STATE OF WISCONSIN

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

DISTRICT II

Case No. 2015AP1160-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JASON R. COOPER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, BOTH ENTERED IN THE CIRCUIT COURT FOR KENOSHA COUNTY, THE HONORABLE MARY KAY WAGNER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin (State), requests neither oral argument nor publication.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The defendant-appellant, Jason R. Cooper, appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OWI) as a sixth offense, and as a repeater (23). Cooper also appeals an order denying his motion for postconviction relief (29).

In the criminal complaint, the State alleged that Cooper had five countable prior convictions that could be used to enhance his sentence (1:3-4). The State also alleged that Cooper was a repeater under Wis. Stat. § 939.62 (1:2). Cooper pled no contest to the charge of OWI as a sixth offense, as a repeater (36:3-4).

The circuit court, the Honorable Mary Kay Wagner, imposed judgment of conviction and sentenced Cooper to ten years of imprisonment, consisting of seven years of initial confinement and three years of extended supervision (37:28).

Cooper filed a motion for postconviction relief, asserting that the repeater enhancer was improperly applied, and that his trial counsel provided ineffective assistance (27). The circuit court denied Cooper's motion after a hearing (38), in a written order (29). Cooper now appeals.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY APPLIED WIS. STAT. § 939.62, THE GENERAL REPEATER PENALTY ENHANCER, TO COOPER'S CONVICTION FOR OWI AS A SIXTH OFFENSE.

A. Introduction.

The issue in this case concerns the interpretation of Wis. Stat. § 939.62, "Increased penalty for habitual

criminality." The statute provides in relevant part as follows:

> (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. . . . 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. . . .

There is no dispute that under the plain language of the statute, a "felony during the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced" that makes a person a repeater cannot be a motor vehicle offense, including an OWI.

The issue in this case focuses on the second part of subsection (2), which states that "[i]n computing the preceding 5-year period, time which the actor spent in actual confinement serving a criminal sentence shall be excluded." The issue is whether the time that a defendant spends in actual confinement serving a criminal sentence for an OWI conviction is excluded.

The circuit court concluded that the time that a defendant spends in actual confinement serving a criminal sentence for OWI is excluded when computing the five-year period (38:7-8). The court therefore denied Cooper's motion for postconviction relief (29). As the State will explain, the court was correct and this court should affirm.

B. Applicable legal principles and standard of review.

The State is aware of no dispute of material fact. Resolution of the issue in this case requires interpretation of Wis. Stat. § 939.62. Interpretation of a statute and application of a statute to undisputed facts present a question of law that a reviewing court determines independently. *State v. Carter*, 2010 WI 77, ¶ 12, 327 Wis. 2d 1, 785 N.W.2d 516.

In interpreting a statute, a reviewing court "begins with the plain language of the statute." *State v. Dinkins*, 2012 WI 24, ¶ 29, 339 Wis. 2d 78, 810 N.W.2d 787, (citing *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110). A court "generally give[s] words and phrases their common, ordinary, and accepted meaning." *Id.* (quoting *Kalal*, 271 Wis. 2d 633, ¶ 45). A reviewing court is to "interpret statutory language reasonably, 'to avoid absurd or unreasonable results.'" *Id.* (quoting *Kalal*, 271 Wis. 2d 633, ¶ 46). "An interpretation that contravenes the manifest purpose of the statute is unreasonable." *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 49).

C. Under Wis. Stat. § 939.62(2), time spent in actual confinement serving a criminal sentence for an OWI conviction is excluded when determining whether the current conviction is within five years of a prior felony conviction.

The circuit court in this case correctly applied the § 939.62 penalty enhancer in this case. The court concluded that Cooper is a repeater because he had a prior felony conviction within five years of his current conviction. The court did not apply the repeater penalty enhancer on the basis of Cooper's prior felony OWI conviction being within five years of his current conviction. Cooper's 2011 felony OWI conviction could not be the predicate felony conviction because § 939.62(3)(a) explicitly states that the predicate felony or misdemeanor conviction cannot be for motor vehicle offenses.

The circuit court instead applied the repeater because of Cooper's 2004 felony drug conviction, and it recognized that the time Cooper was imprisoned on his 2011 felony OWI conviction is excluded when computing whether the current conviction is within five years of the 2004 conviction.

It is undisputed that when the time Cooper spent in actual confinement serving criminal sentences is excluded as required by § 939.62(2), Cooper's current conviction was within five years of his 2004 felony drug conviction. As Cooper points out, he was convicted of felony possession of THC on October 12, 2004, and his current conviction occurred August 4, 2013 (Cooper's Br. at 3 n.2). The State does not dispute Cooper's assertions that there were 3,226 days between October 12, 2004, and August 4, 2013, that Cooper was incarcerated for 1,447 of those days, and that 365 of those days were for Cooper's 2011 felony OWI (Cooper's Br. at 3 n.2). The State does not dispute that if the 365 days that Cooper was imprisoned on his 2011 felony OWI conviction are excluded from the period between Cooper's 2004 conviction and his 2013 conviction, the 2013 felony conviction was within five years of the 2004 conviction, and the repeater applies. Conversely, if the 365 days are not included, the 2013 conviction was not within five years of the 2004 conviction, and the repeater does not apply (Cooper's Br. at 3 n.2).

But the State disagrees with Cooper's assertion that the time Cooper spent in actual confinement serving his criminal sentence for his fifth offense OWI should not be excluded when computing the five-year period between his 2004 felony drug conviction and his current conviction. As the circuit court recognized, the question under § 939.62 concerns the time a person "[w]as on his own two feet in the community," not serving actual confinement (38:8).

Cooper asks this court to conclude that a "criminal sentence" under § 939.62 does not include a criminal sentence for an OWI conviction (Cooper's Br. at 9). He

seemingly asks this court to interpret the statue contrary to its plain language because to apply the plain language "would be inconsistent with the meaning of the statute and lead to an unreasonable result" (Cooper's Br. at 9).

Nothing in § 939.62 supports Cooper's argument. If the legislature had intended that "time spent in actual confinement serving a criminal sentence" not include time spent in actual confinement serving a criminal sentence for an OWI conviction, it could have written the statute to say exactly that. The court explicitly differentiated between OWI convictions and other criminal convictions for purposes of determining whether a person is a repeater. The court defined "felony" and "misdemeanor" as not including motor vehicle offense. Wis. Stat. § 939.62(3)(a). The legislature stated that a person is a repeater if he or she was convicted of a felony within five years of the current offense, unless the prior felony was for a motor vehicle offense or handled in juvenile court. Wis. Stat. §§ 939.62(2) and (3)(a).

If the legislature had intended that a criminal sentence for an OWI conviction was not a "criminal sentence" for the purposes of determining whether the current offense was within five years of the prior offense, it likewise could have defined "criminal sentence" to exclude a criminal sentence for an OWI conviction. It did not do so.

The legislature had no reason to differentiate between actual time spent in confinement serving a criminal sentence and actual time spent in confinement serving a criminal sentence for an OWI conviction. The point of this portion of the statute is that a person with a prior conviction is not a repeater if he or she goes five years without committing another crime. But a person should not be able to escape a repeater enhancement if all or part of the five-year period was spent in actual confinement.

In *State v. Price*, 231 Wis. 2d 229, 235, 604 N.W.2d 898 (Ct. App. 1999), this court explained how the five-year period in the statute generally works:

> With § 939.62(2), STATS., the legislature has decreed that for a period of five years preceding the commission of a crime, an offender's prior criminal record may serve as the basis for an enhanced sentence. However, the legislature has excluded from this five-year calculation any time during which the offender was actually confined serving a criminal sentence. When that situation exists, the five-year period is expanded by the amount of such confinement.

This court then explained why the legislature enacted this portion of the statute:

> Since the expansion of the five-year period is at issue in this case, it is appropriate to inquire why the legislature would have built this provision into the statute. We think the answer is clear. A sentenced offender who is actually confined, whether by imprisonment or subsequent parole hold, is off the streets and no longer able to wreak further criminal havoc against the community.

Id.

As this court has recognized, the repeater statute applies when a person with a prior conviction fails to go five years without committing another crime. The legislature had no reason to treat time spent in actual confinement serving a criminal sentence for an OWI conviction differently from time spent in actual confinement serving any other type of criminal sentence, because in either case the person is in confinement and presumably not committing crimes.

Regardless what crime a person committed that resulted in actual confinement, the time spent in actual confinement is excluded from the five-year period. In this case, when the time Cooper spent in actual confinement is excluded, his current offense was within five years of his 2004 felony THC conviction (38:7-8; Cooper's Br. at 2-3).

Cooper's 2011 felony OWI conviction cannot be used as the felony predicate to make him a habitual repeater. But the time he spent in actual confinement on his 2011 OWI cannot somehow be credited as time during which he did not commit a crime, to avoid application of § 939.62. That would be directly contrary to the purpose of the statute.

D. *State v. Delaney* does not provide that time spent in actual confinement serving a sentence for a criminal OWI conviction is not time spent in actual confinement serving a criminal sentence.

As Cooper seemingly recognizes, nothing in § 939.62 supports his argument that because a repeater penalty enhancer cannot be applied when the prior felony is a felony OWI, time spent in actual confinement serving a sentence for the prior OWI cannot be excluded when computing the five-year period under § 939.62.

Cooper argues that notwithstanding the plain language of the statute, time spent in actual confinement serving a sentence for an OWI conviction cannot be excluded when computing the five-year period between the prior conviction and the current offense because the OWI conviction would be used twice—to enhance the penalty for the OWI and to allow application of the repeater penalty enhancer (Cooper's Br. at 10).

Cooper relies on *State v. Delaney*, 2003 WI 9, 259 Wis. 2d 77, 658 N.W.2d 416, in which the Supreme Court of Wisconsin concluded that the penalty enhancer in § 939.62 can be applied to an OWI conviction, so long as the prior conviction that makes the offender a repeater was not for a motor vehicle violation. *Id.* ¶ 1. In *Delaney*, the supreme court noted that the defendant's conviction for OWI as a third offense was based on two prior OWI offenses, but the repeater enhancer was based on a separate and distinct non-motor vehicle offense. *Id.*

This case is similar to *Delaney*. Cooper was convicted of OWI as a sixth offense, and the repeater enhancer was

based on a separate and distinct non-motor vehicle offense—felony possession of THC.

Cooper's argument is that the repeater enhancer is inapplicable because it can be applied only if time he spent incarcerated for one of his OWI offenses is excluded from the time period between his 2004 THC conviction and his 2013 OWI conviction (Cooper's Br. at 10). He asserts that his prior OWI conviction is therefore being used to enhance his sentence twice, and that this is improper under *Delaney* (Cooper's Br. at 10).

However, in *Delaney* the supreme court did not determine that time spent in actual confinement serving a criminal sentence for an OWI violation is an exception to the language in § 939.62(2) stating that "[i]n computing the preceding 5-year period, time which the actor spent in actual confinement serving a criminal sentence shall be excluded. The court did not even address how the five-year period is computed. The issue in *Delaney* was only "whether § 939.62 applies to Delaney's already enhanced OWI offense based on the existence of a past non-OWI offense." *Delaney*, 259 Wis. 2d 77, ¶ 10. The court concluded only that a repeater penalty enhancer can be applied to an enhanced OWI conviction, so long as the predicate prior crimes are not the prior OWI convictions that are being used to enhance the current conviction under § 346.65. *Id.* ¶ 1.

In *Delaney* the supreme court did say that multiple penalty enhancers are applicable when they are based on "separate and distinct prior offenses." *Delaney*, 259 Wis. 2d 77, ¶ 32. But the court was merely interpreting the language of § 939.62, specifically the language in §§ 939.62(2) and (3)(a), which provides that the prior conviction required to make a person a repeater cannot be a prior OWI conviction.

Nothing in § 939.62 provides that time spent in actual confinement serving a criminal sentence for the prior OWI

conviction should not be excluded when computing the five-year period between felonies under § 939.62(2).

In this case, Cooper's 2014 felony drug conviction is the prior felony conviction making him a repeater. The fact of Cooper's 2011 OWI conviction is relevant to his being a repeater only because the time Cooper spent in actual confinement serving a criminal sentence for his 2011 OWI is excluded from the time between his 2004 felony drug conviction, and his 2013 OWI conviction. The court in *Delaney* did not even hint that this is improper.

Not excluding time spent in actual custody for an OWI conviction when computing whether an offense is within five years of a prior offense would be entirely contrary to the purpose of the exclusion provision in § 939.62(2). As this court has recognized, "A sentenced offender who is actually confined, whether by imprisonment or subsequent parole hold, is off the streets and no longer able to wreak further criminal havoc against the community." *Price*, 231 Wis. 2d at 235. If Cooper's assertion that time spent in actual custody on an OWI conviction is not excluded, a person could escape a repeater enhancement even when most or all of the five-year period is spent in actual confinement. For instance, a person with six OWI convictions could commit a seventh OWI and a non-OWI felony. The court could impose five years of initial confinement on the OWI, and withhold sentence on the other felony. If the person served the five years in actual confinement and committed another OWI the day after he was released, under Cooper's interpretation of § 939.62, the five years spent in actual confinement are not excluded. Therefore, the person would not be a repeater.

This result is obviously not what the legislature contemplated in § 939.62(2). The purpose of the statute is to treat a person as a repeater unless he or she is out of confinement for five years without committing a felony. Because Cooper failed to spend five years out of confinement. the penalty enhancer was properly applied to his current felony OWI conviction.

II. COOPER'S TRIAL COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE.

Cooper argues that his trial counsel was ineffective for not arguing that the penalty enhancer was improperly applied in this case (Cooper's Br. at 11-13). He asserts that his counsel should have made the same argument that Cooper is currently making, that the penalty enhancer under § 939.62 cannot be applied because part of the time he spent in actual confinement was for his 2011 OWI conviction (Cooper's Br. at 11-12).

To prevail on an ineffective assistance of counsel claim, "[a] defendant must prove both that his or her attorney's performance was deficient and that the deficient performance was prejudicial." *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To prove deficient performance, a defendant must prove that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* (citations omitted).

To prove prejudice, a defendant must show "'a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.'" *Id.* (quoting *State v. Guerard*, 2004 WI 85, ¶ 43, 273 Wis. 2d 250, 682 N.W.2d 12). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* (citations omitted).

Cooper cannot satisfy either part of the test. As explained above, the penalty enhancer was properly applied in this case. Cooper's trial counsel did not perform deficiently by not making a meritless argument. And Cooper suffered no possible prejudice when his counsel did not make a meritless argument.

CONCLUSION

For the reasons explained above, the State respectfully requests that this court affirm the judgment of conviction, and the order denying the motion for postconviction relief filed by the defendant-appellant, Jason R. Cooper.

Dated this 26th day of February, 2016

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 3,060 words.

_____
Michael C. Sanders
Assistant Attorney General

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 26th day of February, 2016.

_____
Michael C. Sanders
Assistant Attorney General