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March 5, 2019

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

2017AP2337-CR State of Wisconsin v. Roy James Jones
(L. C. No. 1995CF955367)

Before Stark, P.J., Hruz and Seidl, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Roy Jones, pro se, appeals an order denying his motion for sentence modification and an order denying his motion for reconsideration. Based upon our review of the briefs and record,

we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] We summarily affirm.

In 1997, a jury found Jones guilty of one count of first-degree sexual assault of a child; two counts of first-degree sexual assault of a child while armed; two counts of kidnapping while armed; one count of sexual assault; and one count of attempted sexual assault. The crimes arose from two separate incidents—one occurring in May of 1994 and the other in August of 1995—each involving a different teenage girl. All counts were subject to the habitual criminality enhancer.[2] The circuit court imposed sentences totaling 143 years. This is the eighth time that Jones has sought relief from this court since his 1997 convictions.[3] We will not repeat the extensive facts or procedural history outlined in our prior decisions.

At issue in this appeal is the circuit court's denial of Jones's motion for sentence modification, based on Jones's claim that the State failed to prove his habitual criminal status, thus requiring commutation of his sentence pursuant to WIS. STAT. § 973.13. The circuit court denied both the sentence modification motion and Jones's subsequent reconsideration motion,

[1] All references to the Wisconsin Statutes are to the 2017-18 version, unless otherwise noted.

[2] Without any penalty enhancers for the seven crimes, Jones faced a maximum total 260-year sentence. The habitual criminality enhancers added up to ten years on each of the seven counts, and a weapons enhancer added up to five years on four of the counts, resulting in a possible 350-year maximum total sentence.

[3] *See* ***State v. Jones***, No. 1998AP685-CR, unpublished slip op. (WI App June 29, 1999); ***State v. Jones***, No. 2004AP1836, unpublished slip op. (WI App Dec. 20, 2005); ***State v. Jones***, No. 2007AP2097-CR, unpublished slip op. (WI App Sept. 23, 2008); ***State ex rel. Jones v. Pollard***, No. 2008AP2589-W, unpublished slip op. (WI App Dec. 30, 2008); ***State v. Jones***, No. 2010AP779-CR, unpublished slip op. (WI App Jan. 11, 2011); ***State v. Jones***, No. 2011AP2572, unpublished slip op. (WI App Nov. 6, 2012); and ***State v. Jones***, No. 2013AP1794-CR, unpublished op. and order (WI App July 29, 2014).

concluding Jones's arguments were procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994), which prevents a defendant from raising claims that were or could have been raised in prior postconviction and appellate proceedings unless the defendant articulates a sufficient reason justifying that failure. Although we agree with the circuit court's decision to deny Jones's sentence modification motion as procedurally barred, we choose to reach the merits of Jones's arguments as the record conclusively establishes that the State proved Jones's habitual criminal status and he is not otherwise entitled to commutation of his sentence. *See* ***State v. Baudhuin***, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987) (where the circuit court's decision is correct, we may affirm on grounds not utilized by that court).

A defendant "is a repeater if he was convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced[.]" WIS. STAT. § 939.62(2). Additionally, time that the defendant spent in actual confinement serving a criminal sentence is excluded from the five-year computation period. ***Id.*** If a defendant is a repeater, the sentence for each crime carrying a maximum term of more than ten years' imprisonment can be increased by ten years if the prior conviction was for a felony. WIS. STAT. § 939.62(1)(c) (1995-96).

A defendant is subject to these increased penalties if such "prior convictions are admitted by the defendant or proved by the state." WIS. STAT. § 973.12(1). Thus, "absent a defendant's personal admission, the [S]tate bears the burden of proving that qualifying prior convictions exist if it seeks repeater enhancements under [WIS. STAT.] § 939.62." ***State v. Saunders***, 2002 WI 107, ¶20, 255 Wis. 2d 589, 649 N.W.2d 263. The State may meet its burden under § 973.12(1) by providing a certified judgment of conviction reflecting the prior conviction, but a certified

copy is not required as long as the State proves the existence of the prior conviction beyond a reasonable doubt. ***Saunders***, 255 Wis. 2d 589, ¶3.

At Jones's trial on the underlying crimes, the victim from a 1988 case testified about the facts of that crime. The State thereafter submitted a certified copy of Jones's judgment of conviction from Milwaukee County case No. 1988CF1509 for the circuit court and defense counsel to review. Rather than offering the judgment of conviction as a trial exhibit, the State asked the court to take judicial notice of the same. Defense counsel, after discussing the matter with Jones, did not object, and the court ultimately took "judicial notice that the defendant was convicted of second[-]degree sexual assault on August 24th, 1989[.]" A copy of the judgment is included in the appendix to Jones's brief and reflects that Jones was found guilty of second-degree sexual assault on August 24, 1989, and his eight-year sentence was imposed and began on December 19, 1989.

During his own trial testimony, Jones admitted his prior conviction and also admitted he was incarcerated from "'89 until '93." Even assuming a January 1993 release, Jones's prior conviction would still fall within five years of the present crimes committed in May 1994 and August 1995, because the time from December 1989 to January 1993 would be excluded from the five-year computation period. *See* WIS. STAT. § 939.62(2).

The State, therefore, met its burden under both methods of proof—Jones admitted his previous conviction and the State also proved the existence of the previous conviction beyond a reasonable doubt by introducing a certified copy of the judgment, of which the circuit court took judicial notice. All of this information was provided to the court prior to Jones's sentencing. *See* ***State v. Koeppen***, 195 Wis. 2d 117, 130, 536 N.W.2d 386 (Ct. App. 1995) (proof of prior

conviction must be made before sentence is pronounced). Jones's claim that the State did not prove his habitual criminal status therefore fails on its merits.

Jones seeks commutation of his sentence pursuant to WIS. STAT. § 973.13, which provides: "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." Because the State proved the existence of Jones's prior conviction before sentencing, Jones was properly the subject of the habitual criminal penalty enhancers in this case. There is, therefore, no basis for commutation, as Jones did not receive a sentence in excess of the maximum penalty available on any of the counts for which he was convicted.

Upon the foregoing,

IT IS ORDERED that the orders are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals