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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP1213 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross-Appellant,

v.

COREY T. RECTOR,

Defendant-Appellant-Cross-Respondent.

On certification of an appeal of a decision and order
entered in the Kenosha County Circuit Court, the
Honorable Jason A. Rossell, presiding

BRIEF OF DEFENDANT-APPELLANT-
CROSS-RESPONDENT

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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 a preconceived sentencing policy, and thus run contrary to this Court’s decision in *State v. Ogden*, 199 Wis. 2d 566, 544 N.W.2d 574 (1996)?

The circuit court denied eligibility; the court of appeals certified the case to this Court; this Court should reverse.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication of opinions are customary for this Court.

STATEMENT OF FACTS AND 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 he 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. 3).

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. 6). The state took no position on the motion. (70:3; App 6).

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. 7).

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.¹ (70:4-5; App. 7-8). 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. 8). The court later entered a

¹ Releases pursuant to the substance abuse program before service of a mandatory minimum have since been disallowed. See *State v. Gramza*, 2020 WI App 81, 395 Wis. 2d 215, 952 N.W.2d 836.

written order and Mr. Rector appealed; the state then cross-appealed raising a separate issue. (46; 47; 52).²

The court of appeals issued a certification focusing on the issue raised in the state's cross appeal. *State v. Rector*, No. 2020AP1213-CR, unpublished slip op. (WI App. Nov. 24, 2021). This court granted certification of the entire appeal. Order of February 16, 2022.

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. Wisconsin Stats. §§ 973.01(3g) and 302.05(3)(a)1. exclude those who commit certain crimes from the program, but Mr. Rector's offenses are not among those listed. Thus, all agree that the circuit court was obligated to exercise its discretion to grant or deny Mr. Rector eligibility for the program. Mr. Rector's postconviction motion asked it to grant eligibility, pointing out that

² Mr. Rector is the Respondent with respect to that second issue (whether the statutes require him to remain on the sex-offender registry until his death). Per this Court's order of February 16, 2022, he will file a Respondent's Brief 20 days after the Appellant's Brief on that issue.

the PSI gives ample reason to believe he has an alcohol problem that contributes to his criminal risk. (19:7,17,20,24).

The court denied Mr. Rector the programming, though, saying it did so because 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.” (70:4; App. 7).

A circuit court has wide sentencing discretion, including in determining 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*, this 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. This Court said such a “mechanistic sentencing approach” was contrary to case law, and that such “inflexibility, which bespeaks a made-up mind” was not proper. *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 the 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 17th day of March, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,083 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 17th day of March, 2022.

Signed:

ANDREW R. HINKEL
Assistant State Public Defender