STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2019AP1785-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TORY J. AGNEW,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR DODGE COUNTY, THE HONORABLE BRIAN A. PFITZINGER, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF THE PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Page

ISSUE PRESENTED

Did the circuit court sentence Defendant-Appellant Tory J. Agnew in excess of the maximum allowable terms of initial confinement and extended supervision?

The circuit court answered, "no."

This Court should answer, "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unwarranted as the arguments are fully developed in the parties' briefs. Publication is appropriate to make binding this Court's prior recognition, in an unpublished decision, that a circuit court need not first impose a bifurcated sentence's maximum allowable terms of initial confinement and extended supervision prior to imposing a penalty enhancer.

INTRODUCTION

Agnew smoked marijuana before crashing his vehicle, severely injuring two of his three child passengers. Normally, one convicted of causing injury to another by the intoxicated use of a motor vehicle containing a minor child would face a maximum total bifurcated prison sentence of two years for this unclassified felony. However, by virtue of a penalty enhancer, the Legislature explicitly provided for circuit courts, upon conviction, to impose up to four additional years of confinement for habitual offenders like Agnew.

Through his interpretation of the governing statutes, Agnew maintains that the sentencing court was nevertheless only permitted to assess one-eighth of the maximum authorized penalty enhancer plainly provided by statute. Because the sentence imposed exceeded that amount, Agnew insists that he is entitled to resentencing.

But Agnew's argument depends entirely upon one principle, previously rejected by this Court in an unpublished opinion. Specifically, his argument depends on the incorrect premise that the circuit court must first impose a maximum term of initial confinement for a defendant's base offense before assessing any penalty enhancer. Take away that one premise, and his argument fails.

The sentence imposed comports with authority governing the maximum duration of a bifurcated sentence, the permissible ratio between initial confinement and extended supervision, and the manner a court may apply a sentence enhancer.

Agnew's sentence is lawful, and this Court should affirm.

STATEMENT OF THE CASE

The crash

In 2017, the State charged Agnew with two counts of operating a motor vehicle while intoxicated causing injury and two counts of operating a motor vehicle with a detectable amount of a restricted controlled substance in one's blood causing injury. (R. 1:1–3.) For each crime, the State alleged that Agnew was a habitual offender due to his prior felony conviction, pursuant to Wis. Stat. § 939.62(1)(b). (R. 1:1–3.)

The State later filed an Information, modifying the charges to two counts of causing great bodily harm by the intoxicated use of a vehicle, contrary to Wis. Stat. § 940.25(1)(a), and two counts of causing great bodily harm by the use of a vehicle with a restricted controlled substance in one's blood, contrary to Wis. Stat. § 940.25(1)(am). (R. 27:1–2.) The same habitual criminality penalty enhancer remained for all four counts. (R. 27:1–2.)

All four charges stemmed from a single motor vehicle rollover crash on Interstate Highway 41. (R. 1:6.) Police

learned that Agnew was driving a vehicle that contained one adult and three children. (R. 1:4, 8.) The crash resulted in two children being ejected from Agnew's vehicle, causing injuries that included an acute intracranial hemorrhage, a cervical vertebra facture, and other lacerations and wounds. (R. 1:4, 15.) Testing of Agnew's blood later revealed a Delta-9-Tetrahydrocannabinol concentration of 24 ug/L. (R. 1:14.)

The plea and sentencing

Agnew ultimately pleaded no contest to a single amended charge of operating a motor vehicle while intoxicated, causing injury, with a minor child in the vehicle and as a habitual offender, contrary to Wis. Stat. §§ 346.63(2)(a)1., 346.65(3m), and 939.62(1)(b). (R. 60:1; 91:12.)

In exchange for that plea, the State moved to dismiss and read in the remaining charges. (R. 60:1; 91:23.)

Prior to accepting the plea, the court requested that both parties submit a letter detailing their respective views of the correct maximum terms of initial confinement and extended supervision. (R. 91:9.) Defense counsel asserted by letter that the court could impose no more than six additional months of confinement beyond the potential 18 months of initial confinement available for Agnew's base offense. (R. 64:3.) The State contended that the court could impose up to three years of initial confinement with one year of extended supervision. (R. 62:2.)

At the sentencing hearing, the court imposed an aggregate sentence of 48 months, consisting of 36 months' initial confinement and 12 months' extended supervision, to be served consecutive to any other sentence previously imposed. (R. 66:1; 71:1; 86:30–31.)

The motion for resentencing

Agnew moved the court for resentencing, asserting that "the sentence imposed exceeds the maximum period of initial confinement and extended supervision allowed by law." (R. 74.)

The court denied Agnew's motion, first in an oral ruling, (R. 92:12–13), and later by written order, (R. 77). The court explained that it had the opportunity to review Agnew's arguments and nevertheless believed that the 36-month initial confinement and 12-month extended supervision sentence it imposed complied with the rules established in Chapter 973 of the Wisconsin statutes. (R. 92:12–13.)

Agnew appeals. (R. 78:1.)

STANDARD OF REVIEW

Agnew raises a challenge to how the habitual criminality penalty enhancer should be applied in determining the maximum sentence he faced on an unclassified felony. The interpretation of statutes governing how a penalty enhancer applies is a question of law subject to independent appellate review. *State v. Jackson*, 2004 WI 29, ¶ 11, 270 Wis. 2d 113, 676 N.W.2d 872.

ARGUMENT

The circuit court imposed a lawful sentence.

Agnew argues the circuit court imposed a sentence that exceeded the maximum permissible terms of both initial confinement and extended supervision. (Agnew's Br. 3–4, 27–31.) He is wrong. This Court has already explained two reasons why a vital principle upon which Agnew bases his argument—that a circuit court must first impose the maximum possible terms of initial confinement and extended supervision prior to imposing a penalty enhancer—does not apply to his sentence. Therefore, his analysis is flawed, the

circuit court's sentence was lawful, and this Court should affirm.

A. Rules governing bifurcated sentences

Except for life sentences, a circuit court must impose a bifurcated sentence when sentencing a person to imprisonment in Wisconsin state prisons for felonies committed after December 31, 1999. Wis. Stat. § 973.01(1). Any sentence over one year incarceration must be a bifurcated prison sentence. Wis. Stat. §§ 973.01(1), 973.02.

Any bifurcated prison sentence needs to abide by several rules:

First, where the crime is not a classified felony, as is the case here, the total length of the bifurcated sentence, meaning the sum of the length of the terms of initial confinement and extended supervision, must not exceed the maximum term of imprisonment provided by statute for the crime, "plus additional imprisonment authorized by any applicable penalty enhancement statutes." Wis. Stat. § 973.01(2)(a).

Second, a sentencing court must maintain certain ratios between the ordered terms of initial confinement and extended supervision. The initial confinement term may be no less than one year nor more than 75 percent of the aggregate sentence. Wis. Stat. §§ 973.01(2)(b), 973.01(2)(b)(10). Similarly, the extended supervision portion of the bifurcated sentence may be no less than 25 percent of the ordered term of initial confinement. Wis. Stat. § 973.01(2)(d).

Third, "[s]ubject to the minimum period of extended supervision required under [Wis. Stat. § 973.01(2)(d)], the maximum term of confinement in prison specified in [Wis. Stat. § 973.01(2)(b)] may be increased by any applicable penalty enhancement statute." Wis. Stat. § 973.01(2)(c)1.

Any penalty enhancer is limited to extending the period of initial confinement; it cannot be divided between initial

confinement and extended supervision. *State v. Volk*, 2002 WI App 274, 258 Wis. 2d 584, 654 N.W.2d 24.

B. A circuit court is not required to first impose a maximum term of confinement for an unenhanced crime before applying a penalty enhancer.

Although seemingly complex, the validity of Agnew's analysis turns on a necessary predicate: that a circuit court may only impose a penalty enhancer if it has already imposed the maximum term of confinement for the base, unenhanced offense. (Agnew's Br. 29.)

1. The vital question is whether the maximum portions of the bifurcated sentence *without* the enhancer must be imposed before the court determines how much of the enhancer may apply.

As the State shall explain, Agnew's faulty premise described above undermines his entire argument; his claim must therefore fail. But before addressing the case law concerning that principle, the State begins by explaining how the rules governing bifurcated sentences apply in Agnew's case and how the parties' interpretations diverge in application.

Absent a penalty enhancer, Agnew's unenhanced, unclassified felony charge was punishable, per the statute, by up to two years; specifically, the statute provides a maximum penalty of no "more than one year," and then states that if there was a minor in the vehicle (as was the case here), the maximum period of imprisonment is "doubled." Wis. Stat. § 346.65(3m).

Then, pursuant to section 973.01(2)(a), because it is an unclassified felony, the maximum sentence equals "the maximum term of imprisonment provided by statute for the

crime . . . plus additional imprisonment authorized by any applicable penalty enhancement statutes." Wis. Stat. § 973.01(2)(a).

So for Agnew's base offense alone, the circuit court could impose, at most, 18 months of initial confinement to comply with Wis. Stat. § 973.01(2)(b)10., which caps the maximum term of confinement to 75 percent of the total length of the bifurcated sentence. Eighteen months is 75 percent of 24 months—the total maximum penalty for the base offense. Subtracting the 18-month maximum permissible initial confinement from the maximum 24-month bifurcated sentence would yield only six months remaining for a term of extended supervision.

Up to this point Agnew and the State agree—had Agnew pled no contest to the offense without the habitual offender penalty enhancer, the maximum period of initial confinement the court could have imposed was 18 months. With that maximum period of initial confinement, the maximum period of extended supervision would have been six months.

It is important to remember, though, that the court could have also, on the base offense alone, imposed *more* extended supervision than six months, if it imposed *less* than 18 months of initial confinement. For example, the court on the base offense could have imposed one year of initial confinement followed by one year of extended supervision.

But here the parties diverge when determining how the penalty enhancer may be applied: Does the court have to impose the maximum period of initial confinement on the base offense *first*, which it then must use to determine how much of the enhancer may be applied (Agnew's position)? Or, may the court instead allocate the initial confinement and extended supervision for the base offense without imposing

the maximum penalty, and impose the penalty enhancer from there (the State's position)?

Keep in mind that for an unclassified felony, the statutes do not provide maximum periods of initial confinement and extended supervision.

But, if valid, Agnew's essential principle referenced above would prevent the court from imposing more than 24 months of initial confinement on Agnew's enhanced charge, because any further increase would necessarily cause the six-month term of extended supervision (the maximum allowable in Agnew's view) to fall below 25 percent of the confinement time imposed, thereby defying Wis. Stat. § 973.01(2)(d).[1] (Agnew's Br. 30–31.)

Put differently, Agnew uses 18 months of initial confinement followed by six months of extended supervision as the starting point to assess how much of the penalty enhancer may be added without violating the rules about percentage division of initial confinement and extended supervision.

So although the Legislature provided for habitual criminals like Agnew to face an additional four years of confinement upon conviction, Wis. Stat. § 939.62(1)(b), under Agnew's theory, the circuit court would be helpless to impose more than one-eighth of that four-year period explicitly provided by statute, or only six months. (Agnew's Br. 30.)

But under the State's interpretation of the statutes, 18 months of initial confinement followed by six months of extended supervision is *not* the correct starting point for

[1] To illustrate, an extended supervision period of six months ordered to follow an initial confinement period of 25 months would equal only 24 percent of the confinement period ordered, one percent less than statutorily mandated. Wis. Stat. § 973.01(2)(d).

assessing the maximum periods of initial confinement and extended supervision *with* the penalty enhancer.

Stated differently, the statutes permit a circuit court to lawfully impose a greater period of extended supervision and a lesser period of initial confinement *before* assessing the additional confinement time afforded by a penalty enhancer. This, in turn, permits the circuit court to impose more of the penalty enhancer while maintaining the same ratios and without running afoul of the 25-percent rule in Wis. Stat. § 973.01(2)(d).

2. This Court, in an unpublished opinion, has previously held that the maximum portions of the bifurcated sentence need not be imposed before the court determines how much of the penalty enhancer may apply.

Before the adoption of Truth-in-Sentencing, in 1984, the Wisconsin Supreme Court concluded that the habitual criminality penalty enhancer, Wis. Stat. § 939.62, was not applicable unless a circuit court first imposed a maximum sentence for the base crime. *State v. Harris*, 119 Wis. 2d 612, 614, 350 N.W.2d 633 (1984).[2]

Thereafter, this Court confronted a permissible Truth-in-Sentencing I sentence in *State v. Kleven.* 2005 WI App 66, 280 Wis. 2d 468, 696 N.W.2d 226. In a footnote, this Court stated, without further explanation, that the maximum

[2] Truth-in-Sentencing legislation was adopted in Wisconsin in two phases. The first phase, 1997 Wis. Act 283 (TIS-I), was enacted in June 1998 and applied to offenses committed on or after December 31, 1999. The second phase, 2001 Wis. Act 109 (TIS-II), was enacted in July 2002 and applied to offenses committed on or after February 1, 2003. *See State v. Cole*, 2003 WI 59, ¶ 4, 262 Wis. 2d 167, 663 N.W.2d 700. Agnew committed the offense in question in 2015, thus TIS-II applies to his case.

potential initial confinement for the unenhanced crime "must be deemed to have been imposed" for the court to apply Wisconsin's habitual offender penalty enhancer. *Id.* ¶ 26 n.6.

But this Court has since clarified the application of principles underlying *Kleven* to those similarly situated to Agnew, who are sentenced under Truth-in-Sentencing II, highlighting why Agnew's claim before this Court must fail. *State v. Miller*, No. 2013AP2218, 2014 WL 2524837 (Wis. Ct. App. June 5, 2014) (unpublished). (R-App. 101–03.)

In *Miller*, the circuit court imposed a sentence for an enhanced burglary charge consisting of 11 years' initial confinement and four years' extended supervision, for a total sentence length of 15 years. *Id.* ¶ 5. (R-App. 101.) Absent the penalty enhancer, as a Class E felony, Miller's base charge would have been punishable by no more than 10 years' initial confinement and five years' extended supervision. Wis. Stat. §§ 973.01(2)(b)5., 973.01(2)(d)4.

Miller moved for postconviction relief, arguing that "the circuit court erred when it applied a penalty enhancer to increase his term of initial confinement in prison without first imposing the maximum term of imprisonment," purportedly conflicting with Wis. Stat. § 939.62(1) and *Harris*. *Miller*, 2014 WL 2524837, ¶¶ 1, 6. (R-App. 101.)

Like Agnew, Miller insisted that the circuit court could apply a penalty enhancer only after imposing the maximum term of initial confinement and the maximum term of extended supervision. *Id.* ¶ 12. (R-App. 102.)

Rejecting Miller's argument, this Court explained:

> This legislative history supports our conclusion that [Wis. Stat.] §§ 939.62(1) and 973.01(2)(c), when read together, permit a circuit court to apply a penalty enhancer to increase an individual's term of initial confinement beyond the maximum prescribed by law, *without first imposing the maximum term of initial*

> *confinement and the maximum term of extended supervision.*

Id. (emphasis added).

Additionally, this Court explained that *Harris* had no bearing on Miller's case, both because *Harris* was a pre-Truth-in-Sentencing case and because the circuit court in *Harris* imposed a sentence below the maximum permitted by law, unlike the circuit court that sentenced Miller to a term of initial confinement one year greater than the maximum permitted without a penalty enhancer. *Id.* ¶ 15. (R-App. 103.)

This Court also recognized that *Harris*, if anything, supported the circuit court's imposed sentence, given that Miller was ultimately sentenced to serve a term of initial confinement which exceeded the maximum possible term of confinement for Miller's base burglary offense. *Id*. ¶ 16. (R-App. 103.)

Miller's analysis, albeit non-binding, reveals that this Court has already disagreed with the fundamental premise underlying Agnew's argument; it has recognized that, contrary to Agnew's position, a circuit court need not impose the maximum allowable terms of initial confinement and extended supervision as a prerequisite to applying a sentence enhancer. *Id*. ¶ 12. (R-App. 102.)

C. The circuit court complied with all rules governing the permissible length and division of Agnew's bifurcated sentence.

Assuming this Court's analysis in *Miller* was sound, Agnew's sentence in this case is similarly lawful. Like in *Miller*, Agnew's 2015 crime is a Truth-In-Sentencing II case, and his three-year term of initial confinement exceeded the maximum possible term of confinement that the circuit court could order absent the penalty enhancer. *See* Wis. Stat. § 346.65(3m).

Of particular importance in this case, if Agnew *were not a habitual offender*, the circuit court could have lawfully sentenced him to serve one year initial confinement and one year extended supervision on the base offense, as this bifurcated sentence would have satisfied Wis. Stat. §§ 973.01(2)(b)10. (establishing maximum initial confinement composition of aggregate sentence) and 973.01(2)(d) (establishing minimum extended supervision composition ratio in conjunction with imposed confinement).

Although not required to do so, the circuit court here imposed that exact term of extended supervision (one year) on the enhanced charge. (R. 66:1; 71:1; 86:30–31.) Again, the circuit court did not have to start with 18 months of initial confinement and six months of extended supervision as its base point, because—pursuant to the statutes and *Miller*—it did not have to impose the *maximum* period of initial confinement on the base offense (18 months) before it determined the proper bifurcation.

The court's sentence also complied with *Volk* because the circuit court did not allocate any portion of the sentence enhancer to Agnew's extended supervision term; the amount of extended supervision was lawful even without the penalty enhancer. Wis. Stat. § 973.01(2)(d). The court proceeded to impose a term of initial confinement that exceeded the maximum permissible term for the base offense, which was lawful because Agnew's charges were enhanced due to his habitual criminality. Wis. Stat. § 939.62(1)(b).

Imposing that additional confinement still required the court to abide by the above-referenced 25-percent rule set forth by Wis. Stat. § 973.01(2)(d). Put another way, the court could impose additional confinement by virtue of the penalty enhancer if that increase did not result in the ordered term of extended supervision falling below 25 percent of the increased term of initial confinement. Wis. Stat. § 973.01(2)(d).

Here, the circuit court was entitled to order Agnew to serve 36 months of initial confinement—18 months more than it could have imposed absent the penalty enhancer—and that sentence resulted in a one-year term of extended supervision totaling one-third of the term of initial confinement, thus satisfying the 25-percent rule. Wis. Stat. § 973.01(2)(d). That 36-month term of initial confinement constituted exactly 75 percent of the total bifurcated sentence, also satisfying Wis. Stat. § 973.01(2)(b)10.

Finally, neither *Harris* nor *Kleven* prevented the circuit court from imposing that sentence as the circuit court's ordered term of initial confinement was double the maximum term of initial confinement permissible for Agnew's base offense, and Agnew was sentenced well after the enactment of Truth-in-Sentencing II. *See Miller*, 2014 WL 2524837, ¶ 15–16. (R-App. 103.)

In sum, the circuit court imposed a lawful sentence that did not exceed the maximum permissible terms of initial confinement and extended supervision. This Court should reiterate, in a published opinion, its past recognition that the principle upon which Agnew bases his argument is inapplicable to his case, both because he was sentenced after the enactment of Truth-in-Sentencing II and because the imposed term of initial confinement exceeded that which was available for his base offense. *Id.* Accordingly, this Court should affirm.

CONCLUSION

This Court should affirm the judgment of conviction and order denying postconviction relief.

Dated this 14th day of February 2020.

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 3305 words.

Dated this 14th day of February 2020.

_____
JOHN W. KELLIS
Assistant Attorney General

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I hereby certify that:

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JOHN W. KELLIS
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Supplemental Appendix
State of Wisconsin v. Tory J. Agnew
Case No. 2019AP1785-CR

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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JOHN W. KELLIS
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