


STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No.

2013AP2218-

vs.

ADAM W. MILLER,

Defendant-Appellant.

ON APPEAL FROM AN ORDER
ENTERED ON SEPTEMBER 13, 2013 IN THE CIRCUIT
COURT FOR LA CROSSE COUNTY DENYING DEFENDANT-
APPELLANT'S MOTION FOR POSTCONVICTION RELIEF
THE HONORABLE SCOTT L. HORNE, PRESIDING

BRIEF OF DEFENDANT-APPELLANT

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**STATEMENT OF
THE CASE AND FACTS**

On April 1, 2010, Miller was charged with Attempted First Degree Intentional Homicide, Use of a Dangerous Weapon as a repeater in Count 1. Attempted abduction of a Child, in Count 2, Stalking in Count 3, and Carrying a Concealed Weapon, all of which as a repeater, and Possession of Drug Paraphernalia as a repeater in Count 4.

On October 7, 2010, Miller pled guilty and was convicted of an amended charged of Stalking - Use of a Dangerous Weapon, as a repeater in Count 1, and Burglary armed with Dangerous Weapon as a repeater in Count 2.

On March 10, 2011, Miller was sentenced to 7 years initial confinement, followed by 3 years extended supervision on Count 1, and 11 years initial confinement followed by 4 years of extended supervision on Count 2, consecutive to Count 1, for a total sentence of 25 years.

On August 6, 2013, Miller filed a pro se motion for post-conviction relief pursuant to Sec. 974.06 Wis. Stats, claiming that the sentencing court imposed a sentence which included therein a penalty enhancer, without first imposing the maximum term of imprisonment as required by Sec. 939.62(1)(c) Wis. Stats.

On August 21, 2013, the circuit court denied Miller's post conviction motion. Miller then filed a letter of reconsideration which was also denied on September 13, 2013. The Honorable Scott L. Horne, presiding. Miller now appeals from the decision and order of the La Crosse County Circuit Court denying his motion for post conviction relief.

ARGUMENT

THE CIRCUIT COURT ABUSED IT'S SENTENCING DISCRETION WHEN IT IMPOSED A PENALTY ENHANCER WITHOUT FIRST IMPOSING THE MAXIMUM TERM OF IMPRISONMENT FOR THE UNDERLYING OFFENSE PURSUANT TO SECTION 939.62(1)(c) WIS. STATS.

The court abused it's sentencing discretion when it imposed 11 years initial confinement followed by 4 years extended supervision on Count 2, Burglary-Armed w/Dangerous Weapon, which is a Class E felony and carries a maximum term of imprisonment of 10 years initial confinement and 5 years extended supervision, for a maximum term of imprisonment of 15 years.

Section 973.01(2)(b) Wis. Stats., provides that for a class E felony, the term of initial confinement may not exceed 10 years. First, Miller argues that the court imposed 11 years initial confinement for a felony for which the initial confinement may not exceed 10 years, it's clear that the court imposed 1 year of the penalty enhancer that Miller faced under Sec. 939.62(1)(c) Wis. Stats., for habitual criminality, which provides that:

"A maximum term of imprisonment of more than 10 years may be increased by 6 years if the prior conviction was a felony."

Section 973.01(2) Wis. Stats., states that the total length of a bifurcated sentence equals the length of the term of confinement in prison, plus the length of the term of extended supervision.

It is therefore Miller's first claim that the court clearly increased the 10 year initial confinement portion of his sentence by 1 year in count 2, resulting in 11 years of initial confinement. However, the court only imposed 4 years extended supervision, which is 1 years less than the maximum term of extended supervision for Miller's class E felony.

Section 939.62(1) authorizes penalty enhancement only when the maximum underlying sentence is imposed, which for a class E, is 15 years. The court did not impose the maximum term of imprisonment for the base offense first before increasing the initial confinement portion of Miller's sentence by 1 year.

When a court imposes any portion of a penalty enhancer without first imposing the maximum term of imprisonment for the underlying offense, it constitutes an abuse of discretion, and the enhanced portion of a submaximum sentence shall be vacated. State v. Harris, 119 Wis. 2d (1984).

Section 973.13 Wis. Stats., commands that all sentences in excess of that authorized by law be declared void, including faulty repeater portions of a sentence. State v. Flowers, 221 Wis. 2d 20 (Ct. App. 1998). State v. Quiroz, 2002 WI App. 52, 251 Wis. 2d 245. State v. Jackson, 2004 WI 29, 11 (2004).

Upon denying Millers postconviction motion, the court is under the same misunderstanding of the law, as it was when it originally imposed the sentence. [see Appendix Exhibit #2], the Decision and Order of the Circuit Court, wherein Judge Horne inadvertently states that "The total sentence the defendant received was still less than the statutory maximum for the underlying substantive offense" in citing Harris. Exactly, and like Harris, Judge Horne imposed a submaximum sentence.

Judge Horne further asserts in his decision that "Miller's argument seems to be that if the court wanted to impose a sentence above the maximum for the substantive offense, it should imposed a maximum sentence on the substantive offense then added a separate sentence for the repeater enhancer." Miller makes no such claim in his postconviction motion beyond what he has now argued to this court herein his appeal. Judge Horne's decision does not address Miller's claim, and it's clear from his decision that he misconstrued Miller's postconviction argument, but that the court was under a misunderstanding of the law when it imposed sentence on Miller.

The sentencing court was under a misunderstanding of the law when it sentenced Miller, and because the sentencing court was under an incorrect understanding of the maximum term of confinement as it applied to the base offense, and because Miller is entitled to be sentenced on correct information and a correct understanding of the law, Miller's sentence should be vacated, State v. Kleven, 2005 WI App. 66, 280 Wis. 2d 468, and more specifically, because the sentencing court abused it's discretion when it increased Miller's initial confinement in prison without first imposing the maximum term of imprisonment for the underlying offense as required by Section 939.62(1)(c) Wis. Stats., in violation of Harris, the faulty repeater portion of his sentence of 1 year, should be declared void, and the circuit court's decision should be reversed according.

CONCLUSION

Based on all the files, the record in this case, and the information contained therein Miller's motion for postconviction relief, Miller respectfully requests that the decision of the circuit court be reversed.

Dated this 16th day of December, 2013.

Respectfully Submitted

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a monospaced font.

The length of this brief is 11 pages.

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