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May 5, 2021

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

2020AP578-CR State of Wisconsin v. Todd E. Peterson (L.C. #2005CF194)

Before Neubauer, C.J., Gundrum and Davis, 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).

Todd E. Peterson, pro se, appeals from an order of the circuit court which denied his motion to void the persistent repeater portion of his sentence. 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 (2019-20).[1]

In March 2005, the State charged Peterson with first-degree sexual assault of a child, as a persistent repeater, based on an allegation that Peterson had sexual contact with a child under the age of thirteen on or between July 1, 2002, and July 31, 2003. As support for the persistent repeater allegation, the complaint stated that in 1982 and 1985 Peterson was convicted of two sex offenses in Winnebago County. Specifically, the complaint stated that certified copies of Peterson's previous convictions would show that in case No. 1982CR566, Peterson was convicted for enticing a child for an immoral purpose, contrary to WIS. STAT. § 944.12 (1981-82). Peterson was originally placed on probation, but after revocation of his probation on October 16, 1985, he was sentenced to a two-year term of imprisonment, consecutive to the sentence imposed in case No. 1985CF157. In case No. 1985CF157, Peterson was convicted of first-degree sexual assault, contrary to WIS. STAT. § 940.225(1)(d) (1985-86), based on an allegation that he had sexual contact with a seven-year-old girl. Peterson was sentenced to a five-year term of imprisonment. An amended information and complaint again alleged that Peterson was a persistent repeater based on the two Winnebago County convictions.

The matter proceeded to trial, where a jury found Peterson guilty of first-degree sexual assault of a child. Following entry of the guilty verdict, the circuit court addressed whether Peterson was a persistent repeater. The State reminded the circuit court that it had previously provided the circuit court with certified copies of Peterson's previous judgments of conviction.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

The circuit court specifically referenced the 1985 conviction, stating, "my review of the conviction in 85CF157 … would qualify Mr. Peterson under the persistent repeater statute as a result of this conviction." Pursuant to that finding, the circuit court imposed the mandatory sentence of life in prison without the possibility of extended supervision.

Following multiple postconviction motions and appeals, Peterson, pro se, ultimately filed the motion that underlies this appeal. Pursuant to WIS. STAT. § 973.13, Peterson moved to vacate the persistent repeater enhancer based on a claim that it was improperly applied and therefore resulted in an excessive sentence. Specifically, Peterson's motion alleged that the circuit court lacked a sufficient factual basis to find him a persistent repeater because "his prior conviction did not preced[e] before the date of the present offense." The motion also alleged a due process violation on the grounds that Peterson's sentence was based on inaccurate information. The postconviction court denied Peterson's motion without a hearing, finding his allegations without merit. This appeal follows.

Before a circuit court considers a sentence enhancement, a criminal defendant's repeater status must be established before the circuit court. *See* ***State v. Saunders***, 2002 WI 107, ¶19, 255 Wis. 2d 589, 649 N.W.2d 263. An enhanced penalty for habitual criminality is applicable to a defendant's sentence if (1) the defendant personally admits to qualifying prior convictions, or (2) the State proves the existence of qualifying prior convictions. ***Id.***; WIS. STAT. § 973.12(1). "[I]n the absence of a defendant's admission that he or she has been previously convicted of a qualifying offense, the state must prove prior convictions beyond a reasonable doubt in order to satisfy the proof requirements found under § 973.12(1). This burden of proof applies both to the existence of a conviction and the date of the conviction." ***Saunders***, 255 Wis. 2d 589, ¶51.

Under WIS. STAT. § 939.62(2m)(b)2., the persistent repeater enhancer applies to a defendant's sentence if he or she "has been convicted of a serious child sex offense on at least one occasion at any time preceding the date of violation of the serious child sex offense for which he or she presently is being sentenced under [WIS. STAT.] ch. 973, which conviction remains of record and unreversed." Pursuant to § 939.62(2m)(a)1m., "[s]erious child sex offense" means:

> a. A violation of [WIS. STAT. §§] 948.02, 948.025, 948.05, 948.051, 948.055, 948.06, 948.07, 948.08, 948.081, 948.085, 948.095 or 948.30 or, if the victim was a minor and the convicted person was not the victim's parent, a violation of [WIS. STAT. §] 940.31.
>
> b. A crime at any time under federal law or the law of any other state or, prior to July 16, 1998, under the law of this state that is comparable to a crime specified in subd. 1m. a.

A crime can be comparable to a serious child sex offense even though the elements are not identical. ***State v. Burroughs***, 2002 WI App 18, ¶27, 250 Wis. 2d 180, 640 N.W.2d 190. In deciding whether a crime committed before July 15, 1998, is "comparable" to a serious sex offense under § 939.62(2m)(a)1m.a., a court considers "whether the defendant's conduct under the statute governing the prior conviction would constitute a felony under the current statute." ***State v. Wield***, 2003 WI App 179, ¶18, 266 Wis. 2d 872, 668 N.W.2d 823.

Peterson's challenge to the applicability of the persistent repeater penalty enhancer to his sentence centers around his contention that he "is not a persistent repeater because his prior conviction did not preced[e] before the date of the present offense." The State asserts that it proved that Peterson was a persistent repeater. We conclude that persistent repeater enhancer clearly applies to this case.

We note first, that Peterson's argument is illogical, as his convictions for his 1982 and 1985 serious child sex offenses preceded the commission of the offense underlying this appeal, which began in 2002 and continued into 2003. Thus, his prior convictions clearly preceded the commission of the offense at issue. Moreover, we agree with the State that it met its burden of establishing Peterson's persistent repeater status.

First, the State provided proper notice of Peterson's prior convictions. The State alleged Peterson's persistent repeater status in the complaint before his arraignment by identifying two prior convictions. The State realleged Peterson's persistent repeater status in the information and an amended complaint. The State proved Peterson's status as a persistent repeater through certified copies of his judgments of conviction. *See* ***Saunders***, 255 Wis. 2d 589, ¶¶51, 53-55. The State directed the circuit court's attention to two certified copies of the judgments of convictions for charges of enticing a child for immoral purposes and first-degree sexual assault, previously filed with a pretrial motion.

Next, the record establishes that Peterson's 1985 conviction was comparable to a serious sex offense under WIS. STAT. § 939.62(2m)(a)1m.a.[2] The circuit court focused on Peterson's 1985 conviction for first-degree sexual assault of a child under the age of twelve, contrary to WIS. STAT. § 940.225(1)(d) (1985-86), in determining that Peterson was a persistent repeater. In doing so, the circuit court implicitly determined that Peterson's 1985 conviction was comparable to the offense of first-degree sexual assault of a child under WIS. STAT. § 948.02(1)(a) (2003-04). In 1985, the statute under which Peterson was convicted stated:

[2] Because the circuit court focused on the 1985 conviction in applying the persistent repeater penalty enhancer, we do the same.

> FIRST DEGREE SEXUAL ASSAULT. Whoever does any of the following is guilty of a Class B felony:
>
> ….
>
> (d) Has sexual contact or sexual intercourse with a person 12 years of age or younger.

As relevant to Peterson's conviction, "sexual contact" in 1985 was defined as:

> [T]he intentional touching of the clothed or unclothed intimate parts of another person with any part of the body clothed or unclothed or with any object or device, or the intentional touching of any part of the body clothed or unclothed of another person with the intimate parts of the body clothed or unclothed if that intentional touching is for the purpose of sexual arousal or gratification.

WIS. STAT. § 939.22(34) (1985-86). In 2003, the statute under which Peterson was convicted stated, "Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony." *See* WIS. STAT. § 948.02(1) (2013-14). As relevant to Peterson's conviction, "sexual contact" was defined as:

> Intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant.

WIS. STAT. § 948.01(5)(a) (2013-14). Both statutes are comparable because they describe the same behavior: intentional touching of intimate parts of the victim or defendant for the purpose of sexual arousal or gratification. The primary difference between the statutes is that by 2003, the definition of sexual contact was expanded to include contact done for the purpose of sexual degradation or humiliation.

Moreover, the facts underlying the sexual conduct allegation in the 1985 complaint would also constitute sexual contact under WIS. STAT. § 948.01(5)(a) (2003-04).[3] *See* ***Wield***, 266 Wis. 2d 872, ¶18. Accordingly, in the absence of Peterson's admission that he had been previously convicted of a qualifying offense, the State met its burden of proving that Peterson was convicted of a serious child sex offense prior to the violation for which he is currently sentenced. Thus, we conclude that the persistent repeater penalty enhancer was appropriately applied to Peterson's sentence.

For the foregoing reasons, we affirm the order denying Peterson's motion to void the persistent repeater portion of his sentence.

IT IS ORDERED that the order is 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

[3] According to the 1985 complaint, the victim said that Peterson, who was babysitting her, touched her with his hands, pointing to her crotch area. The victim told her parents that Peterson put his hands on her bottom. The complaint in the present case alleges that Peterson told the victim to put his hand on Peterson's private parts and when the victim refused to do so, Peterson took the victim's hand and put it down his shorts.