

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 4, 2013

Diane M. Fremgen
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. 2013AP844-CR

Cir. Ct. No. 2011CM3703

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EMMIT L. GROCE, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
BONNIE L. GORDON, Judge. *Affirmed.*

¶1 CURLEY, P.J.¹ Emmit L. Groce, Jr., *pro se*, appeals an order denying his motion to correct his sentence. Groce—who was convicted in 2011 of

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.

criminal damage to property as a repeater—filed a motion to correct his sentence in 2013, arguing that two unpublished cases, *State v. Gerondale*, 2010 WI App 1, 322 Wis. 2d 737, 778 N.W.2d 172 (unpublished), and *State v. Ash*, 2012 WI App 106, 344 Wis. 2d 299, 821 N.W.2d 413 (unpublished), required the trial court to modify his sentence. The trial court denied his motion. On appeal, Groce renews the arguments rejected by the trial court. This court affirms.

BACKGROUND

¶2 Groce was charged, on June 15, 2011, with two misdemeanors: battery with the use of a dangerous weapon, *see* WIS. STAT. § 940.19(1), and criminal damage to property, *see* WIS. STAT. § 943.01(1). The complaint alleged that Groce was a repeat offender as defined by WIS. STAT. § 939.62(1)(a), and that he was consequently subject to a two-year maximum sentence on each count.

¶3 By way of a plea agreement, Groce pled guilty to criminal damage to property, and the battery charge was to be read-in at sentencing. Groce was convicted on August 4, 2011, and sentenced on August 10, 2011. The trial court sentenced Groce to a total term of two years, bifurcated as one year in prison and one year on extended supervision—to be served consecutive to any other sentence.

¶4 In January 2013, Groce filed a postconviction motion seeking sentence modification. Groce, relying on two unpublished opinions—*Gerondale*, 322 Wis. 2d 737 (unpublished); and *Ash*, 344 Wis. 2d 299 (unpublished)—argued that his term of extended supervision exceeded the term allowed by law. The trial court denied Groce’s motion, and Groce now appeals.

ANALYSIS

¶5 On appeal, Groce renews the argument he made before the trial court. He argues that the bifurcated sentence of one year of initial confinement followed by one year of extended supervision is illegal.

¶6 The issue of whether Groce’s sentence comports with the applicable statutes is a question of law that this court reviews independently. *See State v. Dwyer*, 181 Wis. 2d 826, 836, 512 N.W.2d 233 (Ct. App. 1994) (“construction of a statute presents a question of law, subject to *de novo* review on appeal”). 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.*

¶7 Groce’s sentence is governed by WIS. STAT. §§ 939.62(1)(a) and 973.01(2)(b)-(d). Those statutes provide, as relevant:

939.62 Increased penalty for habitual criminality. (1) If the actor is a repeater ... the maximum term of imprisonment prescribed by law for that crime may be increased as follows:

(a) A maximum term of imprisonment of one year or less may be increased to not more than 2 years.

973.01 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 misdemeanor committed on or after February 1, 2003, the court shall impose a bifurcated sentence under this section.

(2) STRUCTURE OF BIFURCATED SENTENCES. A bifurcated sentence is a sentence that consists of a term of confinement in prison followed by a term of extended supervision under s. 302.113. The total length of a bifurcated sentence equals the length of the term of confinement in prison plus the length of the term of extended supervision. An order imposing a bifurcated sentence under this section shall comply with all of the following:

....

(b) *Confinement portion of bifurcated sentence.* The portion of the bifurcated sentence that imposes a term of confinement in prison may not be less than one year and, except as provided in par. (c), is subject to whichever of the following limits is applicable:

....

10. For any crime other than one of the following, the term of confinement in prison may not exceed 75% of the total length of the bifurcated sentence:

a. A felony specified in subds. 1. to 9.

b. An attempt to commit a classified felony if the attempt is punishable under s. 939.32(1) (intro.).

(c) *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.

(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)....

¶8 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.*

¶9 As an example, the “75/25” rule applied to an enhanced misdemeanor sentence imposed pursuant to WIS. STAT. § 939.62(1)(a)—which as noted, allows for a maximum sentence of two years—allows for a maximum term of confinement in prison of 18 months (75% of two years). *See* WIS. STAT. § 973.01(2)(b)-(d). Because extended supervision cannot be less than 25% of the term of confinement in prison, a sentence imposing 18 months’ prison time would necessarily require 4.5 months’ extended supervision. It is also important to note that while WIS. STAT. § 973.01(2)(d) mandates a maximum period of extended supervision for classed felonies, it provides no similar cap for un-classed felonies or, as is pertinent here, enhanced misdemeanors.

¶10 Thus, applying the relevant statutes to Groce’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.

¶11 Relying on *Gerondale* and *Ash*, 344 Wis. 2d 299, ¶¶2-5, 13-14, which applied *Gerondale*’s ruling to a defendant who had been resentenced following revocation in 2010, however, Groce claims that his sentence is illegal.

In *Gerondale*—which, as noted, was not published—this court attempted to reconcile the decision in *State v. Volk*, 2002 WI App 274, ¶¶2, 35-36, 258 Wis. 2d 584, 654 N.W.2d 24, which held that in felony cases enhanced penalties are to be applied only to confinement portions of a bifurcated sentence and may not be imposed as extended supervision, with the post-*Volk* statutory requirement that enhanced misdemeanor sentences must be bifurcated.² The *Gerondale* court concluded that the two rules are seemingly inconsistent. It reasoned that because WIS. STAT. § 973.01 requires enhanced misdemeanors to be bifurcated, and misdemeanors do not otherwise provide for a term of extended supervision, § 973.01 necessarily requires that some portion of the penalty enhancer be applied to extended supervision. See *Gerondale*, 322 Wis. 2d 737, unpublished slip op. ¶¶8-9. *Gerondale* also noted that *Volk*, on the other hand, prohibited any portion of the penalty enhancer to be applied to extended supervision. See *Gerondale*, 322 Wis. 2d 737, unpublished slip op., ¶4. In order to reconcile these seemingly contradictory provisions, *Gerondale* held that a misdemeanor prison sentence based on a penalty enhancer may be bifurcated neither more nor less than necessary to comply with the 25% minimum extended supervision requirement: more would run afoul of *Volk*; less would run afoul of § 973.01(2)(d). See *Gerondale*, 322 Wis. 2d 737, unpublished slip op., ¶¶11-12.

¶12 Groce’s argument is unpersuasive because neither *Gerondale* nor *Volk* apply to his case. *Volk* applied only to felonies. It interpreted a version of the statutes in which enhanced misdemeanor sentences were not bifurcated. See

² See also *State v. Jackson*, 2004 WI 29, ¶¶11, 30, 270 Wis. 2d 113, 676 N.W.2d 872 (reaffirming *Volk*’s holding in unclassified felony context). See also 2001 Wis. Act 109 § 1114 (amending WIS. STAT. § 973.01(1) to require bifurcation of misdemeanor sentences).

Volk, 258 Wis. 2d 584, ¶1 n.2 (interpreting 1999-2000 version of state statutes); 2001 Wis. Act 109 (new version of WIS. STAT. § 973.01 requiring bifurcation of misdemeanor sentences in effect July 30, 2002). Also, the statutory language on which *Volk* relied to conclude that penalty enhancers could only be applied to the confinement portion of the sentence, on its face, only applies to felonies. *See id.*, 258 Wis. 2d 584, ¶2 (interpreting WIS. STAT. § 973.01(2)(c)); *see also* § 973.01(2)(c)1. Furthermore, examining WIS. STAT. § 939.62(1)(a) in conjunction with the surrounding statutes demonstrates that the language of the misdemeanor repeater differs from that corresponding to felonies. A misdemeanor repeater sentence can be increased *to* not more than two years. *See id.* Felony repeater sentences, on the other hand, may be increased *by* a period of years, the specific number depending on the length of the underlying crime and the nature of the previous convictions. *See* § 939.62(1)(b). These differences persuade this court that the *Volk* rule does not currently apply to enhanced misdemeanors. As such, our analysis in *Gerondale*, in which we compared *Volk* with § 973.01, also does not apply.

¶13 Moreover, because *Gerondale* is an unpublished opinion of this court, the trial court did not erroneously exercise its discretion when it chose not to apply *Gerondale*'s rationale. *See* WIS. STAT. § 809.23(3)(b) (unpublished opinions issued on or after July 1, 2009 may be cited for persuasive value, but are not precedent, and are “not binding on any court of this state. A court need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it.”). Rather, the trial court appropriately concluded that its sentence complies with WIS. STAT. § 973.01—Groce's term of confinement does not exceed 75% of his sentence and his term of extended supervision is not less than 25% of the length of his confinement.

¶14 In sum, relying on the applicable statutes, WIS. STAT. §§ 973.01 and 939.62, this court concludes that the trial court's decision to deny Groce's motion was proper.

By the Court.—Order affirmed.

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

