STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP1160

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JASON R. COOPER,

Defendant-Appellant.

On Appeal from a Judgment of Conviction, and an Order Denying a Postconviction Motion, Entered in Kenosha County Circuit Court, the Honorable Mary Kay Wagner, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Can the general criminal repeater penalty enhancer, Wis. Stat. § 939.62, be applied to a defendant's sentence based in part on a prior motor vehicle offense?

   The circuit court answered yes.

2. Was trial counsel ineffective for failing to object to the application of the general criminal repeater penalty enhancer?

   The circuit court did not reach this issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is warranted because this case is of substantial and continuing public interest. A decision will provide clarity to circuit courts and defense attorneys regarding the general criminal repeater penalty enhancer statute, Wis. Stat. § 939.62. While undersigned counsel anticipates that the parties' briefs will sufficiently address the issues raised, the opportunity to present oral argument is welcomed if this Court would find it helpful.

STATEMENT OF THE CASE AND FACTS

On August 4, 2013, an officer stopped Mr. Cooper's truck after observing it "weaving within its lane of travel" and failing to completely stop at a flashing red light. (1:2). Mr. Cooper was subsequently arrested based on the smell of alcohol emanating from the truck, his bloodshot and glassy eyes, his slurred speech, and the results of several field sobriety tests. (1:3). Mr. Cooper was uncooperative and his behavior included spitting at police multiple times. (*Id.*).

Complaint

Mr. Cooper was charged with two counts: (1) operating while intoxicated ("OWI") sixth offense, as a repeater, contrary to Wis. Stat. §§ 346.63(1)(a), 346.65(2)(am)5, & 939.62(1)(b), and (2) operating after revocation, as a repeater, contrary to Wis. Stat. §§ 343.44(1)(b) & 939.62(1)(a). (1:1-2).

In support of the OWI sixth offense, the complaint alleged that Mr. Cooper had been "suspended, revoked, or convicted for violating Wis. Stat. § 346.63(1), or a local ordinance in conformity therewith, or the law of another jurisdiction that complies with the requirements of Section 343.307(1)(d), or Section 343.305(10), or a suspension or revocation under the law of another jurisdiction arising out of a refusal to submit to chemical testing" five previous times—in 1995, 1998, 2004, 2005, and 2010. (1:3).

In support of the general criminal repeater penalty enhancer, the complaint asserted that Mr. Cooper was convicted of a felony during the five-year period immediately preceding the commission of the current offenses. *See* Wis. Stat. § 939.62(2). The complaint stated that on October 12, 2004, Mr. Cooper was convicted of felony possession of THC as a second offense. Although October 12, 2004, the date of the felony marijuana conviction, is approximately nine years prior to the date of the offenses in this case, August 4, 2013, the complaint argued that the following periods of time that Mr. Cooper was incarcerated should be excluded from the repeater computation:

- October 10, 2005 to January 16, 2007;
- August 27, 2008 to December 17, 2008;
- December 26, 2008 to January 6, 2009;
- May 18, 2009 to October 29, 2009; and
- July 14, 2010 to June 6, 2012.

(1:2, 4; *see also*, 12[1]). The last period includes 365 days (roughly June 6, 2011 to June 6, 2012) that Mr. Cooper spent incarcerated solely on his OWI fifth offense. (12:4). Without the time Mr. Cooper spent incarcerated on the OWI fifth, the repeater penalty enhancer does not apply.[2]

Plea and Sentence

Mr. Cooper pled no contest to OWI sixth offense, as a repeater. (36:4). During the plea colloquy, trial counsel noted she "computed the time out" to make sure that Mr. Cooper qualified as a repeater pursuant to Wis. Stat. § 939.62(2). (36:6-8).

At sentencing, the Honorable Mary Kay Wagner applied both the OWI penalty enhancer, pursuant to Wis. Stat. § 346.65(2), and the general criminal repeater penalty

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[1] In a merit appeal, parties who are statutorily entitled to have and keep a copy of a presentence investigation report (PSI) need not ask a court's permission to reference a PSI in an appellate brief. ***State v. Buchanan***, 2013 WI 31, ¶ 36, 346 Wis. 2d 735, 828 N.W.2d 847.

[2] Counsel concludes that the repeater penalty enhancer would not apply without the 365 days spent on the OWI fifth offense because:

- The complaint indicates that Mr. Cooper was incarcerated for a total of 1,447 days. (1:4). If the number of days spent incarcerated solely on the OWI fifth is subtracted (365 days), Mr. Cooper was only incarcerated for a total of 1,082 days.
- The amount of time between the date of the felony possession conviction (October 4, 2004) to the date of the offense in this case (August 4, 2013) is 3,226 days.
- 3,226 days minus 1,082 (days incarcerated) equals 2,144 days.
- 2,144 days is greater than five years. Five years is approximately 1,825 days.

enhancer, pursuant to Wis. Stat. § 939.62(2). The court imposed the maximum term of imprisonment available in this case—ten years (seven years of initial confinement and three years of extended supervision). (37:28). The court then ordered that the sentence run concurrent to a reconfinement sentence. (*Id.*).

Postconviction Proceedings

Mr. Cooper filed a postconviction motion requesting that the circuit court vacate the general criminal repeater penalty enhancer and commute his sentence to the maximum term authorized by statute for an OWI sixth offense—six years (three years of initial confinement and three years of extended supervision). (27:1, 7). Mr. Cooper asserted that the inclusion of the 365 days that he was incarcerated on the OWI fifth for the purpose of calculating the repeater penalty enhancer time frame was error, as this in effect twice utilized the OWI fifth offense to enhance his sentence. (27:4-5). Mr. Cooper also alleged that trial counsel was ineffective and that an evidentiary ***Machner*** hearing was required. (27:6-7).

A hearing was held. (38; App. 101-110). The Honorable Mary Kay Wagner denied relief, finding that the time Mr. Cooper spent incarcerated on the OWI fifth offense was properly included in calculating the general criminal repeater penalty enhancer time frame under Wis. Stat. § 939.62. (38:8; App. 108). Consequently, the circuit court did not reach the issue of whether trial counsel was ineffective.

Additional relevant facts are referenced below.

RELEVANT STATUTE

939.62 Increased penalty for habitual criminality.

(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…

(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.…

(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….

ARGUMENT

I. The General Criminal Repeater Penalty Enhancer, Wis. Stat. § 939.62, Was Improperly Applied In This Case Because It Was Based In Part On Mr. Cooper's Prior OWI Fifth Offense.

A. Introduction.

Chapter 346 of the Wisconsin Statutes provides "rules of the road." In particular, Wis. Stat. § 346.63(1) states that no person may drive or operate a motor vehicle while under the influence of an intoxicant. When an individual commits multiple OWI violations, Wis. Stat. § 346.65(2) provides for escalating penalties. For example, anyone violating Wis. Stat. § 346.63(1) for the first time forfeits not less than $150 or more than $300. In comparison, an individual, such as Mr. Cooper, who has violated Wis. Stat. § 346.63(1) five or six times is guilty of a Class H felony, which carries a maximum term of imprisonment of six years, and is subject to a minimum fine of $600 and not less than six months of imprisonment.

The Wisconsin Statutes also include a general criminal repeater penalty enhancer, Wis. Stat. § 939.62. This statute allows a trial court to increase a defendant's sentence when the defendant is a repeat offender. A defendant is a repeat offender "if the actor was convicted of a felony during the five-year period immediately preceding the commission of the crime for which the actor is presently being sentenced, or if the actor was convicted of a misdemeanor on three separate occasions during that same period, which convictions remain of record and unreversed." Wis. Stat. § 939.62(2). When computing the five-year period, time which the defendant spends in actual confinement serving a criminal sentence is excluded. *Id.*

In this case, Mr. Cooper's sentence was enhanced using both the OWI penalty statute, Wis. Stat. § 346.65(2),

and the general criminal repeater penalty enhancer statute, Wis. Stat. § 939.62. Mr. Cooper does not challenge the application of the OWI penalty statute. However, as discussed below, Mr. Cooper asserts that it was improper to apply the general criminal repeater penalty enhancer statute under the facts of this case.

B. Standard of review.

Whether the general criminal repeater penalty enhancer statute, Wis. Stat. § 939.62, applies is a question of law that is reviewed independently. ***State v. Wideman***, 206 Wis. 2d 91, 98, 556 N.W.2d 737 (1996) (quoting ***State v. McAllister***, 170 Wis. 2d 532, 535, 319 N.W.2d 865 (1982)).

C. The general criminal repeater penalty enhancer was improperly applied because it was based in part on Mr. Cooper's OWI fifth offense.

In ***State v. Delaney***, the Wisconsin Supreme Court examined whether the general criminal repeater penalty enhancer statute, Wis. Stat. § 939.62, could be applied to an OWI conviction. 2003 WI 9, 259 Wis. 2d 77, 658 N.W.2d 416. In ***Delaney***, the defendant entered a no contest plea to a OWI third offense, as a repeater, pursuant to Wis. Stat. §§ 346.63(1)(a), 346.65(2)(c), and 939.62(1)(a). ***Id.***, ¶¶ 5, 10. The general criminal repeater penalty enhancer was based on a prior felony conviction for attempted possession of marijuana with intent to deliver. ***Id.***, ¶ 3.

On appeal, the defendant conceded that he was properly subjected to the OWI penalty enhancer statute based on his prior OWI conviction and his refusal to submit to a chemical test. ***Id.***, ¶ 10. However, the defendant challenged the application of the general criminal repeater penalty enhancer to his case. ***Id.***, ¶¶ 10, 18. The Wisconsin Supreme Court held that the criminal repeater penalty enhancer could be applied to the defendant's case. ***Id.***, ¶ 17.

Examining the plain language of the statute, the Court found that the repeater penalty enhancer can be applied to a defendant if two conditions are met. First, the defendant's "present conviction" is for any crime allowing for imprisonment except escape or a failure to report. ***Id.,*** ¶¶ 17-24; Wis. Stat. § 939.62(1). Second, the defendant's "prior conviction" is for any felony or misdemeanor except motor vehicle offenses and offenses prosecuted in juvenile court. ***Id.***, ¶¶ 23-24[3]; Wis. Stat. § 939.62(2) & (3). Thus, the Court concluded that the repeater penalty enhancer statute could be properly applied to the defendant in ***Delaney*** because the present conviction was an OWI third offense, not an escape or failure to report, and the prior conviction was a felony drug conviction that occurred within the statutory time period. ***Id.***, ¶ 25. In addition, the Court emphasized that the application of both the repeater penalty enhancer and the OWI penalty enhancer were based on "separate and distinct" prior convictions. ***Id.***, ¶¶ 31-33, 36.

In this case, as in ***Delaney***, Mr. Cooper's sentence was enhanced under both the OWI penalty statute, Wis. Stat. § 346.65(2), and the general criminal repeater penalty enhancer statute, Wis. Stat. § 939.62. However, unlike in ***Delaney***, a prior OWI conviction was used twice to enhance Mr. Cooper's sentence. Mr. Cooper's OWI fifth conviction was used as a prior conviction that enhanced his OWI in this case to an OWI sixth offense with an increased penalty. In addition, Mr. Cooper's OWI fifth conviction was used a second time for the purposes of the repeater penalty enhancer. The repeater penalty enhancer statute requires that a defendant be "convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced." Wis. Stat. §

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[3] *See also*, ***State v. Maxey***, 2003 WI App 94, ¶¶ 14, 23, 264 Wis. 2d 878, 663 N.W.2d 811 (holding in light of ***Delaney*** that a repeater drug offender penalty enhancer, Wis. Stat. § 961.48(2), and the general criminal penalty enhancer, Wis. Stat. § 939.62(1)(b), could be applied to the defendant).

939.62(2). Here, when calculating whether Mr. Cooper's felony marijuana conviction fell within the five-year period, the State used 365 days that Mr. Cooper was incarcerated solely on the OWI fifth conviction. Without the 365 days that Mr. Cooper was incarcerated on the OWI fifth, the prior marijuana conviction falls outside the five-year statutory requirement.

While the repeater penalty enhancer statute states that "[w]hen computing the five-year period, time which the defendant spends in actual confinement serving a *criminal sentence* is excluded," construing "criminal sentence" to include a motor vehicle offense, such as Mr. Cooper's OWI fifth conviction, would be inconsistent with the meaning of the statute and lead to an unreasonable result. *See* ***Coca-Cola Bottling Co. of Wisconsin v. La Follette***, 106 Wis. 2d 162, 170, 316 N.W.2d 129 (Ct. App. 1982) (A court may construe a clear and unambiguous statute differently "if a literal application would lead to an absurd or unreasonable result.").

As ***Delaney*** concluded, the repeater penalty enhancer statute plainly provides that a defendant's prior felony or misdemeanor conviction *cannot* be a motor vehicle offense. *See* ***id.*** ¶¶ 23-24. Wis. Stat. § 939.62(3)(a) states:

> (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.…
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> (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….

Wis. Stat. § 939.62(2) & (3)(a) (emphasis added). By including time that Mr. Cooper spent incarcerated on the OWI fifth conviction, the repeater penalty enhancer is being applied based in part on a prior motor vehicle offense. This is contrary to the statute's clear intention to exclude motor vehicle offenses from being used as prior convictions for the purposes of applying the repeater penalty enhancer.

Moreover, the ***Delaney*** court emphasized that the repeater penalty enhancer statute and the OWI penalty enhancer can both be applied so long as each enhancer is based on a "separate and distinct" conviction. ***Id.***, ¶¶ 31-33, 36. By interpreting "time…spent…serving a criminal sentence," to include time spent serving a motor vehicle sentence, it is possible, as in this case, that a motor vehicle conviction will be used for both the repeater penalty enhancer and the OWI enhancer. As explained above, by using the time Mr. Cooper spent incarcerated solely on the OWI fifth conviction, the OWI fifth conviction is being used twice—to apply the repeater penalty enhancer and to increase his penalty with an OWI as a sixth offense.

For these reasons, the repeater penalty enhancer was improperly applied in this case. Consequently, the repeater portion of Mr. Cooper's sentence must be vacated and the sentence must be commuted to the maximum term authorized by statute without further proceedings. Wis. Stat. § 973.13. Mr. Cooper's ten-year sentence (seven years initial confinement and three years extended supervision) must be commuted to six years (three years initial confinement and three years extended supervision).

II. Trial Counsel Was Ineffective for Failing to Object to the Application of the General Criminal Repeater Penalty Enhancer, Wis. Stat. § 939.62.

A. Introduction and standard of review.

If this Court deems Mr. Cooper's challenge to the repeater penalty enhancer forfeited because no objection was made, Mr. Cooper requests an evidentiary hearing to determine whether he was deprived of effective assistance of counsel.

An accused's right to effective assistance of counsel derives from the Sixth and Fourteenth Amendments to the United States Constitution, and Art. I, sec. 7 of the Wisconsin Constitution. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997).

In assessing whether counsel's performance satisfied this constitutional standard, Wisconsin applies the two-part test outlined in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***Smith***, 207 Wis. 2d at 273. To establish a deprivation of effective representation, a defendant must demonstrate both that: (1) counsel's performance was deficient, and (2) counsel's errors or omissions prejudiced the defendant. ***Id.***

To prove deficient performance, the defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** (citations omitted). The prejudice prong requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Smith***, 207 Wis. 2d at 276 (citations omitted). The defendant need only demonstrate to the court that the outcome is suspect, but need not establish that the final result of the proceeding would have been different. ***Smith***, 207 Wis. 2d at 275.

An ineffective assistance of counsel claim presents a mixed question of fact and law. ***State v. Thiel***, 2003 WI 111, ¶ 21, 264 Wis. 2d 571, 665 N.W.2d 305. A circuit court's findings of fact are upheld unless clearly erroneous. ***Id.*** Whether counsel was ineffective is a question of law that is reviewed *de novo*. ***Id.***

B. Trial counsel was ineffective for failing to object to the application of the repeater penalty enhancer.

Trial counsel performed deficiently by failing to object to the application of the general criminal repeater penalty enhancer to Mr. Cooper's case. Given ***Delaney's*** holdings that the repeater penalty enhancer cannot be applied if a defendant's prior conviction is for a motor vehicle offense and that the repeater penalty enhancer and the OWI penalty enhancer must be based on "separate and distinct" convictions (*see* Part I), a reasonably competent attorney would have objected to the application of the general repeater penalty enhancer to Mr. Cooper's OWI conviction in this case. *See* ***Strickland***, 466 U.S. at 687-88 (to establish deficient performance, the defendant must show that counsel's representation fell below the object standard of "reasonably effective assistance"). There can be no reasonable strategic reason for failing to object based on ***Delaney*** as striking the general repeater penalty enhancer would have reduced Mr. Cooper's maximum imprisonment exposure.

Moreover, trial counsel's failure to object to the general criminal repeater penalty enhancer prejudiced Mr. Cooper. As discussed in Part I, the repeater penalty enhancer was improperly applied in this case resulting in Mr. Cooper receiving a total prison sentence of ten years (seven years of initial confinement and three years of extended supervision), rather than a maximum of six years.

Therefore, Mr. Cooper was deprived of effective assistance of counsel, and this Court should remand for an evidentiary ***Machner*** hearing.

CONCLUSION

For the reasons stated, Jason R. Cooper respectfully requests that this Court direct the circuit court to vacate the repeater penalty enhancer and commute his sentence to the maximum term authorized by statute, or in the alternative, an evidentiary ***Machner*** hearing.

Dated this 24th day of November, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,394 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 24th day of November, 2015.

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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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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Dated this 24th day of November, 2015.

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