STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2021AP001339-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRACY LAVER HAILES,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Orders Denying Postconviction Relief Entered in Milwaukee County Circuit Court, the Honorable Janet C. Protasiewicz and Michael J. Hanrahan Presiding.

BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Police searched two apartments at 618 North 30th Street, believing that they contained evidence of drug-dealing. The search warrant affidavits make clear that this belief was based in large part on Mr. Hailes' actions at a different address, 520 North 29th Street.

   Did the search warrant affidavits establish a sufficient "nexus" between Mr. Hailes' conduct at 520 North 29th Street and the two apartments at 618 North 30th Street?

   The trial court answered yes. (41:18); (App. 16).

2. As a matter of statutory construction, can the habitual criminality enhancer under Wis. Stat. § 939.62 and the second and subsequent drug offense enhancer under Wis. Stat. § 961.48 be applied to the same charge or conviction?

   The trial court answered yes. (57:3-4); (App. 8-9).

3. If it is improper to apply both enhancers to the same charge or conviction, is Mr. Hailes entitled to withdraw his plea?

   The trial court did not reach this issue, having determined that the charging scheme was proper.

4. If it is improper to apply both enhancers to the same charge or conviction, does this error entitle Mr. Hailes to resentencing?

   The trial court did not reach this issue, having determined that the charging scheme was proper.

5. If it is improper to apply both enhancers to the same charge or conviction, does this error entitle Mr. Hailes to sentence modification?

   The trial court did not reach this issue, having determined that the charging scheme was proper.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Because this is one of two pending cases concerning the proper interpretation of Wis. Stat. § 973.01(2)(c),[1] publication is requested. Oral argument is not requested.

STATEMENT OF THE CASE AND FACTS

Background

Police executed three search warrants targeting three different apartments which they believed to be linked to drug activity in Milwaukee: 618 North 30th

[1] *See State v. Cloyd*, Appeal Nos. 2018AP001589 & 2019AP00145.

Street, Apartment 102; 618 North 30th Street, Apartment 208; and 520 North 29th Street, Apartment 102. (61:5; 110:2). Based on evidence recovered from 618 North 30th Street, Apartment 102, the State ultimately charged Mr. Hailes with:

- Possession of a firearm as a felon, as a habitual criminal contrary to Wis. Stat. §§ 941.29(2)(a) and 939.62(1)(b);
- Possession with intent to deliver heroin (more than 50 grams) as a second and subsequent offense and as a habitual criminal contrary to Wis. Stat. §§ 961.41(1m)(d)4, 939.62(1)(c), and 961.48(1)(a);
- Possession with intent to deliver cocaine (more than 40 grams) as a second and subsequent offense and as a habitual criminal contrary to Wis. Stat. §§ 961.41(1m)(cm)4, 961.48(1)(a), and 939.62(1)(c);
- Possession with intent to deliver THC (less than 200 grams) as a second and subsequent offense and as a habitual criminal contrary to Wis. Stat. §§ 961.41(1m)(h)1, 961.48(1)(b), and 939.62(1)(b);
- Keeping a drug house as a second and subsequent offense and as a habitual

> criminal contrary to Wis. Stat. §§ 961.42(1), 939.62(1)(b), and 961.48(1)(b).

(61:1-3).

Based on evidence recovered from 618 North 30th Street, Apartment 208, Mr. Hailes was charged with:

- Possession of a firearm as a felon, as a habitual criminal contrary to Wis. Stat. §§ 941.29(2)(a) and 939.62(1)(b);
- Possession with intent to deliver THC (less than 1,000 grams) as a second and subsequent offense and as a habitual criminal contrary to Wis. Stat. §§ 961.41(1m)(h)2, 961.48(1)(b), and 939.62(1)(b);
- Possession with intent to deliver cocaine (1 gram or less) as a second and subsequent offense and as a habitual criminal contrary to Wis. Stat. §§ 961.41(1m)(cm)1g, 961.48(1)(b), and 939.62(1)(b).
- Keeping a drug house as a second and subsequent offense and as a habitual criminal contrary to Wis. Stat. §§ 961.42(1), 939.62(1)(b), and 961.48(1)(b).

(61:3-5).

All three search warrants have nearly identical supporting affidavits prepared by Milwaukee Police Officer Joseph Esqueda. (106:4; 107:4; 110:5). According to the affidavits for the North 30th Street apartments, Officer Esqueda has ten years of law enforcement experience, including extensive drug enforcement experience. (106:4; 107:4). The affidavits therefore include detailed background information regarding the logistics of the illicit drug trade, as well as the common behaviors of drug dealers. (106:4-5: 107:4-5).

The bulk of the information in the affidavit specific to this case comes from a confidential informant. (106:4-14; 107:4-14). According to Officer Esqueda, the informant was "credible" based on their assistance in another pending criminal matter. (106:7: 107:7). In addition, the affidavit also references the informant's helpful participation in other "investigations." (106:7: 107:7).

The informant told police Mr. Hailes was selling cocaine, heroin, and marijuana from the 520 North 29th Street residence. (106:6; 107:6). The informant claimed to have personally observed Mr. Hailes in possession of cocaine while at that address. (106:7: 107:7).

The informant also told police that Mr. Hailes was residing at "an apartment" at 618 North 30th Street. (106:6: 107:6). The informant was able to describe two cars linked to Mr. Hailes. (106:6; 107:6).

Police observed both cars parked outside the North 30th Street apartment building. (106:6-7: 107:6-7).

The affidavit also discloses that Mr. Hailes' probation agent told police that Mr. Hailes was residing at 618 North 30th Street, Apartment 307 and that he had told the agent that he was planning to move into Apartment 102 within the same building. (106:8: 107:8). Further investigation disclosed that Mr. Hailes was also seen moving furniture into Apartment 208, where he was listed as a subscriber for WE Energies. (106:9: 107:9).

Mr. Hailes' probation agent also informed police that he had seen Mr. Hailes running extension cords from Apartment 307 to Apartment 208, presumably to stay connected to electronic monitoring equipment required as a condition of his supervision. (106:9: 107:9). The agent also claimed to see men he identified as "lookouts" within the apartment building. (106:10: 107:10). In addition, Mr. Hailes has a prior criminal history involving drug trafficking convictions. (106:10: 107:10-11).

Motion to Suppress

Defense counsel filed a motion to suppress "all evidence" seized from Apartments 102 and 208 at the North 30th Street address along with "the fruits" of illegal law enforcement conduct. (9:1-4). As grounds, the motion asserted that the affidavits for the search warrants failed to establish probable cause with respect to the apartments at the North 30th Street location. (9:3).

The court, the Honorable Timothy Witkowiak presiding, held a non-evidentiary hearing on the motion. (41). The court noted that the confidential informant had seen Mr. Hailes with drugs on two separate occasions at the 520 North 29th Street address. (41:15). Officers then verified Mr. Hailes' connection to the North 30th Street building. (41:15); (App. 13). While the officers did not observe any drug dealing at that location, (41:15); (App. 13), the court relied on the expertise of the officer who drafted the affidavit, "indicating that drug dealers oftentimes do have the tools of their trade, that being the guns, the drugs themselves, and the items utilized for drug dealing within their apartments or their homes or residences." (41:16-17); (App. 14-15). In addition, the court also found that the affidavit sufficiently established the credibility and reliability of the confidential informant. (41:17-18); (App. 15-16). It therefore denied the motion to suppress. (41:18); (App. 16).

Plea and Sentence

Following the denial of the suppression motion, Mr. Hailes agreed to resolve the case by entering a plea. (39). Mr. Hailes pleaded guilty to: (1) Count One, possession of a firearm by a felon, as a habitual criminal; (2) Count Two, as amended, possession with intent to deliver heroin (10-50 grams), as a habitual criminal and as a second and subsequent offense; (3) Count Three, possession with intent to deliver cocaine (greater than 40 grams) as a habitual criminal and as a second and subsequent offense; (4) Count Six,

possession of a firearm by a felon, as a habitual criminal; (5) Count Eight, possession with intent to deliver cocaine (1 gram or less) as a habitual criminal and as a second and subsequent offense. (39:3; 83:1-4). The remaining counts were dismissed and read-in. (39:3). Under the terms of the agreement, both sides would be free to argue at sentencing. (87:2).

The court, the Honorable Janet Protasiewicz, imposed a global sentence of 16 years initial confinement followed by 11 years of extended supervision. (30:1).

Postconviction Proceedings

Mr. Hailes filed a Rule 809.30 postconviction motion arguing that both the habitual criminality enhancer and the second and subsequent drug offense enhancer could not be applied to the same charge or conviction. (56:4). Mr. Hailes argued that this defect rendered his plea not knowing, intelligent or voluntary. (56:7). In addition and in the alternative, Mr. Hailes also argued that trial counsel was ineffective for not challenging the improper charging scheme and for not advising Mr. Hailes, prior to accepting a plea, that he could not be convicted of both enhancers. (56:11). Mr. Hailes further argued that, if the court did not allow him to withdraw his pleas, the enhancer issue entitled him to either resentencing or sentence modification. (56:13).

The court, the Honorable Janet Protasiewicz presiding, denied the motion in a written order, without a hearing. (57); (App. 6-10). Because the court

concluded that it was not improper to apply both enhancers to the same charge or conviction, it concluded that none of Mr. Hailes' legal claims merited relief. (57:4-5); (App. 9-10).

Mr. Hailes then filed a supplemental postconviction motion, raising additional arguments for plea withdrawal arising out of the improper charging scheme. (80). The court, the Honorable Michael J. Hanrahan presiding, denied that motion for the same reason—it did not accept Mr. Hailes' argument that the charging scheme was improper. (95:1-2); (App. 11-12).

This appeal follows. (96).

ARGUMENT

I. The search warrant affidavits fail to establish a "nexus" between Mr. Hailes' conduct at the 520 North 29th Street residence and the two apartments at 618 North 30th Street. Accordingly, the court should have granted the motion to suppress.

A. Legal standard and standard of review.

Both the state and federal constitutions forbid the issuance of search warrants absent probable cause. U.S. Const. Amend. IV & XIV; Wis. Const. Art. I, § 11. The two provisions offer "essentially identical"

protections. *See State v. Ward*, 2000 WI 3, ¶ 55, 231 Wis.2d 723, 604 N.W.2d 517.

In assessing a challenge to a search warrant, this Court must ask "whether objectively viewed, the record before the warrant-issuing judge provided 'sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that they will be found in the place to be searched.'" *Ward*, 2000 WI 3, ¶ 27 (citations omitted); *see also Illinois v. Gates*, 462 U.S. 213, 238 (1983).

While this Court is instructed to give "great deference" to the magistrate's determination of probable cause, "whether the language of the search warrant meets constitutional requirements for reasonableness is a question of law and [this Court's] review is *de novo*." *State v. Schaefer*, 2003 WI App 164, 24, 266 Wis. 2d 719, 668 N.W.2d 760.

B. The "nexus" requirement.

Probable cause must be specific to the place searched. *Gates*, 462 U.S. at 238; *Ward*, 2000 WI 3, ¶ 27. Thus, "probable cause to believe that a person has committed a crime does not automatically give the police probable cause to search his house for evidence of that crime." *State v. Higginbotham*, 162 Wis. 2d 978, 995, 471 N.W.2d 24 (1991). Accordingly, even when there is "sufficient evidence" to label a person as a "drug dealer," that fact alone does not establish "that there is sufficient evidence to search the suspect's home." *Ward*, 2000 WI 3, ¶ 36.

This Court placed significant emphasis on this "nexus" requirement in *State v. Sloan*, 2007 WI App 146, 303 Wis. 2d 438, 736 N.W.2d 189. In that case, UPS alerted police to a package that had been dropped off for shipment which UPS staff believed to contain illegal drugs. *Id.*, ¶ 2-5. Police confirmed that the package contained marijuana, and obtained a search warrant for the location listed as the return address. *Id.* Police had footage of Sloan dropping the package off, confirmed that Dept. of Transportation records listed the return address as Sloan's address, observed two cars registered to Sloan parked at that address, and verified that Sloan received utility services in his name at that location. *Id.*, ¶¶ 5, 29.

This Court concluded that none of these facts were sufficient to establish probable cause to search the address listed on the package of marijuana. *Id.*, ¶ 38. While police adequately established that Sloan had a connection to the targeted residence, the Court nevertheless concluded that "[t]he lack of any factual connections between crimes by Sloan or others and the residence to be searched is fatal to a finding of probable cause." *Id.* In this Court's view, "there must be some factual connection between the items that are evidence of the suspected criminal activity and the place to be searched." *Id.* This factual connection requires more than the generic "legal conclusions" of the law enforcement affiant. *Id.*, ¶ 31.

Importantly, this Court was clear that the "nexus" requirement is essential for the overall integrity of the Fourth Amendment; without it, the

constitution's protections are "dilute[d] […] to the strength of mist or vapor." *Id.*, ¶ 38.

C. The affidavits do not establish a nexus between Mr. Hailes's alleged drug-dealing at the 520 North 29th Street address and the two apartments searched at 618 North 30th Street.

Mr. Hailes concedes that the affidavits in this case establish probable cause with respect to 520 North 29th Street, as they contain specific descriptions of illegal activity occurring at that residence. However, just as in *Sloan*, the affidavits fail to prove that there is any nexus between that activity and the two apartments searched at 618 North 30th Street.

Instead, the bulk of the information in the affidavits merely establishes that Mr. Hailes has a connection to these two apartments, *not* that he is storing drugs or contraband in either location. Following *Sloan,* none of this information is sufficiently suggestive to prove that either apartment "probably" contained evidence of a crime. Thus, the mere fact that Mr. Hailes had been seen moving in and out of these apartments, that he had subscribed to utilities at one of these addresses, or that his car had been present at the apartment complex, without more, fails to establish probable cause, where there have been no actual observations of illegal behavior at that location. *Sloan*, 2007 WI App 146, ¶ 38. In this case, there was no "surveillance that shows anything about the house that suggests criminal activity might be

afoot" nor was there any "claim of prior police reports of drug sales or other suspicious activity at that address." *Id.*, ¶ 32.

Instead, there are only three possibly suggestive pieces of evidence, none of which are significant enough to meet the constitutionally-imposed probable cause requirement. First, the probation agent claimed to see "lookouts" at the 618 North 30th Street address. (106:10: 107:10). However, unlike the police officer author of the affidavit, there is nothing in this record that would establish the probation agent's knowledge, experience, or ability to tell the difference between individuals lawfully present within the vicinity of the residence and suspected drug accomplices. The probation agent's observation is nothing more than a hunch, which cannot establish probable cause. After all, the Wisconsin Supreme Court has made clear that a hunch is insufficient to satisfy the even lower standard of proof required for reasonable suspicion. *State v. Post*, 2007 WI 60, ¶ 10, 301 Wis. 2d 1, 733 N.W.2d 634. The probation agent's conclusory suspicions of criminality, untethered from any indicia of reliability—such as drug investigation experience—add little, if anything, to the probable cause analysis.

Second, the affidavit leans heavily on Mr. Hailes' prior record, which includes numerous drug offenses. (106:10-11: 107:10-11). Again, however, our supreme court has made clear that this status alone, without more, cannot furnish probable cause to search

an apparently unrelated residence or location. *Ward,* 2000 WI 3, ¶ 36.

Third, the affidavit is also reliant on the officer's training, which asserts that drug traffickers may keep evidence of their crimes in locations other than the site of actual drug transactions. (106:5; 107:5). Such conclusory assertions were rejected by this Court in *Sloan*, which held that such claims do not provide the requisite *factual* connection. *Sloan*, 2007 WI App 146, ¶ 32. Merely describing the stereotypical behaviors of drug dealers is insufficient to establish probable cause. Instead, police must establish why such generic observations "probably" apply to the facts of this case. Because the affidavit does not make the requisite connection, it is plainly deficient.

Accordingly, because the evidence is clear that police had no actual evidence that criminality was occurring at the 618 North 30th Street apartments, the warrant failed to establish probable cause. The resulting search was unlawful and the evidence obtained must be suppressed.

D. Good faith does not excuse the actions of law enforcement.

Assuming that this Court agrees that the searches were unlawful, the Court must then address the applicability of the good-faith exception. *See State v. Eason*, 2001 WI 98, ¶ 27, 245 Wis. 2d 206, 629 N.W.2d 625; *United States v. Leon*, 468 U.S. 897, 918-20 (1984).

Under federal law, the State must prove that the "police relied in good faith on the judge's decision to accept the affidavit and issue the warrant." *United States v. Koerth*, 312 F.3d 862 (7th Cir. 2002). While the officer's decision to obtain the warrant establishes a *prima facie* case of good faith, that *prima facie* case can be rebutted under two scenarios:

> (1) If the reviewing authority "wholly abandoned his judicial role or otherwise failed in his duty to perform his neutral and detached function and not serve merely as a rubber stamp for the police."
>
> or
>
> (2) "[T]he officer submitted an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."

Id. (citing *Leon*, 468 U.S. at 923) (quotations omitted).

In this case, the facts and circumstances satisfy both criteria, such that good faith does not apply. Here, the reviewing authority "rubber-stamped" an affidavit that contains no evidence whatsoever regarding drug-dealing at 618 North 30th Street. The search warrant was thus deficient on its face and either the magistrate, or the officer who relied on it, should have been aware of its flaws. Because they chose to act anyway, the exclusionary sanction should apply.

In addition, Wisconsin law provides an extra layer of protection in its good-faith analysis. For the good faith exception to apply under Wisconsin law, the State must satisfactorily prove that:

> 1. Officers conducted a significant investigation before obtaining the warrant;
>
> 2. The warrant was reviewed by a knowledgeable police officer or government attorney; and
>
> 3. A reasonably well-trained police officer would not know the search was illegal.

State v. Scull, 2015 WI 22, ¶ 38, 361 Wis. 2d 288, 862 N.W.2d 562.

Here, the State cannot satisfy its burden with respect to the first prong, because police failed to conduct an adequate investigation of the 618 North 30th Street address before obtaining the warrant. Instead, police relied almost entirely on information obtained regarding 520 North 29th Street, a completely separate address, and did not make sufficient efforts to investigate whether 618 North 30th Street was also a site of potential drug activity before applying for a search warrant. For example, police did not bother to observe whether there was substantial traffic between the two locations which would be consistent with drug activity. They did not bother to double-check the probation agent's claims of drug "lookouts" at the building. Most importantly, they never verified whether there was any increase in

activity at that location which would be consistent with drug trafficking, such increased foot traffic.

Accordingly, because the law enforcement investigation was deficient, good faith does not apply and the evidence should have been suppressed.

II. Wis. Stat. § 973.01(2)(c) prohibits application of both the second and subsequent drug offense enhancer and the habitual criminality enhancer to the same charge or conviction.

A. Legal principles and standard of review.

Pursuant to Wis. Stat. § 961.48(1), a person charged with a drug crime can have their term of imprisonment enhanced if the underlying crime is a "second or subsequent offense." The statute therefore adds either four or six additional years of initial confinement (depending on the underlying conviction) to the defendant's maximum exposure when the State proves "the offender has at any time been convicted of any felony or misdemeanor offense under this chapter or under any statute of the United States or of any state relating" to controlled substances. Wis. Stat. § 961.48(1)-(3).

In addition to this specific enhancer for repeat drug offenders, the legislature has also created an enhancer for "habitual criminality" via Wis. Stat. § 939.62(1). Depending on both the nature of the prior conviction(s) and the current offense, the defendant's

maximum term of imprisonment may be increased under this statute by up to six additional years.

When the court seeks to apply multiple penalty enhancers to the same conviction, Wis. Stat. § 973.01(2)(c) explains how and in what order these enhancers are applied to the defendant's term of initial confinement.

In determining whether Wis. Stat. § 973.01(2)(c) allows both the second and subsequent drug offense enhancer and the habitual criminal enhancer to be applied to the same conviction, this Court exercises *de novo* review. *See State v. Arberry*, 2018 WI 7, ¶ 14, 379 Wis. 2d 254, 905 N.W.2d 832 (statutory interpretation is a question of law reviewed *de novo*).

B. The plain statutory language of Wis. Stat. § 973.01(2)(c) establishes that both enhancers cannot be applied to the same offense.

In assessing the meaning of Wis. Stat. § 973.01(2)(c), this Court must begin with the plain language of the statute. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. If the language is plain, no further analysis is required. *Id*. In this case, the plain language of Wis. Stat. § 973.01(2)(c) permits only one of these penalty enhancers, either § 939.62(1) or § 961.48, to apply.

Wis. Stat § 973.01(2)(c) provides:

> (c) Penalty enhancement.
>
> 1. Subject to the minimum period of extended supervision required under par. (d), the maximum term of confinement in prison specified in par. (b) may be increased by any applicable penalty enhancement statute. If the maximum term of confinement in prison specified in par. (b) is increased under this paragraph, the total length of the bifurcated sentence that may be imposed is increased by the same amount.
>
> 2. If more than one of the following penalty enhancement statutes apply to a crime, the court shall apply them in the order listed in calculating the maximum term of imprisonment for that crime:
>
> a. Sections 939.621, 939.632, 939.635, 939.645, 946.42(4), 961.442, 961.46, and 961.49.
>
> b. Section 939.63.
>
> c. Section 939.62(1) or 961.48.

Wis. Stat. § 973.01(2)(c).

Comparing sub. a. with sub. c., one can immediately discern a notable difference: the use of an internal conjunctive in sub. a.—"and"—rather than the word "or" as appears in sub. c. Thus, utilizing the plain language of the statute, a sentencing court could apply any applicable enhancer in sub. a., in the order listed, if the facts permitted. For example, if the facts permit, the State could apply the domestic abuse enhancer (Wis. Stat. § 939.621), the school zone enhancer. (Wis. Stat. § 939.632), and the hate crime

statute (Wis. Stat. § 939.645) to the same offense, in the order listed.

In stark contrast, because of the internal disjunctive "or" utilized in sub. c., the court must choose either § 939.62(1) or § 961.48. The statute therefore explicitly departs from the mechanism set forth in sub. a and instructs the reader that they can apply one or the other, but not both.

However, because there is no explicit external disjunctive (i.e., between the three subsections), if the facts support, one can apply one enhancer from sub. a. (or more than one, because of the internal conjunctive in sub. a.), and then the sub. b. enhancer (dangerous weapon), and then one—but not both—of the enhancers from sub. c. For example, there would be nothing improper about the State charging a qualifying crime and then enhancing that offense with both the domestic abuse enhancer (§939.621) and the school zone enhancer (§939.632) from sub. a., then also applying the dangerous weapon enhancer (§939.63) from sub. b., and finally the habitual criminal enhancer (939.62(1)) from sub. c.

Thus, the plain language of Wis. Stat. § 973.01(2)(c) shows that the legislature chose to permit some, but not all, possible combinations of penalty enhancers. In summary, the express use of the conjunctive "and" in sub. a. stands in clear contrast to the express use of the disjunctive "or" in sub. c. As a result, either § 939.62(1) or 961.48 can apply, but not both.

This reading is supported by a review of other "closely-related" statutes, *Kalal*, 2004 WI 58, ¶ 46, such as those statutes governing attempted crimes. For example, consider Wis. Stat. § 939.32(1g):

> The maximum penalty for an attempt to commit a crime that is punishable under sub. (1) (intro.) is as follows:
>
> (b)
>
> 1. If neither s. 939.62(1) nor s. 961.48 is being applied, the maximum term of imprisonment is one-half of the maximum term of imprisonment, as increased by any penalty enhancement statute listed in s.973.01(2)(c)2.a. and b., for the completed crime.
>
> 2. If either s. 939.62(1) or 961.48 is being applied, the maximum term of imprisonment is determined by the following method:
>
> a. Multiplying by one-half the maximum term of imprisonment, as increased by any penalty enhancement statute listed in s. 973.01(2)(c)2.a. and b., for the completed crime.
>
> b. Applying s. 939.62(1) or 961.48 to the product obtained under subd. 2.a.

Once again, the legislature's usage of disjunctive language "or" in sub. 2.b. reflects that the overall effect of the statutory scheme is to hold an offender responsible for *either* Wis. Stat. § 939.62(1) or 961.48, but not both.

This language is mirrored in Wis. Stat. § 939.32(1m):

> Bifurcated sentences. If the court imposes a bifurcated sentence under s. 973.01(1) for an attempt to commit a crime that is punishable under sub. (1)(intro.), the following requirements apply:
>
> (a) Maximum term of confinement for attempt to commit classified felony.
>
> 1. Subject to the minimum term of extended supervision required under s. 973.01(2)(d), if the crime is a classified felony and neither s. 939.62(1) nor s. 961.48 is being applied, the maximum term of confinement in prison is one-half of the maximum term of confinement in prison specified in s. 973.01(2)(b), as increased by any penalty enhancement statute listed in s. 973.01(2)(c)2.a. and b., for the classified felony.
>
> 2. Subject to the minimum term of extended supervision required under s. 973.01(2)(d), if the crime is a classified felony and either s. 939.62(1) or 961.48 is being applied, the court shall determine the maximum term of confinement in prison by the following method:
>
> a. Multiplying by one-half the maximum term of confinement in prison specified in s. 973.01(2)(b), as increased by any penalty enhancement statutes listed in s. 973.01(2)(c)2.a. and b., for the classified felony.
>
> b. Applying s. 939.62(1) or 961.48 to the product obtained under subd. 2.a.

Again, a plain reading of the statute evinces that *either* the second and subsequent drug offense enhancer or the habitual criminal statute may be applied, but not both.

C. Legislative history.

Here, the language is plain, and no resort to secondary sources is necessary. However, if this Court concludes that the statutory language is ambiguous, legislative history supports Mr. Hailes' reading. *See Kalal*, 2004 WI 58, ¶ 48 (court may utilize legislative history to discern meaning only if statute is facially ambiguous).

On a historical note, as part of the "second wave" of Truth-in-Sentencing,[2] the legislature enacted 2001 Wisconsin Act 109 ("Act 109"), more commonly referred to as "TIS-II."[3] Act 109 streamlined the "plethora" of penalty enhancers, retaining several enhancers—such as the use of a dangerous weapon, "hate crimes," etc.—and characterized other enhancers as aggravating factors that the trial judge must consider at sentencing.[4] Act 109, Section 1129, created Wis. Stat. § 973.01(2)(c), which remains the same today with *de minimis* change. Act 109, Sections 540-542, created the new sections on attempted

[2] Michael B. Brennan, Thomas J. Hammer, & Donald Latorraca, *Fully Implementing Truth-in-Sentencing*, WISCONSIN LAWYER, November 2002.

[3] The text of the bill is available online at https://docs.legis.wisconsin.gov/2001/related/acts/109.pdf.

[4] Brennan *supra* n. 4.

crimes, e.g., § 939.62(1g-1m), and these subsections are unchanged. These new sections to Act 109 had an effective date of February 1, 2003.

Nothing in the extensive drafting records for Act 109 or its earlier incarnations reflect any indication of a conjunctive legislative intent for application of enhancers for both second or subsequent drug offenses and habitual criminality. Act 109 adopted the same language from an earlier Assembly Bill (2001 AB-3) that had failed to pass. AB-3 made some changes to an earlier bill that had also failed to pass, 1999 Assembly Bill 465, incorporating recommendations from the Criminal Penalties Study Committee [CPSC] made at the end of the 1999-2000 legislative session. The language of § 973.01(2)(c)(2) from the failed 2001 bill is identical to the 1999 version, with *de minimis* change: the 1999 version stated "939.62," while the 2001 and final version both stated "939.62(1)." The CPSC published a detailed report (178 pages) dated 8/31/99, which was incorporated as the drafter's note to AB-465.[5] Nothing in these legislative materials indicate that CPSC recommended a conjunctive application of both enhancers.

In sum, even if Wis. Stat. § 973.01(2)(c) (or § 939.62(1g-1m)) were ambiguous, there is nothing in legislative history suggesting that the legislature

[5] This report is available online at https://www.wistatedocuments.org/digital/collection/p267601coll4/id/439/.

intended that both §§ 939.62(1) and 961.48 apply to a single conviction.

D. This case is not governed by *State v. Maxey*, 2003 WI App 94, 264 Wis. 2d 878, 663 N.W.2d 811.

In *Maxey*, the State sought review of a trial court order denying application of both the repeat drug offender enhancer (§961.48(2)) and the habitual criminal enhancer (§939.62(1)(b)) to a charge of marijuana possession. *Maxey*, 2003 WI App 94, ¶ 1. This Court concluded that this charging scheme was proper because neither statute articulated an explicit exception like the one Maxey sought. *Id*., ¶ 18. This Court therefore reversed, relying principally on *State v. Delaney*, 2003 WI 9, 259 Wis. 2d 77, 658 N.W.2d 416. *Maxey*, 2003 WI App 94, ¶¶ 16-17.

This Court read *Delaney* for the proposition that, in order to be exempted from application of an enhancer, the statute itself must explicitly provide for that exception. *Id*., ¶¶ 17-18. Looking at both enhancer provisions, this Court concluded that there was "nothing in the language" of either enhancer statute that would preclude the charging scheme at issue. *Id*.

However, *Maxey* involves an offense date prior to the effective date of Wis. Stat. § 973.01(2)(c). Thus, this Court was essentially answering a separate statutory construction issue, one distinct from the issue here—the proper interpretation of Wis. Stat. § 973.01(2)(c), which governs the application of enhancers in a given case. This Court in *Maxey*

obviously did not address Mr. Hailes' argument here—that the disjunctive language of Wis. Stat. § 973.01(2)(c) precludes application of both the second and subsequent drug offense enhancer and the habitual criminal enhancer to the same offense – because § 973.01(2)(c) did not yet exist at the time of the offense in *Maxey*. Thus, while Mr. Hailes acknowledges *Maxey,* the precedential value of that opinion is in doubt because it was superseded by a more specific legislative enactment governing how and when enhancers may be applied in a specific case.

Accordingly, this Court should hold that the statute does not permit application of both enhancers to a single drug charge.

III. Because it is improper for both enhancers to be applied to the same charge or conviction, Mr. Hailes' plea is invalid and must be withdrawn.

A. Mr. Hailes' plea was not knowingly, intelligently, and voluntarily entered.

A defendant who seeks to withdraw a plea after sentencing has the burden to prove by clear and convincing evidence that a manifest injustice would result if withdrawal was not permitted. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

A manifest injustice occurs when there are serious questions affecting the fundamental integrity of the plea that renders it unknowing, involuntary, and unintelligently entered. *State v. Dawson*, 2004 WI

App 173, ¶ 6, 276 Wis. 2d 418, 688 N.W.2d 12. Numerous cases have held that affirmative misinformation about the law given to the defendant requires plea withdrawal because the plea is uninformed and its voluntariness compromised. *See, e.g., State v. Riekkoff*, 112 Wis. 2d 119, 332 N.W.2d 744 (1983) (holding that when the defendant pled guilty, incorrectly believing that he could seek appellate review of an evidentiary order, he misunderstood the effects of his plea and the plea was therefore involuntary); *Dawson*, 276 Wis. 2d 418 (holding that the legally unenforceable reopen-and-amend provision of the defendant's plea deal rendered the plea involuntary); *State v. Woods*, 173 Wis. 2d 129, 496 N.W.2d 144 (Ct. App. 1992) (holding that a guilty plea entered at least in part based on inaccurate legal information about sentencing was neither knowing or voluntary); *State v. Brown*, 2004 WI App 179, 276 Wis. 2d 559, 687 N.W.2d 543 (holding that when the State promised to drop, but did not drop, all charges requiring the defendant to register as a sex offender or subjecting the defendant to a Chapter 980 civil confinement, the defendant's plea was involuntary).

Significantly, case law does not require that the decision to plead be based exclusively on the misinformation the defendant received. *State v. Dillard*, 2014 WI 123, ¶ 60, 358 Wis. 2d 543, 859 N.W.2d 44. Rather, a guilty or no-contest plea is not voluntary unless the defendant is "fully aware of the direct consequences [of his plea], including the actual value of any commitments made to him by the court, prosecutor, or his own counsel…" *Id.*

Here, there are at least three important ways that the plea was not knowing, intelligent, and voluntary. First, under *Woods*, the plea involved an impossibility—Mr. Hailes could not lawfully have both enhancers applied to the same conviction. As this Court has held, "[t]he plea agreement to a legal impossibility necessarily rendered the plea an uninformed one." *Woods*, 173 Wis. 2d at 140. By agreeing to have his sentence enhanced in a legally impossible fashion, (39:3), Mr. Hailes was entering a plea to a legal impossibility. Accordingly, under *Woods*, that plea is categorically invalid.

Second, Mr. Hailes' plea was not entered with full knowledge of the information relevant to a decision regarding whether to plead. Mr. Hailes was incorrectly informed by his attorney, the court, and the State (to the extent the State did not correct the complaint/amended information or seek to dismiss one set of the enhancers at the time of the plea), that he could be convicted of counts carrying both the repeater enhancer and the second and subsequent enhancer. (37:4-6; 39:10-11; 87).

As set forth in the postconviction motion, Mr. Hailes would testify that at the time of his plea, he did not know that he could only have been charged and convicted of the repeater enhancer or with the second and subsequent enhancer on seven of the nine counts. (56:11). Thus, he was prevented from making a reasoned decision about whether to proceed to trial or plead as he was not aware of the direct consequences of his plea. Mr. Hailes' capacity to knowingly,

intelligently, and voluntarily choose between accepting the State's plea offer and proceeding to trial was therefore undermined.

Third, the benefits of the plea were "illusory." *Dillard*, 2014 WI 123, ¶ 79. As the Wisconsin Supreme Court has held, if the State offers to dismiss an enhancer which is not legally applicable to the defendant's charge, this may cause the defendant to misunderstand the "'actual value' of the plea offer he accepted." *Id*. Here, Mr. Hailes was charged with multiple drug charges, all of which carried both enhancers. (83). As drafted, the amended information exposed Mr. Hailes to significant imprisonment due to the application of both enhancers. (83). The State agreed to dismiss multiple charges carrying both enhancers, thereby reducing his overall exposure. (39:3). On paper, the offer therefore represents a substantial reduction in exposure. However, as shown above, the State could not legally apply both enhancers to each charge. Accordingly, the "true" reduction in exposure entailed by the plea offer is significantly different, meaning that the perceived reduction in exposure is not as great as it initially appears.

Accordingly, Mr. Hailes' plea must be withdrawn.[6]

[6] Mr. Hailes' initial postconviction motion asserted that the court could order plea withdrawal without an evidentiary hearing. (56:11). Following *Woods* and *State v. Douglas*, 2018 WI App 12, 380 Wis. 2d 159, 908 N.W.2d 466, it is clear that this

continued

B. Mr. Hailes received ineffective assistance of counsel.

"One way to demonstrate manifest injustice [entitling the defendant to plea withdrawal] is to establish that the defendant received ineffective assistance of counsel." *Dillard*, 2014 WI 123, ¶ 84. "Article I, Section 7 of the Wisconsin Constitution and the Sixth Amendment to the United States Constitution (applied to the states by the Fourteenth Amendment) guarantees criminal defendants the right to effective assistance of counsel." *Id*.

"To show he has been deprived of that right, the defendant must prove (1) that trial counsel's performance was deficient; and (2) that this deficiency prejudiced the defendant." *Id*., ¶ 84. In this context, the prejudice prong requires proof that the defendant would have made a different choice (rather than pleading guilty) but-for trial counsel's ineffectiveness. *Id*., ¶ 96.

Here, Mr. Hailes' attorney was deficient for: (1) failing to move to dismiss either the repeater enhancers or the second and subsequent enhancers from seven of the nine charges; and (2) telling Mr.

Court can order plea withdrawal without remanding for an evidentiary hearing. However, if this Court holds that an evidentiary hearing is necessary, Mr. Hailes did request one in both of his motions. (56:11; 80:4). If the Court agrees with the legal prerequisites for his claims, Mr. Hailes will have satisfied the legal requirements to obtain such a hearing. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433.

Hailes that he could be convicted of counts carrying both the repeater enhancer and the second and subsequent enhancer.

Mr. Hailes' postconviction motion explained, at length, why it was improper to apply both enhancers to the same charge or conviction. (56:4-7). Moreover, Mr. Hailes also argued that "[t]here can be no reasonable strategic reason for trial counsel's failure to read the relevant statutes and properly advise Mr. Hailes." (56:11). As the Wisconsin Supreme Court has held, "A defendant's decision whether to go to trial or plead is generally the most important decision to be made in a criminal case" and "[a] defendant should have the benefit of an attorney's advice on this crucial decision." *Dillard*, 2014 WI 123, ¶ 90.

Moreover, Mr. Hailes was prejudiced because he entered a plea based on misinformation and pled to three counts erroneously carrying both the repeater enhancer and second and subsequent enhancer. Mr. Hailes' postconviction motion therefore averred that:

> Mr. Hailes would testify that his attorney told him that he could be convicted of counts carrying both the repeater enhancer and the second and subsequent enhancer. His attorney never told him, and he did not know, that there was a challenge to the enhancers. Additionally, had he known that there was a challenge to the enhancers, he would not have pled to the counts with both enhancers.

(56:11-12).

Mr. Hailes therefore sufficiently pleaded his ineffectiveness claim in the postconviction motion. (56:11-12). Accordingly, this Court must therefore remand for an evidentiary hearing. *Allen*, 2004 WI 106, ¶ 9.

IV. Mr. Hailes is entitled to sentence modification.

A. Legal standard.

A circuit court has the inherent power to modify a defendant's sentence upon the showing of a "new factor." *State v. Harbor*, 2011 WI 28, ¶ 35, 333 Wis. 2d 53, 797 N.W.2d 828.

In assessing a claim for sentence modification, a circuit court applies a two-part analysis: First, the defendant bears the burden of demonstrating the existence of a new factor by clear and convincing evidence. *Id.*, ¶ 36. A "new factor" is defined as "a fact or set of facts highly relevant to the imposition of the sentence, but not known to the trial judge at the time of the original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." *Id.*, ¶ 40 (citing *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). "Whether the fact or set of facts put forth by the defendant constitutes a 'new factor' is a question of law." *Id.*, ¶ 33. Erroneous or inaccurate information may constitute a new factor. *State v. Norton*, 2001 WI App 245, ¶7, 248 Wis. 2d 162, 635 N.W.2d 656.

Once a defendant has satisfactorily demonstrated the existence of a new factor, the circuit court moves to step two of the analysis. It exercises its discretion and determines "whether that new factor justifies modification of the sentence." *Id.*, ¶ 37. It is not necessary, however, that the new factor "frustrate" the purpose of the original sentence. *Id.*, ¶ 48.

B. The improper application of enhancers is a "new factor."

In this case, as discussed above, trial counsel, the State, and the court overlooked the fact that Mr. Hailes was charged with, and later convicted of, multiple counts that erroneously carried both the repeater enhancer and the second and subsequent enhancer.

The fact that Mr. Hailes was charged with, and later convicted of, multiple counts that erroneously carried both the repeater enhancer and the second and subsequent enhancer is highly relevant to the imposition of the sentence. The dismissal of the repeater enhancer or the second and subsequent enhancer on seven of the nine charges in the amended information would have reduced Mr. Hailes' total charged exposure significantly—by approximately 30 years. Likewise, the dismissal of the repeater enhancer or the second and subsequent enhancer on the three charges to which Mr. Hailes pled, would have reduced the total exposure Mr. Hailes faced at the time of sentencing by 16 years.

It is important that a circuit court have accurate information regarding the nature of the charges and a defendant's exposure. The nature of the charges and a defendant's exposure is critical as it directly relates to the seriousness of the conduct at issue and the need to protect the public.

Therefore, if this Court agrees that enhancers were improperly applied to his convictions, this Court should find that a new factor exists and remand to the circuit court so that it can exercise its discretion and determine whether sentence modification is warranted.

V. Mr. Hailes is entitled to resentencing.

A. Legal standard.

"A defendant has a constitutionally protected due process right to be sentenced based on accurate information." *State v. Tiepelman*, 2006 WI 66, ¶ 9, 291 Wis. 2d 179, 717 N.W.2d 1.

When a circuit court relies on inaccurate information, "we are dealing 'not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude.'" *State v. Travis*, 2013 WI 38, ¶ 17, 347 Wis. 2d 142, 832 N.W.2d 491 (quoting *United States v. Tucker*, 404 U.S. 443, 447 (1972)). "A criminal sentence based upon materially untrue information, whether caused by carelessness or design, is inconsistent with due process of law and cannot stand." *Id.*

A defendant who requests resentencing due to inaccurate information at the sentencing hearing must show that: (1) the information was inaccurate; and (2) that the court relied on the inaccurate information in the sentencing. *Tiepelman*, 291 Wis. 2d 179, ¶ 26.

"Once actual reliance on inaccurate information is shown, the burden shifts to the state to prove the error was harmless." *Id*. ¶¶ 2, 9. In order to prove an error is harmless, the State must demonstrate that "there is no reasonable probability that the error contributed to the sentence; or that it is clear beyond a reasonable doubt that the same sentence would have been imposed absent the error." *Travis*, 347 Wis. 2d 142, ¶ 26.

B. The court relied on inaccurate information when it sentenced Mr. Hailes.

In this case, at the beginning of the sentencing hearing, the circuit court specifically confirmed the counts to which Mr. Hailes had pleaded and those that had been dismissed and read-in. (40:3).

However, as discussed above, multiple counts erroneously carried both the repeater enhancer and the second and subsequent enhancer. Therefore, the circuit court had before it, and considered, inaccurate information at the time of sentencing. This Court should remand for a new sentencing hearing as a sentencing court cannot properly exercise its discretion if it has an incorrect understanding of the facts and the law. *See Travis*, 2013 WI 38, ¶ 26.

C. If this Court concludes that Mr. Hailes forfeited his ability to challenge the inaccuracy, his motion entitled him to a hearing on his ineffective assistance of counsel claim.

As set forth in the postconviction motion, if this Court were to conclude that this issue is not adequately preserved, Mr. Hailes is entitled to a hearing on his claim of ineffective assistance of counsel. As to deficient performance, the motion alleged that "trial counsel was deficient for failing to inform the circuit court that both the repeater enhancer and second and subsequent enhancer could not be applied together on the counts in this case." (56:15). The motion further argued that "[t]here can be no reasonable strategic reason for allowing the court to believe that Mr. Hailes's exposure was greater than it actually was." (56:15). As to prejudice, Mr. Hailes averred that he was prejudiced "because the circuit court was not correctly informed of the nature of the charges or the total amount of time Mr. Hailes faced. Thus, the fact that the circuit court did not have accurate information at the sentencing undermines the confidence in the outcome of this case." (56:15).

Accordingly, if this Court concludes that the inaccurate information claim is waived, Mr. Hailes is entitled to an evidentiary hearing on remand regarding his claim of ineffective assistance of counsel. *Allen*, 2004 WI 106, ¶ 9.

CONCLUSION

For the reasons set forth herein, Mr. Hailes respectfully requests that this Court reverse the circuit court's order denying the suppression motion, grant plea withdrawal, and remand for a hearing consistent with the arguments herein.

Dated this 22nd day of November, 2021.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. the length of this brief is 7,508 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 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 s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules 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 or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 instead of full names of persons, 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.

Dated this 22nd day of November, 2021.

Signed:
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