STATE OF WISCONSIN

IN SUPREME COURT

No. 2021AP1339-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRACY LAVER HAILES,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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Defendant-Appellant-Petitioner Tracy Laver Hailes has petitioned this Court to review the court of appeals' published decision in *State v. Hailes*, No. 2021AP1339-CR, 2023 WL 3318339 (Wis. Ct. App. May 9, 2023). Plaintiff-Respondent State of Wisconsin disagrees that the issues presented in Hailes's petition warrant this Court's review under Wis. Stat. § (Rule) 809.62(1r). But if this Court grants review, the State will present a novel issue by way of an alternative ground to affirm, namely that two sentencing enhancers were properly applied to Hailes's case. The court of appeals imprudently and incorrectly resolved that novel issue in Hailes's favor before affirming his judgment of conviction and the postconviction orders denying relief.

I. Following his drug and gun convictions, Hailes sought postconviction relief based on the application of two sentencing enhancers to his case.

This case concerns Hailes's postconviction motions seeking plea withdrawal, sentence modification, or resentencing. (Pet-App. 4.) The basis for all these requests was his belief that two sentencing enhancers were erroneously applied to his case. (Pet-App. 4.) Specifically, some of the charges to which Hailes pleaded guilty carried both the habitual criminal enhancer (Wis. Stat. § 939.62) and the second or subsequent enhancer for repeat drug offenders (Wis. Stat. § 961.48). (Pet-App. 4.) Relying on a statute that tells a sentencing court how to rank enhancers when more than one applies, Hailes argued that he couldn't have been charged with or convicted of crimes carrying both enhancers. (Pet-App. 14–16.) The circuit court denied relief, reasoning that both enhancers correctly applied. (Pet-App. 7–8.)

The court of appeals affirmed, but on alternative grounds. (Pet-App. 4–5.) In a published decision, it agreed with Hailes that both sentencing enhancers can't apply at the

same time. (Pet-App. 4–5.) The court of appeals read the plain language of Wis. Stat. § 973.01(2)(c) as precluding that scenario. (Pet-App. 14–17.) However, because it's clear from the record that the enhancers played no part in Hailes's decision to plead guilty or in the sentence he received, the court of appeals denied Hailes relief.[1] (Pet-App. 4–5.)

II. The issues that Hailes presents do not warrant this Court's review.

The main hook for Hailes's petition is his contention that the court of appeals' decision denying him relief "contradicts two other published cases of the court of appeals establishing that an unenforceable or illegal plea entitles the defendant to plea withdrawal as a matter of law." (Pet. 10.) That isn't accurate: the cases that Hailes references—*State v. Dawson*, 2004 WI App 173, 276 Wis. 2d 418, 688 N.W.2d 12, and *State v. Woods*, 173 Wis. 2d 129, 496 N.W.2d 144 (Ct. App. 1992)—are readily distinguishable from this case, as the court of appeals explained. (Pet-App. 20–21.)

Specifically, in both *Dawson* and *Woods*, legal impossibilities induced the defendants' pleas, at least in part. (Pet-App. 20–21.) In each case, the inducement factored into the conclusion that the defendant's plea wasn't knowing, intelligent, and voluntary. *See Dawson*, 276 Wis. 2d 418, ¶ 25 (holding that the defendant "established that his plea was not knowing and voluntary because it was induced by the promise of a possible future benefit that could never be conferred");

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[1] As discussed in greater detail below, the way the court of appeals decided Hailes's case prevented the State from seeking review of its published holding that both sentencing enhancers cannot apply at the same time. *See* Wis. Stat. § (Rule) 809.62(1g)(c), (1m); *see also State v. Castillo*, 213 Wis. 2d 488, 491, 570 N.W.2d 44 (1997) (explaining that "adverse decision" in the petition for review statute refers to the mandate reached by the court of appeals).

Woods, 173 Wis. 2d at 141–42 ("[B]ecause Woods pled guilty based on inaccurate information from the attorneys and the judge regarding his potential sentence . . . Woods' guilty plea was neither knowing nor voluntary.").

Here, unlike in *Dawson* and *Woods*, Hailes "failed to establish that the penalty enhancers in any way induced his plea, such that Hailes can now claim that his plea was not knowing, intelligent, and voluntary." (Pet-App. 21–22.) Rather, the record shows that Hailes pleaded guilty because he lost his suppression motion, and the State had a strong case against him. (Pet-App. 22–23.) Given this key distinction, the court of appeals' decision here in no way contradicts *Dawson* and *Woods*. (Pet. 10–11.)

The only other attempt that Hailes seems to make to satisfy this Court's criteria for review is his pitch that review is warranted to "resolve when an issue is too 'novel' for counsel to reasonably act on his client's behalf by raising it." (Pet. 12.) Whatever the merits of that contention, this Court would have no reason to reach the issue because Hailes cannot show prejudice from any deficient performance in this case. *See Strickland v. Washington*, 466 U.S. 668, 697 (1984) ("[A] court need not determine whether counsel's performance was deficient before examining . . . prejudice."). In fact, as the court of appeals recognized, Hailes didn't even properly allege prejudice in his postconviction motion. (Pet-App. 24–25.) Even if he had, the record refutes any claim of a reasonable probability that Hailes would have insisted on going to trial had his attorney not supposedly misadvised him about the enhancers. (Pet-App. 25.) Again, the record "clearly demonstrates" that "Hailes was motivated to plead guilty, not by anything related to the penalty enhancers, but by the circuit court's denial of his motion to suppress and the strength of the State's case." (Pet-App. 25.)

Hailes may also believe that the question whether he's entitled to sentencing relief warrants this Court's

discretionary review. (Pet. 15–16.) Suffice it to say, the court of appeals had no trouble rejecting Hailes's claims for sentence modification and resentencing under the facts of this case. Under well-established standards that Hailes doesn't challenge (Pet. 15–16), he was required to show that the penalty enhancers played some role at his sentencing hearing, (Pet-App. 26–29). But they didn't, as the court of appeals recounted. (Pet-App. 27–29.)

In short, the State disagrees that the issues Hailes presents warrant this Court's review.

III. If this Court grants review, the State will present a novel issue by way of an alternative ground to affirm.

Pursuant to Wis. Stat. § (Rule) 809.62(3)(d)–(e), the State advises that there's an alternative ground to affirm that should be addressed if this Court grants Hailes's petition for review: both sentencing enhancers properly applied to Hailes's case. The parties briefed this issue in the court of appeals and the court of appeals resolved the issue in Hailes's favor, holding that under section 973.01(2)(c), both sentencing enhancers *cannot* apply at the same time. (Pet-App. 14–17.)

Whether the habitual criminal enhancer and the second or subsequent enhancer can apply at the same time is a novel and important question. Indeed, Hailes sought publication on the issue in the court of appeals (Hailes's Br. 10), and the court of appeals published its decision after resolving the issue in his favor, (Pet-App. 29). Although the State disagrees with the court of appeals' reading of section 973.01(2)(c), it cannot petition for review on that issue because of how the court of appeals resolved Hailes's case. Since the court of appeals ultimately affirmed Hailes's judgment of conviction and the orders denying postconviction relief, the State didn't receive an "adverse decision" within the meaning of Wis. Stat. § (Rule) 809.62(1m). In *Castillo*, this Court explained that

"adverse decision" means "the result (or disposition or mandate) reached by the court of appeals in the case." *State v. Castillo*, 213 Wis. 2d 488, 491, 570 N.W.2d 44 (1997) (citation omitted). "A court's ultimate decision is separate from the court's opinion, however, and a party may not petition this court for review if it merely 'disagrees with the rationale expressed in the opinion.'" *Id.* (citation omitted). Succinctly, when "the mandate, or outcome, [is] favorable to [a party] . . . [the party] may not properly petition this court for review." *Id.* at 492.

The way that the court of appeals resolved this case was imprudent. "Typically, an appellate court should decide cases on the narrowest possible grounds." *Maryland Arms Ltd. P'ship v. Connell*, 2010 WI 64, ¶ 48, 326 Wis. 2d 300, 786 N.W.2d 15. Here, the narrowest way to decide this case was to hold that Hailes wasn't entitled to relief even assuming that both enhancers were improperly applied to his case. The court of appeals' reaching out to resolve the statutory-interpretation question has created an inequitable scenario where a party cannot petition this Court for review of a published decision with which it disagrees. The court of appeals' approach should be discouraged.

Further, the court of appeals' reading of section 973.01(2)(c) is incorrect. It held that "the plain language" of the statute "clearly indicates" that either the habitual criminal enhancer or the second or subsequent enhancer "can apply to enhance a penalty, but not both." (Pet-App. 16.) In reaching this conclusion, the court of appeals contravened well-established tools of statutory construction by narrowly focusing on a single word in the statute: "or." (Pet-App. 15–17.)

The court of appeals correctly recognized "that statutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, [the court] ordinarily stop[s] the inquiry.'" *State ex rel. Kalal v. Cir. Ct.*

for Dane Cty., 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted); (Pet-App. 15). But it failed to acknowledge that "[c]ontext is important to meaning"; that "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole"; and that "[s]tatutory language is read where possible to give reasonable effect to every word." *Id.* ¶ 46; (Pet-App. 15–17.)

Read in context and giving reasonable effect to every word in the paragraph, section 973.01(2)(c) doesn't "clearly indicate[ ]" that either the habitual criminal enhancer or the second or subsequent enhancer "can apply to enhance a penalty, but not both." (Pet-App. 16.)

Section 973.01(2)(c) covers penalty enhancement as part of a bifurcated sentence of imprisonment and extended supervision. To begin, the statute says that the maximum term of confinement for a crime "may be increased by *any applicable penalty enhancement statute*." Wis. Stat. § 973.01(2)(c)1. It then tells the sentencing court what to do "[i]f *more than one*" of certain "penalty enhancement statutes apply to a crime." Wis. Stat. § 973.01(2)(c)2. Importantly, the statute directs the court to "apply them"—meaning the multiple enhancement statutes at issue—in a particular order in deciding the total sentence for the crime:

> 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, 939.623, 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)2.a.–c.

In holding that section 973.01(2)(c) clearly indicates that a sentencing court can't apply the habitual criminal enhancer (section 939.62) and the second or subsequent

enhancer (section 961.48) at the same time, the court of appeals laser focused on the word "or" in section 973.01(2)(c)2.c. (Pet-App. 16–17.) It favored the ordinary disjunctive meaning of "or" (one or the other, but not both), especially because the Legislature used the word "and" in listing enhancers in section 973.01(2)(c)2.a. (Pet-App. 16.)

The use of the word "or" "is 'almost always disjunctive.'" *Encino Motorcars, LLC v. Navarro*, 138 S.Ct. 1134, 1141 (2018) (citation omitted). "Unsurprisingly," though, "statutory context can overcome the ordinary, disjunctive meaning of 'or'." *Id.* Here, a sentencing court reading the statute doesn't even reach section 973.01(2)(c)2.a.–c. without first determining that multiple sentencing enhancers apply to a crime. *See* Wis. Stat. § 973.01(2)(c)2. Further, the court heads into section 973.01(2)(c)2.a.–c. knowing that it "shall apply them"—the multiple sentencing enhancers at issue—in a particular order. *See* Wis. Stat. § 973.01(2)(c)2. Under these circumstances, it would be odd to read the ranking that follows in section 973.01(2)(c)2.a.–c. as creating a scenario where the multiple sentencing enhancers that apply suddenly *don't* all apply. Again, the entire premise is that multiple sentencing enhancers apply, and the court is being instructed on the order on which to "apply *them*." Wis. Stat. § 973.01(2)(c)2. Not to mention, section 973.01(2)(c) explicitly states that that the maximum term of confinement for a crime "may be increased by *any applicable penalty enhancement statute*." Wis. Stat. § 973.01(2)(c)1.

The court of appeals' published opinion doesn't engage with the above context, so it offers no explanation of why it has settled on the most reasonable interpretation of the statute. (Pet-App. 15–17.) Nor did the court of appeals explain how section 973.01(2)(c) clearly abrogated *State v. Maxey*, 2003 WI App 94, ¶¶ 16–18, 21–23, 264 Wis. 2d 878, 663 N.W.2d 811, which had previously held that the habitual criminal enhancer and the second or subsequent enhancer

can apply at the same time because neither enhancer statute says otherwise. (Pet-App. 16–17.)

In short, this is a situation where statutory context informs the correct meaning of "or." The most reasonable reading of this statute is that "or" means "and," such that the maximum term of confinement for a crime "may be increased by *any applicable penalty enhancement statute*." Wis. Stat. § 973.01(2)(c)1. At a minimum, section 973.01(2)(c) doesn't clearly abrogate *Maxey*.[2] *Estate of Miller v. Storey*, 2017 WI 99, ¶ 51, 378 Wis. 2d 358, 903 N.W.2d 759 ("A statute will be construed to alter the common law only when that disposition is clear." (citation omitted)).

In a published opinion, the court of appeals got it wrong.

[2] Notably, in two supreme court cases decided after the creation of section 973.01(2)(c), where both enhancers applied to the defendant, whether it was proper to do so was not even raised as an issue. *See State v. Delebreau*, 2015 WI 55, ¶ 2 & n.2, 362 Wis. 2d 542, 864 N.W.2d 852 (the defendant "was convicted of one count of delivering heroin (less than three grams), second or subsequent offense, as a repeater and as party to a crime"); *State v. Sanders*, 2008 WI 85, ¶ 1, 311 Wis. 2d 257, 752 N.W.2d 713 ("The defendant was convicted of possession of cocaine with intent to deliver as a second offense and as a habitual offender contrary to Wis. Stat. §§ 961.41(1m)(cm)1r., 961.48, and 939.62 (2005–06).").

CONCLUSION

The State disagrees that the issues raised in Hailes's petition warrant this Court's review. But if this Court grants review, the State will present a novel issue by way of an alternative ground to affirm.

Dated this 5th day of July 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 2,421 words.

Dated this 5th day of July 2023.

Electronically signed by:

Kara L. Janson
KARA L. JANSON

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Supreme Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 5th day of July 2023.

Electronically signed by:

Kara L. Janson
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