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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 FROM THE WISCONSIN
COURT OF APPEALS, DISTRICT II, FROM AN
APPEAL OF POSTCONVICTION ORDERS ENTERED
IN KENOSHA COUNTY CIRCUIT COURT, THE
HONORABLE JASON A. ROSSELL, PRESIDING

**RESPONSE BRIEF OF
PLAINTIFF-RESPONDENT-CROSS-APPELLANT**

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STATEMENT OF THE ISSUE

The circuit court has discretionary authority to grant or deny eligibility to participate in an earned release substance abuse program. Here, Corey Rector alerted the postconviction court to a sentencing error and moved for admittance into the program. The court corrected the error. Then, it exercised discretion and denied the motion because substance abuse wasn't a criminogenic factor contributing to Rector's crimes. Did the circuit court reasonably exercise discretion when it denied Rector's postconviction motion?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests both oral argument and publication, pursuant to Wis. Stat. §§ (Rule) 809.22 and 809.23.

STATEMENT OF THE CASE

This Court granted certification from the court of appeals, accepting for consideration all issues raised in the appellate court. Each party presented one issue in the court of appeals. Rector, as the Appellant, presented an issue regarding the circuit court's denial of eligibility to participate in an earned release substance abuse program that is the subject of this brief. The State, as Cross-Appellant, presented an issue of statutory interpretation as to the meaning of a phrase in a sex offender registration statute. The State already filed its opening brief on the issue presented in the cross-appeal. The statement of the case in the State's opening brief provides a sufficient statement of the case for both issues presented for review. The State provides additional facts on the circuit court's denial of earned release substance abuse program eligibility in its argument in this brief.

STANDARD OF REVIEW

This Court reviews a circuit court's decision about a defendant's eligibility to participate in the earned release substance abuse program under the erroneous exercise of discretion standard of review. *State v. Owens*, 2006 WI App 75, ¶¶ 5–7, 291 Wis.2d 229, 713 N.W.2d 187. Such a “discretionary decision will be affirmed if it is made based upon the facts of record and in reliance on the appropriate law.” *Id.* ¶ 7.

ARGUMENT

This Court should affirm the circuit court's postconviction order that denied eligibility to participate in the earned release substance abuse program.

A. This Court should review whether the circuit court erroneously exercised its discretion when it denied Rector's eligibility to participate in the program.

2003 Wisconsin Act 33 granted circuit courts discretionary authority to make defendants eligible to participate in earned release through a Department of Corrections substance abuse program. 2003 Wis. Act 33, §§ 2505, 2749, 2751 *available at* <https://docs.legis.wisconsin.gov/2003/related/acts/33.pdf> (creating Wis. Stat. §§ 302.05(3) and 973.01(3g), (8)(ag)).

When the court imposes a sentence, it must, “as part of the exercise of its sentencing discretion, decide whether the person being sentenced is eligible or ineligible” to participate in the earned release substance abuse program. Wis. Stat. § 973.01(3g); *see also id.*, § 302.05(3)(a)1. (sentencing court eligibility determination).

Determining eligibility is a multi-step process. First, the defendant cannot have a disqualifying conviction. The statutes prohibit eligibility for convictions of crimes under Wis. Stat. ch. 940 and some crimes in Wis. Stat. ch. 948. *See* Wis. Stat. §§ 302.05(3)(a)1.; 973.01(3g). Second, the circuit court decides whether to grant eligibility to a defendant who does not have a disqualifying conviction. Wis. Stat. §§ 302.05(3)(a)2. and 973.01(3g).

Possession of child pornography in Wis. Stat. § 948.12 is not a disqualifying conviction such that a circuit court must move to the second step and exercise its discretion as to eligibility. Wis. Stat. §§ 302.05(3)(a)1.; 973.01(3g) (child pornography not a disqualifying crime).

To fulfill the statutory obligations, a circuit court “must state whether the defendant is eligible or ineligible for the program,” but the statute does not “require completely separate findings on the reasons for the eligibility decision, so long as the overall sentencing rationale also justifies the [earned release] determination.” *Owens*, 291 Wis. 2d 229, ¶ 9. One factor a court necessarily considers is whether the defendant has an alcohol or drug addiction. *State v. Johnson*, 2007 WI App 41, ¶ 16, 299 Wis. 2d 785, 730 N.W.2d 661.

When a defendant seeks appellate review of a circuit court’s discretionary eligibility determination, this Court presumes the circuit court acted reasonably. *Owens*, 291 Wis. 2d 229, ¶ 7. An appellate court is mindful of the “strong public policy against interfering with the trial court’s sentencing.” *Id.* It must affirm when the circuit court relied on appropriate law and the decision was based upon the facts in the record. *Id.*

B. This Court should conclude the circuit court reasonably exercised its discretion postconviction after it corrected an error at the sentencing hearing as to eligibility.

The circuit court did not err when it issued a postconviction order denying Rector's request for earned release in a substance abuse program. The court corrected an error that had occurred during the sentencing hearing and used the postconviction proceeding to explain its discretionary decision to deny participation in the earned release substance abuse program.

Here, Rector's alcohol use had not been a predominant concern during the sentencing hearing. The presentence investigation (PSI) identified Rector's alcohol use at a frequency around once per week to about twice a month. (R. 19:7, 20.) Although Rector's wife had identified concerns with his alcohol consumption, (R. 19:7), and the PSI suggested "he may have substance abuse problems and may benefit from substance abuse treatment intervention of some kind," (R. 19:20), the PSI concluded he "does not appear to be in need of case planning and programming services to address needs pertaining to substance abuse," (R. 19:26). Neither Rector nor his counsel identified alcohol use as a concern during their sentencing arguments. (R. 69:8–13.)

The circuit court then made an error at the sentencing hearing that it later corrected postconviction. At the sentencing hearing, the circuit court had thought Rector's child pornography convictions were a disqualifying offense for earned release eligibility. (R. 69:19.) The court stated that the PSI had identified Rector as ineligible for the earned release substance abuse program. (R. 69:19.) The PSI had incorrectly identified Rector as ineligible for the program. (R. 19:2.) The court made an error of law as a result. (R. 69:19.) But the court remedied the error postconviction.

After the sentencing hearing, Rector filed a postconviction motion seeking earned release eligibility for the program. (R. 39.) He identified the error of law contained within the PSI. (R. 39:2.) Rector asked the circuit court to correct the error, and find him eligible to participate in the earned release substance abuse program. (R. 39.)

Having been alerted to the error in the PSI, the circuit court corrected the legal error in its postconviction ruling. (R. 70:3–4.) It then proceeded to the discretionary question of whether to grant earned release eligibility to participate in the substance abuse program. (R. 70:4–5.) The court explained that it grants eligibility when there is a nexus between the crime and substance abuse: “I only authorize the Substance Abuse Program when it directly goes to the criminogenic factor that caused the crime.” (R. 70:4.) The court concluded that in Rector’s case substance abuse “doesn’t address the criminogenic factors and therefore the Court is not gonna grant the relief and will deny the motion.” (R. 70:5.) The court entered a postconviction order denying Rector’s motion that had sought earned release eligibility in the substance abuse program. (R. 46.)

The *Owens* decision is very instructive for this Court’s review due to its legal and factual similarities to Rector’s case. *Owens*, 291 Wis. 2d 229. Both *Owens* and this appeal involve circuit courts making a misstatement of law at the sentencing hearing. In *Owens*, the court had stated the defendant was ineligible for the earned release program because of his age even though the statute contains no age requirement. *Id.* ¶ 3. Here, the court incorrectly identified Rector as statutorily ineligible as incorrectly stated in the PSI. (R. 19:2; 69:19.) In both cases, the defendants pursued postconviction relief and each circuit court exercised discretion denying eligibility to participate after correcting a legal error that had occurred during the sentencing. In *Owens*, the circuit court was aware

of the defendant's substance abuse history, but found the gravity of the offense and need for public protection more compelling sentencing factors than earned release, especially because the defendant had not addressed his substance abuse problems in the past. *Owens*, 291 Wis. 2d 229, ¶¶ 10–11. Here, Rector had some, though not extensive, substance abuse issues. (R. 19:20, 26.) The circuit court's greater concern at sentencing was Rector's revictimization of children through his possession of pornography and it structured a sentence to deter such crimes. (R. 69:14, 17.)

This Court should affirm the circuit court order denying Rector's postconviction motion. In *Owens*, the court of appeals affirmed the circuit court's discretionary denial of earned release eligibility in the substance abuse program. *Owens*, 291 Wis. 2d 229, ¶ 11. This Court should do the same here.

C. This Court should conclude the circuit court did not have a preconceived sentencing policy to deny earned release eligibility in the substance abuse program.

The circuit court did not impose a preconceived sentencing policy in denying Rector's eligibility to participate in the earned release substance abuse program. Rector misconstrues the court's statements, alleging such statements reflect a prohibitive preconceived policy barring program eligibility participation for possession of child pornography crimes. (Rector's Br. 7–9.) He argues that the court's statements ran afoul of *State v. Ogden*, 199 Wis. 2d 566, 544 N.W.2d 574 (1996). (Rector's Br. 7–9.) Rector is wrong.

In *Ogden*, this Court concluded that a circuit court fails to properly exercise its discretion when it applies a preconceived sentencing policy. *Ogden*, 199 Wis. 2d at 568–71. Rector inaccurately asserts that *Ogden* applies here, alleging the circuit court prohibited participation in the

earned release substance abuse program under a policy to exclude eligibility for crimes of child pornography possession. (Rector's Br. 7–9.) But the circuit court never made such a statement.

The circuit court explained that it authorizes earned release eligibility to the program when there is a nexus between substance abuse and “the criminogenic factor that caused the crime.” (R. 70:4.) The court observed that such a direct link exists in crimes such as operating while intoxicated. (R. 70:4.) But the court continued that it did not limit eligibility participation to crimes where substance use was an element of the offense. The court offered crimes of domestic violence as an example where eligibility participation may be granted depending on the underlying facts of the case. (R. 70:4.) The court found that in Rector's case substance abuse was not linked to the criminogenic factors that contributed to his crimes. (R. 70:5.)

In the circuit court, Rector did not allege substance abuse contributed to his possession of child pornography. At the sentencing hearing, defense counsel focused his argument on how Rector may have possessed child pornography, but “there has been no indication that he has ever followed up on any of this particular fantasy life of his.” (R. 69:9.) Even when program eligibility was the focus of a postconviction hearing, Rector's counsel offered little more than the conclusory statement that “Mr. Rector has informed me that he has a substance abuse disorder and needs for treatment and he's . . . going to get treatment of some sort.” (R. 70:3.) He offered essentially the same general statement in his postconviction motion that the “Department of Corrections has identified Mr. Rector as having a need for alcohol treatment.” (R. 39:1.)

Now on appeal, Rector offers no greater specificity than he offered in the circuit court. He makes a conclusory statement to this Court that “the PSI gives ample reason to believe he has an alcohol problem that contributes to his criminal risk.” (Rector’s Br. 8 (citing R. 19:7, 17, 20, 24).) But the PSI refutes such a claim.

The PSI stated that Rector “does not appear to be in need of case planning and programming services to address needs pertaining to substance abuse.” (R. 19:26.) Rector identified no substance abuse problem, identifying that he wanted to avoid using substances to cope. (R. 19:17, 20.) Rector’s mother similarly stated she “was not aware of a substance abuse history on the defendant’s behalf.” (R. 19:7.) And, while Rector’s wife had expressed concern about his alcohol use because he does “stupid crap” and “doesn’t remember half the crap,” she could only provide an example of it presenting a problem in an earlier operating while intoxicated (OWI) arrest. (R. 19:7.) She “was more concerned about the potential for the defendant’s use of alcohol to spiral out of control” because “she grew up around alcoholics and she did not want him to go down that route.” (R. 19:7.) The PSI observed that Rector had reduced alcohol use to around once a week to about twice a month. (R. 19:7, 20.) At most, the PSI only identified “some kind” of a “[p]robable” substance abuse concern. (R.19: 20, 24.)

The PSI contains no statement that any alcohol problem contributed to his criminal behavior. He had no prior criminal record. (R. 19:9.) He had forfeitures citations for a first offense OWI and operating without a license. (R. 19:10.) Rector’s first criminal convictions arose after he amassed a large collection of child pornography during his separate downloads (R. 19:3; 69:3), resulting in the five separate convictions (R. 22:1). But in describing these crimes, the PSI never stated Rector possessed or viewed child pornography in

connection with any alcohol use. (R. 19:3–5.) There is no suggestion in the PSI's description of the offenses that alcohol use played any role in his crimes.

The circuit court reasonably exercised its discretion denying eligibility participation in the earned release substance abuse program. Rector's position lacks fidelity to the sentencing discretion of circuit courts. He essentially argues that if he can establish the presence of some concern with his alcohol use, then the circuit court should have authorized eligibility participation in the earned release substance abuse program. But such a standard removes precisely the discretionary decision-making left to the circuit court.

This Court should affirm the circuit court's postconviction order denying Rector's motion. The court did not have a preconceived sentencing policy to exclude defendants convicted of possession of child pornography from participating in the earned release substance abuse program. But if this Court concludes the circuit court did erroneously exercise its discretion, the correct course of action is to reverse the postconviction order and remand so the circuit court may properly exercise its discretion. *King v. King*, 224 Wis. 2d 235, 254, 590 N.W.2d 480 (1999). Here, a remand is unnecessary because the circuit court properly exercised its discretion.

CONCLUSION

This Court should affirm the postconviction order that denied Rector's motion for eligibility to participate in the earned release substance abuse program.

Dated this 5th day of April 2022.

Respectfully submitted,

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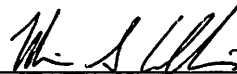
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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2352 words.

Dated this 5th day of April 2022.



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**CERTIFICATE OF COMPLIANCE WITH
WIS. STAT. § (RULE) 809.19(12) (2019-20)**

I hereby certify that:

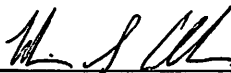
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12) (2019-20).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 5th day of April 2022.



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