

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 19, 2014**

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 Nos. 2013AP1833-CR  
2013AP1834-CR**

**Cir. Ct. Nos. 2009CF1695  
2009CM2707**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ERIC T. ALSTON,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Dane County:  
WILLIAM E. HANRAHAN, Judge. *Reversed and cause remanded with  
directions.*

¶1 KLOPPENBURG, J.<sup>1</sup> Eric Alston appeals an order modifying the sentences imposed by the circuit court following Alston's convictions for one

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

count of criminal damage to property in violation of WIS. STAT. § 943.01(1), and two counts of battery in violation of WIS. STAT. § 940.19(1). Alston was convicted of all three charges as a repeater, in violation of WIS. STAT. § 939.62(1)(a), and the court therefore applied a penalty enhancer to Alston's sentences.

¶2 Alston argues that the sentences are unlawful because the circuit court imposed a portion of the penalty enhancer as extended supervision, in violation of WIS. STAT. § 973.01(2)(c)1. The State argues that the issues in this appeal are resolved by this court's recent decision in *State v. Lasanske*, 2014 WI App 26, ¶11, 353 Wis.2d 280, 844 N.W.2d 417, where we held that § 973.01(2)(c)1. does not apply to misdemeanor sentences. I agree and, under *Cook v. Cook*, 208 Wis.2d 166, 190, 560 N.W.2d 246 (1997), I follow *Lasanske's* holding and reject Alston's argument that his sentences are unlawful under § 973.01(2)(c)1. However, as explained below, I reverse because the sentences imposed by the circuit court violate WIS. STAT. § 973.01(2)(b)10.

## BACKGROUND

¶3 The three charges of which Alston was convicted are all Class A misdemeanors. See WIS. STAT. §§ 940.19(1) and 943.01(1). The maximum term of imprisonment for a Class A misdemeanor is nine months (with no extended supervision). See WIS. STAT. § 939.51(3)(a).

¶4 Because Alston was convicted of each of the charges as a repeater, WIS. STAT. § 939.62(1) applied. That statute provides:

If the actor is a repeater ... and the present conviction is for any crime for which imprisonment may be imposed, ... 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.

Accordingly, the circuit court was permitted to impose a sentence of up to two years of imprisonment on each of the three charges.

¶5 At sentencing in 2010 on each of the three charges, the circuit court placed Alston on probation for a period of three years, and ordered that the terms of probation run concurrently. The circuit court also imposed and stayed sentences on each of the three charges. The imposed-and-stayed sentences consisted of two years' imprisonment, bifurcated between eighteen months' initial confinement and six months' extended supervision, to run consecutively.

¶6 Alston's probation was revoked on all three charges in May 2012, and Alston was sentenced to prison.

¶7 In May 2013, Alston filed a postconviction motion for resentencing. Relying on WIS. STAT. § 973.01(2)(c)1., Alston argued that the sentences imposed by the circuit court were unlawful because penalty "enhancers can only be applied to initial confinement and not to extended supervision." The circuit court denied Alston's motion, but stated in writing:

It was the unmistakable intent of the court to sentence the defendant to the maximum period of confinement on each count, based upon factors set forth at the sentencing hearing. If the amount of initial confinement/E.S. time was incorrectly calculated, the defendant may submit an order which reflects the intent of the court, consistently with the law.

Alston submitted a proposed order, along with a letter requesting that the court "modify Mr. Alston's sentences to one year in jail on each count with no extended supervision. One year jail is consistent with the court's intent of maximum confinement (it exceeds the nine month max without repeater status), and also

does not impose any portion of enhancer as extended supervision.”<sup>2</sup> On June 27, 2013, the court signed the proposed order, which modified Alston’s sentences on each of the three charges from eighteen months’ initial confinement and six months’ extended supervision “to 1 year incarceration and 0 months extended supervision,” to run consecutively and to be served “in the county jail pursuant to Wis. Stat. § 973.02.”

¶8 On June 28, 2013, the prosecutor filed a letter with the circuit court objecting to the order modifying Alston’s sentences and requesting that the court hold a hearing on the matter. The court held a hearing and subsequently issued an order modifying Alston’s sentences on each of the three charges “from one year in jail to 22 months and 15 days in prison, bifurcated by 18 months Initial Confinement and four months and 15 days Extended Supervision,” to run consecutively.<sup>3</sup> Alston appeals.

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<sup>2</sup> Alston based his request on his representation that case law did not authorize the imposition of any extended supervision and set the maximum sentence on a “misdemeanor repeater” as one year in jail.

<sup>3</sup> In imposing the modified sentence set forth above, the circuit court followed the recommendation of the prosecutor. The prosecutor based her recommendation on this court’s unpublished decisions in *State v. Gerondale*, Nos. 2009AP1237/1238-CR, unpublished slip op. (WI App Nov. 3, 2009) and *State v. Ash*, No. 2012AP381-CR, unpublished slip op. (WI App Aug. 15, 2012). Relying on those cases, the prosecutor stated: “[A]cross the state, courts that are dealing with this issue are imposing 18 months, if the intention is for a maximum sentence, of initial confinement and 4½ months of extended supervision. And even that’s somewhat of an absurdity because what we’re saying is the maximum of two years is really 22 months and two weeks.” *Gerondale* and *Ash* were decided before *Lasanske*, and also dealt with facts not presented in this appeal. It appears that the rule set forth in *Lasanske*, as we apply it here, resolves the absurdity noted by the prosecutor below.

## STANDARD OF REVIEW

¶9 “A circuit court exercises its discretion at sentencing,” and appellate review is therefore generally “limited to determining if the court’s discretion was erroneously exercised.” *State v. Brown*, 2006 WI 131, ¶19, 298 Wis. 2d 37, 725 N.W.2d 262. However, the issue of whether a sentence violates a statute is a question of law, which we review de novo. See *State v. Murdock*, 2000 WI App 170, ¶18, 238 Wis. 2d 301, 617 N.W.2d 175 (“The interpretation and application of statutes present questions of law that we review de novo.”).

## DISCUSSION

¶10 Alston argues that the sentence imposed by the circuit court is illegal because it imposes a portion of the penalty enhancer as extended supervision, in violation of WIS. STAT. § 973.01(2)(c)1. Prior to *Lasanske*, our courts repeatedly struggled with the conflict caused by applying § 973.01(2)(c)1. to misdemeanor repeater sentences like Alston’s. See *Lasanske*, 353 Wis. 2d 280, ¶1. I do not revisit the intricacies of this conflict, because our holding in *Lasanske* that § 973.01(2)(c)1. does not apply to misdemeanor sentences is controlling. However, to explain why the modified sentences imposed by the circuit court in this case are nevertheless improper, I set forth the applicable statutory provisions, describe the procedure set forth in *Lasanske* for applying these statutory provisions, and apply them to Alston’s case.

¶11 A number of interrelated statutory provisions govern misdemeanor repeater sentences. WISCONSIN STAT. § 939.62(1)(a) sets forth the penalty enhancer that applies to misdemeanor repeater sentences, and allows a circuit court to increase the maximum term of imprisonment “to not more than 2 years.” Under WIS. STAT. § 973.02, a sentence of more than one year must be to the

Wisconsin state prisons. WISCONSIN STAT. § 973.01(1) provides that “whenever a court sentences a person to imprisonment in the Wisconsin state prisons for a felony ... or a misdemeanor ... the court shall impose a bifurcated sentence.” A bifurcated sentence is a sentence that “consists of a term of confinement in prison followed by a term of extended supervision.” WIS. STAT. § 973.01(2). As applicable to misdemeanor repeater sentences, “the term of confinement in prison may not exceed 75% of the total length of the bifurcated sentence,” and “[t]he term of extended supervision may not be less than 25% of the length of the term of confinement in prison.” WIS. STAT. § 973.01(2)(b)10. and (d).

¶12 In *Lasanske*, we discussed these statutory provisions and set forth a procedure for circuit courts to follow when imposing misdemeanor repeater sentences. *Lasanske*, 353 Wis. 2d 280, ¶¶8-9. Under this procedure, the court determines the “applicable maximum term of imprisonment for the misdemeanor,” and adds to that the “additional imprisonment authorized by any applicable penalty enhancement statute.” *Id.*, ¶9. The court then bifurcates the sentence into a term of initial confinement and a term of extended supervision, imposing “no more than 75% of the total length of the bifurcated sentence as confinement and no less than 25% of the length of the term of confinement as extended supervision.” *Id.*, ¶12.

¶13 When the circuit court here modified Alston’s sentences, the court imposed a sentence of twenty-two months and fifteen days on each of the three charges of which Alston was convicted. The court then bifurcated each sentence into a term of initial confinement of eighteen months, and a term of extended supervision of four months and fifteen days. Each bifurcated sentence breaks down into the following percentages: (1) the eighteen-month term of initial confinement amounts to approximately eighty percent of the length of the

bifurcated sentence; and (2) the four-month-and-fifteen-day term of extended supervision amounts to approximately twenty-five percent of the length of the term of initial confinement. The term of initial confinement on each of the sentences imposed by the circuit court therefore violates the requirement that “the term of confinement in prison ... not exceed 75% of the total length of the bifurcated sentence.” WIS. STAT. § 973.01(2)(b)10.

### CONCLUSION

¶14 Because the sentences imposed by the circuit court violate WIS. STAT. § 973.01(2)(b)10., I reverse the circuit court’s order modifying Alston’s sentences, and I remand for further proceedings consistent with this opinion.

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

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

