

**FILED
04-19-2022
CLERK OF WISCONSIN
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.

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

REPLY BRIEF

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ARGUMENT

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

As Rector noted in his opening brief, the circuit court initially denied him eligibility for the substance abuse and challenge incarceration programs because it had been informed—incorrectly—that the statutes excluded him from these programs. In its response, the state agrees that this was error. App. 4-5; Resp. 20-21.

But, the state says, the circuit court's remarks at the postconviction hearing corrected its earlier error and, what's more, demonstrated a sound exercise of its discretion to deny Rector eligibility. Resp. 20-21.

The state's argument ignores the bulk of the circuit court's postconviction comments and reads into the remainder words the court did not utter. Here's the entirety of the court's material remarks:

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....

[T]he problem in this case as I indicated at sentencing is it's not a substance abuse crime.

It doesn't address the criminogenic factors and therefore the Court is not gonna grant the relief and will deny the motion.

(70:4-5; App. 7-8).

The circuit court's only comment specific to Rector's case was that his convictions were for possessing child pornography, which in the court's view is "not a substance abuse crime." This division of statutory offenses into "substance abuse crime[s]" (like operating while intoxicated) and non-"substance abuse crime[s]" (like possessing child pornography) is a pre-conceived, blanket sentencing policy of the sort condemned in *State v. Ogden*, 199 Wis. 2d 566, 571, 544 N.W.2d 574 (1996).

But the state's brief simply doesn't acknowledge the court's "substance abuse crime" rubric. It says Rector "misconstrues" the court's remarks, Resp. 9, but doesn't point to any suggestion in those remarks that the court was considering the circumstances of Rector's individual case. Though the court allowed that domestic violence offenses *might* involve substance abuse as a contributing factor, its only comment about the case (and the defendant) before it was "[i]n this case it's a possession of child pornography." This solitary remark reflects a preconceived sentencing policy.

Instead of defending the sentencing court's actual, stated reasons for denying substance abuse program eligibility, the state offers other reasons why

a court *could* have denied eligibility. It suggests that the court's comments about a domestic-violence offense potentially being alcohol-related were meant to highlight the lack of a factual connection in Rector's case. Resp. 10. There's no support for this reading—again, concerning the case before it, the court mentioned only the name of the offense. Its comments about domestic abuse simply highlighted the differences between the types of offenses it considered “substance abuse crimes” and Rector's offense of possessing child pornography.

The state also offers a fresh argument—never made to the sentencing court—that Rector is not appropriate for the program. It concludes that “Rector had some, though not extensive, substance abuse issues.” Resp. 9. This may be the state's judgment; but the DOC has determined that Rector's issues are such that he requires treatment (and this information was presented to the court). (57:1). More importantly, there's no indication that the state's proffered justifications were on *the court's* mind: regarding Rector, its only comment was about the statutory offense he'd committed—which, it implied, categorically ruled out SAP eligibility.

Thus, this case is not like *State v. Owens*, 2006 WI App 75, ¶¶10-11, 291 Wis. 2d 229, 713 N.W.2d 187, on which the state relies. In *Owens*, the circuit court gave an individualized explanation of why it judged the program inappropriate; here the circuit court offered no justification other than a blanket statement

about Rector's statutory offense not being a "substance abuse crime."

Instead of exercising its discretion, here the circuit court relied on an unlawful preconceived sentencing policy, just as the court had in *Ogden*. Just as it did in *Ogden*, this Court should reverse.

CONCLUSION

Because the circuit court refused to make 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 19th day of April, 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 19th day of April, 2022.

Signed:

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