COURT OF APPEALS DECISION DATED AND FILED

June 4, 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. 02-3227-CR

Cir. Ct. No. 02-CM-1426

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEPHEN E. LEE,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Waukesha County: PATRICK L. SNYDER, Judge. *Affirmed*.

¶1 NETTESHEIM, P.J.[1] Stephen E. Lee appeals from the sentencing provisions of an original and amended judgment of conviction. Lee was convicted and sentenced as a habitual criminal pursuant to WIS. STAT. § 939.62 (1999-

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02).

2000).[2] On appeal, Lee contends that the trial court erred by failing to expressly impose a maximum sentence for the underlying offense before imposing the enhanced penalties permitted by § 939.62. We reject Lee's argument because Wisconsin law envisions the very kind of sentence recited in the original judgment of conviction.

¶2 Lee also contends that his prior convictions were "uncounseled" convictions and therefore not a proper basis for an enhanced sentence. We reject this argument because Lee's postconviction motion challenging the prior convictions failed to objectively demonstrate that the convictions were in any way suspect because they were uncounseled.

¶3 The criminal complaint charged Lee with misdemeanor theft pursuant to WIS. STAT. § 943.20(1)(a) and retail theft pursuant to WIS. STAT. § 943.50(1m)(d). Each of these offenses is a Class A misdemeanor carrying a penalty of "a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both." WIS. STAT. § 939.51(3)(a). In addition, the complaint alleged that Lee was a habitual criminal based upon three prior retail theft convictions. As a result, Lee was subject to a maximum term of imprisonment of three years on each count. WIS. STAT. § 939.62(1)(a).[3]

¶4 Lee, acting pro se, and the State negotiated a plea agreement which resolved the case. Lee has provided only a partial transcript of the plea

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[3] Effective February 1, 2003, the maximum term of imprisonment was reduced to two years. 2001 Wis. Act 109.

proceeding. From it we are able to glean the following. Lee entered a plea of guilty to the first count and the State dismissed but read in the second count. The trial court's colloquy with Lee included Lee's admission that he had been convicted of the three prior retail convictions alleged in the complaint. The trial court sentenced Lee to the maximum—three years' imprisonment concurrent with a sentence that Lee was then serving.

¶5 Postconviction, Lee brought a pro se motion raising the same challenges which he advances in this appeal. Lee first argued that the enhanced portion of his sentence was invalid because the trial court had not expressly imposed the maximum sentence on the underlying offense. Lee additionally alleged that the three prior retail theft convictions were "uncounseled" convictions and therefore could not form the basis for the enhanced sentence. The trial court did not conduct any proceedings on this motion. Instead, the court responded by entering an amended judgment of conviction stating Lee's sentence as follows: "9 Months for original charge followed by 27 Months for the habitual criminal enhancer for total of 3 years." The court also rejected Lee's challenge to the prior "uncounseled" convictions.

¶6 On appeal, Lee first challenges the sentencing provisions of both the original and amended judgments of conviction. His premise is that the trial court erred by failing to expressly impose the maximum sentence for the underlying offense before imposing the enhanced sentence. As such, Lee sought a sentence commutation to nine months, the maximum permitted for the underlying offense. The trial court apparently bought into the premise, but not the result, of Lee's argument because in response to Lee's motion, the court entered into an amended judgment of conviction stating, "9 Months for original charge followed by 27 Months for the habitual criminal enhancer for total of 3 years."

¶7 We hold that the trial court's initial sentence as recited in the original judgment of conviction was valid. No statute or case holds that a trial court must segregate the portions of an enhanced sentence in the manner argued by Lee. If anything, the law is to the contrary. WISCONSIN STAT. § 973.12(2) states:

> In every case of sentence under s. 939.62, the sentence shall be imposed for the present conviction, *but if the court indicates in passing sentence how much thereof is imposed because the defendant is a repeater, it shall not constitute reversible error, but the combined terms shall be construed as a single sentence for the present conviction.* (Emphasis added.)

Thus, a sentencing court is not required to recite how much of an enhanced sentence is attributable to the defendant's repeater status. From this, it follows that the sentencing court also is not required to state how much of an enhanced sentence is attributable to the conviction for the underlying offense *where the total sentence, including the enhanced portion, represents the maximum permitted under the law.* Instead, the language of the statute expressly states the sentence of a repeat criminal is a single term, rather than one sentence for the substantive offense and an additional term for the repeater status.

¶8 That is the situation here. Lee was subject to a maximum sentence of nine months on the underlying charge. However, the prior convictions put his total exposure at three years. The trial court sentenced Lee to three years. That sentence necessarily had to be premised upon Lee's status as a habitual criminal because the total sentence exceeded the nine-month maximum for the underlying offense.

¶9 Lee relies upon ***State v. Harris***, 119 Wis. 2d 612, 350 N.W.2d 633 (1984). There, the trial court "bifurcated" an enhanced sentence for attempted

armed robbery between thirty months on the underlying charge and six months on the repeater convictions. ***Id***. at 615. The supreme court vacated the repeater portion of the sentence because the total term of imprisonment was less than the maximum term of five years for the underlying offense. ***Id***. at 625.

¶10 ***Harris*** does not support Lee's argument. As noted earlier, the trial court sentenced Lee to three years, the maximum permitted in light of Lee's prior convictions. As such, that portion of Lee's sentence attributable to the underlying conviction necessarily had to be the nine-month maximum. Therefore, the trial court's original judgment of conviction was correct, and the sentencing provisions of the amended judgment of conviction are of no legal effect. We vacate the sentencing provisions of the amended judgment of conviction and reinstate the sentencing provisions of the original judgment.

¶11 As a separate challenge, Lee contends that his prior convictions were "uncounseled" and therefore not a proper basis for an enhanced sentence. The trial court denied this request without a hearing.

¶12 In ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), the supreme court set out the procedure by which a trial court determines whether the defendant is entitled to an evidentiary hearing on a postconviction motion.[4] First, the court must determine whether the facts alleged would entitle the defendant to relief. ***Id***. at 310. If this test is satisfied, the court must conduct an evidentiary

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[4] We appreciate that ***State v. Bentley***, 201 Wis. 2d 303, 307, 548 N.W.2d 50 (1996), dealt with a postconviction motion seeking to withdraw a guilty plea based on a claim of ineffective assistance of counsel, whereas here we deal with a postconviction motion seeking to modify a sentence based on alleged "uncounseled" prior convictions. Despite the different nature of Lee's motion, we see no reason why the ***Bentley*** analysis should not also apply here.

hearing. ***Id***. However, if the motion fails to allege such sufficient facts, the court has the discretion to deny a postconviction motion without a hearing if: (1) the defendant fails to allege sufficient facts in his or her motion to raise a question of fact, (2) the motion presents only conclusory allegations, or (3) the record conclusively demonstrates that the defendant is not entitled to relief. ***Id***. at 309-11 (citing with approval to ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972)).

¶13 Lee's postconviction motion falters on the threshold factor under ***Bentley***. Lee's allegation of "uncounseled" prior convictions casts no suspicion on the validity of those convictions. Absent something more, we have no reason to presume that Lee was not advised of his right to counsel and that he chose to proceed without counsel knowing the risks. In short, the integrity of the prior convictions is not impugned in the slightest by Lee's postconviction motion stating that the convictions were "uncounseled."

By the Court.—Judgments affirmed.

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