prejudice is irrelevant. Finally, the portion of § 973.12(1) which allows for time to investigate the defendant's possible prior convictions before a plea is accepted does not extend the period for alleging repeater status beyond the time of arraignment or plea acceptance or entry. Martin, 162 Wis.2d 883, 906.

B. Amending a Repeater Allegation

A charging document may be amended after arraignment or plea acceptance to correct an error in the portion dealing with repeater status if the amendment does not prejudice the defendant. In State v. Gerard, 189 Wis.2d 505, 509, 525 N.W.2d 718 (1994), the court allowed the correction of the portion of the information which dealt with the extent of the penalty because that portion was not required by § 973.12(1) and because the amendment did not prejudice the defendant. An amendment of this type is not prohibited by § 973.12(1) because the allegation of a defendant's prior convictions will still have been made prior to arraignment and plea acceptance. Therefore, the amendment will be allowed unless there is prejudice to the defendant.

Applying Martin and Gerard, the Wisconsin Court of Appeals has held that "where the information correctly alleges a defendant's repeater status, a post-arraignment amendment to the information does not violate § 973.12 as long as it does not affect the sufficiency of the notice to the defendant concerning his or her repeater status." State v. Campbell, 201 Wis.2d 777, 785, 549 N.W.2d 501 (Ct. App. 1996).

A post-arraignment or post-plea amendment to the charging document alleging a provable prior conviction after the State failed to prove the prior conviction included in the original charging document will not be allowed. An amendment of that sort violates due process because the defendant has not been sufficiently notified of possible punishment at the time of arraignment or plea. State v. Wilks, 165 Wis.2d 102, 110, 477 Wis.2d 632 (Ct. App. 1991).

C. Dismissal and Refiling

When a repeater allegation has not been timely filed, or if there is an error in the allegation, the State may move for dismissal of the complaint without prejudice and, if the motion is granted, issue a new complaint that includes a proper repeater allegation. State v. Larsen, 177 Wis.2d 835, 839-40, 503 N.W.2d 359 (Ct. App. 1993).

II. Methods of Proving Repeater Status

Before sentencing a defendant to the enhanced periods set forth in § 939.62, the prior convictions serving as a basis for the penalty increase must be "admitted by the defendant or proved by the State." § 973.12.

The Wisconsin Court of Appeals has emphasized that "[w]hen the State seeks an enhanced sentence based upon a repeater allegation, it must carry the burden to prove that

allegation. While a prior conviction is not an element of the charged offense, it is an essential element of proof **to be satisfied at sentencing** if the State is to secure the additional punishment it seeks." State v. Koeppen, 195 Wis.2d 117, 129-30, 536 N.W.2d 386 (Ct. App. 1995), emphasis in original, citing State v. Goldstein, 182 Wis.2d 251, 260, 513 N.W.2d 631 (Ct. App. 1994).

The necessary proof can be accomplished in either of two ways:

(a) by the defendant's personal admission of the priors; or (b) by proof of the priors by reference to an official record, preferably by furnishing the court with copies of the judgment of conviction.

A. By the Defendant's Personal Admission

An admission of the validity of the prior convictions should be made by the defendant personally, on the record. An admission may not "be inferred nor made by a defendant's attorney, but rather, must be a direct and specific admission by the defendant." State v. Koeppen, *supra*, 195 Wis.2d 127, citing, State v. Farr, 119 Wis.2d 651, 659, 350 N.W.2d 640 (1984).

In guilty plea cases, it is sufficient to cover this step with a specific question during the plea acceptance colloquy. SM-32, Accepting A Plea Of Guilty, includes the following question:

"Were you convicted of (name of offense) on (date)?"

Adding a question like this was suggested by the court of appeals in State v. Goldstein, *supra*, 182 Wis.2d 251, 261:

One simple and direct question to the defendant from either the prosecutor or the trial judge asking whether the defendant admits to the repeater allegation will, in most cases, resolve the issue. We suggest that trial judges include this question in their colloquy with the defendant at the plea hearing (if there is one) or, otherwise, at the time of sentencing.

The Wisconsin Supreme Court has given similar advice in a case involving sentencing as a repeater after a jury trial:

The trial court may ask the defendant the direct question while observing the defendant's criminal record before him whether the defendant was convicted on a particular date of a specific crime. . . .

State v. Farr, *supra*, 119 Wis.2d 651, 659.

The question in SM-32 is modelled after the one suggested in Farr. If the question is being used to fulfill the proof of prior conviction element, it must be asked before the defendant is sentenced. Koeppen, 195 Wis.2d at 130.

B. By Copy of the Judgment of Conviction

The most direct method of proving prior convictions is to provide a certified copy of the judgment(s) of conviction. Section 973.12(1) provides in part as follows:

An official report of the F.B.I. or any other governmental agency of the United States or of this or any other state shall be prima facie evidence of any conviction or sentence therein reported.

Any official report specific enough to identify the defendant, the crimes, and the date of the convictions is sufficient. See Farr, *supra*, 119 Wis.2d at 660. A presentence report qualifies. Id.

Whether a court may satisfy the proof requirement by taking judicial notice of court records in the same county is an open question. However, even if the use of judicial notice would be acceptable, it must still be used prior to sentencing. Koeppen, 195 Wis.2d at 131 (the use of judicial notice at a postconviction proceeding to correct the failure to prove prior convictions at sentencing is not effective because it is too late).

III. Substantive Issues

A. Timing of Offenses and Convictions

A defendant will be eligible for enhanced punishment as a repeat offender "if the actor was convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced, or if the actor was convicted of a misdemeanor on 3 separate occasions during that same period, which convictions remain of record and unreversed. . . ." § 939.62(2); State v. Midell, 40 Wis.2d 516, 527, 162 N.W.2d 54 (1968); Goldstein, 182 Wis.2d at 259. The date the

judgment or judgments of conviction were entered determine the date for measuring the 5-year period. State v. Mikrut, 212 Wis.2d 859, 569 N.W.2d 765 (Ct. App. 1997).

B. Misdemeanor Convictions

The phrase "convicted of a misdemeanor on three separate occasions," as used in § 939.62(2), does not require that three misdemeanor convictions occur in three separate court appearances. State v. Wittrock, 119 Wis.2d 664, 674, 350 N.W.2d 647 (1984). The focus is on the quantity of crimes committed and not the date of each conviction. "Whenever a misdemeanant is convicted of a fourth misdemeanor which was committed subsequent to the convictions of three prior misdemeanors, the defendant's sentence may be enhanced by the repeater statute." Id.

Because the focus is on the quantity of misdemeanors committed, a defendant's sentence may be enhanced even if the three misdemeanors serving as the basis for repeater status were committed as part of a single incident or transaction. State v. Hopkins, 168 Wis.2d 802, 810, 484 N.W.2d 549 (1992). "[T]hree convictions of misdemeanors during the five-year period satisfies the statute, regardless of when the misdemeanors were committed." Id.

In the Committee's judgment, a misdemeanor conviction expunged under § 973.015 cannot be the basis for a repeater finding. Section 939.62(2) requires that "convictions remain of record and unreversed"; an expunged conviction does not "remain of record."⁴

C. Periods of Incarceration

When a court calculates the 5-year period between the commission of the present offense and the conviction of any prior offenses, "time which the actor spent in actual confinement serving a criminal sentence shall be excluded." § 939.62(2).

The charging document need not include the period of incarceration served by the defendant even if the period between the commission of the present crime and the defendant's prior conviction(s) is greater than 5 years. State v. Squires, 211 Wis.2d 873, 879, 565 N.W.2d 309 (Ct. App. 1997).

Where the period between the commission of the present crime and the conviction for any prior crimes exceeds five years and the defendant had been imprisoned during that period, the length of the period of confinement must either be admitted by the defendant or proved by the State. State v. Goldstein, 182 Wis.2d at 260 (the defendant's

admission that he spent "10 months, about" in prison was inadequate to satisfy the proof of the element).

The Wisconsin Court of Appeals has suggested the use of the following question to obtain an adequate admission from the defendant: "For what period of time was the defendant incarcerated as a result of the conviction?" Zimmerman, 185 Wis.2d at 559.

If an adequate admission cannot be obtained from the defendant, the State must prove the period of incarceration in the same way it is required to prove the defendant's prior convictions. Goldstein, 182 Wis.2d at 260-61.

IV. Sentencing

Section 939.62 applies only where the court wishes to impose a sentence beyond the statutory maximum for the crime of which the defendant was convicted. So, even if repeater status was properly alleged and proved, the penalty increases come into play only if the sentencing judge imposes a sentence in excess of the regular maximum for the crime. If the court imposes a sentence within the regular statutory range, it is error to attribute any part of that sentence to repeater status under § 939.63. Harris, 119 Wis.2d at 625. Relying on the § 939.62 to enhance a sentence within the statutory maximum is an abuse of discretion and a specific increase imposed for repeater status will be dropped from the sentence. Id. See also State v. Vinson, 183 Wis.2d 297, 313-15, 515 N.W.2d 314 (Ct. App. 1994).

However, a sentencing judge's mistaken reference to a defendant's status as a repeat offender will not automatically constitute an abuse of discretion. If the judge offers specific findings upon which the sentence was based and does not specifically state that the sentence is being enhanced due to the repeat offender statute, an abuse of discretion will not be found even if the judge mistakenly refers to the defendant as a repeat offender or if the judge correctly refers to the defendant as a repeat offender but imposes a sentence below the statutory maximum. Farr, 119 Wis.2d at 661-63.

A. Correctly Stating a Repeater Sentence

The factfinding for proof of prior convictions is to be done by the trial court. Block v. State, 41 Wis.2d 205, 211, 163 N.W.2d 196 (1968). If the court desires to impose a sentence greater than the regular statutory maximum, it must "make a finding that the defendant is a repeater." State v. Harris, 119 Wis.2d 612, 619-20, 350 N.W.2d 633 (1984). The findings must specifically articulate the basis for the repeater status on the facts on record. Id.

Section 939.62(1) provides that if a person qualified as a repeater, maximum sentences are increased as follows:

- a maximum of one year or less may be increased to not more than 3 years.
- a maximum of more than one year but not more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 6 years if the prior conviction was for a felony.
- a maximum of more than ten years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 10 years if the prior conviction was for a felony.

If the defendant's status as a repeater under § 939.62 has been properly alleged and proved, and if the sentencing court has concluded that a sentence in excess of the regular statutory maximum is appropriate, the sentence should be correctly stated on the record and reflected in the judgment of conviction. The court should state that the defendant's status as a repeater has been established, identify the increased sentence that § 939.62 allows, and then state the sentence that is being imposed. Again, the term of years imposed must be in excess of that authorized by the statutory maximum for the crime and within the increased penalty allowed by § 939.62. The court should not indicate that any particular portion of the sentence is attributed to the defendant's repeater status, but a statement to that effect will not constitute reversible error. See § 973.12(2) and State v. Upchurch, 101 Wis.2d 329, 335, 305 N.W.2d 57 (1981), cited in Harris, 119 Wis.2d 612, 625.

B. Multiple Counts; Consecutive or Concurrent Sentences

If a defendant is being sentenced for multiple counts and is a repeat offender, the sentence for all or any of the separate counts may be increased accordingly. Melby v. State, 70 Wis.2d 368, 384, 234 N.W.2d 634 (1975).

The imposition of consecutive sentences is not a condition to the use of an enhanced penalty under § 939.62, Stats. State v. Davis, 165 Wis.2d 78, 83, 477 N.W.2d 307 (Ct. App. 1991). The phrase "maximum term of imprisonment," as used in § 939.62, refers only to each individual crime and does not contemplate the total sentence for multiple count convictions. Therefore, each count in a multiple count conviction may be enhanced under § 939.62, even if the individual sentences are imposed concurrently. Id.

C. Probation

The maximum term of probation is the maximum term of imprisonment for the crime. If the maximum term of imprisonment is increased under § 939.62(1), the maximum term of probation is increased accordingly. State v. Wicks, 168 Wis.2d 703, 706-07, 484 N.W.2d 378 (Ct. App. 1992).

D. Correcting an Improper Repeater Sentence

Section 973.13 provides that if a sentence is wrongly enhanced under § 939.62, (as by a failure to prove repeater status) the excess portion of the sentence will be void and the sentence commuted without further proceedings. This may be done either by an appellate court or by the trial court in a postconviction proceeding. Therault, 187 Wis.2d at 133; Zimmerman, 185 Wis.2d at 559; State v. Holloway, 202 Wis.2d 694, 551 N.W.2d 841 (Ct. App. 1996).

If a trial court in a postconviction proceeding determines that the defendant's prior convictions were not properly proved, the court may correct the sentence by removing the excess portion and may also amend other portions of the sentence. Holloway, 202 Wis.2d at 698. Therefore, if a sentencing court is forced to correct the sentence under § 973.13, it may resentence the defendant "if the premise and goals of the prior sentence have been frustrated" by the need to commute the sentence. Id. at 700. In Holloway, the trial court reduced a sentence due to a failure to prove the defendant's prior convictions, but then altered the sentences from concurrent to consecutive. The court of appeals affirmed that the sentencing court acted lawfully.

V. Application to Specific Crimes

A. Attempt – § 939.32

The penalty for an attempt (of other than a Class A felony) is half the penalty allowed for the completed crime. § 939.32(1). Because § 939.62 is considered a penalty enhancer and not a crime in itself, it is not subject to the halving provisions of the attempt statute, § 939.32(1). Therefore, if a defendant who qualifies as a repeat offender is convicted of an attempt, the "maximum penalty for the underlying crime is halved and then that penalty may be enhanced under § 939.62." State v. Bush, 185 Wis.2d 716, 725-26, 519 N.W.2d 645 (Ct. App. 1994).

B. Controlled Substance Offenses – § 961.48

Section 961.48 provides for enhanced penalties for second or subsequent offenses under Chapter 961. It fulfills the same legislative purpose as does § 939.62. State v. Ray, 166 Wis.2d 855, 872, 481 N.W.2d 288 (Ct. App. 1992). Therefore, if a defendant is eligible for penalty enhancement under both § 961.48 and § 939.62, the sentence may be enhanced under either section but not under both. Id. at 873.

C. Contempt of Court – Punitive Sanction – § 785.04

Contempt of court for which a punitive sanction is imposed under § 785.04 is not a crime, and therefore, is not subject to the penalty-enhancing provisions of § 939.62. State v. Carpenter, 179 Wis.2d 838, 842-43, 508 N.W.2d 69 (Ct. App. 1993) applying McGee v. Racine County Circuit Court, 150 Wis.2d 178, 441 N.W.2d 308 (Ct. App. 1989).

D. Possession of a Firearm by a Felon – § 941.29

Section 941.29 states that "any person previously convicted of a felony who possesses a firearm is guilty of a Class E felony." This statute does not create a "penalty enhancer" but rather creates a distinct crime. State v. Jones, 142 Wis.2d 570, 576, 419 N.W.2d 263 (Ct. App. 1987). Therefore, the two-year maximum penalty applicable to violations of § 941.29 may be enhanced under § 939.62. Id.

E. Use of a Dangerous Weapon – § 939.63

Section 939.63 states that the maximum term of imprisonment for a crime may be increased if "a person commits a crime while possessing, using or threatening to use a dangerous weapon." Sections 939.62 and 939.63 may both be used to enhance the maximum term of imprisonment for a single crime. State v. Pernell, 165 Wis.2d 651, 658, 478 N.W.2d 297 (Ct. App. 1991). If the sentencing court wishes to use both § 939.62 and § 939.63 to increase the maximum term of imprisonment for a single crime, § 939.63 must be applied first. The amount of enhancement available under § 939.62 should then be determined (based on the maximum term of imprisonment for the underlying crime plus the amount already enhanced under § 939.63). Id. at 658-59.

COMMENT

SM-35 was approved by the Committee in February 1998.

1. The text of subs. (1), (2), and (3) of § 939.62 follow. As to sub. (2m), see note 2, below.

(1) If the actor is a repeater, as that term is defined in sub. (2), and the present conviction is for any crime for which imprisonment may be imposed (except for an escape under s. 946.42 or a failure to report under s. 946.425) the maximum term of imprisonment prescribed by law for that crime may be increased as follows:

(a) A maximum term of one year or less may be increased to not more than 3 years.

(b) A maximum term of more than one year but not more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 6 years if the prior conviction was for a felony.

(c) A maximum term of more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 10 years if the prior conviction was for a felony.

(2) The actor is a repeater if the actor was convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced, or if the actor was convicted of a misdemeanor on 3 separate occasions during that same period, which convictions remain of record and unreversed. It is immaterial that sentence was stayed, withheld or suspended, or that the actor was pardoned, unless such pardon was granted on the ground of innocence. In computing the preceding 5-year period, time which the actor spent in actual confinement serving a criminal sentence shall be excluded.

[NOTE: Sub. (2m) is not included.]

(3) In this section "felony" and "misdemeanor" have the following meanings:

(a) In case of crimes committed in this state, the terms do not include motor vehicle offenses under chs. 341 to 349 and offenses handled through proceedings in the court assigned to exercise jurisdiction under chs. 48 and 938, but otherwise have the meanings designated in s. 939.60.

(b) In case of crimes committed in other jurisdictions, the terms do not include those crimes which are equivalent to motor vehicle offenses under chs. 341 to 349 or to offenses handled through proceedings in the court assigned to exercise jurisdiction under chs. 48 and 938. Otherwise, felony means a crime which under the laws of that jurisdiction carries a prescribed maximum penalty of imprisonment in a prison or penitentiary for one year or more. Misdemeanor means a crime which does not carry a prescribed maximum penalty sufficient to constitute it a felony and includes crimes punishable only by a fine.

2. Section 939.62(2m) contains what is commonly referred to as the "three strikes" provision. The formal title is "persistent repeater."

3. Repeater statutes are proliferating. The following provide increased penalties for repeated commission of specific crimes and are not addressed in this Special Material.

- § 939.621 Increased Penalty for Certain Domestic Abuse Offenses: provides a penalty increase of up to 2 years for domestic abuse offenses committed within 72 hours of arrest for a domestic abuse offense.

- § 939.626 Increased Penalty; Repeat Child Sex Crimes: provides a 10 year penalty increase for a second violation of §§ 948.02, 948.05, 948.06, 948.07, or 948.08.

Several other statutes refer to an "increased penalty" in their titles, but in fact provide for a minimum sentence, not an increase of the maximum. See, for example, § 939.623 Increased Penalty; Repeat Serious Sex Crimes [five-year minimum sentence]; § 939.624 Increased Penalty; Repeat Serious Violent Crimes [five-year minimum sentence]; § 939.635 Penalties; Assault Or Battery In Secured Juvenile Correctional Facility [five-year minimum sentence].

Finally, there is a series of statutes providing for a penalty increase where a crime is committed under certain circumstances: while armed with a dangerous weapon; while identity is concealed; etc. These have the effect of creating an additional element of the crime and most are addressed by jury instructions presenting the additional fact as a special question for the jury:

- § 939.625 Gang Crime Penalty Enhancer: provides a penalty increase of 5 years for gang-related criminal activity [see Wis JI-Criminal 985].

- § 939.63 Penalties; Use Of A Dangerous Weapon: provides for penalty increases if a person commits a crime while possessing or using a dangerous weapon [see Wis JI-Criminal 990].

- § 939.632 Penalties; Violent Crime in a School Zone: provides a 5-year penalty increase for certain "violent crimes" that are felonies and a 6-month penalty increase for certain "violent crimes" that are misdemeanors (changing their status from a misdemeanor to a felony). There is no jury instruction.

- § 939.64 Penalties; Use of Bulletproof Garment: provides a 5-year penalty increase for felonies committed while wearing a bulletproof garment [see Wis JI-Criminal 993].

- § 939.641 Penalties; Concealing Identity: provides a 5-year penalty increase for felonies committed while identity is concealed; increases the maximum sentence to one year in jail for misdemeanors [see Wis JI-Criminal 994].

- § 939.645 Penalties; Crimes Committed Against Certain People or Property: this is the so-called Hate Crimes Law; it provides a 5-year penalty increase for felonies and increases the maximum sentence to one year in jail for misdemeanors [see Wis JI-Criminal 996, 996.1].

- § 939.648 Penalty; Terrorism: provides a 10-year penalty increase for crimes involving "terrorism." There is no jury instruction.

- § 939.646 Penalty; Crimes Committed Using Information Obtained From The Sex Offender Registry: provides for a 6-month increase on misdemeanors and a 5-year increase for felonies if the

crime was committed using information obtained from the sex offender registry under § 301.46. There is no jury instruction.

- § 939.648 Penalty; Terrorism: provides a 10-year penalty increase for crimes involving "terrorism."

Also note that Chapter 961 has its own repeater provision for controlled substance offenses [see § 961.48]. See the discussion at sec. V., B., this Special Material.

4. For discussion of misdemeanor expunction under § 973.015, see SM-36, Misdemeanors; Special Disposition Under Section 973.015.