COURT OF APPEALS
DECISION
DATED AND FILED

December 18, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2753-CR **Cir. Ct. No. 00-CF-3514**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER DEON VANCE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: DANIEL T. DILLON, Judge. *Modified and, as modified, affirmed.*

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

¶1 DYKMAN, J. Christopher Vance appeals from a judgment convicting him of armed robbery and first-degree reckless endangerment while armed, both with concealing identity and repeater penalty enhancers. Vance argues that the trial court erred when it imposed a sentence consisting of ten years' confinement and twenty years' extended supervision on the reckless endangerment

count. The issue is whether the trial court properly sentenced Vance with the concealing identity enhancer when he did not plead guilty to that allegation. In addition, the parties agree that the trial court erred in using the penalty enhancers to increase the extended supervision portion of Vance's sentence, but disagree as to whether the remedy is a remand for resentencing or commuting the period of extended supervision to five years. We conclude that the trial court erred in sentencing Vance to twenty years of extended supervision on count three. But because it is not apparent that the trial court would change Vance's sentence on remand, as it sentenced him to the maximum period of confinement for the reckless endangerment conviction, resentencing is not required. We therefore modify Vance's sentence to comply with Truth in Sentencing and, as modified, affirm.

BACKGROUND

¶2 The criminal complaint alleged that Vance and Curry Hardaway entered Kristina Hughes's residence at approximately 4:00 a.m. on December 27, 2000, while armed with handguns and wearing masks or something covering their mouths and noses. During the robbery, Hardaway seized $1,100.00 from Hughes, hit her in the temple with his gun and fired three to four shots. One shot grazed Hughes's leg and one hit Hughes's friend, Wallace Cross. Hardaway and Vance also injured two teenage girls at Hughes's residence, one girl needing fourteen stitches to close the wound on her forehead. Hardaway and Vance fled the residence, but police apprehended them later that same day.

¶3 The State charged Vance with four counts, all as party to the crime: armed robbery, burglary while armed, recklessly endangering safety while armed and causing substantial bodily harm while armed, in violation of WIS. STAT.

§§ 943.32(2), 943.10(2)(a), 941.30(1) and 940.19(3) (2001-02).[1] All counts included a habitual criminality enhancer, pursuant to WIS. STAT. § 939.62(1)(c), as a result of Vance's March 27, 2000 conviction for possession of marijuana as a second offense. Vance subsequently pled guilty to counts one and three, armed robbery and recklessly endangering safety, with the habitual criminality enhancer on both counts. The other charges were dismissed.

¶4 At a plea hearing on December 5, 2001, the trial court verified Vance's understanding of his rights and advised him of the maximum penalties for the charged offenses:

> THE COURT: In Count 1, you are charged with being a party to the crime—participating in a crime that—as a party to the crime of armed robbery. That carries with it a period of incarceration not to exceed 60 years. And because of the habitual criminality allegation as alleged, that term of incarceration can be increased by not more than 10 years. So therefore you face 70 years on that charge. Do you understand that, sir?
>
> MR. VANCE: Yes, your Honor.
>
> THE COURT: Count 3 charges you with recklessly and feloniously endangering another's safety while armed with a handgun, and that carries with it a period of incarceration not to exceed 15 years, and a fine not to exceed $10,000, or both. Do you understand that?
>
> MR. VANCE: Yes, your Honor.
>
> THE COURT: But because that also is charged with the habitual criminality allegation, the term of incarceration may be increased by not more than 10 years, which changes that 15 into 15 plus 10, which is 25. Do you understand that?
>
> MR. VANCE: Yes, sir.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶5 The court then received Vance's pleas to counts one and three:

> THE COURT: What is your plea to the charge of armed robbery as a party to the crime, with threat of force, and with an habitual criminality allegation?
>
> MR. VANCE: Guilty.
>
> THE COURT: What is your plea to the charge of first-degree recklessly endangering safety of another with a weapon, also with an habitual criminality allegation?
>
> MR. VANCE: Guilty, your Honor.

¶6 At sentencing, however, after counsel informed the court that the information contained a concealing identity enhancer (which had not been alleged in the criminal complaint), the court concluded that Vance had received proper notification of that penalty enhancer and revised its statement of the maximum sentences. The court noted that pursuant to the information, Vance faced a maximum possible sentence of seventy-five years for the armed robbery and twenty years for reckless endangerment while armed because the penalty enhancer for concealing his identity during the offense added five years to the potential sentence for each count. It then sentenced Vance to ten years' confinement and twenty years' extended supervision on count one, the armed robbery charge. On count three, first-degree reckless endangerment, the court also imposed ten years of confinement and twenty years of extended supervision, concurrent to count one. Vance appeals.

DISCUSSION

¶7 Vance challenges the validity of his sentence on count three, arguing that the trial court's use of the concealed identity enhancer renders the sentence invalid. When a trial court imposes a sentence in excess of that authorized by law, the remedy is to void the portion that is in excess and the remaining sentence shall

stand commuted. WIS. STAT. § 973.13. Whether the trial court properly interpreted and applied the penalty enhancer requires the application of WIS. STAT. § 939.641(2) to an undisputed set of facts. This presents a question of law and our review is de novo. ***State v. Holloway***, 202 Wis. 2d 694, 697-98, 551 N.W.2d 841 (Ct. App. 1996).

¶8 In his initial brief, Vance argues that the trial court erred when it applied the concealed identity enhancer at sentencing because he pled guilty to first-degree reckless endangerment while armed and as a habitual criminal, but without the added allegation of concealing identity in violation of WIS. STAT. § 939.641(2). He entered this plea after the trial court informed him that the maximum sentence on count three was twenty-five years: fifteen years for the base offense and ten more years for the habitual criminality enhancer. At sentencing, however, the trial court advised Vance that with the concealed identity enhancer, the potential period of incarceration for first-degree reckless endangerment was thirty years, and proceeded to sentence him to ten years of confinement and twenty years of extended supervision.

¶9 The State contends that Vance's remedy for the discrepancy between the charges at his plea and at his sentencing is a motion to withdraw his plea. In the State's view, under the plea agreement Vance agreed to plead guilty to counts one and three as described in the information, and the information includes the concealing identity element of each count. Therefore, the State concludes that Vance is arguing that the plea colloquy omitted an element of the offense. Further, the State submits that judicial estoppel precludes Vance from objecting on appeal to the penalty enhancer for concealing identity because, when that enhancement was discussed at sentencing, Vance agreed that it applied. We disagree.

¶10 Neither the trial court nor the plea questionnaire form referred to the concealed identity penalty enhancer, although the minutes from the plea hearing include it in counts one and three. Vance pled guilty in response to the trial court's question "What is your plea to the charge of first-degree recklessly endangering safety of another with a weapon, also with an habitual criminality allegation?" When the court reviewed the elements of the charges with Vance, it did not mention concealing identity as one of them. Under these circumstances, we reject the State's assertion that Vance's recourse was to seek withdrawal of his guilty plea. He has no reason to withdraw it because he did not plead guilty to a charge attaching the concealed identity enhancer.

¶11 We consider ***State v. Villarreal***, 153 Wis. 2d 323, 450 N.W.2d 519 (Ct. App. 1989), analogous, although it did not involve inconsistent penalty enhancers in the plea and at sentencing. In ***Villarreal***, the defendant did not personally waive her right to have the jury determine the dangerous weapon element of the crime of second-degree murder by use of a dangerous weapon. ***Id.*** at 325. We concluded that the trial court erred by finding that Villarreal had used a dangerous weapon and by applying that penalty enhancer at sentencing. ***Id.*** at 332. In doing so we compared the dangerous weapon penalty enhancer to that for concealing identity:

> We see an allegation of use of a dangerous weapon as akin to that of concealing identity. Concealing identity does not create a substantive offense by itself. However, it does create a substantive offense when charged in conjunction with an underlying crime. So also here. Use of a dangerous weapon, standing alone, does not create a substantive offense. However, it does create a substantive offense when charged in conjunction with first-degree murder or when recited as a conviction in conjunction with second-degree murder. Use of a dangerous weapon thus becomes an element necessary to sustain a conviction for the offense of second-degree murder by use of a dangerous

> weapon. As such, Villarreal had the right to a jury determination of this element."
>
> ….
>
> The state further argues that since Villarreal is not challenging the validity of the conviction for second-degree murder, her position implicitly lends credence to the state's argument that the dangerous weapon element is not an essential element of the underlying offense. The state misses the point. Villarreal's argument is *not* that use of a dangerous weapon is an essential element of second-degree murder. Rather, it is that the dangerous weapon element is essential to the charge of second-degree murder *by use of a dangerous weapon*—the offense of which Villarreal stands convicted.

Id. at 329-31 (citations omitted). We then reversed the conviction for second-degree murder by use of a dangerous weapon and directed the trial court on remand to enter a judgment of conviction against Villarreal for second-degree murder. ***Id.*** at 332.

¶12 A similar result is required here. Vance did not plead guilty to the concealing identity enhancer, which is an element of the charge of first-degree reckless endangerment while armed with identity concealed. Therefore, the trial court erred in sentencing him for that offense. By failing to state the effect of the concealed identity enhancer at the time of the plea, the trial court did not ensure that Vance had "a full understanding of the possible penalty, including both the maximum available penalty and any presumptive minimum term of imprisonment." ***State v. Quiroz***, 2002 WI App 52, ¶19, 251 Wis. 2d 245, 641 N.W.2d 715, *review denied*, 2002 WI 109, 254 Wis. 2d 263, 648 N.W.2d 478. In short, Vance was sentenced on one charge based on a guilty plea to a different offense.

Judicial Estoppel

¶13 We do not agree with the State that this is a case that warrants applying judicial estoppel to bar consideration of Vance's argument. Judicial estoppel is an equitable doctrine that precludes a party from taking inconsistent positions in legal proceedings and thereby playing "fast and loose" with the courts. ***State v. Petty***, 201 Wis. 2d 337, 346-47, 548 N.W.2d 817 (1996). Although generally invoked at the trial court level, an appellate court may consider and apply judicial estoppel. *See* ***id.*** There are three prerequisites for invoking the doctrine: (1) the party against whom judicial estoppel is sought must assert a position that is clearly inconsistent with an earlier position; (2) the facts at issue are the same in both cases, and (3) the party must have persuaded the first court to adopt its position. ***Id.*** at 348.

¶14 We conclude that the prerequisites for judicial estoppel are not present here. The State contends that because Vance did not object to the concealing identity enhancer at sentencing, he cannot challenge its application on appeal. But, "[t]he mere appearance of inconsistency is insufficient for invocation of the doctrine." ***Id.*** at 350 n.5. Moreover, Vance did not argue at sentencing that he should be sentenced with the penalty enhancer or that his guilty plea included it. Rather, he agreed that the information contained a concealed identity allegation. We cannot reasonably conclude from the sentencing transcript that Vance's position before the trial court is "clearly inconsistent" with the one he takes on appeal, or that he "convinced the first court to adopt its position." ***Id.*** at 348. In short, this case is not an example of "[t]he manipulative perversion of the judicial process" such that judicial estoppel precludes consideration of Vance's argument. ***Id.*** at 354.

¶15 Vance pled guilty after the trial court advised him that the maximum penalty for first-degree reckless endangerment while armed was fifteen years. The trial court's determination at sentencing that Vance had received sufficient notice of the concealing identity allegation in the information did not change the fact that Vance entered a plea to a charge without a concealed identity enhancer. Vance does not seek resentencing and does not challenge his sentence for count one. Accordingly, we modify the judgment of conviction for count three by ordering the penalty enhancer for concealing identity deleted from that count.

Validity of Extended Supervision Portion of Sentence

¶16 Even if Vance had pled guilty to counts including the concealing identity penalty enhancer, the sentence on count three would still be invalid. Under Truth in Sentencing, there are two components to a sentence of imprisonment: a term of confinement and a term of extended supervision. WIS. STAT. § 973.01(1). Vance faced a maximum sentence of ten years for first-degree reckless endangerment, a Class D felony (under WIS. STAT. § 939.50(3)(d)(1999-2000)). Pursuant to WIS. STAT. § 973.01(2)(b)4 (1999-2000), the maximum available term of confinement was five years. Therefore, the maximum period of extended supervision the trial court could impose was five years.

¶17 As the State points out, in ***State v. Volk***, 2002 WI App 274, ¶2, 258 Wis. 2d 584, 654 N.W.2d 24, we held that, because the statute refers to penalty enhancers increasing the term of confinement, "WIS. STAT. § 973.01(2)(c)[2] does

[2] WISCONSIN STAT. § 973.01(2)(c) provides in pertinent part:

Penalty enhancement.

(continued)

not authorize a sentencing court to impose any portion of a penalty enhancer as extended supervision." The trial court, based on the dangerous weapon, habitual criminality and concealing identity enhancers, sentenced Vance on count three to ten years of confinement and twenty years' extended supervision. The extended supervision portion of this sentence is invalid because, despite the application of penalty enhancers, under WIS. STAT. § 973.01(2) and ***Volk***, the most extended supervision Vance could receive remained five years.

¶18 While the State and Vance agree that the twenty-year term of extended supervision on count three is not permitted under WIS. STAT. § 973.01(2), they disagree as to the appropriate remedy. Vance argues that pursuant to WIS. STAT. § 973.13,[3] the excess portion of his sentence on count three is void as a matter of law and should be commuted to ten years' confinement and five years' extended supervision. The State argues that we should remand for resentencing as we did in ***Volk***. There, even though we held that the defendant's sentence was invalid and § 973.13 indicated that the sentence should be commuted "without further proceedings," we concluded that resentencing was required:

> … [T]he 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.

[3] WISCONSIN STAT. § 973.13 reads as follows:

> **Excessive sentence, errors 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 statute and shall stand commuted without further proceedings.

> As we have explained, 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 to five years pursuant to WIS. STAT. § 973.13, we would produce a sentence based on mathematics, rather than an individualized sentence based on "the facts of the particular case and the characteristics of the individual defendant." [State v. Holloway, 202 Wis. 2d 694, 699-700, 551 N.W.2d 841 (Ct. App. 1996)].

Volk, 258 Wis. 2d 584, ¶48.

¶19 Resentencing is not necessary in this case. The trial court sentenced Vance to ten years of confinement followed by twenty years of extended supervision on count one. On count three, the court also imposed ten years of confinement and twenty years of extended supervision, concurrent to count one. Commuting the period of extended supervision in count three to five years will not change the term of extended supervision that Vance must serve, because the sentence for count one remains intact. Although count three, first-degree reckless endangerment, carries a lesser penalty than count one, the trial court determined that an identical term of confinement was warranted for both counts. In these circumstances, we conclude that there is not a substantial possibility that the trial court will change the term of confinement imposed in count three, were we to remand for resentencing. The purpose of the original sentence is not frustrated by reducing the term of extended supervision to five years, because Vance will still serve twenty years of extended supervision for count one. Thus, we do not deem

it necessary for the trial court to revisit the entire question, as we did in ***Volk***. Accordingly, we modify Vance's sentence on count three to ten years of confinement and five years of extended supervision, for a total sentence of fifteen years.

By the Court.—Judgment modified and, as modified, affirmed.

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