

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 9, 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 Nos. 2008AP1229-CR
2008AP1230-CR
2008AP1231-CR**

**Cir. Ct. Nos. 2001CF3519
2001CF3562
2001CF3558**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VINCENT EDWARD WOLLERT,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ and JEFFREY A. KREMERS, Judges. *Affirmed.*

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

¶1 PER CURIAM. Vincent Edward Wollert appeals from three amended judgments and three postconviction orders denying his petitions for

eligibility for the Earned Release Program (“Program”).¹ We conclude that the trial court properly exercised its discretion in determining that Wollert was ineligible for the Program because early release was inconsistent with the trial court’s intent when it imposed sentence. Therefore, we affirm.

¶2 Wollert was convicted in three separate cases of a total of five counts of armed robbery with the threat of force for robbing pharmacies in five separate incidents in which he stole cash, checks and narcotics, most particularly Oxycontin. The trial court imposed sentence in these three cases for these five offenses in a consolidated sentencing proceeding during which four additional uncharged robberies were read-in for sentencing purposes. The trial court imposed five concurrent sentences of twenty-seven years; each consisted of seventeen- and ten-year respective concurrent periods of initial confinement and extended supervision to run consecutive to any other sentence.

¶3 Wollert was sentenced for these offenses on October 11, 2001. At that time, the trial court was not required to and did not determine Wollert’s eligibility for the Program. *See* WIS. STAT. § 973.01(3g) (eff. July 26, 2003); 2003 Wis. Act 33, § 2749.

¶4 The Program, also known as the Wisconsin Substance Abuse Program, was created in 1989. *See* WIS. STAT. § 302.05 (1989-90). To participate, a defendant must satisfy the statutory criteria for eligibility of WIS.

¹ The Honorable Richard J. Sankovitz was the trial court judge who originally imposed sentence in these three cases. The Honorable Jeffrey A. Kremers was the trial court judge who denied Wollert’s petitions seeking eligibility for the Earned Release Program. At that time, Judge Kremers also ordered the correlative amendment of the three judgments of conviction to reflect that ineligibility determination.

STAT. § 302.05(3)(a) (2007-08), and be “substantively” eligible pursuant to § 302.05(3)(e) (2007-08).² The statutory eligibility requirements are straightforward and readily determinable. Either the Department of Corrections (“Department”) or the trial court may determine whether a convicted defendant is statutorily eligible. “Substantive” eligibility requires the trial court to exercise its discretion to determine whether a particular convicted defendant is well-suited to participate in the Program, and appropriate to receive the potential benefit of early release from confinement.³ See WIS. STAT. § 973.01(3g) (eff. July 26, 2003); *State v. Steele*, 2001 WI App 160, ¶12, 246 Wis. 2d 744, 632 N.W.2d 112. For defendants such as Wollert, who were convicted of a crime subsequent to the creation of the Program in 1989 but did not receive eligibility determinations when sentenced, § 302.05(3)(e) authorizes them to petition the trial court for a substantive eligibility determination after being found statutorily eligible by the Department.

¶5 After the Department determined Wollert’s statutory eligibility for the Program, Wollert filed three petitions seeking an eligibility determination from the trial court. The trial court declared Wollert ineligible in all three instances and denied the petitions. Wollert appeals from these three orders, which we consolidate on appeal for briefing and dispositional purposes, to challenge the trial court’s exercise of discretion.

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

³ An eligible inmate, who successfully completes the Program, is released early from prison to extended supervision. See WIS. STAT. § 302.05(3)(c)2. The time remaining on the confinement portion of the inmate’s sentence is then converted to extended supervision so the total sentence is not reduced. See *id.*

¶6 Eligibility for these programs is discretionary, applying the same criteria as those considered when imposing sentence. *See Steele*, 246 Wis. 2d 744, ¶¶8-11. The primary sentencing factors are the gravity of the offense, the character of the offender, and the need for public protection. *State v. Larsen*, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The weight the trial court assigns to each factor is a discretionary determination. *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). An exercise of discretion requires a reasoned approach and a reasonable outcome. *See Larsen*, 141 Wis. 2d at 426-28.

¶7 Wollert challenges the trial court's exercise of discretion. Preliminarily, the trial court judge who sentenced Wollert was not the same judge who decided Wollert's eligibility petitions. The trial court denied Wollert's eligibility petitions because: (1) "[t]he gravity of the crime militates against allowing participation"; (2) "[t]he need to punish the defendant necessitates confinement"; and (3) "[t]he defendant needs to be confined to protect the community." To determine whether the trial court properly exercised its discretion, we review the transcript of the sentencing for these five convictions.

¶8 The sentencing court considered these offenses as serious by their effect on the victims and the risk they created. The sentencing court described the victims' "terror" because Wollert was wielding a weapon. It also explained the risk: "walk[ing] into a store or a gas station or any place with a gun and you don't know what is going to happen." At sentencing, the trial court told Wollert that it also considered

[t]he crime[s are] obviously aggravated by how many times you did this. And the thing that is most aggravating to a court about this is that you had the opportunity over and over again, probably hundreds of

times to reconsider what you were doing. And ... you always made the wrong choice.

¶9 The sentencing court also addressed the need for punishment. It explained, “this was a very organized and methodological and deliberate repetition of a very dangerous crime. And [the trial court] think[s] a person who commits a crime like that deserves punishment, even if they could be rehabilitated within a shorter period of time.”

¶10 The sentencing court also addressed the need to protect the community, commenting to Wollert that “[t]he rest of our community needs the assurance that anybody who’s willing to go to these lengths will receive the appropriate punishment.” In fact, the trial court explained directly to Wollert at sentencing that

it’s appropriate that you be in prison and until you have reached a point in your life which [the trial court] gauge[s] to be in your mid 50’s when you cannot be the risk to the community that you are here today, and when you have served a sufficient time for us to be satisfied that you forfeited the rights that [the trial court] mentioned before. [The trial court] think[s] that sentencing you to prison until the time when you are in your mid 50’s followed by a period of time that we can watch you and make sure that you have the appropriate incentive to follow the law that would last until a normal retirement time is appropriate in these cases.

¶11 Wollert contends that it was the sentencing court’s intent “to sentence him to a substance abuse program which was not then available which was then frustrated by the postconviction court’s denial of the [Department]’s grant of Wollert’s admission into the [Program.]” We disagree.

¶12 At sentencing, the court told Wollert:

Of course, when we sentence we consider not only the seriousness of the crime, we consider what is necessary to rehabilitate you and your circumstance and we consider what is necessary to protect the community.... If our sole goal at sentencing was to put you on ice long enough to make sure that your addiction is no longer a motivator for further crime we'll not need anywhere near the total length of time I have to work here with.... We probably wouldn't even need the years if all we were talking about was solving your addiction. I further believe that prison is not the best place to work on addictions like this. In fact my belief is that you will get little help with your addiction other than help with abstaining from the drug by virtue of being locked up. And, so, therefore I don't want my sentence to be viewed as some kind of response to addiction.

I also want it to be clear that this is not about Oxycontin. If we had cocaine on the shelves of pharmacies these kinds of robberies would happen over and over again. This is about a person who has a problem and decides to solve it through violence rather than solving it the way that any other law abiding person would solve it.

Accordingly, while I don't believe that it would take a lengthy period of time to rehabilitate you, I think it is appropriate that you spend a longer period of time than that in prison. These offenses were so wrong and so serious that you have forfeited your liberty. You have cut yourself off from the rest of us by how dangerously you acted and by how deliberately you terrorized other people.

While mindful of his addiction, the sentencing court was not sentencing Wollert for treatment, but for punishment and for community protection. The sentencing court also commented that, despite having "300 years to work with," in referring to the maximum potential penalty for these offenses, it sought to confine Wollert, who was then thirty-eight, until he was "in [his] mid 50's." It was a proper exercise of discretion for the trial court to determine that the sentencing court, in imposing five concurrent seventeen-year periods of initial confinement, would not have endorsed Wollert's participation in the Program, where early release was a consequence. *See* WIS. STAT. § 302.05(3)(c)2.

¶13 The trial court properly exercised its discretion in denying Wollert's eligibility for the Program. Reviewing the transcript, it is reasonable to conclude that the sentencing court was not inclined to offer Wollert an opportunity for early release, nor was its principal purpose in imposing sentence to treat Wollert's substance abuse problems. The sentencing transcript belies Wollert's contention that declaring him ineligible for the Program frustrated the sentencing court's intent.

By the Court.—Judgments and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

