STATE OF WISCONSIN

COURT OF APPEALS

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 Postconviction Motion, Entered in Kenosha County Circuit Court, the Honorable Mary Kay Wagner, Presiding.

REPLY BRIEF

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, Wisconsin 53202-4116
(414) 227-4805
lambk@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

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.

In this case, Mr. Cooper's OWI fifth offense was improperly used to enhance his sentence twice. The OWI fifth was used to enhance the OWI in this case to an OWI sixth. In addition, the OWI fifth was used a second time for the purposes of applying the general criminal repeater penalty enhancer. (*See* Def. Br. at 2-3, 8-9). The State agrees that without the 365 days that Mr. Cooper was incarcerated on the OWI fifth, the repeater penalty enhancer does not apply to this case. However, the State disagrees that the 365 days should be excluded when calculating the applicability of the repeater penalty enhancer. (State's Br. at 5).

The repeater penalty enhancer statute, Wis. Stat. § 939.62, 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" and that "[i]n computing the five-year period, time which the defendant spends in actual confinement serving a *criminal sentence* is excluded." However, as Mr. Cooper explained in his initial brief (at 9-10), construing "criminal sentence" to include a motor vehicle offense, such as Mr. Cooper's fifth OWI offense, would be inconsistent with the meaning of the statute and lead to an unreasonable result.

First, Wis. Stat. § 939.62(2) & (3)(a) provides that a prior conviction for the purpose of applying the repeater

penalty enhancer *cannot* be a motor vehicle offense. By including time spent incarcerated on a motor vehicle offense, the repeater enhancer *is* being based in part on a prior motor vehicle offense. Thus, using time spent incarcerated on a motor vehicle offense frustrates the legislature's intent.

Second, the Wisconsin Supreme Court in ***State v. Delaney*** emphasized that the repeater penalty enhancer and the OWI penalty enhancer can both be applied so long as each enhancer is based on a "separate and distinct" conviction. 2003 WI 9, ¶¶ 31-33, 36, 259 Wis. 2d 77, 658 N.W.2d 416; *see also*, ***State v. Ray***, 166 Wis. 2d 855, 873, 481 N.W.2d 288 (Ct. App. 1992) (holding that it was improper to apply a substance abuse penalty enhancer and the general criminal repeater penalty enhancer based on a single prior drug related conviction).[1] By interpreting "criminal sentence" to include a motor vehicle offense sentence, it is possible, as in this case, that a motor vehicle conviction is being used twice—once to apply the repeater penalty enhancer and a second time to apply the OWI enhancer.

The State's brief references ***State v. Price***, 231 Wis. 2d 229, 604 N.W.2d 898 (Ct. App. 1999), several times. To be clear, ***Price*** held that a parole hold is "time which the actor spent in actual confinement serving a criminal sentence" pursuant to Wis. Stat. § 939.62(2). ***Id.*** at 236. ***Price*** did not address the specific issue in this case—whether a criminal sentence includes time spent incarcerated on a motor vehicle offense.

---

[1] The ***Ray*** decision does not expressly state whether the enhancers were based on a single conviction or multiple convictions. However, the Wisconsin Supreme Court in ***Delaney*** construed ***Ray*** to involve a single conviction. ***Delaney***, 2003 WI 9, ¶ 31.

The State emphasizes that "[t]he purpose of the [repeater] statute is to treat a person as a repeater unless he or she is out of confinement for five years without committing a felony." (*See* State's Br. at 10). Mr. Cooper agrees that this is probably true generally, but not across-the-board. Wis. § 939.62 does not apply when the defendant's present conviction is for an escape or failure to report or his prior conviction is a motor vehicle offense. Thus, the statute permits instances where an individual commits another crime within five years, but the repeater does not apply.

The State also argues that "[i]f 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." (State's Br. at 10). However, as stated above, the repeater statute permits instances where the repeater penalty enhancer does not apply. Moreover, the applicability of the repeater penalty enhancer when motor vehicle offenses are involved is purely a matter of timing and the order of convictions. For example, a person convicted of five OWIs who then commits a felony drug offense cannot be sentenced as a repeater because the predicate offenses were all for motor vehicle violations. In contrast, a person engaged in the exact same criminal offenses, but in a slightly different order can be punished with a significantly higher sentence. If the drug conviction occurs first, followed by five OWIs, then the defendant could be sentenced as a repeater. Similarly, if three OWI convictions were followed by the drug conviction and then there were two more OWIs, the defendant would again be considered a repeater. *See* ***Delaney***, 2003 WI 9, ¶¶ 41-42 (Abrahamson, C. J., dissenting). Consequently, the mere fact that the repeater may not be applicable in certain instances does not refute Mr. Cooper's assertion that a "criminal

sentence" excludes time spent incarcerated on a motor vehicle offense.

And, lastly, in this particular case, Mr. Cooper is not "escaping" the enhancement of his sentence. Mr. Cooper's OWI fifth was used to enhance the OWI in this case to an OWI sixth with an increased penalty.[2] Finding that Mr. Cooper's OWI fifth can be used to enhance the OWI in this case to an OWI sixth *and* also for the purposes of the repeater penalty enhancer is contrary to the repeater statute's clear intention to exclude motor vehicle offenses from being used as prior convictions and ***Delaney's*** holding that two enhancers can be applied so long as each is based on a "separate and distinct" conviction.

Therefore, the repeater penalty enhancer was improperly applied in this case and the repeater portion must be vacated and the sentence commuted to the maximum term authorized by statute without further proceedings.

---

[2] On his OWI fifth conviction, Mr. Cooper received three years in prison (one year of initial confinement and two years of extended supervision). (37:17-19). On this case, Mr. Cooper's sixth OWI conviction, the circuit court imposed six years in prison (three years of initial confinement and three years of extended supervision) plus an additional four years of initial confinement using the general criminal repeater enhancer. (37:28). At sentencing, the circuit court specifically considered that this was Mr. Cooper's sixth OWI conviction. (37:24 ("And now we're at the 6th offense drunk driving, which is an outrage. Outrage."); *see also*, 37:32 ("I wish you had quit drinking after the first DUI, or the second. And, certainly, the third, fourth, and fifth. So here we are.")).

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

The State argues that Mr. Cooper was not deprived of effective assistance of counsel because the general criminal repeater penalty enhancer was properly applied. (State's Br. at 11).

However, as discussed above, Mr. Cooper disagrees that the repeater penalty enhancer was properly applied. And, as discussed in detail in Mr. Cooper's initial brief (at 11-13), if this Court deems Mr. Cooper's challenge forfeited, Mr. Cooper requests an evidentiary hearing to determine whether he was deprived of effective assistance of counsel.

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 25th day of March, 2016.

Respectfully submitted,

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
lambk@opd.wi.gov

Attorney for Defendant-Appellant

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 1,291 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 25th day of March, 2016.

_____

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
lambk@opd.wi.gov

Attorney for Defendant-Appellant