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DISTRICT I

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

2017AP2470-CR State of Wisconsin v. Timothy M. Steel (L.C. # 2000CF2799)

Before Brennan, Brash and Dugan, 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).

Timothy M. Steel, *pro se*, appeals from an order denying his motion to void the excess portion of his sentence.¹ See WIS. STAT. § 973.13 (2015-16) (“In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and

¹ The Honorable Jeffrey A. Wagner imposed Steel’s sentence in 2000 and denied his motion in 2017.

the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings.”).² 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. We conclude that neither the bifurcated sentence nor the period of initial confinement exceeded the statutory maximums. We summarily affirm the order.

In 2000, Steel pled guilty and was convicted of felony murder as a party to a crime with the underlying crime of armed robbery. *See* WIS. STAT. §§ 940.03, 939.05, and 943.32(1)(b) and (2) (1999-00). He was sentenced to thirty-seven years of initial confinement and twenty years of extended supervision. His appellate counsel filed a no-merit appeal, and we affirmed his conviction. *See State v. Steel*, No. 2001AP2297-CRNM, unpublished slip op. and order (WI App Jan. 16, 2002).

In April 2017, Steel filed a motion seeking to void the excess portion of his sentence. He asserted that at sentencing, the trial court failed to abide by the rule that the maximum term of initial confinement for an unclassified felony may not exceed seventy-five percent of the total bifurcated sentence. *See* WIS. STAT. § 973.01(2)(b)6. (1999-00) (“For any felony other than a felony specified in subds. 1. to 5., the term of confinement in prison may not exceed 75% of the total length of the bifurcated sentence.”). On April 24, 2017, the trial court denied the motion in a written order, explaining:

² All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

The sentence imposed in this case plainly comports with the statutes: 75% of 57 years is 42.75 years; 25% of 37 years is 9.25 years. These calculations demonstrate conclusively that the term of confinement in this case is less than 75% of the total length of the bifurcated sentence and that the term of extended supervision in this case is not less than 25% of the length of the term of confinement. In sum, the sentence imposed in this case is not excessive.

Steel did not appeal the trial court's April 24, 2017 order. Instead, in November 2017, he filed another motion to void the excess portion of his sentence. This time, he added references to *State v. Mason*, 2004 WI App 176, 276 Wis. 2d 434, 687 N.W.2d 526, a case that recognized felony murder was a stand-alone unclassified crime and applied the seventy-five-percent rule to calculate the maximum term of initial confinement. See *id.*, ¶¶1, 9-10. The trial court denied Steel's motion in a written order, referring to the reasons outlined in its April 24, 2017 order. This appeal follows.

On appeal, Steel argues that at sentencing, the trial court failed "to use a demonstrated rational process to reach a reasonable conclusion" and failed to state its reasoning. Steel also argues that he was entitled to an evidentiary hearing on his November 2017 motion. We reject Steel's suggestion that the trial court's exercise of discretion is properly before the court at this time and his assertion that an evidentiary hearing is necessary. Steel's motion sought relief pursuant to WIS. STAT. § 973.13. Thus, the sole issue before this court is whether the trial court imposed a sentence that exceeded the maximum allowed by law. That presents an issue of law that we review *de novo*. See *State v. Flowers*, 221 Wis. 2d 20, 31, 586 N.W.2d 175 (Ct. App. 1998) (reviewing *de novo* the issue of whether the application of a penalty enhancer resulted in an excessive sentence).

As best we can discern, Steel challenges both the total length of his bifurcated sentence and the length of his initial confinement period. We begin with the total bifurcated sentence. Citing *Mason*, Steel argues that his sentence of fifty-seven years exceeded the maximum potential bifurcated sentence. The defendant in *Mason* was convicted of felony murder with the underlying crime of attempted armed robbery, and he was, therefore, subject to a maximum bifurcated sentence of fifty years. *See id.*, 276 Wis. 2d 434, ¶8. In his motion and again on appeal, Steel calculates his own maximum terms of total imprisonment and initial confinement based on “the application of the attempt statute.” However, the underlying crime in Steel’s case was armed robbery, not attempted armed robbery. Therefore, Steel’s calculations are incorrect.

The felony murder statute in effect at the time Steel committed his crime, WIS. STAT. § 940.03 (1999-00), provided in relevant part: “Whoever causes the death of another human being while committing or attempting to commit a crime specified in [WIS. STAT. §] ... 943.32(2) may be imprisoned for not more than 20 years in excess of the maximum period of imprisonment provided by law for that crime or attempt.” The maximum potential bifurcated sentence for the underlying crime of armed robbery, a Class B felony, was sixty years. *See* WIS. STAT. § 939.50(3)(b) (1999-00). Thus, the maximum potential bifurcated sentence for Steel’s

crime was eighty years.³ His bifurcated sentence of fifty-seven years did not exceed the maximum allowed by law.

Next, we consider whether the period of initial confinement imposed in this case was excessive. Applying the seventy-five-percent rule to Steel’s fifty-seven-year bifurcated sentence, *see* WIS. STAT. § 973.01(2)(b)6. (1999-00), the maximum term of initial confinement could not exceed 42.75 years. Steel was sentenced to thirty-seven years of initial confinement. Contrary to Steel’s assertions, the term of initial confinement imposed did not exceed the maximum allowed by law.

For the foregoing reasons, Steel is not entitled to relief under WIS. STAT. § 973.13. We summarily affirm the trial court’s order.

IT IS ORDERED that the order of the trial court is summarily affirmed pursuant to 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 In its appellate brief, the State recognizes that the trial court erroneously informed Steel that he was facing sixty years of imprisonment. The State adds: “Steel has not asserted that that misinformation is a basis for relief.” Steel did not rebut the State’s assertion in his reply brief, and he did not raise this issue in his trial court motion. Therefore, we do not discuss the trial court’s reference to a sixty-year period of potential imprisonment. *See Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (We may take as a concession the failure to refute in a reply brief a proposition asserted in a response brief.); *see also State v. Schulpius*, 2006 WI 1, ¶26, 287 Wis. 2d 44, 707 N.W.2d 495 (“[Q]uestions not argued will not be considered or decided.”).