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STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT IV

Case No. 2013AP2218

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ADAM W. MILLER,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF
CONVICTION AND ORDER DENYING MOTION
FOR POSTCONVICTION RELIEF, ENTERED IN
LA CROSSE COUNTY, THE HONORABLE
SCOTT L. HORNE, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF
PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

	Page
STATEMENT OF THE ISSUE	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	2
FACTS AND PROCEDURAL BACKGROUND	2
STANDARD OF REVIEW	4
ARGUMENT	4
THE SENTENCING COURT APPROPRIATELY APPLIED THE ENHANCED PENALTY STATUTE, IN WHICH IT INCREASED THE DEFENDANT'S SENTENCE OF INITIAL CONFINEMENT BY ONE YEAR.	4
CONCLUSION.....	8

TABLE OF AUTHORITIES

CASES

State v. Harris, 119 Wis. 2d 612, 350 N.W.2d 633 (1984)	4, 6, 7, 8
State v. Jackson, 2004 WI 29, 270 Wis. 2d 113, 676 N.W.2d 872	4
State v. Kleven, 2005 WI App 66, 280 Wis. 2d 468, 696 N.W.2d 226	4, 7

STATUTES

Wis. Stat. § 939.62(1)..... 2, 4

Wis. Stat. § 939.62(1)(c)..... 2, 3, 5, 7

Wis. Stat. § 973.01(2)(b) 2, 3, 5

Wis. Stat. § 973.01(2)(c)..... 8

Wis. Stat. § 973.12(2)..... 6

Wis. Stat. § 974.06 3

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STATEMENT OF THE ISSUE

The State rephrases the issue on appeal as follows:

The sentencing court appropriately applied the repeater penalty enhancer, in which it increased the defendant's sentence of initial confinement by one year.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

FACTS AND PROCEDURAL BACKGROUND

The State's amended information charged Miller with two counts: (1) Stalking, Use of a Dangerous Weapon (Repeater), and (2) Armed Burglary (Repeater) (14). Miller pled guilty to both counts (11; 12).

Count 1, a Class F felony, carried a maximum imprisonment term of 14.5 years for the following reason: The base maximum imprisonment of 7.5 years of initial confinement and 5 years extended supervision (Wis. Stat. § 973.01(2)(b)) was increased to 9.5 years initial confinement and 5 years extended supervision by the repeater enhancer (Wis. Stat. § 939.62(1)(c)).¹

Count 2, a Class E Felony, carried a maximum imprisonment term of 17 years for the

¹ This statute provides in relevant part:

(1) If the actor is a repeater . . . and the present conviction is for any crime for which imprisonment may be imposed . . . the maximum term of imprisonment prescribed by law for that crime may be increased as follows: . . .

(c) A maximum term of imprisonment of more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors[.]

Wis. Stat. § 939.62(1) and (1)(c).

following reasons: The base maximum imprisonment of 10 years of initial confinement and 5 years extended supervision for a Class E felony (Wis. Stat. § 973.01(2)(b)), was increased to 12 years initial confinement and 5 years extended supervision by the repeater enhancer (Wis. Stat. § 939.62(1)(c)).

Prior to sentencing, Miller, represented by counsel, moved to withdraw his plea on the grounds that he felt “pressured” and “bullied” by his former attorney to enter the plea (17; 38:4). The court held a hearing and denied Miller’s motion (38:50).

The court ultimately imposed the following sentence: On Count 1, Miller was sentenced to 7 years initial confinement, followed by 3 years extended supervision (25; 40:41-42; R-Ap. 110-11). On Count 2, Miller was sentenced to 11 years initial confinement, followed by 4 years extended supervision (*id.*). The sentences were ordered consecutive to one another (*id.*).

Miller filed a Wis. Stat. § 974.06 postconviction motion, requesting that his sentence be vacated (43). He claimed that with respect to his sentence on Count 2, the court illegally applied the repeater penalty enhancer (43:2). Under Miller’s argument, the sentencing court was required to first impose the maximum term of imprisonment (the maximum for both initial confinement *and* extended supervision) for the base offense of armed burglary before it could impose the penalty enhancer (43:3-4). But because the sentencing court did not first impose the maximum amount of *extended supervision* (5 years), it illegally imposed the penalty enhancer when it increased his term of initial confinement by one year (*id.*)

The court denied his motion (44; A-Ap. Exhibit 2).

Miller appeals.

STANDARD OF REVIEW

Miller argues that the sentencing court committed legal error by erroneously imposing a penalty enhancer. This presents a question of law, which this Court reviews de novo. *See State v. Kleven*, 2005 WI App 66, ¶ 8, 280 Wis. 2d 468, 696 N.W.2d 226 (citing *State v. Jackson*, 2004 WI 29, ¶ 11, 270 Wis. 2d 113, 676 N.W.2d 872 (interpreting applicable statutes to determine “how penalty enhancers are applied at sentencing” is a question of law “subject to independent appellate review”).

ARGUMENT

THE SENTENCING COURT APPROPRIATELY APPLIED THE ENHANCED PENALTY STATUTE, IN WHICH IT INCREASED THE DEFENDANT’S SENTENCE OF INITIAL CONFINEMENT BY ONE YEAR.

Miller notes that, with respect to Count 2, the sentencing court “only imposed 4 years extended supervision, which is 1 years [sic] less than the maximum term of extended supervision for Miller’s class E felony” (Miller’s Brief at 5). Miller argues that Count 2’s sentence is therefore illegal because, under his interpretation, Wis. Stat. § 939.62(1) authorizes penalty enhancement “only when the maximum underlying sentence is imposed” (Miller’s Brief at 5). He cites to *State v. Harris*, 119 Wis. 2d 612, 350 N.W.2d 633 (1984)

for the proposition that if a court imposes a penalty enhancer without first imposing the maximum term of imprisonment, “it constitutes an abuse of discretion, and the enhanced portion of a submaximum sentence shall be vacated” (Miller’s Brief at 5). He argues that because the sentencing court’s sentence violates *Harris*, “the faulty repeater portion of his sentence of 1 year, should be declared void, and the circuit court’s decision should be reversed” (Miller’s Brief at 6).

The postconviction court disagreed with Miller’s arguments and found that “neither *Harris* nor any of the other case law Miller cites supports this proposition” (44:2; A-Ap. Exhibit 2). The State agrees.

As indicated above, without the penalty enhancer, Count 2 carried a 10-year maximum term of initial confinement and 5-year maximum term of extended supervision (Wis. Stat. § 973.01(2)(b)). Count 2’s maximum initial confinement was increased to 12 years by the repeater enhancer (Wis. Stat. § 939.62(1)(c)). Here, the court sentenced Miller above the 10-year base maximum initial confinement, to 11 years initial confinement (and 4 years extended supervision) (25; 40:41-42; R-Ap. 110-11)

When the sentencing court imposed its sentence, it stated:

In terms of determining the length of the sentence, I’m not going to impose the maximum sentence taking into account the fact that you did spare [the victims] the ordeal of a trial through the plea[.]

....

As to Count Two, the total length of the sentence is 15 years and zero months. *The initial term of confinement in prison is eleven years and zero months. The time you'll serve on extended supervision is four years and zero months.*

(40:41-42; R-Ap. 110-11) (emphasis added).

Contrary to Miller's assertion, there is no statute or case law that provides that a sentencing court can impose a penalty enhancer only after it has first imposed the maximum term of imprisonment.² The only case that Miller relies on for this proposition is *Harris*, 119 Wis. 2d 612. In *Harris*, the defendant was convicted of an offense that carried a maximum, indeterminate sentence of **five** years in prison, and she was a repeater, which subjected her to an additional two years of imprisonment. *See id.* at 614-16 (emphasis added). The sentencing court sentenced Harris to "an indeterminate term of not more than **three** years" for the attempted robbery, but then went on to say: "The repeater has been taken into consideration, and there would be six months on

² There is also no statute or case law that provides a sentencing court must segregate the portions of an enhanced sentence. On the contrary, Wis. Stat. § 973.12(2) provides:

In every case of sentence under s. 939.62, the sentence shall be imposed for the present conviction, but if the court indicates in passing sentence how much thereof is imposed because the defendant is a repeater, it shall not constitute reversible error, but the combined terms shall be construed as a single sentence for the present conviction.

the [case number] which would amount to the three years. That is, 30 months and 6 months[.]” *Id.* at 615 (emphasis added). Therefore, the defendant’s total sentence was *still* less than the statutory maximum for the underlying base offense.

The Supreme Court concluded that the sentencing court relied on an erroneous view of the law when it “attempted to use the repeater statute to enhance the sentence.” *Id.* at 625. The Court stated: “The repeater statute . . . is not applicable to the sentence of a defendant *unless the trial court seeks to impose a sentence in excess of that prescribed by law for the crime for which the defendant is convicted.*” *Id.* at 619 (emphasis added). Accordingly, the Court vacated the six months the sentencing court had imposed as “an enhancement for a repeater status,” leaving in place only the thirty months it had imposed for the base offense. *Id.* at 625-26.

In this case, the sentencing court did not commit the same error identified in *Harris*. Rather, it appropriately sentenced Miller to a term of initial confinement that was “*in excess of that prescribed by law for the crime for which the defendant is convicted.*” *See Harris*, 119 Wis. 2d. at 619. *See also Kleven*, 280 Wis. 2d 468, ¶ 12 (providing that “the enhanced penalty statutes . . . were very much ‘applicable’ to [defendant’s] sentence because the circuit court in this case sought ‘to impose a sentence greater than that prescribed by law’ for the base offense”). Therefore, the enhanced statute for repeaters,

Wis. Stat. § 939.62(1)(c), applies to Miller's sentence because the sentencing court imposed a sentence greater than that prescribed by law for the base offense of armed burglary.

Finally, Wis. Stat. § 973.01(2)(c) provides in relevant part that “the maximum term of confinement in prison . . . may be increased by any applicable penalty enhancement statute. If the maximum term of confinement in prison . . . is increased under this paragraph, the total length of the bifurcated sentence that may be imposed is increased by the same amount.” The statute does not provide, contrary to what Miller *wants* it to provide, that the sentencing court must *first* impose the maximum amount of both initial confinement and extended supervision before it applies the penalty enhancer and increases the defendant's term of initial confinement.

CONCLUSION

Applying the repeater penalty enhancer, the sentencing court appropriately sentenced Miller to an initial term of confinement that was “in excess of that prescribed by law for the crime for which [he was] convicted.” *See Harris*, 119 Wis. 2d. at 619. The State respectfully requests that this Court affirm the judgment of conviction and postconviction order denying relief.

Dated this 20th day of February, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1591 words.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 20th day of February, 2014.

Sara Lynn Larson
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