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**DISTRICT IV**

January 27, 2016

To:

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Circuit Court Judge  
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You are hereby notified that the Court has entered the following opinion and order:

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2014AP2174-CR                      State of Wisconsin v. Tyrone R. Martin (L.C. # 2013CF270)

Before Kloppenburg, P.J., Higginbotham and Sherman, JJ.

Tyrone R. Martin appeals from a judgment of conviction and order denying his postconviction motion for sentence modification. Based upon our review of the briefs and record at conference, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).<sup>1</sup> We affirm.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Martin pled no contest to several crimes arising from the abuse and neglect of his children. The sole issue on appeal concerns the sentence imposed for Martin's conviction for exposing genitals to a child, with a habitual criminality enhancer. For that crime, the court sentenced Martin to six years of imprisonment, comprised of four-and-one-half years of initial confinement followed by one-and-one-half years of extended supervision. On appeal, Martin contends that the sentencing court did not properly apply the habitual criminality enhancer. We disagree.

Exposing one's genitals to a child is a Class I felony. WIS. STAT. § 948.10(1)(a). The maximum term of imprisonment for a Class I felony is three years and six months. WIS. STAT. § 939.50(3)(i). The term of imprisonment must be bifurcated between a term of initial confinement and a term of extended supervision. WIS. STAT. § 973.01(2). The maximum term of initial confinement for a Class I felony is one year and six months, and the maximum term of extended supervision is two years. WIS. STAT. § 973.01(2)(b)9. and (d)6. Because Martin was a habitual criminal with a prior felony conviction, the maximum term of imprisonment could be increased by up to four years pursuant to WIS. STAT. § 939.62(1)(b).

The application of the various sentencing statutes to the undisputed facts of this case presents a question of law, which we review de novo. *See State v. Jackson*, 2004 WI 29, ¶11, 270 Wis. 2d 113, 676 N.W.2d 872 (interpreting applicable statutes to determine "how penalty enhancers are applied at sentencing" is a question of law "subject to independent appellate review").

The application of a WIS. STAT. § 939.62(1) penalty enhancer to a bifurcated sentence is controlled by WIS. STAT. § 973.01(2)(c)1. which provides:

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.

Thus, a circuit court may, in its discretion, apply a penalty enhancer to increase the term of initial confinement, which thereby increases the “total length of the bifurcated sentence.” WIS. STAT. § 973.01(2)(c). In this case, WIS. STAT. § 939.62(1)(b) permitted the circuit court to increase Martin’s term of initial confinement by up to four years, and increase the total length of his bifurcated sentence accordingly.

Martin argues that the circuit court erred by not following the sentencing methodology described in *State v. Lasanske*, 2014 WI App 26, ¶¶6-7, 353 Wis. 2d 280, 844 N.W.2d 417. In that case, we considered “the vexing problem” of how to structure a sentence when the underlying crime is a misdemeanor and the need for a bifurcated sentence arises only from the application of a penalty enhancer. *Id.*, ¶1. Before discussing penalty enhancers and bifurcation in the context of misdemeanors, we described the procedure for applying a penalty enhancer to a felony and wrote that “[o]nly after determining an appropriate bifurcated sentence in compliance with the limits imposed by WIS. STAT. § 973.01(2)(b) and (d) does the court add a penalty enhancer to a felony sentence.” *Id.*, ¶7. Martin argues that statement requires a circuit court to *first* pronounce the sentence it would have imposed without the application of a penalty enhancer, and *then* impose additional confinement permitted by the penalty enhancer. In Martin’s view, a sentence imposed without such a discrete pronouncement is illegal and only the maximum initial confinement for the underlying crime may stand.

We reject Martin's argument. The issue in *Lasanske* concerned the application of penalty enhancers to a misdemeanor. Regardless, nothing in WIS. STAT. § 973.01(2) requires such a step-by-step process. To do so would elevate form over substance. The circuit court does not err if it imposes a total term of initial confinement within the maximum, as adjusted by the penalty enhancer. Martin's sentence passes that test.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order are summarily affirmed.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*