

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 15, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP2042-CR

Cir. Ct. No. 2000CF3537

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WANDELL LEE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL B. BRENNAN, Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Wandell Lee appeals from a circuit court order denying his motion for reconsideration of an order granting in part and denying in part his earlier motion for sentence modification. Because we conclude that the

circuit court erred in imposing a sentence that improperly included a habitual criminal enhancer, we reverse.¹

¶2 Lee was convicted of one count of fleeing an officer in violation of WIS. STAT. § 346.04(3) (1999-2000)² and habitual criminality in violation of WIS. STAT. § 939.62. Lee was sentenced under the first truth-in-sentencing scheme (TIS-I), in which fleeing an officer was denoted an unclassified felony with a maximum term of three years' incarceration. In light of this classification, the circuit court concluded that Lee faced a potential penalty enhancement of six years under WIS. STAT. § 939.62(1)(b). The circuit court sentenced Lee to six years of confinement and two years of extended supervision.

¶3 Lee moved the circuit court to modify his sentence on May 5, 2005, arguing that the circuit court had improperly “applied a portion of the [habitual criminality penalty] enhancer as extended supervision,” contrary to *State v. Volk*, 2002 WI App 274, 258 Wis. 2d 584, 654 N.W.2d 24. *Volk* holds that a penalty enhancer cannot be applied to a term of extended supervision. *Id.*, ¶35. Lee also contended that the sentencing court erroneously exercised discretion by ignoring certain sentencing factors.

¶4 The circuit court agreed with Lee that the penalty enhancer had been improperly applied and imposed a new sentence of six years of initial confinement and nine months of extended supervision. The circuit court rejected as untimely

¹ Lee has filed a motion for summary disposition. Because this opinion resolves the merits of the appeal, we need not address Lee's motion.

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Lee's claim of erroneous exercise of discretion. Lee moved for reconsideration, arguing that the circuit court erred by rejecting his erroneous exercise of discretion claim and by not securing his presence when it ruled on his motion for sentence modification. The circuit court denied the motion, and Lee appeals.

¶5 This case addresses whether the penalty enhancer was properly applied to the underlying unclassified felony under TIS-I. A number of statutory and common law principles, some in conflict with each other, are relevant to the issue of whether the sentence imposed was lawful. The interpretation and application of statutes and caselaw to undisputed facts present questions of law which we decide *de novo*. *Volk*, 258 Wis. 2d 584, ¶34.

¶6 WISCONSIN STAT. § 973.01(2)(b)6, provides that confinement may not exceed 75% of the total length of a bifurcated sentence when the underlying conviction is for an unclassified felony. Simultaneously, § 973.01(2)(d) provides that extended supervision may not exceed 25% of the length of confinement of a bifurcated sentence imposed for an unclassified felony. This court held in *Volk* that a penalty enhancer cannot be applied to a term of extended supervision. *Volk*, 258 Wis. 2d 584, ¶¶35-36.

¶7 Subsequently, the supreme court reviewed *Volk*'s holding in *State v. Jackson*, 2004 WI 29, ¶¶21-25, 270 Wis. 2d 113, 676 N.W.2d 872, a case where the defendant, like Lee, was convicted of fleeing an officer as a habitual criminal under TIS-I. The court acknowledged in *Jackson* that the maximum term of initial confinement could not exceed 75% of the total term of imprisonment, including the enhancer. *Id.*, ¶40. Applying the holding of *Volk* and the 75% statutory restriction, *Jackson* held that the maximum term of confinement for fleeing with an enhancer was eighty-one months or 75% of 108 months. *Id.*, ¶42.

The court went on to conclude “that the general penalty enhancer for an unclassified felony under TIS-I is neither subject to bifurcation nor is to be added to the underlying term of imprisonment pursuant to WIS. STAT. § 939.62.” *Id.*, ¶44. The court held, therefore, that “the court of appeals’ reliance on WIS. STAT. § 973.01(2)(d), the statute specifying that the extended supervision term imposed by the court be at least 25% of the term of confinement imposed, was *misplaced*.” *Id.* (emphasis added).

¶8 Recently, our court had occasion to visit *Jackson*’s holding in *State v. Kleven*, 2005 WI App 66, 280 Wis. 2d 468, 696 N.W.2d 226. We explained that under *Jackson*, in the case of unclassified felonies under TIS-I, “the penalty enhancer is added initially to the term of confinement pursuant to WIS. STAT. § 973.01(2)(c) and ... the penalty enhancer cannot be bifurcated.” *Id.*, ¶22 (citation omitted). *Kleven* went on to note that the court in *Jackson* applied the rule of lenity in interpreting WIS. STAT. § 973.01 “to determine the upper limit of confinement that may be imposed under TIS-I for an enhanced, unclassified felony.” *Id.*, ¶23. *Kleven* determined that *Jackson* required the sentencing court to determine the maximum term of imprisonment allowable and then to apply the condition that this maximum term of confinement could not exceed 75% of the maximum term of imprisonment. *Id.*

¶9 In this case, the maximum term of imprisonment was three years (36 months) for the fleeing offense and six years (72 months) for the habitual criminality enhancer for a total of 108 months. Applying these principles to the case at bar, we arrive at the same figure set forth in *Jackson* and calculated by the sentencing court here, $108 \text{ months} \times 75\% = 81 \text{ months}$.

¶10 We next determine what constraints might apply to the term of extended supervision. *Kleven* held that because “the penalty enhancer cannot be bifurcated” under *Jackson*, a defendant may only be ordered to serve “at most, the maximum term of extended supervision available for his base offense.” *Kleven*, 280 Wis. 2d 468, ¶26. *Kleven* explained that it adopted this approach because it was consistent with *Jackson*’s admonition that “penalty enhancers are not to be bifurcated but serve only to extend the confinement portion of a bifurcated sentence under TIS-I.” *Kleven*, 280 Wis. 2d 468, ¶27. *Kleven* also noted that its approach was consistent with “the rule of lenity as applied in *Jackson* to these ‘ambiguous penal statutes’ because it favors the defendant by producing shorter maximum terms of extended supervision and total imprisonment.” *Id.* (citation omitted). Finally, *Kleven* explained that its interpretation was consistent with *Volk* which held that penalty enhancers cannot be applied to a term of extended supervision. *Id.* Basing our calculations on the principles recently affirmed in *Kleven*, we conclude that the maximum term of initial confinement for fleeing an officer is 27 months (36 months x 75%); therefore, the term of extended supervision would equal 25% of the length of confinement of the base offense 6.75 months (27 months x 25%). See *id.*, ¶26.

¶11 Accordingly, we reverse the sentencing court’s order that Lee serve six years of initial confinement and nine months of extended supervision and remand this cause for resentencing. As we observed in *Volk*:

[A] sentence under the truth-in-sentencing law consists of a term of confinement and a term of extended supervision. These two components form a symbiotic relationship with the length of one necessarily influencing the length of the other and the overall length of the bifurcated sentence. Although the sentencing court imposes two discrete terms—one of confinement and one of extended supervision—it remains that the end product is but a single sentence. When a crucial component of such a

sentence is overturned, it is proper and necessary for the sentencing court to revisit the entire question. If we held otherwise ... we would produce a sentence based on mathematics, rather than an individualized sentence based on “the facts of the particular case and the characteristics of the individual defendant.”

Volk, 258 Wis. 2d 584, ¶48 (citation omitted).

¶12 Because our ruling on this issue disposes of the appeal, we decline to address the other issues raised. *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the “narrowest possible ground”).

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

