COURT OF APPEALS
DECISION
DATED AND FILED

June 20, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-3245-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DWAYNE O. JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed.*

¶1 BROWN, P.J.[1] Dwayne O. Jackson appeals his sentence after pleading no contest to a charge of sexual intercourse with a child over the age of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

sixteen as a repeater pursuant to WIS. STAT. § 948.09. Jackson brought a motion to withdraw the plea on the ground that the repeater enhancement was invalid. Jackson observed that the repeater used by the State was a conviction which was on appeal at the time of the plea. He reasoned that the whole conviction was void as a matter of law because a conviction with an included repeater cannot be used until the appeal for that conviction is complete. The trial court rejected the theory and we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On December 28, 1999, a criminal complaint was filed charging Jackson with one count of sexual intercourse with a child over the age of sixteen in violation of WIS. STAT. § 948.09, and three felony counts of bail jumping in violation of WIS. STAT. § 946.49(1). Each count contained an allegation that Jackson had been convicted of a felony within five years of the date of the commission of the charged offenses, thereby making him a repeater under WIS. STAT. § 939.62(2) and subject to penalty enhancement under § 939.62(1)(b). The repeater allegations under § 939.62(2) were based entirely upon Jackson's December 15, 1999 felony conviction in Outagamie county Case No. 99-CF-196.

¶3 On March 22, 2000, Jackson pled no contest to the charge of having sexual intercourse with a child over sixteen years of age as a repeater. The repeater conviction was the prior Outagamie county conviction. The bail jumping counts were dismissed outright and not read in. On May 30, 2000, Jackson was sentenced to nine months in county jail consecutive to prison sentences that had been previously imposed upon him in other cases.

¶4 On September 19, 2000, Jackson filed a motion for postconviction relief seeking to withdraw his no contest plea. The motion was heard November 1, 2000, and denied by written order filed November 15, 2000.

DISCUSSION

¶5 Jackson takes issue with the circuit court's interpretation of the word "conviction" in WIS. STAT. § 939.62(2) and alleges that the term has been rendered ambiguous by recent Wisconsin case law. The interpretation of statutory language is subject to de novo review. *See* ***State v. Theriault***, 187 Wis. 2d 125, 131, 522 N.W.2d 254 (Ct. App. 1994).

¶6 Jackson claims an ambiguity exists in defining the term "convicted" as used in WIS. STAT. § 939.62(2) that is therefore subject to judicial construction. Jackson further states that "[t]he word 'conviction' is capable of conveying two meanings" and that "an ambiguity exists" in the use of the term "convicted" in § 939.62(2). *See* ***State v. Wimmer***, 152 Wis. 2d 654, 658-59, 449 N.W.2d 621 (Ct. App. 1989).[2]

¶7 Jackson relies heavily on ***Monroe County v. Jennifer V.***, 200 Wis. 2d 678, 548 N.W.2d 837 (Ct. App. 1996),[3] for a resolution of this ambiguity. In ***Jennifer V.***, this court interpreted the meaning of "conviction" in WIS. STAT. § 48.415(5)(a), stating that "the correct interpretation of 'conviction' in § 48.415(5)(a), Stats., is a conviction after the appeal of right has been exhausted."

[2] Clarification of this ambiguity is provided by ***State v. Goldstein***, 182 Wis. 2d 251, 513 N.W.2d 631 (Ct. App. 1994), and ***Mikrut v. State***, 212 Wis. 2d 859, 569 N.W.2d 765 (Ct. App. 1997).

[3] Importantly, ***Monroe County v. Jennifer V.***, 200 Wis. 2d 678, 548 N.W.2d 837 (Ct. App. 1996), concerns a termination of parental rights case and interprets a children's code statute, WIS. STAT. § 48.415(5)(a).

Jennifer V., 200 Wis. 2d at 690. Jackson urges a similar definition be used in conjunction with WIS. STAT. § 939.62(2) to invalidate the repeater allegation and Jackson's plea, as well as his entire conviction and sentence. Jackson argues that his entire conviction is void because he was sentenced as a repeater and his appeal is not yet complete. In other words, he alleges that his full conviction must fall because the repeater portion of that conviction is void.

¶8 We will not address the issue of the statutory construction of WIS. STAT. § 939.62(2) in resolving this case. Despite references to Jackson being a "repeater," we hold that the repeater enhancement was not invoked in his sentencing and is therefore irrelevant.

¶9 It is important to point out what the sentencing court did here because it plays such a large part in the result of this appeal. In articulating the basis for sentence, the sentencing court made clear that it was not sentencing Jackson under the repeater enhancement. In fact, at the postconviction hearing, the court expressly disavowed the notion that Jackson's repeater status played a role in his sentence. The court iterated its belief that sentences not exceeding the maximum limit are not held to have been imposed under the repeater statute.

¶10 With these facts at hand, we hold that the issue Jackson raises is governed by ***State v. Harris***, 119 Wis. 2d 612, 350 N.W.2d 633 (1984). There, the supreme court held that the repeater statute "is not applicable to the sentence of a defendant unless the trial court seeks to impose a sentence in excess of that prescribed by law for the crime for which the defendant was convicted." ***Id***. at 619. We conclude, based on our reading of ***Harris***, that the repeater statute is initially a "stand-alone" statute which does not impact upon the underlying conviction unless it is actually used. Therefore, if the trial court has not exercised

its discretion to actually *use* the repeater, the repeater statute itself is not triggered. It is illogical to conclude that the underlying conviction is therefore void simply because it includes a never-used repeater. The fact that the word "repeater" is attached to the underlying crime is irrelevant to Jackson's sentence if the trial court never used it. Thus, it cannot be said that the sentence for the underlying crime is void.

¶11 Here, Jackson got the maximum sentence for the underlying crime. That underlying crime is not void. Standing by itself, it is perfectly valid. Although Jackson was sentenced as a repeater, the repeater was never put into play. Therefore, it was irrelevant for sentencing purposes. We affirm.

By the Court.—Judgment and order affirmed.

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