

18AP000799

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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OF WISCONSIN

CASE NO. 2018AP000799-CR

CASE NO. CIRCUIT COURT 2007-CF+1506

STATE OF WISCONSIN,
Plaintiff-Respondent
V.
JAMES A CULVER
Defendant-Appellant

ON APPEAL FROM THE JUDGEMENT AND ORDER DENYING MOTION
DATED APRIL 2, 2018, AND THE DENIAL OF THE WIS. STATS. 973.13
MOTION DATED APRIL 19, 2018, THE HONORABLE TIMOTHY SAMUELSON,
DANE COUNTY CIRCUIT COURT, PRESIDING.

JAMES A CULVER #291061
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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

ISSUES PRESENTED FOR REVIEW.....1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION....1

STATEMENT OF CASE.....1,2

STATEMENT OF FACTS.....3

ARGUMENT.....3-8

I. Did the circuit court impose a statutorily unavailable sentence.

II. Did the circuit court err in denying mr culvers motion (973.13 EXCESSIVE ERROR CURED).

CONCLUSION.....8

APPENDIX.....

I.Order denying motion§973.13.....100

II. judgement and conviction.....101-102

TABLE OF AUTHORITIES

WISCONSIN CASE LAWS CITED	PAGE
1. State v. Smith-IWER, 2014 WI app 16	2
2.State v. Robinson, 2013 WI app 105	2
3. State v. jackson, 2004 WI 29	3,4,5
4.State v. Volk, 2002 WI app 274	3,4,5
5.State v. Cole 2003 WI 59 (no 02-0681-cr)	5
6.State v. Rodriguez, 2015 WISC app lexis 719	5
7.State ex-rel Kalal v. circuit court for dane county hn28 (in re-criminal complaint) 2004 WI (AMBIGUITY)	6

WISCONSIN STATUTES	PAGE
1.wis stat § 809.23	1,2
2.wis stat §346.65(2)(f)2	1,3
3.wis stat §973.13	2
4.wis stat 973.01	3
5.wis stat§ 346.63(1)	3
6. wis stat 973.01(d)5	3
7. wis stat 973.01 (2)(b)6	4
8. wis stat §939.62	4
9. wis stat §973.01(2)(c)	4
10. wis stat §961.41(1)(cm)(3)	5
11. wis stat 346.65(2)(f) (2001-02)	5
12.wis stat §939.621 (2001-01)	5
13. wis stat §973.01(2)(b)6 1997-98	5

ISSUES PRESENTED FOR REVIEW

I. Did the circuit court impose a statutorily unavailable sentence. When it sentenced mr culver to one year and six months confinement and five years and six months extended supervision on a class H felony with enhancer? The circuit court denied mr culver motion to vacate the sentence.

II. Did the circuit court err in denying mr culver motion base on unpublished non-citable per-curiam (809.23 (3) (b)) appellate decisions?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

mr culver request both oral argument and publication.

STATEMENT OF CASE

mr culver was charged in 2007 for the offense of operating under the influence (5th offense) with minor child in the vehicle, in violation of wis. stst. 346.65 (2)(f), a class H felony. (see docket 1). This was in dane county circuit court case number 2007-cf-1506. (see judgement of conviction docket 31).

A plea questionnaire/waiver of rights was signed on august 8, 2008, and on august 29, 2008 mr culver entered a plea of no contest for the charge of (5 th owi) see docket 25.

In dane county circuit court honorable judge john w markson handed down a sentence of seven years r16. The initial confinement term was one year and six months, followed by five years and six months extended supervision ID.R69 on january 13, 2009. The court amended the judgement so to reflect that

the conviction was for an unclassified felony (see dockets 18,22,34,35,36) as opposed to a class H felony petition(Exh. D.) mr culver was released on extended supervision on june 29, 2010, revoked on december 27,2012 due to a prior violation, and then re-released on extended supervision on june 30, 2014 R15. Then on june 23, 2016 mr culver was taken into custody and revoked on october 19, 2016. administrative law judge cynthia l. stoppel for a period of two years and six months confinement time. that will be served as of december 23, 2018 for re-release followed by just short of eighteen months of extended supervision.

On december 27, 2017 mr culver filed a motion wis. stat. 973.13 (excessive error cured). due to the enhancer penalty being applied to the extended supervision portion of the sentence, (when enhancements are only to be applied to the confinement portion of the sentence.) 5th owi was a class H felony and subject to three years confinement and three years extended supervision max. on april 2, 2018 a motion hearing was heard (transcripts in docket), and honorable judge timothy sameulson denied motion on most significantly state v smith -iwer 2014 wi app 16, state v. robinson 2013 wi app 105, neither of those cases are authoritative or binding under wis stat. 809.23(3)(b). the court solely relied on non-published, non-citable and per-curiam cases to justify motion being denied and sentence to be within the law.

mr culver believes the denial of his motion wis stat.973.13 (excessive error cured) to vacate the sentence contradicts laws.

STATEMENT OF FACTS

In 2007-cf-1506, mr culver was convicted of (5th owi). That is a class H felony, punishable by a maximum of six years (THREE YEARS INITIAL CONFINEMENT AND THREE YEARS EXTENDED SUPERVISION). see wis. stats 973.01 mr culver admitted a wis. stat 346.65(2)(f)2 enhancement, which doubled the potential initial confinement portion of the sentence. sec. 346.65(2)(f)2. specifies, "if there was a minor passenger under 16 years of age in the motor vehicle at time of violation that gave rise to the conviction under wis. stst. 346.63(1), the applicable minimum fines and imprisonment ... for the conviction are double.

ARGUMENT

However, the enhancer does not change the maximum allowable extended supervision portion of the sentence. see e.g. state v. jackson, 2004 wi 29,270 wis. 2d 113, 676 n.w.2d 872, and state v. volk, 2002 wi app 274, 258 wis. 2d 584, 654 n.w. 2d (a penalty enhancer cannot be applied to a term of extended supervision). wis stat.973.01 (d)5. specifies,"for a class H felony, the term of extended supervision may not exceed three years." (EMPHASIS ADDED). that applies whether or not there is an enhancer.

Jackson addressed " how pentalty enhancers are to be applied to unclassified felonies in calculating the maximum term of confinement under truth-in-sentencing". Jackson,2004 wi 29 at paragraph (2). the supreme court held the six year reapter penalty enhancer should be added to the underlying term of confinement that could be imposed for each of jacksons offenses

wis. stat. 973.01(2)(b)6 does not provide for the bifurcation of penalty enhancers..." paragraph 19-20. The jackson court found support for its interperation of this statute in the highly-respected criminal penalty studies committee final report (august 31, 1999), chaired by judge BARLAND,(herein after"report") which set the ground work for the movment to truth-in-sentencing:

The extended supervision caps... would apply regardless of whether the penalties for the crime of conviction have been increased because the actor is a hibitual criminal and or because one of the penalty enhancers... has been pleaded and proved. In these instances the maximum term of confinement increases according to schedules in the statutes and the over all maximum term of imprisonment increases by a like amount The maximum term of extended supervision however, does not increase... given the purpose os extended supervision, the committee believes this amount is sufficient. It does not recomend adjusting extended supervision caps when penalty enhancers (including habitual criminality)are present in the case.

Report at 20 (footnotes omitted), quoted with approval in jackson, 2004 wi 29 at paragraph 24 (the full text of the report is currently available at.

<http://cdml6119.contentdm.oclc.org/cdm/ref/collection/page267601coll14/id/439>)

In volk, 2002 wi app 274, the wisconsin court of appeals held that the circuit court erroneously applied the penalty enhancer of wis. stat. 939.62 to the extended supervision term of the bifurcated sentence.Volk,2002 wi app 274 at paragraph 2. the court held that wis. stat. 973.01 does not allow a

sentencing court to impose any portion of a penalty enhancer as extended supervision. ID. the wisconsin supreme court approved of vols holding in jackson. see jackson, 2004 wi 29 at paragraph 20-25.

state v. cole 2003 wi 59 no. 02-0681-cr, the court aso1 examined several factors that supported that, conclusion including that the word imprisonment "imprisoned" used once in wis stat. 961.41 (1)(cm)(3) should not be construed to have two meanings. cole was also corrected in the circuit court to reverse the enhancer being applied to the extended supervision. was reversed and the three year max extended supervision was imposed.

State v. Jackson, 2004 wi 29 (see hn26) under truth-in-sentencing legislative (tis 11), only a few unclassified felonies remain. these include operating an motor vehicle while intoxicated with minor passenger (THIRD&FOURTH OFFENSE) wis stas. 346.65(2)(f)(2001-02) and the felony enhancement of committing domestic abuse during the 72 hour period following a domestic abuse incident. wis stat.939.621 (2001-02) therefore, the 75% percent rule of wisconsin stat.973.01(2)(b) 6 1997-98, has limited applications for future cases.

State v. Rodriguez, 2015 sisc. app lexis 719 appeal no. 2014AP2477 page 31 we question this interperation of Volk. In that case, the sentencing court had applied a penalty enhancer to both the initial confinement and the extended supervision portion of Volk's sentence. (see id page 2 paragraph 28-29) we conclude this was an error, as the penalty enhancer statute clearly only permits enhancement of maximum term of confinement. (see ID parigraph 35-36) we also conclude that wis. stat. 973.13 did not apply to volk because "a crucial

component" of his sentence had been over turned, requiring the sentencing court to revisit the entire question (see ID paragraph 47-48)

It is ambiguous for the court to say confinement, imprisonment, extended supervision all mean the same word.

1. liable to more than one interpretation.

2. uncertain or indefinite.

When different meanings to one word is ambiguous. (ambiguity) state ex-rel Kalal v. circuit court for dane county (page 47) hn28 (in re-criminal complaint) 2004 wi the test for ambiguity generally keep the focus on the statutory language: A statute is ambiguous if it is capable of being understood by reasonably well-informed person in two or more senses.

Note word bifurcated means two parts.

1. is confinement/imprisonment time.

2. extended supervision after you have served your confinement/imprisonment time.

note extended supervision is not imprisonment or confinement you are (FREE) in the community to see a probation or parole agent it is after your release from imprisonment or confinement not during.

Taken from website of attorney Huppertz & Powers S.C Peewaukee wi. (extended supervision) individuals facing "extended supervision" have carried out the term of a prison sentence and now face a certain time period of supervision under DOC agent, the duration of which was determined in the original criminal sentence.

Website :<https://doc.wi.gov> state of wisconsin department of corrections community corrections - general information

page. under the heading probation, parole and extended supervision SUB-HEADING: extended supervision " means you have completed your prison sentence, and now have a period of community supervision.

BLACK LAW DICTIONARY 7th EDITION "IMPRISONMENT page 760" the act of confining a person especially in prison. stat of being confined. a priod of confinement.

To use imprisonment, confinement, extended supervision is to use AMBIGUOUS. Each one of those words have differnt meanings. for dane county circuit court to say they all mean imprisonment would be incorrect to make that statement. The law states enhancers are to be added to the confinement/ imprisonment portion of the sentence. Extended supervision is clearly after release from confinement/imprisonment and back in the cummunity "FREE".

When mr culver was released from prison on extended supervision on june 29, 2010 he should of discharged june 25, 2013 (three years E.S.). he was however taken into custody on november 19, 2012 and revoked on december 27, 2012, being re-confined for eighteen months, with credit from november 19, 2012 mr culver was then re-released on extended supervision on june 30, 2014. which would have left eighteen months of (E. S. three years). That extended supervision should have expired no later than november 18,2015 which would be three years from his custody date of november 19, 2012.

After revoking mr culvers supervision and reconfining him for eighteen months, the extended supervision agent only leagle authority to supervise mr culver for eighteen months after

his release.

The sentencing court made an error all sentences in excess of that allowed by law are void. wisconsin stats. 973.13 SPECIFIES, "EXCESSIVE SENTENCE, ERROR CURED". In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings. In sum the department of corrections lacked jurisdiction to revoke extended supervision on an expired sentence. The order that mr culver be returned to prison must be reversed.

CONCLUSION

For the reasons and facts stated in this brief the appellet court should reverse the decision of the circuit court and adjudge them null and void and reverse or remanded this case without further due. to correct this error.

CERTIFICATION OF MAILING

I certify that this brief or appendix was deposited in the united states mail for delivery to the clerk of appeals by first-class mail, or other class of mail that at least as expeditious, on (date of mailing) July 7, 2018. I further certify that this brief or appendix was correctly addressed and postage was pre-paid.

Date: July 7, 2018



signature

james a culver #291061

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and for brief produced with a [choose one] X monospaced or ___ proportional serif font.

The length of this brief is 19 pages [if a monospaced font is used] or 1903 words [if a proportional serif font is used].

Date July 7, 2018

Signature: James A Culver
james a culver #291061

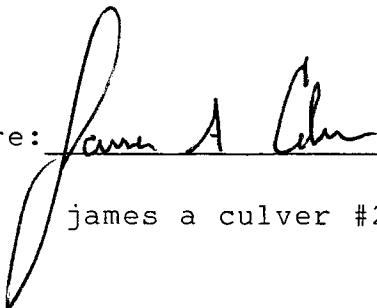
APPELLANTS BRIEF APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate or as a part of this brief, is an appendix that complies with §809.19(2)(a) and that contains, at a minimum (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit courts reasoning regarding those issues.

I further certify that if this appeal is taken from the circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the finding of fact and conclusions of law, if any, and final decision of 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 first names and last names initials instead of full names or 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.

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APPENDIX

1. ORDER DENYING MOTION §973.13..... 100
2. JUDGEMENT AND CONVICTION..... 101-102