

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 20, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2008AP2783-CR
2008AP2784-CR
STATE OF WISCONSIN**

**Cir. Ct. Nos. 2006CM2805
2006CM3977**

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDRES JUSTINIANO,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Dane County:
STEVEN D. EBERT, Judge. *Affirmed.*

¶1 BRIDGE, J.¹ Andres Justiniano appeals from judgments of conviction for three counts of disorderly conduct, in violation of WIS. STAT.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

§ 947.01. A repeater enhancement was added to each count pursuant to WIS. STAT. § 939.62(1)(a). Justiniano contends that he was improperly sentenced as a repeat offender because the prior conviction upon which the repeater enhancement was based was no longer “of record” at the time of sentencing because it was amended from a felony conviction to a misdemeanor conviction after the criminal complaint was filed but before he was sentenced. We affirm.

BACKGROUND

¶2 Based on conduct occurring on August 6, 2006, a criminal complaint was filed on August 10 charging Justiniano with one count of bail jumping and two counts of disorderly conduct, as a repeater. This case was docketed as No. 2006CM2805. A second criminal complaint was filed on November 13, 2006, charging Justiniano with one count of bail jumping and one count of disorderly conduct. Repeater enhancements were added to those charges as well. The second case was docketed as case No. 2006CM3977. Justiniano pled no contest to two counts of disorderly conduct in case No. 2006CM2805 and one count of disorderly conduct in case No. 2006CM3977. The remaining charges were dismissed.

¶3 The repeater enhancements in case No. 2006CM2805 were based on May 2004 felony convictions. On August 26, 2006, after the complaint in case No. 2006CM2805 had been filed, the May 2004 convictions were amended from felony convictions to misdemeanor convictions.² At the plea hearing, Justiniano

² Copies of the original May 2004 conviction and August 2006 amended conviction are not contained in the record. However, both parties agree that Justiniano was convicted in 2004 of felonies and those felonies were amended to misdemeanors prior to sentencing.

argued that he should not be considered a repeat offender for the two charges to which he pled no contest in case number 2006CM2805 because his May 2004 convictions were no longer “of record” as is required by WIS. STAT. § 939.62(2).³ It was Justiniano’s position that although the prior convictions were “of record” at the time the charged offenses were committed, to be sentenced as a repeat offender the prior convictions needed to be “of record” at the time of sentencing. The State argued that the relevant point of time was the date of the offense and that because the prior convictions were of record when the presently charged offenses were committed, Justiniano’s sentencing as a repeater was appropriate.

¶4 The circuit court agreed with the State. The court explained, “I think [the statutory language] means that at the date of the offense had he been convicted of a felony within the preceding five-year period, and that needn’t be proven until the time of sentencing.” Accordingly, the court sentenced Justiniano as a repeat offender pursuant to WIS. STAT. §§ 939.62(2) and 973.12(1), imposing concurrent sentences of nine months imprisonment for each of the three counts to which he pled.⁴ Following his appeal of his convictions, case Nos. 2006CM2805 and 2006CM3977⁵ were consolidated for purposes of briefing and disposition.

³ WISCONSIN STAT. § 939.62(2) provides that a defendant is a repeat offender if he or she “was convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced ... which convictions remain of record and unreversed.”

⁴ The maximum sentence under WIS. STAT. § 947.01 is 90 days imprisonment and/or a \$1,000 fine. WIS. STAT. § 939.51(3)(b). An enhancement under WIS. STAT. § 939.62(1)(a) increases the maximum sentence by no more than an additional two years’ imprisonment.

⁵ Justiniano does not contend that he was improperly sentenced as a repeater in case No. 2006CM3977.

DISCUSSION

¶5 Justiniano contends that to be subject to the repeater enhancement, the qualifying prior conviction must be “of record” at the time of sentencing. He further contends that because the prior conviction relied upon by the State for the repeater enhancement in case No. 2006CM2805 was amended from a felony to a misdemeanor offense prior to sentencing, the felony conviction no longer remained “of record” within the meaning of the statute and he was therefore not subject to sentencing as a repeat offender.

¶6 Justiniano’s argument turns on his construction of WIS. STAT. § 939.62(2). Statutory construction presents a question of law which is subject to our de novo review. *State v. Cole*, 2000 WI App 52, ¶3, 233 Wis. 2d 577, 608 N.W.2d 432. WISCONSIN STAT. § 939.62(2) provides that a convicted defendant is subject to the enhancement of his or her sentence as a repeat offender if he or she “was convicted of a felony during the 5-year period immediately preceding the commission of the crime for which [he or she] presently is being sentenced ... which convictions remain of record and unreversed.” To be qualifying, § 939.62(2) requires that the prior conviction must have occurred within the five years preceding the commission of the crime for which the offender is being sentenced. Section 939.62(2) also requires that the prior conviction be on record and unreversed. Justiniano interprets this portion of the statute as requiring that the prior conviction remain on record at the time of sentencing.

¶7 Justiniano argues that in WIS. STAT. § 939.62(2), the use of the present tense of the word “remain,” as opposed to “remained,” the past tense form of the word, suggests that the conviction must remain on record at the time of sentencing. We disagree. The statute’s use of the word “remain” is consistent

with its use of the word “commission,” a present tense alternative to the word committing, in describing the point in time from which an offender’s repeater status is to be determined. Moreover, a fair reading of § 939.62(2) is that an offender’s status as a repeater is determined at the time he or she committed the crime for which he or she is being sentenced. This means that as of the time of the commission of the crime, the offender must have been convicted of a felony within five years and that conviction must have remained on record at that time. Proof of these requirements would then be presented after the offender’s conviction, but before his or her actual sentencing. See *State v. Saunders*, 255 Wis. 2d 589, 614-15, 649 N.W.2d 263.

¶8 Based on statements made by the supreme court in *State v. Hahn*, 2000 WI 118, 238 Wis. 2d 889, 618 N.W.2d 528, Justiniano also argues that he should benefit by having had his prior conviction vacated before his sentencing as a repeater in the present matter. In *Hahn*, the court held that an offender does not have a constitutional right to challenge a prior conviction at an enhanced sentence proceeding which is predicated on the prior conviction unless the challenge pertains to an alleged violation of the defendant’s constitutional right to counsel. *Id.*, ¶29. The court stated, however, that in forums other than the enhanced sentence proceeding, a defendant may use whatever means available under state law to challenge the validity of the prior conviction on other grounds and, if successful, may “seek to reopen the enhanced sentence.” *Id.*, ¶28. From this statement, Justiniano reasons that if a defendant may have his prior conviction vacated or reversed after being sentenced as a repeater, then he too “must be able to benefit from having his prior convictions vacated *before* he is to be sentenced as a repeater.” We are not persuaded.

¶9 *Hahn* addressed a discrete question: May a prior conviction be challenged during a sentence enhancement proceeding? The court answered this question in the negative, but indicated that an offender may use whatever means available under state law to challenge the validity of a prior conviction and, if successful, “may seek to reopen the enhanced sentence.” *Id.* Although Justiniano contends otherwise, his prior conviction was not invalidated, it was merely amended. Thus, although the severity of the conviction was reduced, the determination of guilt remained the same. The court in *Hahn* was silent as to an offender’s potential course of action with regard to a prior conviction that is amended. Moreover, the court stated only that a defendant may seek to reopen the enhanced sentence. It did not comment on an offender’s entitlement to have his or her enhanced sentence reopened. Nor did the court discuss the effect an invalidated prior conviction may have on the enhanced sentence.

¶10 Finally, Justiniano argues that the “rule of lenity” favors his interpretation of WIS. STAT. § 939.62. The “rule of lenity” referred to by Justiniano was discussed in *State v. Jackson*, 2004 WI 29, ¶41, 270 Wis. 2d 113, 676 N.W.2d 872, wherein the court stated that “ambiguous penal statutes should be interpreted in favor of the defendant” and when there is doubt concerning the severity of the penalty set forth in the ambiguous penal statute, a milder penalty is favored over a harsher one. Justiniano does not contend that WIS. STAT. § 939.62 is ambiguous, and we agree that it is not. The “rule of lenity” is therefore not applicable.

CONCLUSION

For the reasons discussed above, we affirm the judgments of conviction.

By the Court.—Judgments affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)4.

