

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 24, 2003

Cornelia G. Clark
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 No. 02-0947-CR

Cir. Ct. No. 00-CF-1401

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL D. JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman and Lundsten, JJ.

¶1 LUNDSTEN, J. This case concerns the effect of penalty enhancers on the calculation of “confinement” and “extended supervision” under truth-in-sentencing. Michael D. Jackson was charged, convicted, and sentenced under the truth-in-sentencing laws applicable to crimes committed from December 31, 1999, to February 1, 2003. See 1997 Wis. Act 283, § 419. Thus, we are not applying the

additions and revisions to truth-in-sentencing that apply to crimes committed on or after February 1, 2003. 2001 Wis. Act 109, § 1143m.

¶2 Jackson appeals a judgment of conviction entered by the circuit court convicting him of operating a motor vehicle without the owner's consent and fleeing an officer, both with repeater penalty enhancers. He also appeals an order denying his motion for postconviction relief. Jackson argues that the circuit court incorrectly calculated the maximum initial terms of confinement because, under truth-in-sentencing, when a sentence is subject to a penalty enhancer the penalty enhancer must be "bifurcated" before it is added to the maximum confinement period for the underlying crime. We disagree with Jackson's analysis and affirm the circuit court.

Background

¶3 Jackson was convicted of operating a motor vehicle without the owner's consent and fleeing an officer, WIS. STAT. §§ 943.23(3) and 346.04(3) (1997-98),¹ both as a repeat offender on the basis of a prior felony conviction. Operating a motor vehicle without the owner's consent is a Class E felony, subject to a maximum term of imprisonment of 5 years. WIS. STAT. § 939.50(3)(e). Fleeing an officer is an unclassified felony, subject to a maximum imprisonment of 3 years. WIS. STAT. § 346.17(3)(a). The repeater enhancer subjected Jackson

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

to an additional 6 years of imprisonment on each count. WIS. STAT. § 939.62(1)(b).²

¶4 Because Jackson was sentenced under truth-in-sentencing, his prison sentence was bifurcated into a term of confinement followed by a period of extended supervision. WIS. STAT. § 973.01(1).³ The statutory maximum period of confinement under § 973.01(2) was 2 years for the Class E felony conviction and 2 years, 3 months for the unclassified felony.⁴ To determine the maximum

² WISCONSIN STAT. § 939.62(1) provides:

If the actor is a repeater, as that term is defined in sub. (2), and the present conviction is for any crime for which imprisonment may be imposed ... the maximum term of imprisonment prescribed by law for that crime may be increased as follows:

....

(b) A maximum term of more than one year but not more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 6 years if the prior conviction was for a felony.

³ WISCONSIN STAT. § 973.01(1) provides:

BIFURCATED SENTENCE REQUIRED. Except as provided in sub. (3), whenever a court sentences a person to imprisonment in the Wisconsin state prisons for a felony committed on or after December 31, 1999, the court shall impose a bifurcated sentence that consists of a term of confinement in prison followed by a term of extended supervision under s. 302.113.

⁴ The relevant portions of WIS. STAT. § 973.01(2) provide:

(b) *Imprisonment 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, subject to any minimum sentence prescribed for the felony, and, except as provided in par. (c), may not exceed whichever of the following is applicable:

....

(continued)

periods of confinement, the circuit court initially added the 6-year penalty enhancer to the maximum term of confinement on each conviction. The circuit court later indicated that it believed the maximum confinement for the unclassified felony was 7½ years (90 months).

¶5 Thus, the circuit court sentenced Jackson believing the maximum initial confinement was 8 years (96 months) for the Class E felony with repeater enhancement, and 7½ years (90 months) for the unclassified felony with repeater enhancement. The circuit court sentenced Jackson to concurrent terms of 6 years (72 months) of confinement and 2 years of extended supervision.

¶6 Jackson filed a postconviction motion arguing that the circuit court incorrectly calculated the maximum terms of confinement he faced under both convictions and seeking resentencing. The circuit court denied Jackson's motion.

5. For a Class E felony, the term of confinement in prison may not exceed 2 years.

6. For any felony other than a felony specified in subds. 1. to 5., the term of confinement in prison may not exceed 75% of the total length of the bifurcated sentence.

(c) *Penalty enhancement.* The maximum term of confinement in prison specified in par. (b) may be increased by any applicable penalty enhancement. 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 term of extended supervision.* The term of extended supervision that follows the term of confinement in prison may not be less than 25% of the length of the term of confinement in prison imposed under par. (b).

Discussion

The Methodology Used to Add Penalty Enhancement to the Period of Confinement

¶7 Jackson contends that the circuit court improperly added the entire 6 years of possible repeater penalty enhancement to the maximum confinement time for each of his convictions. Jackson argues that, under truth-in-sentencing, when a sentence is subject to a penalty enhancer, the penalty enhancer must be “bifurcated” before it is added to the maximum confinement period for the underlying crime. Jackson points out that WIS. STAT. § 939.62(1)(b), the applicable penalty enhancement statute, states: “the maximum term of *imprisonment* ... may be increased ... by not more than 6 years” (emphasis added). Jackson reasons that because the penalty enhancer increases the term of “imprisonment” under § 939.62, and because the truth-in-sentencing statute, WIS. STAT. § 973.01, requires that a term of *imprisonment* be broken down into a term of confinement followed by a term of extended supervision, it follows that a penalty enhancer must similarly be broken down before it is added to the maximum confinement period for the underlying crime.

¶8 Jackson’s argument is disposed of by our decision in *State v. Volk*, 2002 WI App 274, 258 Wis. 2d 584, 654 N.W.2d 24, a decision issued approximately two weeks after the State submitted its responsive appellate brief. In *Volk*, we held that, by its plain language, WIS. STAT. § 973.01(2)(c) directs that penalty enhancement time is added to the maximum term of confinement specified in § 973.01(2)(b), and *not* added to the term of extended supervision. *Volk*, 258 Wis. 2d 584, ¶¶35-36. Therefore, Jackson’s contention that a penalty enhancer be bifurcated into a confinement portion and an extended supervision portion directly conflicts with *Volk*.

¶9 Under truth-in-sentencing, when a circuit court sends a convict to prison, it imposes a “bifurcated sentence” consisting of a term of “confinement” followed by a term of “extended supervision.” The maximum bifurcated sentence may not exceed the maximum term of imprisonment. WIS. STAT. § 973.01(2)(a); *see also Volk*, 258 Wis. 2d 584, ¶35. Maximum periods of confinement are set forth in § 973.01(2)(b). The minimum term of extended supervision is defined in § 973.01(2)(d). Section 973.01(2)(c) directs that any applicable penalty enhancement be added to the maximum periods of confinement specified in § 973.01(2)(b). The 25% extended supervision requirement in § 973.01(2)(d) may act to limit the actual time available for initial confinement.

¶10 We now apply the truth-in-sentencing statutory scheme to Jackson’s two convictions.

Jackson’s Class E Felony

¶11 Jackson’s unenhanced Class E felony subjected him to a maximum term of confinement of 2 years and a maximum term of imprisonment of 5 years. His repeater status added 6 years to his term of confinement, for a total of 8 years, and 6 years to his maximum term of imprisonment, for a total of 11 years.

¶12 To check whether all 8 years may be imposed as initial confinement time, we must apply the 25% rule found in WIS. STAT. § 973.01(2)(d). Subparagraph (d) mandates that extended supervision “may not be less than 25% of the ... term of confinement ... imposed” under § 973.01(2)(b). Because Jackson’s maximum term of imprisonment is 11 years, he can only be sentenced to 8 years of confinement if the imposition of 8 years of confinement leaves enough time under the maximum term of imprisonment to also impose extended supervision equal to 25% of 8 years. Stated in mathematical terms, Jackson may

only receive the full 8 years of confinement if 8 plus 25% of 8 is less than or equal to 11.

$$8 + (25\% \text{ of } 8) = 8 + 2 = 10$$

Since 10 is less than or equal to 11, the entire 8 years is available for initial confinement. Accordingly, the trial court correctly calculated the maximum period of confinement for Jackson's Class E felony.

Jackson's Unclassified Felony

¶13 We turn our attention to Jackson's unclassified felony. The circuit court determined that it could impose 90 months (7½ years) of confinement time on this conviction. Jackson, applying his bifurcated penalty enhancer approach, asserts the correct maximum confinement is 81 months and, therefore, the circuit court's assumed maximum was too high by 9 months. The State agrees that the circuit court erred, but contends in its appellate brief that the court erred in Jackson's favor by calculating the maximum confinement 9 months too low. Under the State's calculation, the maximum confinement period was 99 months. While the circuit court came closest to the mark, it is a measure of the complexity of truth-in-sentencing statutes applicable here that Jackson, the State, and the circuit court all miscalculated the maximum confinement period. We conclude that the circuit court sentenced Jackson on the unclassified felony erroneously believing the maximum was 90 months when the true maximum was 86.4 months.

¶14 Jackson's unenhanced unclassified felony subjected him to a maximum term of confinement of 27 months (2 years, 3 months) and a maximum term of imprisonment of 36 months (3 years). His repeater status added 72 months (6 years) to his term of confinement, for a total of 99 months (8 years,

3 months), and 72 months (6 years) to his maximum term of imprisonment, for a total of 108 months (9 years).

¶15 We again apply the 25% extended supervision rule found in WIS. STAT. § 973.01(2)(d) to our initial calculation of the maximum confinement time, here 99 months. Because Jackson's maximum term of imprisonment is 108 months, he can only be sentenced to 99 months of confinement if the imposition of 99 months of confinement leaves enough time under the maximum term of imprisonment to also impose extended supervision equal to 25% of 99 months. Stated in mathematical terms, Jackson may only receive the full 99 months of confinement if 99 plus 25% of 99 is less than or equal to 108.

$$99 + (25\% \text{ of } 99) = 99 + 24.75 = 123.75$$

Since 123.75 is greater than 108, the entire 99 months is *not* available for initial confinement. Therefore, we must calculate the maximum amount of confinement consistent with the 25% extended supervision rule.

¶16 If extended supervision must be 25% of confinement and extended supervision plus confinement must be less than or equal to maximum imprisonment, the problem can be conceptualized as dividing Jackson's 108-month maximum imprisonment into 5 parts: 4 parts confinement and 1 part extended supervision. Therefore:

$$\text{minimum extended supervision} = 108 \div 5 = 21.6$$

$$\text{maximum confinement} = 4 \times 21.6 = 86.4$$

It follows that Jackson was subject to a maximum confinement of 86.4 months because this amount, when compared with Jackson's 108-month maximum sentence, leaves 25% of 86.4 (21.6 months) for extended supervision.⁵

Conclusion

¶17 The net result is that the circuit court sentenced Jackson on the enhanced Class E felony with a correct understanding of the maximum period of initial confinement, but sentenced him on the enhanced unclassified felony under the mistaken belief that the maximum initial period of confinement was 90 months when the true maximum was 86.4 months.

¶18 Jackson appealed and requested resentencing in hopes that we would agree with his assertion that the circuit court sentenced him under the mistaken belief that his Class E felony carried a maximum confinement period of 96 months when the true maximum was 18 months lower and under the mistaken belief that his unclassified felony carried a maximum confinement period of 90 months when the true maximum was 9 months lower. We have now concluded that the only error was with respect to the unclassified felony, and the difference there was only 3.6 months.

¶19 Because any reduction in Jackson's unclassified felony sentence leaves his Class E sentence both unchanged and controlling, and because resentencing may expose Jackson to an increased sentence, *see State v. Church*, 2002 WI App 212, ¶36, 257 Wis. 2d 442, 650 N.W.2d 873, *review granted*, 2002

⁵ It appears that the truth-in-sentencing revisions applicable to crimes committed after February 1, 2003, largely eliminate the need for this type of complex calculation.

WI 121, 257 Wis. 2d 116, 653 N.W.2d 888 (Oct. 21, 2002) (No. 01-3100-CR), we will affirm the judgment of conviction. If, however, Jackson desires resentencing under these circumstances, we invite him to file a motion for reconsideration with this court pursuant to WIS. STAT. RULE 809.24. If Jackson files such a motion, he should address the harmless error argument in the State's responsive brief.⁶

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

⁶ In this regard, we direct the parties' attention to *State v. Avila*, 192 Wis. 2d 870, 893-893b, 532 N.W.2d 423 (1995); *State v. Peete*, 185 Wis. 2d 4, 23-24 & n.11, 517 N.W.2d 149 (1994); *State v. Farr*, 119 Wis. 2d 651, 660-61, 350 N.W.2d 640 (1984); *State v. Harris*, 119 Wis. 2d 612, 619-22, 624-26, 350 N.W.2d 633 (1984); *State v. Volk*, 2002 WI App 274, ¶48, 258 Wis. 2d 584, 654 N.W.2d 24; *State v. Kourtidas*, 206 Wis. 2d 574, 590, 557 N.W.2d 858 (Ct. App. 1996); and *State v. Coolidge*, 173 Wis. 2d 783, 796, 496 N.W.2d 701 (Ct. App. 1993).

