

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 31, 2009

David R. Schanker
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. 2008AP933

Cir. Ct. No. 2002CF2022

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

NICHOLAS J. CARL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
WILLIAM SOSNAY, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Nicholas J. Carl, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2007-08) motion. Among other things, Carl claims he was charged under a non-existent statute and counsel was ineffective for failing to discover and prevent the error. Carl's arguments are premised on a

faulty understanding of the statutes. We therefore reject his arguments and affirm the order.

¶2 In April 2002, Carl was charged with aggravated battery for stabbing a man. *See* WIS. STAT. § 940.19(5) (2001-02).¹ At that time, the charge was a Class C felony, carrying a maximum imprisonment term of fifteen years. WIS. STAT. § 939.50(3)(c). The confinement portion of such a sentence could not exceed ten years, WIS. STAT. § 973.01(2)(b)3., and there was no maximum term of extended supervision. In August 2002, Carl pled no contest and was sentenced to fifteen years' imprisonment, consisting of three years' initial confinement and twelve years' extended supervision. Carl did not appeal.

¶3 In 2001, the legislature passed 2001 Wis. Act 109, the second phase of our conversion to the determinate “truth-in-sentencing” penalty structure. In the Act, aggravated battery, contrary to WIS. STAT. § 940.19(5), became a Class E felony. 2001 Wis. Act 109, § 608. The maximum total imprisonment time remained at fifteen years, *id.* at § 555, and the maximum confinement time remained at ten years. *Id.* at § 1121. However, the extended supervision portion of the Class E felony was capped at the maximum of five years. *Id.* at §§ 1130-1131. These changes became effective February 1, 2003. *See State v. Stenklyft*, 2005 WI 71, ¶16, 281 Wis. 2d 484, 697 N.W.2d 769.

¶4 In April 2004, Carl filed a *pro se* motion for sentence modification because the new classification established a maximum of five years' extended supervision, but he had been sentenced to twelve years of supervision. The court

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

denied the motion, stating that the truth-in-sentencing revisions were not retroactive and the change did not constitute a “new factor” under sentence modification jurisprudence. Carl did not appeal.

¶5 Carl was released to extended supervision on October 23, 2005. He allegedly violated the terms and was revoked in December 2006. In April 2007, he was ordered reconfined for six years.

¶6 After this court rejected in February 2008 Carl’s motion to extend the time to appeal his original judgment of conviction, Carl filed another WIS. STAT. § 974.06 (2007-08) motion in the trial court. He asserted the State lacked jurisdiction to charge him with a Class C felony in 2002 because his crime was a Class E felony when it was committed; his plea was therefore uninformed; he was sentenced on inaccurate information, apparently meaning the incorrect sentencing maximums; and counsel was ineffective for not preventing these errors. The court denied the motion, primarily because the classification was corrected when Carl was charged and because Carl demonstrated no true errors.

¶7 Carl’s primary argument surrounds the publication format of the Wisconsin Statutes. In the 2001-02 statute book, the text of WIS. STAT. § 940.19(5) is displayed as follows:

(5) Whoever causes great bodily harm to another by an act done with intent to cause great bodily harm to that person or another is guilty of a Class E felony.

NOTE: Sub. (5) is shown as amended eff. 2–1–03 by 2001 Wis. Act 109. Prior to 2–1–03 it reads:

(5) Whoever causes great bodily harm to another by an act done with intent to cause either substantial bodily harm or great bodily harm to that person or another is guilty of a Class C felony.

(Boldface and size change in original.) Carl claims that because WIS. STAT. § 990.001(6) (2007-08) specifies that “history notes are not part of the statutes[,]” only the text in regular typeface, not what is bolded, applied to his 2002 crime. Carl is mistaken.

¶8 The “history notes” to which WIS. STAT. § 990.001(6) (2007-08) refers “appear[] in the Wisconsin Statutes after each statutory section, tracing its history since 1970.” *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶69, 271 Wis. 2d 633, 681 N.W.2d 110 (Abrahamson, C.J., concurring). These sections are prefaced by the specific word “History.” “History notes” does not refer to the inclusion of statutory revisions pending or due to become effective after the statute books’ publication.² The change of aggravated battery from Class C to Class E was not effective until February 1, 2003. Carl was properly charged with a Class C felony.

¶9 In addition, Carl cannot challenge his sentence simply because the legislature changed the maximum term of extended supervision. *See State v. Trujillo*, 2005 WI 45, ¶9, 279 Wis. 2d 712, 694 N.W.2d 933; *State v. Tucker*, 2005 WI 46, ¶25, 279 Wis. 2d 697, 694 N.W.2d 926; *State v. Torres*, 2003 WI App 199, ¶12, 267 Wis. 2d 213, 670 N.W.2d 400. Indeed, it is not evident that such a challenge would be prudent in this instance. When Carl was initially sentenced, the trial court determined that the maximum imprisonment term should

² Statutes are published biennially. WIS. STAT. § 35.18(1) (2007-08). Further, the legislative reference bureau—and, previously, the Revisor of Statutes—is permitted to include “such other matter as the bureau deems desirable and practicable.” *Id.* Inclusion of upcoming changes to the statutes, which have been authorized by the legislature and which will be effective well before the next set of statute books is to be printed, is not only desirable and practicable, but wise and efficient.

be served, dividing the term into three years' initial confinement and twelve years' extended supervision.³ If Carl sought to be resentenced under the revised scheme, the most supervision the court could order is five years. Thus, if the court determined that maximum imprisonment remained appropriate, the sentence would work to increase Carl's confinement.

¶10 Carl's complaints about the validity of the charging statute and his penalty are meritless. Therefore, there can be no ineffective assistance of counsel claim, in part because there was no error for counsel to discover and in part because counsel cannot be deficient for failing to raise a meritless challenge. *See State v. Wheat*, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441.

¶11 For the first time on appeal,⁴ Carl alleges he could not have been charged with aggravated battery at all because his victim was not elderly or disabled. Carl is combining statutes. He was charged with aggravated battery under WIS. STAT. § 940.19(5). That statute prohibits causing great bodily harm "by an act done with intent to cause either substantial bodily harm or great bodily harm" Subsection 940.19(6) prohibits causing bodily harm "by conduct that creates a *substantial risk* of great bodily harm" (Emphasis added.) Subsection

³ Carl attempts to show that his maximum sentence could only have been ten years. Under truth-in-sentencing, "imprisonment" usually means "confinement" plus "extended supervision." At the time Carl was sentenced, WIS. STAT. § 973.01(2)(b), which specified maximum confinement terms for felonies, was titled "*Imprisonment* portion of bifurcated sentence." (Emphasis added.) Thus, Carl contends his maximum possible total sentence was ten years. We disagree; title notwithstanding, § 973.01(2)(b)3. specifies that the confinement portion, not the imprisonment, may not exceed ten years, and WIS. STAT. § 939.50(3)(c) assigns a maximum fifteen-year imprisonment term.

⁴ Carl does not show where he raised this issue in the trial court; we generally do not consider issues raised for the first time on appeal. *Wirth v. Ehly*, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980).

940.19(6) further specifies there is a rebuttable presumption of *substantial risk* of great bodily harm if the victim is sixty-two years of age or older, or is physically disabled. WIS. STAT. § 940.19(6)(a)-(b). However, those paragraphs apply only in the context of a charge under § 940.19(6),⁵ and only to establishing the risk element of the crime. The rebuttable presumption of risk is wholly unrelated to § 940.19(5).

¶12 For the first time in his reply brief, Carl alleges the State suppressed a medical report on his victim. Carl believes the victim’s injuries were not as serious as the State claims. He asserts the victim showed the court a laceration “about 1 1/2 inches long and[]that was all.” The criminal complaint asserts that the victim’s wound “went through a layer of fat and muscle causing internal bleeding. In addition, the lacerations to [the victim’s] fingers were serious and [he] lost dexterity in two of his ten fingers” Whether the victim’s injuries were severe enough to satisfy the State’s burden of proof is a defense that was waived by the valid no-contest plea. *See State v. Kelty*, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886. Further, arguments may not be raised for the first time in a reply brief. *See Northwest Wholesale Lumber, Inc. v. Anderson*, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

By the Court.—Order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

⁵ Further, even under WIS. STAT. § 940.19(6), a victim need not be elderly or disabled before a defendant can be charged.

