STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2019AP001785-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TORY J. AGNEW,

Defendant-Appellant.

On Appeal from a Judgment Of Conviction and Order Denying Defendant's Postconviction Motion for Resentencing, Entered in the Dodge County Circuit Court, the Honorable Brian A. Pfitzinger, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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In its attempt to defend the unlawful sentence imposed by the circuit court, the state relies almost entirely on a single unpublished decision, *State v. Miller*, No. 2013AP2218, unpublished slip op., 2014 WL 2524837 (WI App June 5, 2014) (R-App. 101-03). This Court must reject the state's argument on appeal for two main reasons.

First, the applicable sentencing statutes and controlling precedent overwhelmingly support Agnew's claim for resentencing. Second, *Miller* is factually and legally distinguishable from Agnew's case such that it provides no persuasive support for the state's position.

I. Agnew is entitled to resentencing because the sentence imposed exceeds the applicable maximum term of total imprisonment, the maximum term of confinement, and the maximum term of extended supervision.

Before addressing the substantial flaws in the state's reliance on *Miller*, it's worth recalling the substance and foundation of Agnew's claim for resentencing. Agnew's sentence is unlawful because the maximum term of extended supervision that may be imposed on Agnew's unclassified felony conviction, if the circuit court seeks to enhance Agnew's term of confinement, is 6 months. (*See* Agnew's Initial Br. at 3, 21-31). For this proposition, Agnew relies primarily

upon Wis. Stats. §§ 973.01(2)(b)10., (2)(c)1., and (2)(d) (2017-18), and *State v. Kleven*, 2005 WI App 66, ¶¶24-27, ¶26 n.6, 280 Wis. 2d 468, 696 N.W.2d 226). Next, because any enhanced term of initial confinement must not force the maximum term of extended supervision to be less than 25 percent of the term of confinement imposed, *see* Wis. Stats. §§ 973.01(2)(c)1. and (2)(d) (2017-18), Agnew's maximum term of enhanced confinement is 24 months (6 months is 25 percent of 24 months).

While the state takes no specific issue with Agnew's interpretation of the relevant sentencing statutes, it attempts to disregard this Court's *binding* decision in *Kleven* by dismissing this Court's holding as set forth "[i]n a footnote" and "without further explanation." (*See* State's Br. at 9-10). *Kleven*, unlike *Miller*, cannot be so easily ignored.

Kleven squarely addressed "what constraints apply to the term of extended supervision that may be ordered for the enhanced [unclassified] offense." 280 Wis. 2d 468, ¶24. In doing so, this Court held that "Kleven may be ordered to serve at most, the maximum term of extended supervision available for his base offense, which is two and one-half years." *Id.*, ¶26. In a footnote, this Court then explained that two and one-half years was Kleven's maximum term of extended supervision because "all two and one-half years of the confinement available for the base offense must be deemed to have been imposed in order the enhanced term of confinement to apply." *Id.*, ¶26 n.6.

Therefore, the maximum term of extended supervision on an enhanced unclassified felony is the total maximum term of imprisonment on the base offense minus the maximum term of confinement on the base offense. *Id.* In support of this rule, the *Kleven* court aptly relied on the applicable TIS-I sentencing statutes, *State v. Jackson*, 2004 WI 29, ¶¶17, 20-24, 30, 270 Wis. 2d 113, 676 N.W.2d 872, and *State v. Volk*, 2002 WI App 274, ¶35, 258 Wis. 2d 584, 654 N.W.2d 24. *Id.*, ¶¶24-27.

Pursuant to *Kleven*, Agnew rightly asserts that his maximum term of extended supervision, if the circuit court seeks to enhance his term of initial confinement, is 6 months. That must be so because, "all [18 months] of the confinement available for the base offense *must be deemed to have been imposed in order the enhanced term of confinement to apply*." *See Kleven*, 280 Wis. 2d 468, ¶26 n.6. (Emphasis added).

Next, because any enhanced term of confinement greater than 24 months would force Agnew's maximum term of extended supervision (6 months) to be less than 25 percent of the initial confinement imposed, Agnew's maximum enhanced term of confinement is 24 months. *See* Wis. Stats. §§ 973.01(2)(c)1. and (2)(d) (2017-18). Finally, because Agnew's maximum term of confinement is 24 months and his maximum term of extended supervision is 6 months, his maximum term of overall imprisonment is 30 months.

Accordingly, the sentence imposed in this case: 4 years imprisonment, consisting of 3 years of

confinement and 1 year of extended supervision is unlawful and Agnew is entitled to resentencing. *See State v. Volk*, 258 Wis. 2d 584, ¶¶46-48.

II. The state's reliance on *Miller* is misplaced because that unpublished decision is factually and legally distinguishable from Agnew's case such that it provides no persuasive support for the state's position.

Miller is distinguishable and does not support the state's position for two main reasons: First, *Miller* does not concern the application of a penalty enhancer to an *unclassified* felony and therefore *Miller* does not clarify the "application of the principles underlying *Kleven*." (*Contra* State's Br. at 10). Second, the relief sought by Miller and the rule applied by the court of appeals in that case are substantially different from the relief sought by Agnew and the rule applied in *Kleven* and applicable to Agnew's sentence.

A brief review of *Miller* will demonstrate the lack of support it provides the state in this case. Miller was convicted of burglary while armed with a dangerous weapon as a repeater, contrary to Wis. Stats. §§ 943.10(2)(a) and 939.62(1)(c) (2011-12). *State v. Miller*, No. 2013AP2218, unpublished slip op.,¶3. Miller's underlying conviction was a "Class E felony." *Id.*, ¶4. Miller faced an underlying maximum term of imprisonment of 15 years, which consisted of a maximum term of initial confinement of 10 years and a maximum term of extended supervision of 5 years. *Id.* (citing Wis. Stats. §§ 939.50(3)(e), 973.01(2), 973.01(2)(b)5. and (d)4. (2011-12)). Miller

was convicted and sentenced as a "repeater" with prior misdemeanor convictions, which increased the "maximum term of imprisonment" by "up to two years" pursuant to Wis. Stat. § 939.62(1)(c) (2011-12). *Id.*

At sentencing, the circuit court correctly noted that Miller faced a maximum penalty of 12 years confinement, "ten plus an additional two for the [penalty] enhancer," plus five years of extended supervision. *Id.*, ¶5. The court sentenced Miller to 15 years imprisonment, consisting of 11 years confinement and 4 years extended supervision. *Id.* Postconviction, Miller moved the court to vacate his sentence, arguing that under *State v. Harris*, 119 Wis. 2d 612, 350 N.W.2d 633 (1984), the court was required to impose the "maximum term of imprisonment on the underlying offense" before it could exercise its discretion to apply the applicable penalty enhancer. *Id.*, ¶6. Specifically, Miller argued that by only imposing 4 years out of the possible 5 years of extended supervision, the court was not authorized to utilize the applicable penalty enhancer to increase Miller's term of confinement from 10 years to 11 years. *See id.*, ¶¶2, 7, 12.

The court of appeals rejected *Miller's* argument. Relying on the plain statutory text and *State v. Volk*, 258 Wis. 2d 584, ¶43, the court reasserted the clear rule that penalty enhancers must be used to increase a defendant's "maximum term of confinement in prison," and that the law "does not allow a circuit court to impose any portion of a penalty enhancer as extended supervision." *Id.*, ¶¶10-12. Simply put, there was and is no support for Miller's assertion that

a court must impose the maximum term of extended supervision, before utilizing a penalty enhancer to increase a defendant's maximum term of confinement. *Id.*, ¶12.

Moreover, the court rejected Miller's reliance on *State v. Harris*. *Id.*, ¶¶13-16. *Harris* is a pre-truth-in-sentencing case concerning an "indeterminate" sentence. *Id.*, ¶14. There, the circuit court attempted to utilize 6 months of a penalty enhancer to "increase" the defendant's sentence *to* 3 years where the maximum penalty on the underlying offense was 5 years imprisonment. *Id*. Our supreme court reversed and explained that the circuit court erred by applying the penalty enhancer without first imposing the maximum underlying sentence on the base offense. *Id.*

The *Miller* court aptly explained why *Harris* did not support Miller's claim. *Id.*, ¶¶15-16. First, *Harris* is a pre-truth-in-sentencing case where the court imposed a sentence below the underlying maximum on the base offense. *Id.*, ¶15. Second, the court noted that *Harris* actually supported the circuit court's sentence on Miller because the court did impose a sentence "in excess of" the maximum term of confinement (11 years vs. 10 years). *Id.*, ¶16. Thus, Miller's sentence was a proper exercise of discretion in that the court used the penalty enhancer, not to increase Miller's term of extended supervision, but to increase, by 1 year, Miller's maximum term of initial confinement. *Id.*, ¶17.

To start with, Agnew does not assert, as did Miller, that his sentence is unlawful because the

circuit court did not impose the maximum term of extended supervision. In fact, Agnew argues the opposite: that his sentence is unlawful, in part, because the court imposed a term of extended supervision that is twice the applicable maximum (1 year vs. 6 months). Further, the rule applied in *Miller*, that circuit court's need not impose the maximum term of extended supervision before utilizing a penalty enhancer to increase a defendant's applicable maximum term of confinement is simply not applicable or at issue in Agnew's case because the circuit court, even under the state's theory, imposed at least the maximum term of extended supervision (12 months). For these reasons alone, *Miller* simply does not support the state's position.

Moreover, the rule set forth in *Kleven* concerning the *maximum* applicable term of extended supervision that could be imposed is not a rule that *requires* the circuit court to actually impose the maximum term of extended supervision. Kleven, 280 Wis. 2d 468, ¶26 ("Kleven may be ordered to serve *at most*, the maximum term of supervision available for his base offense, which is two and one-half years."). (Emphasis added).

In this case, while the "maximum" term of extended supervision is 6 months, if the court seeks to increase Agnew's term of confinement, the court may, in its sentencing discretion, impose less than 6 months extended supervision so long as the terms of confinement and extended supervision otherwise comply with the applicable sentencing statutes. The court could, for example, impose 20 months and 5 months of extended supervision. Since 5 months is 25

percent of 20 months and the court could utilize 2 months of the penalty enhancer to increase Agnew's confinement from 18 months to 20 months, this theoretical sentence would fully comply with *Kleven* and the rule applied by the court in *Miller*. That being said, assuming the court wishes to use as much of the penalty enhancer as possible, the maximum term of confinement (24 months) must be accompanied by 6 months of extended supervision to comply with Wis. Stats. §§ 973.01(2)(c)1. and (2)(d).

Furthermore, the most important distinguishing characteristic between *Miller* and Agnew's case is that Agnew's case concerns the unique rules only applicable to *unclassified* felony sentences increased beyond the underlying maximum term of confinement by an applicable penalty enhancer. Therefore, the state is wrong to assert that *Miller* "clarified the application of principles underlying *Kleven* to those similarly situated to Agnew, who are sentenced under [TIS] II." (State's Br. at 10). *Miller*, even if an unpublished decision of the court of appeals could,[1] said nothing to "clarify," modify or withdraw, the principles underlying *Kleven*.

Under *Kleven*, Agnew's maximum term of extended supervision, "because the penalty enhancer cannot be bifurcated," is 6 months (the maximum term of imprisonment on the underlying offense

[1] "The court of appeals may not overrule, modify or withdraw language from a previously published decision of the court of appeals." *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246.

(24 months) less the maximum term of confinement on the underlying offense (18 months). *See Kleven*, 280 Wis. 2d 468, ¶26 n. 6 (citing *Jackson*, 270 Wis. 2d 113, ¶32).

Therefore, it is unsurprising that Agnew's claim does not rely on *Miller* or *Harris* and that Miller's claim, or this Court's rejection of it, neither relied on or cited *Kleven* or *Jackson*. These are two separate lines of cases that concern different sentencing principles. The state's grasping for persuasive support from *Miller* does not save the circuit court's unlawful sentence from *Kleven* and Wis. Stats. §§ 973.01(2)(b)10., (2)(c)1., and (2)(d) (2017-18).

CONCLUSION

For the reasons argued above and as previously argued in Agnew's brief-in-chief, Agnew respectfully asks this Court to reverse the circuit court's order denying Agnew's postconviction motion and remand this case to the circuit court for resentencing.

Dated this 19th day of February, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,061 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 19th day of February, 2020.

Signed:

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