

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**APRIL 21, 1999**

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**No. 98-0732-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**STEVEN C. BILLIAT,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Waukesha County:  
DONALD J. HASSIN, JR., Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

ANDERSON, J. Steven C. Billiat appeals from an order denying his postconviction motion to strike the term “habitual” from his judgment of conviction. We determine that Billiat is judicially estopped from raising this argument on appeal because he agreed to the habitual criminality allegation as part of his plea bargain presented to the circuit court. As a result, we affirm.

We will briefly summarize the relevant facts. Billiat was charged with three crimes: felon in possession of a canister of oleoresin of capsicum (pepper spray) per § 941.26(4)(L), STATS.; possession of a controlled substance (heroin) per § 161.41(2r)(b), STATS., 1993-94; and possession of drug paraphernalia per § 161.573(1), STATS., 1993-94.<sup>1</sup> In addition to these three charges, it was alleged that Billiat had previously been convicted in June 1992 and thus was a habitual criminal pursuant to § 939.62, STATS.

Pursuant to a plea agreement, Billiat pled guilty to the heroin possession charge with a habitual criminality enhancer, and the other two charges were dismissed and read in for sentencing purposes. On the heroin possession charge, he was sentenced to one year in prison.

Afterward, Billiat moved the court to “strike all reference to ‘Habitual’ ... contained in the Judgments of Conviction.” Regarding the specific crime on which Billiat was found guilty, the judgment of conviction stated “Possession of heroin w/o a prescription/habitual.” Supporting his motion, Billiat contended that the word “habitual” should be deleted from the judgment because this word is irrelevant. He asserted that if a defendant is not sentenced to the increased penalty permitted for a repeat criminal conviction, then he or she is not a habitual criminal. Therefore, the judgment should not reflect this allegation.

After a hearing was held on the issue, Billiat’s motion was denied. He appeals.

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<sup>1</sup> The Uniform Controlled Substances Act, ch. 161, STATS., 1993-94, was renumbered to ch. 961, STATS., on July 9, 1996. *See* 1995 Wis. Act 448, §§ 243-323. Section 161.41(2r)(b), STATS., 1993-94, is now § 961.41(3g)(a)2, STATS., and § 161.573(1), STATS., 1993-94, was renumbered and amended as § 961.573(1), STATS. All future references to ch. 161 refer to the 1993-94 statutes.

It is not disputed that Billiat was convicted of a crime in 1992. Accordingly, it was appropriate to charge him as a § 939.62(2), STATS.,<sup>2</sup> habitual criminal. Section 939.62 permits the court to increase the maximum term of imprisonment prescribed by law for the convicted crime and apply an enhanced penalty if the individual is a habitual criminal. *See State v. Harris*, 119 Wis.2d 612, 616, 350 N.W.2d 633, 636 (1984). For a heroin conviction, a person may be imprisoned for up to one year. *See* § 161.41(2r)(b), STATS. A habitual criminality penalty can increase the possible prison term to three years. *See* § 939.62(1)(a). The circuit court judge may use his or her discretion when determining whether a defendant should receive the maximum possible sentence.

Billiat received a one-year sentence to be served concurrent to any other sentences. Therefore, he was sentenced with the heroin possession crime's one-year penalty and not with the increased sentence permissible for a habitual criminal.

Billiat argues that the word "habitual" should be struck from the judgment of conviction because he did not receive a sentence based on this factor. He contends that this word could have implications on his future in the prison system. If it remains on his judgment, he fears that when his risk rating, custody level and potential risk to the public are examined by a parole board or similar corrections officials, these persons will be unable to make a correct assessment

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<sup>2</sup> Section 939.62(2), STATS., states:

The actor is a repeater if the actor was convicted of a felony during the 5-year period immediately preceeding the commission of the crime for which the actor is presently being sentenced ... which convictions remain of record and unreversed.

because the word “habitual” on his judgment of conviction incorrectly reflects the sentence he received.

Despite raising a novel and interesting appellate argument, after our review of the record, we conclude that Billiat is judicially estopped from raising this argument on appeal. The doctrine of judicial estoppel precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position on appeal. *See Coconate v. Schwanz*, 165 Wis.2d 226, 231, 477 N.W.2d 74, 75 (Ct. App. 1991). “It is contrary to fundamental principles of justice ... to permit a party to assume a certain position in the course of litigation which may be advantageous, and then after the court maintains that position, argue on appeal that the action was error.” *State v. Petty*, 201 Wis.2d 337, 345, 548 N.W.2d 817, 820 (1996) (quoted sources omitted).

Billiat entered into a plea agreement with the prosecution in this case. As a part of this agreement, he stipulated to pleading guilty to the charge of heroin possession as a habitual criminal that exposed him to a maximum of three years of prison.<sup>3</sup> We agree that being labeled as a habitual criminal may have an

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<sup>3</sup> At the plea hearing, the court had the following colloquy with Billiat:

THE COURT: Apparently the understanding given to all these matters by way of the lengthy memorandum prepared and filed by [defense counsel] on behalf of the defendant, request to enter plea and waiver of rights form, that the defendant would be pleading other than not guilty to ... the possession of Heroin charge ... alleging the defendant to be, upon conviction of that offense ... a habitual criminal, the maximum exposure for which is three years imprisonment....

....

THE COURT: Now, Mr. Billiat, you have been present. You have heard all of this.... Some allegations

(continued)

impact on the defendant's future in the prison system. However, it was advantageous for Billiat to stipulate to a plea agreement that dismissed several of his charges. Therefore, he is estopped from arguing on appeal contrary to his earlier stipulation. For these reasons, we affirm.

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have a habitual criminality, are going to be dismissed, others are not.

The total wash of the entire matter, I believe, is if you are found guilty consistent with the plea agreement that's been discussed here on the record today, your maximum exposure is eighteen years and nine months and fines of five hundred thirty thousand dollars, as I calculate them; understand that?

BILLIAT: Yes, I do.

....

THE COURT: You also acknowledge you were convicted ... of obtaining controlled substances by misrepresentation back on June 11, 1992?

BILLIAT: Yes.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.

