

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

November 25, 1998

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. 98-1949-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ROBERT A. HUPPELER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Dane County: P. CHARLES JONES, Judge. *Affirmed.*

ROGGENSACK, J.<sup>1</sup> Robert Huppeler appeals from a judgment that sentenced him as a repeater and from the circuit court's subsequent order denying his postconviction motion to modify his sentence. Huppeler claims that he is

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<sup>1</sup> This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

entitled to sentence modification pursuant to § 973.13, STATS.,<sup>2</sup> because the circuit court did not use the correct process for sentencing him as a repeat offender and because the court abused its discretion<sup>3</sup> when it considered factors other than punishment in imposing his sentence. We conclude that § 973.13 is not the appropriate statutory provision under which to contend that the court erroneously exercised its discretion in imposing sentence, in this case. Furthermore, we conclude that Huppeler is not entitled to sentence modification because the circuit court applied the proper sentencing factors to the facts of record, taking into account Huppeler's rehabilitative needs and repeater status. Therefore, we affirm.

## BACKGROUND

On May 16, 1997, Huppeler was found guilty of battery in violation of § 940.19(1), STATS., and habitual criminality under § 939.62, STATS. The circuit court withheld his sentence and placed him on probation for two years.

On August 4, 1997, Huppeler violated the terms of his probation by committing the crime of unlawful use of a telephone. His probation was revoked, and he was returned to court for sentencing on December 23, 1997, where he received two years for the battery conviction, as a repeat offender, and was placed on probation for two years consecutive to the prison term, for the unlawful use of a telephone. The court reasoned that the sentence would provide Huppeler with a

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<sup>2</sup> Huppeler contends the court violated § 971.13, STATS.; however, that section deals with competency. Therefore, we conclude his reference was meant to be § 973.13, STATS.

<sup>3</sup> The correct terminology is now whether the circuit court “erroneously exercised” its discretion rather than “abused” its discretion; however, the substance of this standard of review is unchanged. *Brookfield v. Milwaukee Metro. Sewerage Dist.*, 171 Wis.2d 400, 423, 491 N.W.2d 484, 493 (1992).

structured environment to ensure that he took his medications and began mental health treatment.

Thereafter, Huppeler filed a postconviction motion to modify the battery sentence. On May 1, 1998, the court heard argument on the motion, and on June 10, 1998, the court rendered its oral decision denying Huppeler's sentence modification motion. This appeal followed.

## DISCUSSION

### **Standard of Review.**

Sentencing is within the discretion of the circuit court, and our review is limited to whether the circuit court erroneously exercised its discretion. *State v. Harris*, 119 Wis.2d 612, 622, 350 N.W.2d 633, 638 (1984). Because the circuit court is in the best position to consider the relevant sentencing factors and the demeanor of the defendant, we are reluctant to interfere with the sentencing discretion of the circuit court and we presume that the court acted reasonably. *Id.*

However, as with all acts of discretion, “the term contemplates a process of reasoning.” *McCleary v. State*, 49 Wis.2d 263, 277, 182 N.W.2d 512, 519 (1971). There should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth. *Id.* Therefore, when we review a discretionary determination, we examine the record to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *Id.*; *State v. Keith*, 216 Wis.2d 61, 69, 573 N.W.2d 888, 892-93 (Ct. App. 1997).

**Sentence Modification.**

Huppeler claims that his battery sentence should be modified because the circuit court did not use the correct process for sentencing him as a repeat criminal and because the circuit court erroneously exercised its discretion when it considered factors other than punishment in imposing his sentence. As a result of these errors, Huppeler claims that, pursuant to § 973.13, STATS., his two-year sentence for battery should be voided and his sentence commuted to nine months, without further proceedings.

***1. Section 973.13, STATS.***

In his postconviction motion and in his appeal to this court, Huppeler claimed that he was entitled to sentence modification pursuant to § 973.13, STATS., which states:

In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings.

Huppeler argues that his sentence should be commuted to nine months, the maximum penalty for a battery conviction without a penalty enhancer, because the court used an improper procedure in sentencing him as a repeat criminal. However, § 973.13 as it pertains to sentencing a repeat criminal, applies only when the State fails to prove the prior conviction necessary to establish habitual criminal status or when the penalty given is longer than permitted by law for a repeater. *State v. Spaeth*, 206 Wis.2d 135, 156, 556 N.W.2d 728, 737 (1996). Therefore, because Huppeler does not claim that the State failed to prove his prior

conviction, and because the penalty given did not exceed that authorized by law for a repeater, his reliance on § 973.13 is misplaced.

## 2. *Sentencing a repeater.*

Huppeler argues that *State v. Harris*, 119 Wis.2d 612, 350 N.W.2d 633 (1984), mandates a two-step analysis when sentencing a repeat criminal. In *Harris*, the supreme court concluded that the repeater statute, § 939.62(1), STATS., does not apply to a defendant's sentence unless the maximum sentence is imposed for the crime for which the defendant is convicted. *Harris*, 119 Wis.2d at 616-17, 350 N.W.2d at 636. The court noted that by adding the repeater time to less than the maximum sentence for the substantive crime, the circuit court improperly treated the additional time as another sentence not as an enhancer to the substantive offense, thereby thwarting the purpose of the repeater statute which "is to increase the punishment of persons who fail to learn to respect the law after suffering the initial penalties and embarrassment of conviction." *See id.* at 618-19, 350 N.W.2d at 636-37 (quoting *State v. Banks*, 105 Wis.2d 32, 49, 313 N.W.2d 67, 75 (1981)). As implied in *Harris* and as explicitly stated in § 973.12(2), STATS., the sentence of a repeat criminal is a single term, rather than one sentence for the substantive offense and an additional term for being a repeat offender. Therefore, neither *Harris* nor § 973.12(2) stands for the proposition that sentencing of a repeat criminal must be a two-step process.

The maximum penalty for battery is nine months in prison, but if found to be a repeat criminal, the sentence may be enhanced to a maximum of three years. By sentencing Huppeler to two years in prison, a time period greater than the maximum penalty for battery alone, the court clearly pronounced that it was enhancing the sentence for the substantive crime. Therefore, the circuit court

properly enhanced Huppeler's sentence in accordance with *Harris* and § 973.12(2), STATS., and without exceeding the three-year maximum sentence for battery as a repeat criminal.

### 3. *Sentencing factors.*

Huppeler also claims that the circuit court improperly considered factors other than punishment in sentencing Huppeler. Huppeler argues that punishment is the only valid reason for enhancing a sentence, therefore, the circuit court erroneously exercised its discretion when it relied on rehabilitation as a factor in sentencing Huppeler.

Huppeler is correct in asserting that the purpose of the repeater statute is to increase the sentence penalty of repeat offenders. *See Harris*, 119 Wis.2d at 619, 350 N.W.2d at 637. A longer sentence is obviously a greater punishment than a shorter sentence. However, we have been presented with nothing in the statutes or controlling precedent which precludes the sentencing court from applying the same factors in sentencing a repeat criminal as would be applied in sentencing a first-offender, and we know of none. *See id.* at 623-24, 350 N.W.2d at 639.

The primary factors that the circuit court should consider when sentencing a defendant are the gravity of the offense, the character of the offender, and the need for protection of the public. *Id.* at 623, 350 N.W.2d at 639. In addition, the court may consider related factors such as:

- (1) Past record of criminal offenses;
- (2) history of undesirable behavior pattern;
- (3) the defendant's personality, character and social traits;
- (4) result of presentence investigation;
- (5) vicious or aggravated nature of the crime;
- (6) degree of the defendant's culpability;
- (7) defendant's demeanor at trial;
- (8) defendant's age,

educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention.

*Id.* at 623-24, 350 N.W.2d at 639 (quoting *Harris v. State*, 75 Wis.2d 513, 519-20, 250 N.W.2d 7, 11 (Ct. App. 1977)).

At Huppeler's resentencing on December 23, 1997, the court sentenced him to two years in prison, reasoning that the sentence would provide Huppeler with a structured environment to ensure that he took his medications and began mental health treatment. The circuit court clearly articulated its reasons for imposing the sentence, addressing both Huppeler's character as a person in need of mental health treatment and his need for close rehabilitative control afforded by a confined prison setting. Because the circuit court logically applied the facts to the proper sentencing factors, it did not erroneously exercise its discretion in sentencing Huppeler to two years in prison.

### CONCLUSION

Huppeler is not entitled to sentence modification because the circuit court used the correct process and applied the appropriate sentencing factors when it sentenced Huppeler as a repeat offender.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)4., STATS.

