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

2018AP2302 State of Wisconsin v. Jermaine McFarland (L.C. # 2001CF2994)

Before Kessler, Dugan and Fitzpatrick, 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).

Jermaine McFarland, *pro se*, appeals an order denying his postconviction motion seeking commutation of the sentence he received for committing first-degree reckless injury while using a dangerous weapon, as a habitual offender. He also appeals an order denying reconsideration. He claims that the circuit court wrongly applied the penalty enhancer permitting an increased sentence for committing a crime while using a dangerous weapon. 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 affirm.

In 2002, a jury found McFarland guilty of three crimes committed on October 10, 1999: first-degree reckless injury while using a dangerous weapon; endangering safety by use of a dangerous weapon; and possessing a firearm while a felon. The circuit court found that he committed each crime as a habitual offender. The circuit court imposed a maximum, twenty-one year prison sentence for first-degree reckless injury while using a dangerous weapon as a habitual offender. The circuit court imposed consecutive maximum eight-year sentences for the other two crimes, resulting in an aggregate thirty-seven-year prison term on all charges.

McFarland pursued a postconviction motion and a direct appeal in which he alleged that his trial counsel was ineffective for, *inter alia*, failing to raise a multiplicity challenge to his prosecution for both reckless injury while using a dangerous weapon and endangering safety by use of a dangerous weapon. We affirmed. *See* ***State v. McFarland*** (***McFarland I***), No. 2004AP633-CR, unpublished slip op. (WI App Apr. 12, 2005). In both 2006 and 2012, McFarland filed a postconviction motion raising constitutional challenges to his convictions. *See* WIS. STAT. § 974.06. The circuit court denied his claims in both proceedings, and we affirmed.

In 2018, McFarland filed the postconviction motion underlying this appeal. He sought partial commutation of his sentence for first-degree reckless injury because, he alleged, the sentencing court wrongly added five years to that sentence pursuant to the penalty enhancer for committing the offense while using a dangerous weapon. The circuit court denied relief,

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

concluding that McFarland was not entitled to sentence commutation and, to the extent his motion was an effort to continue pursuit of his multiplicity challenge, the claim was procedurally barred. The circuit court next denied McFarland's motion to reconsider, and he appeals.

WISCONSIN STAT. § 974.06 is the primary statutory mechanism for a convicted person to pursue constitutional and jurisdiction challenges to a criminal conviction after the time for a direct appeal has passed. *See* ***State v. Henley***, 2010 WI 97, ¶50, 328 Wis. 2d 544, 787 N.W.2d 350. The statute promotes finality, *see* ***id.***, ¶53, and therefore includes a procedural hurdle requiring the person to present a sufficient reason for failing to raise the challenges in earlier motions or appeals, *see* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Section 974.06 is not, however, the exclusive means for seeking postconviction relief under all circumstances. When a convicted person alleges that he or she received an excessive sentence under a penalty enhancer, the person may pursue relief under the authority of WIS. STAT. § 973.13. *See* ***State v. Mikulance***, 2006 WI App 69, ¶14, 291 Wis. 2d 494, 713 N.W.2d 160. McFarland makes such an allegation here and contends that he is entitled to relief under § 973.13. We turn to the merits of that claim without considering whether McFarland demonstrated a sufficient reason for failing to raise the claim previously. *See* ***Mikulance***, 291 Wis. 2d 494, ¶¶13-14.

WISCONSIN STAT. § 973.13 provides: "[i]n 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." To obtain relief under this statute, McFarland must show either that: (1) the sentence exceeded the statutory maximum, *see* ***id.***; or (2) the State failed to prove

the facts permitting an enhancement, *see* ***Mikulance***, 291 Wis. 2d 494, ¶14. McFarland does not make either showing.

First-degree reckless injury, a Class C felony, carried a maximum ten-year prison sentence when McFarland committed the crime in October 1999. *See* WIS. STAT. §§ 940.23(1) (1999-2000), 939.50(3)(c) (1997-98).[2] Pursuant to WIS. STAT. § 939.62 (1)(b) (1999-2000), if a person committed a crime as a habitual offender, the person's sentence could be increased by not more than six years when, as here, the maximum sentence was otherwise not more than ten years and the prior conviction was for a felony.[3] Additionally, pursuant to WIS. STAT. § 939.63(1)(a)2. (1999-2000), if a person committed a felony while using a dangerous weapon, the person's sentence could be increased by not more than five years if the maximum sentence for the crime was otherwise more than five years.

McFarland claims that the circuit court should not have applied WIS. STAT. § 939.63(1)(a)2. (1999-2000) to his sentence for first-degree reckless injury. In support of the claim, he asserted in his opening brief that the State's argument in ***McFarland I*** "implied" that the State charged him with violating § 939.63 (1999-2000) as a stand-alone offense. He went on to assert that "§ 939.63 standing alone does not constitute a crime," and therefore cannot support a five-year sentence. In his reply brief, McFarland "admits that he erred" in his opening brief when describing the State's position. Instead, he argues, the State's actual position in

[2] The penalties for a Class C felony increased when 1997 Wis. Act 283 took effect on December 31, 1999. *See* ***id.***, §§ 324, 456. Those increased penalties are codified in the 1999-2000 version of the Wisconsin statutes. The penalties in effect for a Class C felony when McFarland committed his crimes on October 10, 1999, are codified in the 1997-98 version.

[3] McFarland does not dispute that the circuit court properly enhanced his sentence for reckless injury by six years under WIS. STAT. § 939.62(1)(b) (1999-2000).

McFarland I was "that the jury did not have to consider the element of use of a dangerous weapon at all in order to find him guilty of the charge, because the element was never given to the jury for consideration." (Some capitalization omitted.) He next asserts: "it is undisputed that the jury did not find McFarland guilty of every element necessary to constitute the crime of first-degree reckless injury while armed." (Some capitalization omitted.) He concludes that his sentence should therefore be reduced by five years. McFarland misunderstands the law and misstates the facts.

The criminal complaint in this case invoked WIS. STAT. § 939.63, and expressly alleged that McFarland committed first-degree reckless injury while using a dangerous weapon. When the State invokes § 939.63, the penalty enhancer described in that statute "become[s] an element of the underlying offense, and the defendant has a right to a jury determination" regarding that element. *See* ***State v. Miles***, 221 Wis. 2d 56, 64, 584 N.W.2d 703 (Ct. App. 1998). The record plainly shows that the circuit court honored McFarland's right to such a jury determination. The trial transcripts reflect that the circuit court instructed the jury regarding the penalty enhancer, explaining that the jury must be satisfied beyond a reasonable doubt that McFarland committed first-degree reckless injury while using a dangerous weapon before he could be found guilty of that crime. The verdict form for the jury to use in resolving the charge complied with the recommendation of the Wisconsin Criminal Jury Instructions Committee and included a bifurcated inquiry with a special question. *See* WIS JI—CRIMINAL 990, cmt. Specifically, the verdict form required the jury first to determine whether McFarland was guilty of first-degree reckless injury. The form then provided that "if you find the defendant guilty, you must answer the following question: [d]id the defendant commit the crime of first-degree reckless injury while using a dangerous weapon?" The jury answered this question, "yes."

Thus, the record shows that the jury found McFarland guilty of first-degree reckless injury while using a dangerous weapon. Any contention to the contrary is unequivocally wrong.

At sentencing, the circuit court elected to enhance McFarland's sentence for first-degree reckless injury based on McFarland's use of a dangerous weapon while committing the crime. The five-year enhancement imposed did not exceed the maximum penalty permitted by WIS. STAT. § 939.63(1)(a)2. (1999-2000).

In sum, McFarland does not show either that the jury declined to convict him of using a dangerous weapon while committing first-degree reckless injury or that the circuit court imposed an enhanced sentence that exceeded the maximum allowed by law. He is therefore not entitled to sentence commutation under WIS. STAT. § 973.13. *See* ***id.***; *see also* ***Mikulance***, 291 Wis. 2d 494, ¶14.

In the postconviction proceedings underlying this appeal, the circuit court determined not only that McFarland failed to demonstrate an entitlement to sentence commutation but also that he sought to relitigate a previously resolved multiplicity claim. The circuit court concluded that the attempted relitigation was barred by ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991)—which prohibits repeated litigation of the same claim—and, to the extent that any aspect of the multiplicity claim had not been previously litigated, McFarland was procedurally barred from raising the issue pursuant to ***Escalona-Naranjo*** and WIS. STAT. § 974.06. McFarland repeatedly assures this court that he is not pursuing a multiplicity claim and that the only relief he seeks is sentence commutation under WIS. STAT. § 973.13. We accept his assurances. Accordingly, we deem any multiplicity claim abandoned, and we do not consider it. *See* ***Mueller v. Harry Kaufmann Motorcars, Inc.***, 2015 WI App 8, ¶2 n.2, 359 Wis. 2d 597,

859 N.W.2d 451. Because McFarland does not demonstrate an entitlement to sentence commutation under WIS. STAT. § 973.13, and because he does not pursue any other claim for relief, we affirm.

IT IS ORDERED that the orders are summarily affirmed. *See* 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