

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 3, 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. 2009AP1237-CR
2009AP1238-CR**

**Cir. Ct. Nos. 2007CM261
2007CM292**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL C. GERONDALE,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Brown County: SUE E. BISCHER, Judge. *Judgments affirmed in part, reversed in part; order reversed and cause remanded with directions.*

¶1 HOOVER, P.J.¹ Michael Gerondale, pro se, appeals judgments of conviction for battery and two counts of theft, all as a repeater, and an order denying his postconviction motion. Gerondale argues the circuit court erroneously bifurcated the repeater portions of his prison sentence and contends we must therefore vacate those portions of his sentence. We agree in part with Gerondale’s argument, reverse the sentencing portion of the judgments and the postconviction order, and remand for resentencing.

BACKGROUND

¶2 Gerondale’s convictions for battery and theft were class A misdemeanors carrying nine-month maximum sentences. However, the repeater statute, WIS. STAT. § 939.62(1)(a), provides that a “maximum term of imprisonment of one year or less may be increased to not more than 2 years.” Accordingly, the circuit court sentenced Gerondale to two years’ imprisonment on each of the three charges, each consisting of one year of confinement and one year of extended supervision. Because two of the sentences were ordered to be served concurrently, Gerondale was sentenced to a total of two years’ confinement followed by two years’ extended supervision.

¶3 Gerondale’s appointed counsel filed a postconviction motion arguing no portion of a penalty enhancer could be imposed as extended supervision.² The

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

² Gerondale also submitted a separate filing, presenting further argument and complaining his attorney had inadequately presented Gerondale’s position. Gerondale subsequently responded to the court that he would rely on his attorney’s submission.

circuit court concluded the rule could not logically be applied to misdemeanors and denied the motion. Gerondale now appeals.

DISCUSSION

¶4 In *State v. Volk*, 2002 WI App 274, 258 Wis. 2d 584, 654 N.W.2d 24, “[w]e h[e]ld that WIS. STAT. § 973.01(2)(c) [(1999-2000)] does not authorize a sentencing court to impose any portion of a penalty enhancer as extended supervision.” Our supreme court approved that holding in *State v. Jackson*, 2004 WI 29, ¶30, 270 Wis. 2d 113, 676 N.W.2d 872. However, the earlier version of § 973.01 addressed in both cases applied only to felonies.³ Both cases relied in part on the legislative history of the earlier version, as well as § 973.01(2)(c)’s language. The pertinent language of § 973.01(2)(c) did not change with the revision, but a phrase was added to the beginning of the subsection.

¶5 There are numerous provisions of WIS. STAT. § 973.01 that are relevant to our inquiry. They are:

(1) BIFURCATED SENTENCE REQUIRED. [W]henver a court sentences a person to imprisonment in the Wisconsin state prisons for ... a misdemeanor committed on or after February 1, 2003, the court shall impose a bifurcated sentence under this section.

(2) STRUCTURE OF BIFURCATED SENTENCES. An order imposing a bifurcated sentence shall comply with all of the following:

(b) *Confinement portion of bifurcated sentence.* The portion of the bifurcated sentence that imposes a term of confinement in prison may not be less than one year

³ The supreme court specifically noted in *Jackson* that the truth-in-sentencing legislation was passed in two phases and that the “case does not address the recent changes of TIS-II.” *State v. Jackson*, 2004 WI 29, ¶2 n.2, 270 Wis. 2d 113, 676 N.W.2d 872.

and, except as provided in par. (c), is subject to whichever of the following limits is applicable:

[1. - 9. For a classified felony, the term of confinement in prison may not exceed (variable) years.]

10. For any crime other than [a classified felony], the term of confinement may not exceed 75% of the total length of the bifurcated sentence[.]

(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.

(d) *Minimum and maximum term of extended supervision.* The term of extended supervision may not be less than 25% of the length of the term of confinement in prison imposed under par. (b) and, for a classified felony, is subject to whichever of the following limits is applicable: [1. - 6. The term of extended supervision may not exceed (variable) years.]

¶6 While the various provisions of WIS. STAT. § 973.01 appear to interact well enough when dealing with the lengthier penalties attendant to felonies, the statute breaks down when applied to misdemeanors. By definition, a misdemeanant may not be sentenced to prison (as opposed to jail) unless subject to a penalty enhancer, because the maximum penalties for misdemeanors are less than one year imprisonment. See WIS. STAT. § 939.60. “[A] sentence of more than one year shall be to the Wisconsin state prisons” WIS. STAT. § 973.02.

¶7 WISCONSIN STAT. § 973.01 is internally inconsistent and cannot be fully complied with in certain circumstances. For example, if a court sentences a defendant to thirteen months’ imprisonment on a misdemeanor pursuant to the habitual criminality statute, the sentence must be served in prison. That thirteen-

month sentence must be bifurcated pursuant to § 973.01(1), but § 973.01(2)(b) requires the confinement portion to be at least one year. This leaves only one month to bifurcate as extended supervision, which would conflict with the § 973.01(2)(d) requirement that extended supervision comprise no less than 25% of the confinement portion of the sentence. Additionally, the language that was added to § 973.01(2)(c) when the statute was revised to include application to misdemeanors specifically states that penalty enhancement sentences are “[s]ubject to the minimum period of extended supervision under par. (d)[.]”

¶8 This conundrum is magnified by our courts’ interpretation of the statute to prohibit any of the repeater portion of a sentence from being applied to extended supervision. Turning to the facts of this case, Gerondale faced a maximum nine-month sentence on each of the charges. None of that portion of his sentence could be bifurcated because it is too short to warrant confinement in prison in the first place and, regardless, it would be impossible to comply with both the one-year confinement rule and the 25% extended supervision rule unless that sentence was at least one year and three months. And, since none of the repeater portion of Gerondale’s two-year sentence may be apportioned to extended supervision, his entire sentence must then be served as confinement in prison.

¶9 This result, however, conflicts with the WIS. STAT. § 973.01(1) mandate that misdemeanor sentences “shall” be bifurcated. The result is unacceptable because it would write the misdemeanor bifurcation rule out of the statute since only penalty-enhanced misdemeanor sentences can result in prison confinement. Further, the straight two-year confinement sentence would violate the 25% extended supervision requirement that § 973.01(2)(c)—specifically pertaining to penalty enhancement—explicitly incorporates.

¶10 Given the conflicts inherent in the statute, the circuit court’s conclusion that the *Volk* rule did not apply to misdemeanors is certainly understandable. However, we must seek an interpretation that will most reasonably honor all provisions of the statute. See *Wagner v. Milwaukee County Election Comm’n*, 2003 WI 103, ¶33, 263 Wis. 2d 709, 666 N.W.2d 816. Gerondale is correct that, ordinarily, we would presume the legislature was aware of the *Volk* interpretation—that penalty enhancer portions of sentences could not be bifurcated—when it revised the statute to include application to misdemeanors. See *Blazekovich v. City of Milwaukee*, 225 Wis. 2d 837, 845, 593 N.W.2d 809 (Ct. App. 1999), *aff’d*, 2000 WI 41, 234 Wis. 2d 587, 610 N.W.2d 467. The effective date of the new legislation, as recognized by WIS. STAT. § 973.01(1), was not until February 1, 2003, and *Volk* had been decided October 16, 2002. The new legislation, 2001 Wis. Act 109, §§ 1114-1133, however, was enacted July 26, 2002, while the *Volk* case was still pending. Thus, the legislature could not have been aware of the *Volk* decision when drafting the new legislation. Nonetheless, we are bound by prior precedent and must apply the holdings of *Volk* and *Jackson*.

¶11 The construction that causes the least amount of conflict is one that honors the *Volk/Jackson* interpretation relying on the plain language of WIS. STAT. § 973.01(2)(c) to the extent possible, but that also requires the sentence to include the mandatory 25% minimum term of extended supervision. Thus, a misdemeanor prison sentence based on a penalty enhancer may be bifurcated only to the extent required to comply with the 25% minimum extended supervision requirement. We believe this interpretation furthers the intent of the extended supervision sentencing component. Our interpretation is also consistent with the habitual criminality enhancer statute, which, rather than referring to either

confinement or extended supervision, merely provides that the “maximum term of imprisonment ... may be increased.” WIS. STAT. § 939.62(1). While our construction does not fully resolve the conflicts presented by WIS. STAT. § 973.01, the problem is one that the legislature must ultimately resolve.

¶12 Gerondale’s combined sentences of two years’ confinement and two years’ extended supervision bifurcate the penalty enhancer portion of his sentences and exceed the 25% minimum term of extended supervision, and therefore do not comply with our construction of WIS. STAT. § 973.01. Even if the circuit court had ordered all three two-year sentences to be served consecutively, the longest (and shortest) term of extended supervision the court could have granted was 14.4 months.⁴

¶13 Gerondale argues his sentence was excessive and that the extended supervision portion of his sentence should simply be voided pursuant to WIS. STAT. § 973.13. We rejected the same argument in *Volk*:

[A] sentence under the truth-in-sentencing law consists of a term of confinement and a term of extended supervision. These two components form a symbiotic relationship with the length of one necessarily influencing the length of the other and the overall length of the bifurcated sentence. Although the sentencing court imposes two discrete terms—one of confinement and one of extended supervision—it remains that the end product is but a single sentence. When a crucial component of such a sentence is overturned, it is proper and necessary for the sentencing court to revisit the entire question. If we held otherwise and simply confirmed the term of confinement and commuted the extended supervision ... pursuant to WIS. STAT. § 973.13, we would produce a sentence based on

⁴ Because the requirement is 25% of the term of confinement, not of the sentence, the extended supervision number is obtained by dividing the sentence into fifths. Thus, the extended supervision term will constitute 20% of the total sentence imposed.

mathematics, rather than an individualized sentence based on “the facts of the particular case and the characteristics of the individual defendant.”

Volk, 258 Wis. 2d 584, ¶48 (quoting *State v. Holloway*, 202 Wis. 2d 694, 699-700, 551 N.W.2d 841 (Ct. App. 1996)). We therefore remand to the circuit court for resentencing consistent with our interpretation of WIS. STAT. § 973.01.

By the Court.— Judgments affirmed in part, reversed in part; order reversed and cause remanded with directions.

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

