STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT II

Case No. 2020AP1213 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross-Appellant,

v.

COREY T. RECTOR,

Defendant-Appellant-Cross-Respondent

Appeal of a judgment and an order entered in the
Kenosha County Circuit Court,
the Honorable Jason A. Rossell, presiding

APPELLANT'S BRIEF

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ISSUE PRESENTED

The circuit court denied Mr. Rector eligibility for the substance abuse program because, it said, his offenses were not "substance abuse crime[s]" such as drunk driving. Did this denial reflect an improper preconceived sentencing policy?

The circuit court denied eligibility; this Court should reverse.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Rector does not request oral argument. Publication is also not merited, as resolving this issue requires only the application of established law to the facts of this case.

STATEMENT OF THE CASE

Mr. Rector pleaded guilty to five counts of possessing child pornography. (66:11-12). The presentence investigation by the Department of Corrections erroneously said Mr. Rector was not statutorily eligible for the Substance Abuse or the Challenge Incarceration programs. (19:2).

The court imposed concurrent sentences of eight years of initial confinement and ten years of extended supervision. (69:17-18). At the end of the sentencing hearing, the following exchange occurred:

> THE COURT: Give me one second here. 302 days of sentence credit. Not eligible because the mandatory minimum is not eligible for

> Challenge Incarceration due to age. Not eligible for Substance Abuse because it's [not] a substance abuse crime.
>
> MR. BARTH: Will he be eligible after he completes the mandatory minimum?
>
> THE COURT: They're indicating on the PSI that he's not statutorily eligible and I can't find it's a substance-based offense and he's—I believe by age he's—well, I mean he's—essentially in less than 30 days he's aged out of Challenge Incarceration because you have to be 35 and you turn 35 in about a month, so. All right. Good luck.

(69:19; App. 101).

Mr. Rector filed a postconviction motion noting the PSI's error and asking the court to make him eligible for the Substance Abuse Program. (39). At the hearing on the motion, Mr. Rector informed the court that the Department of Corrections had identified a substance-abuse treatment need. (70:3; App. 104). The state took no position on the motion. (70:3; App 104).

The circuit court denied the motion, saying that

> even if it was an error in the PSI, there are two reasons why I would not authorize the Substance Abuse Program.
>
> First of all, it's not a substance abuse crime. I only authorize the Substance Abuse Program when it directly goes to the criminogenic factor that caused the crime. So if there's an operating while intoxicated case or maybe a domestic violence case in which alcohol was used or in

> some way, shape or form the substance abuse was the reason for the crime. In this case it's a possession of child pornography.

(70:4; App. 105).

The court went on to note that in some other drunk-driving cases the DOC had released inmates via the substance abuse program before they had served the statutory mandatory minimum sentence, though judges have the power to prevent this by setting an eligibility date for the program. (70:4-5; App. 105-06). It then reiterated that it would not make Mr. Rector eligible because "as I indicated at sentencing … it's not a substance abuse crime. It doesn't address the criminogenic factors and therefore the court is not [going to] grant the relief and will deny the motion." (70:5; App. 106). The court later entered a written order and Mr. Rector appealed; the state cross-appealed raising a separate issue. (46; 47; 52).

ARGUMENT

The circuit court denied Mr. Rector substance abuse program eligibility according to a preconceived sentencing policy.

Mr. Rector's convictions for violating Wis. Stat. § 948.12 do not make him statutorily ineligible for the substance abuse program. Wis. Stat. § 973.01(3g). And, as Mr. Rector and the PSI pointed out to the court, there is ample reason to believe he has an

alcohol problem that contributes to his criminal risk. (19:7,17,20,24).

The court nevertheless denied Mr. Rector the programming because, it said, possession of child pornography is not a "substance abuse crime." It gave examples of what it did view as "substance abuse crimes": "an operating while intoxicated case or maybe a domestic violence case in which alcohol was used or in some way, shape or form the substance abuse was the reason for the crime."

A circuit court has wide sentencing discretion. This discretion includes the determination of eligibility for SAP. Sec. 973.01(3g). A circuit court is forbidden, though, to employ a "preconceived policy of sentencing that is closed to individual mitigating factors." *State v. Ogden*, 199 Wis. 2d 566, 571, 544 N.W.2d 574 (1996). Thus in *Ogden*, the supreme court invalidated a circuit court's decision not to permit Huber for child-care purposes, where the sentencing judge announced during sentencing that he would not do so for "normal child care" but only where it was "absolutely essential." *Id.* at 572. The supreme court said this "mechanistic sentencing approach" was contrary to case law, and that such "inflexibility, which bespeaks a made-up mind" was not acceptable. *Id.* at 571-72. It therefore ordered resentencing. *Id.* at 574.

In this case, the circuit court likewise applied a "preconceived policy of sentencing": it would not consider SAP eligibility in cases involving certain

classes of charges it did not consider "substance abuse crimes." As in *Ogden*, this violated the rule against a "mechanistic sentencing approach," and was improper.

The legislature, in enacting the statutes governing the substance abuse program, made it available for a large majority of criminal offenses. *See* § 973.01(3g). It also made clear that whether to grant eligibility to a particular defendant is a matter for the circuit court's discretion. *Id.* But as *Ogden* shows, a court's adoption of a preconceived sentencing policy is not a proper exercise of discretion. This is especially so where that policy—that a defendant is only eligible in cases involving "substance abuse crimes" like drunk driving—uniformly denies eligibility for offenses the legislature has included within the program.

CONCLUSION

Because the circuit court refused to make Mr. Rector eligible for the substance abuse program according to a preconceived sentencing policy, he respectfully requests that this Court reverse the denial of his postconviction motion and remand for a proper exercise of discretion.

Dated this 12th day of October, 2020.

Respectfully submitted,

Electronically signed by Andrew R. Hinkel
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 928 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief of appellant, including the appendix as a separate attachment, if any, which complies with the requirements of Wisconsin Supreme Court Order 19-02: Interim Court Rule Governing Electronic Filing in the Court of Appeals and Supreme Court.

Dated this 12th day of October, 2020.

Signed:

Electronically signed by Andrew R. Hinkel
ANDREW R. HINKEL
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that I have submitted an electronic copy of this appendix to brief of appellant, which complies with the requirements of Wisconsin Supreme Court Order 19-02: Interim Court Rule Governing Electronic Filing in the Court of Appeals and Supreme Court.

Dated this 12th day of October, 2020.

Signed:

Electronically signed by Andrew R. Hinkel
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