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DISTRICT II

February 1, 2023

To:

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

2021AP508-CR

State of Wisconsin v. Sherman S. Barber (L.C.#2018CF1032)

Before Gundrum, P.J., Neubauer and Grogan, 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).

Sherman S. Barber appeals from a judgment, following a no-contest plea, that convicted him, in part, of one count of possession of THC with intent to deliver with three enhancers relating to habitual criminality, a firearm repeater, and use of a dangerous weapon. He also appeals from an order denying postconviction relief. On appeal, Barber only takes issue with the firearm repeater enhancer and argues we should vacate the enhancer's mandatory minimum four-year period of confinement. *See* WIS. STAT. § 939.6195 (2019-2020).¹ Based upon our review

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

of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

A criminal complaint alleged that, on July 23, 2018, police attempted to stop a vehicle that Barber was driving. After a chase, Barber pulled over and he along with four other occupants fled on foot. Officers chased Barber, who was carrying a large brown plastic grocery bag. Barber momentarily disappeared. When officers apprehended Barber, he was no longer in possession of the grocery bag. Officers retraced Barber's flightpath and found the grocery bag and a black semi-automatic handgun inside a recycling bin. The bag contained over two pounds of marijuana.

The State charged Barber with four counts: (1) possession of a firearm by a felon, (2) possession with intent to deliver THC, (3) attempting to flee an officer, and (4) obstructing an officer. All the charges included the habitual criminal enhancer. Both possession counts included a repeat firearm enhancer, and the possession of THC count also included a dangerous weapon enhancer.

Pursuant to a plea agreement, Barber pled no contest to possession of THC with intent to deliver with the habitual criminal, repeat firearm, and use of a dangerous weapon enhancers as well as attempting to flee an officer with the habitual criminal enhancer. The remaining charges were dismissed and read-in. The agreement provided the State would recommend an eight-year prison sentence, consisting of five years' initial confinement and three years' extended supervision. During the plea hearing, the court reviewed the facts alleged in the criminal complaint with Barber. The court inquired whether it could rely on those facts to support his plea, and Barber answered affirmatively. The court also advised Barber the State would have to

prove, in part, “that you committed that crime while possessing a dangerous weapon. I tell you a firearm is a dangerous weapon.” Barber indicated he understood and then pled no contest to the possession of THC charge. The court determined there was a factual basis to support the charge and found Barber guilty.

As relevant to this case, the firearm repeater enhancer provides that, if a person is a habitual criminal and the “person uses a firearm in the commission of the crime,” then “the court shall impose a bifurcated sentence” and “the term of confinement in [the] prison portion of the bifurcated sentence shall be at least 4 years.” WIS. STAT. § 939.6195(1)(a)2., (2). Prior to sentencing, Barber began to assert the firearm did not belong to him and he did not want the firearm repeater enhancer to apply. At sentencing, the State advised the court that no one ran away in the same direction as Barber. Barber told the court that he “would just like to take full responsibility for [his] actions” and that he never used a firearm. The court concluded Barber possessed a firearm.

In pronouncing the court’s sentence, the court reasoned, in part, that although the sentencing range included a minimum term of incarceration, “I don’t see the minimum as being appropriate here either, not given your prior performances on supervision.” On the possession of THC count, the court sentenced Barber to five years’ initial confinement and three years’ extended supervision. It determined Barber would be eligible for the Earned Release Program after he served four years of initial confinement.

On appeal, Barber only objects to the firearm repeater enhancer’s mandatory minimum four-year period of confinement. He contends he never admitted to using a firearm in the commission of a crime. Barber explicitly asserts he does not wish to withdraw his no-contest

plea or be resentenced. He simply wants this court to vacate the firearm enhancer’s mandatory minimum four-year confinement term. In support, Barber cites *State v. Mikulance*, 2006 WI App 69, ¶14, 291 Wis. 2d 494, 713 N.W.2d 160, which states “[WIS. STAT.] § 973.13 expressly commands courts to declare as void *all* sentences in excess of the maximum term authorized by law.” However, this remedy does not apply when the sentence imposed does not exceed the maximum statutory penalty. See *State v. Finley*, 2016 WI 63, ¶51 n.31, 370 Wis. 2d 402, 882 N.W.2d 761. Here, Barber concedes his sentence does not exceed the maximum statutory penalty. Accordingly, we have no excess sentence to commute pursuant to § 973.13.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court 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