COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1426-CR **Cir. Ct. No. 2011CM6644**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TORREY L. SMITH-IWER,
A/K/A TOME SMITHIWER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

¶1 CURLEY, P.J.[1] Torrey L. Smith-Iwer appeals the judgment, entered following a jury trial, convicting him of two counts of battery-domestic

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

abuse, as a repeater, and two counts of bail jumping-domestic abuse, as a repeater, contrary to WIS. STAT. §§ 940.19(1), 968.075(1)(a), 946.49(1)(a) and 939.62(1)(a) (2011-12). He also appeals from the order denying his postconviction motion. Smith-Iwer argues that the trial court's sentence of one year of initial confinement and one year of extended supervision on each count, to be served consecutively, was an illegal sentence. He contends that pursuant to ***State v. Volk***, 2002 WI App 274, 258 Wis. 2d 584, 654 N.W.2d 24, a sentencing court may not impose any portion of a penalty enhancer as extended supervision, and that pursuant to ***State v. Gerondale***, 2010 WI App 1, 322 Wis. 2d 737, 778 N.W.2d 172, unpublished slip op. (Nov. 3, 2009), his misdemeanor prison sentence of one year required the trial court to sentence him to only three months of extended supervision in order to comply with the twenty-five percent minimum extended supervision requirement of the statute as ***Gerondale*** dictated. As a consequence of the holding in these two cases, Smith-Iwer asserts that his sentences are illegal.

¶2 Because Smith-Iwer's sole argument below was that the trial court erred at sentencing by applying a portion of the penalty enhancer as extended supervision, citing ***Volk***, and because he did not argue, as he does now, that under ***Gerondale*** the trial court's sentence of one year of initial confinement obligated the court to impose no more than three months of extended supervision, he has not properly preserved this claim. Thus, this court will not address it.[2] *See* ***State v. Dowdy***, 2012 WI 12, ¶5, 338 Wis. 2d 565, 808 N.W.2d 691 ("As a general rule,

[2] This court notes that Smith-Iwer has cited two unpublished cases that support his interpretation of ***Gerondale***, but has failed to cite two others, ***State v. Groce***, 2013 WI App 128, 351 Wis. 2d 226, 838 N.W.2d 866, unpublished slip op. (Sept. 4, 2013), and ***State v. Robinson***, 2013 WI App 105, 349 Wis. 2d 789, 837 N.W.2d 178, unpublished slip op. (July 23, 2013), one of which was written by this author, that determined that sentences such as those imposed here were lawful.

issues not raised in the circuit court will not be considered for the first time on appeal."). As to his argument based on the holding in ***Volk***, that case addressed a different version of WIS. STAT. § 973.01 that applied only to felonies. Thus, inasmuch as the holding did not impact misdemeanor sentences, it is inapplicable, and this court affirms.

BACKGROUND

¶3 On December 7, 2011, Smith-Iwer was charged with two counts of misdemeanor battery as an act of domestic abuse, as a repeater, and two counts of bail jumping (domestic abuse), as a repeater. He was charged with bail jumping because at the time of his arrest, he was out on bail for a charge of carrying a concealed weapon. One of the conditions of his bail was that he was prohibited from committing any crime.

¶4 According to E.L.'s testimony at a jury trial, she, Smith-Iwer, and a woman named Rachel drove into a McDonald's parking lot because Smith had to use the bathroom. E.L. was driving. Smith-Iwer became angry after E.L. pulled into a parking spot, claiming she parked too close to a pole. Smith-Iwer then hit her on the right side of her face with a closed fist. Shortly thereafter, the three of them left the McDonald's parking lot and drove back to the hotel where they were staying. On the trip back, Smith-Iwer, who was still angry and raising his voice, threatened to harm E.L. if her driving became worse. During the drive he continued to punch her several times while she was driving. After returning to the hotel, E.L. and Smith-Iwer went out and sat in the car, at which time Smith-Iwer again became angry and punched her on the left side of her face.

¶5 The next day E.L. decided to go to the hospital because she was pregnant and concerned about the health of her fetus. At that time, she reluctantly

revealed to hospital staff that the injuries on her face were a result of Smith-Iwer's actions. As a result, the police were called and E.L. was taken to a women's shelter while Smith-Iwer was arrested. E.L. testified that she did not give Smith-Iwer permission to strike her and that the punches resulted in black eyes, severe bruising and pain.

¶6 The jury found Smith-Iwer guilty of all four counts. Because Smith-Iwer had been charged as a repeater pursuant to WIS. STAT. § 939.62(1)(a) and the trial court took judicial notice that he had been convicted of the felony charge of substantial battery-intending bodily harm in Racine County on September 5, 2008, he was subject to a maximum sentence of two years on each count for which he was convicted.[3] As noted, the trial court sentenced him to one year of initial confinement and one year of extended supervision on each count, to be served consecutively. Smith-Iwer was unsuccessful in his postconviction motion challenging his sentences. This appeal follows.

ANALYSIS

¶7 As noted, the only question properly before this court is whether the trial court correctly sentenced Smith-Iwer in light of this court's decision in ***Volk***. Although sentencing is generally a matter of trial court discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶4, 270 Wis. 2d 535, 678 N.W.2d 197, we review *de novo* contentions that a sentence violates the statutes, *see* ***State v. Turnpaugh***, 2007 WI App 222, ¶2, 305 Wis. 2d 722, 741 N.W.2d 488 (statutory construction is a matter of appellate *de novo* review).

[3] WISCONSIN STAT. § 939.62(1)(a) reads: "A maximum term of imprisonment of one year or less may be increased to not more than 2 years."

¶8 Our inquiry "'begins with the language of the statute.'" *See* ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). We give statutory language "its common, ordinary and accepted meaning," and give "technical or specially-defined words or phrases" "their technical or special definitional meaning." *See* ***id.*** We must also keep in mind that "[c]ontext is important to meaning. So, too, is the structure of the statute in which the operative language appears." *See* ***id.***, ¶46. Therefore, we interpret statutory language "in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *See* ***id.***

¶9 Smith-Iwer claims that he was erroneously sentenced because in ***Volk***, 258 Wis. 2d 584, ¶¶2, 35-36, this court found that the sentencing court could not impose any portion of a penalty enhancer as extended supervision under WIS. STAT. § 973.01(2)(c). Here, Smith-Iwer's potential sentence was enhanced due to his status as a habitual criminal. Under WIS. STAT. § 939.62(2), "[t]he actor is a repeater if the actor was convicted of a felony during the five-year period immediately preceding the commission of the crime for which the actor is presently is being sentenced." The State proved that Smith-Iwer had been convicted of a felony in 2008. He was sentenced in this case on October 29, 2012. Thus he could have been sentenced for up to two years on each count.

¶10 The facts in ***Volk*** are that Volk was convicted of the felony charge of aggravated battery as a habitual criminal and was sentenced to six years of initial confinement and six years of extended supervision. *See* ***id.***, 258 Wis. 2d 584, ¶15. Because his conviction triggered the habitual criminal enhancement statute, his potential sentence was increased from ten years to twelve years. ***Id.***, ¶27. Volk argued on appeal that the trial court erroneously applied the habitual criminal

penalty enhancer to the extended supervision portion of his sentence. ***Id.***, ¶¶30-31, 35. Volk contended that the additional penalty could only be applied to the term of confinement. ***Id.***, ¶¶30-31. This court agreed with him. *See* ***id.***, ¶35.

¶11 However, the statute addressed in ***Volk*** has been changed. The then-existing WIS. STAT. § 973.01, from the 1999-2000 version of the statutes, reads in relevant part:

> **Bifurcated sentence of imprisonment and extended supervision. (1)** BIFURCATED SENTENCE REQUIRED. Except as provided in sub. (3), whenever a court sentences a person to imprisonment in the Wisconsin state prisons for a *felony* committed on or after December 31, 1999, the court shall impose a bifurcated sentence that consists of a term of confinement in prison followed by a term of extended supervision under s. 302.113.
>
> ….
>
> **(2)**(c) *Penalty enhancement*. The maximum term of confinement in prison specified in par. (b) may be increased by any applicable penalty enhancement. If the maximum term of confinement in prison specified in par. (b) is increased under this paragraph, the total length of the bifurcated sentenced that may be imposed is increased by the same amount.

(Emphasis added.) Missing from the statute is any reference to misdemeanor sentences. Indeed, misdemeanor sentences were not required to be bifurcated until February 1, 2003. *See* WIS. STAT. § 973.01(1).

¶12 The statute has also seen several revisions since the time the legislature required misdemeanor sentences to be bifurcated. Currently, WIS. STAT. § 973.01(2)(b)10. provides that "[f]or any crime … the term of confinement in prison may not exceed 75% of the total length of the bifurcated sentence," and WIS. STAT. § 973.01(2)(c) provides, as relevant:

> *Penalty enhancement*. 1. Subject to the minimum period of extended supervision required under par. (d), the maximum term of confinement in prison specified in par. (b) may be increased by any applicable penalty enhancement statute. If the maximum term of confinement in prison specified in par. (b) is increased under this paragraph, the total length of the bifurcated sentence that may be imposed is increased by the same amount.

In addition, WIS. STAT. § 973.01(2)(d) now provides:

> (d) *Minimum and maximum term of extended supervision*. The term of extended supervision may not be less than 25% of the length of the term of confinement in prison imposed under par. (b) and, for a classified felony, is subject to whichever of the following limits is applicable:
>
> 1. For a Class B felony, the term of extended supervision may not exceed 20 years.
>
> 2. For a Class C felony, the term of extended supervision may not exceed 15 years.
>
> 3. For a Class D felony, the term of extended supervision may not exceed 10 years.
>
> 4. For a Class E, F, or G felony, the term of extended supervision may not exceed 5 years.
>
> 5. For a Class H felony, the term of extended supervision may not exceed 3 years.
>
> 6. For a Class I felony, the term of extended supervision may not exceed 2 years.

¶13 In essence, for misdemeanor sentences, WIS. STAT. § 973.01 creates a "75/25" rule, which states that the maximum "term of confinement in prison may not exceed 75% of the total length of the bifurcated sentence," while the term of extended supervision "may not be less than 25% of the length of the term of confinement in prison." *See* ***id.***

¶14 Thus, applying the relevant statutes to Smith-Iwer's sentence, this court concludes that the sentence was proper. The sentence of one year of

confinement in prison followed by one year of extended supervision satisfies both aspects of the "75/25" rule. ***Volk*** is inapposite to Smith-Iwer's sentences. Smith-Iwer's sentences are in accord with the current version of WIS. STAT. § 973.01. Accordingly, this court affirms.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.