

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 18, 2006**

Cornelia G. Clark  
Clerk of Court of Appeals

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**Appeal No. 2005AP947-CR**

Cir. Ct. No. 2003CF3515

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**ANDRE SINCLAIR FULLER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 CURLEY, J. Andre Sinclair Fuller appeals from the judgment of conviction entered after he pled guilty to taking and driving a vehicle without the owner's consent and fleeing from an officer. He also appeals from the order denying his postconviction motion. Fuller contends that the trial court erroneously

denied him eligibility for the Earned Release Program because it mistakenly concluded that he did not have a drug problem. He also contends that the trial court failed to exercise its discretion when it denied his postconviction motion seeking modification of the court's determination of eligibility using a form order. Because we conclude that the trial court's determination that Fuller was ineligible for the Earned Release Program was not erroneous and that the trial court properly exercised its discretion in denying Fuller's postconviction motion, we affirm.

### I. BACKGROUND.

¶2 According to the criminal complaint, on June 15, 2003, Fuller demanded that seventy-six-year-old Gordon Resler exit his car, forcefully obtained the keys to Resler's car while armed with a knife, and drove off. Fuller was chased by police, and during the chase he ran a red light, was hit by another car, and hit a wooden power line pole. He was eventually arrested after exiting the car and trying to flee on foot. Fuller was charged with operating a vehicle without the owner's consent and fleeing from an officer, contrary to WIS. STAT. §§ 943.23(2) and 346.04(3) (2003-04).<sup>1</sup> At the time of these crimes, Fuller was on extended supervision in connection with previous robbery and forgery convictions. Fuller agreed to plead guilty to both counts,<sup>2</sup> and the State agreed to recommend a sentence of two years of initial confinement and two years of extended supervision for operating a vehicle without the owner's consent, and one year, six months of

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

<sup>2</sup> Fuller was originally charged with a third count, armed robbery. Pursuant to the plea agreement, in exchange for Fuller pleading guilty to operating a vehicle without owner's consent and fleeing from an officer, the State filed an amended information dismissing the armed robbery charge.

initial confinement and two years of extended supervision for fleeing an officer, to be served concurrently. Fuller's defense attorney joined the State's recommendation.

¶3 Fuller was sentenced on May 12, 2004. In sentencing Fuller, the court was also obligated to determine whether Fuller would be eligible for the Wisconsin Substance Abuse Program, the so-called Earned Release Program, under WIS. STAT. § 302.05. Because an individual qualifies for the program only if he or she has a drug problem, it was necessary for the court to ascertain whether Fuller had drug or alcohol issues. The court apparently suspected that Fuller had a drug or alcohol problem, because statements such as the following were asked: "Do you have a drug problem or alcohol problem? You have to have some problem that you're committing these robberies. Even though you're not convicted of a robbery in this case, basically that's the underlying fact[] here. There's some reason you got a knife...."; and "Well, what's the problem here? There has to be a drug or alcohol problem. There's something underlying this. There's some reason you're doing this." Fuller, however, denied that drug or alcohol use was a reason for his crimes and instead gave other reasons, including peer pressure. The court then specifically asked Fuller: "I have to also determine if you're eligible for Boot Camp or the Earned Release Program, and you have to have a drug or alcohol problem to be eligible. I guess you don't have one you're telling me, correct?" Fuller responded: "I mean I've been to my whole time on extended supervision I had a marijuana problem, but that stopped due to the fact that I would have been—was going to get revoked when I got locked up for this."

¶4 In sentencing Fuller, the trial court observed that Fuller's offense was "extremely serious," and could have led to a sentence of more than forty

years. The court called it “disturbing” that Fuller had taken the car of a seventy-six-year-old man and driven it through a red light, and emphasized the danger involved in eluding police, which had endangered him, the public, and the officers who were involved. Commenting on Fuller’s prior criminal record, the court called it “bad,” and noted that although Fuller was only twenty-one years old, he had already been in prison and was on extended supervision when he committed the crime in question. The court noted the need to protect the community from Fuller, stating “obviously the community has to be protected from someone who gets out of prison and commits another offense.” The court also considered the need for punishment, and stated that “[t]here has to be a punishment aspect” and called the recommended sentence “light” and “a slap on the wrist.”

¶5 The court ultimately chose not to follow the State’s recommendation and instead sentenced Fuller to two years of initial confinement, followed by two years of extended supervision for operating a vehicle without the owner’s consent, and the maximum sentence, one year and six months of initial confinement, followed by two years of extended supervision for fleeing from an officer, to be served consecutively. The court explained that concurrent sentences would be inappropriate as it “would unduly depreciate the serious nature of the offense and also take away from [Fuller’s] prior record.” With respect to the Earned Release Program, the court stated: “You’re not eligible for Boot Camp, the Challenge Incarceration program, or the Earned Release Program because of your statement you have no drug problem, and you’re only eligible if there’s a drug problem.”

¶6 On March 11, 2005, Fuller filed a postconviction motion asking the court to reconsider its determination that he was ineligible for the Earned Release Program. Fuller argued that the court’s conclusion was based on the mistaken belief that he did not have a drug problem, when in fact he did. He provided

documents from the Department of Corrections showing that while on extended supervision for his prior crimes, he had tested positive for marijuana on five occasions and had often failed to attend drug treatment. He claimed that he was confused during the sentencing hearing “because the court asked more than one question at a time, interspersed with questions about [his] prior convictions” and that “[a]s a result of this confusion and [his] limited command of the English language, his answers conveyed the impression that, apart from some marijuana usage he did not have a drug problem.” Arguing that the records from the Department of Corrections showed that he was sentenced based on inaccurate information and because due process requires that he be sentenced on the basis of accurate information, he asked the court to declare him eligible for the Earned Release Program.

¶7 The court denied the motion without a hearing. On March 14, 2005, the court issued an order using a form entitled “Order on Petition for Eligibility for Earned Release Program,” with the word “(Reconsideration)” handwritten underneath. On the form, boxes next to the following statements were checked, reflecting the court’s determination for why Fuller was not eligible for the Earned Release Program: “The court already made this determination at sentencing and declines to change it”; “The gravity of the crime militates against allowing participation”; and “The need to punish the defendant necessitates confinement.” Fuller now appeals.

## II. ANALYSIS.

¶8 Fuller maintains that the trial court made its determination with respect to eligibility for the Earned Release Program based on inaccurate information and that his due process rights were violated because the trial court

subsequently failed to exercise discretion when it did not explain why it denied his postconviction motion requesting modification of the Earned Release determination.

¶9 Sentencing is within the discretion of the trial court, and on appeal this court reviews only whether the trial court erroneously exercised that discretion. *State v. Spears*, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999). There is a “strong public policy against interference with the sentencing discretion of the trial court and sentences are afforded the presumption that the trial court acted reasonably.” *State v. Harris*, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). The primary factors the trial court must consider in imposing sentence are: (1) the gravity of the offense, (2) the character of the offender, and (3) the need for protection of the public. *Id.* at 623. In addition, if appropriate, the court may also consider other factors including the defendant’s prior record, need for “close rehabilitative control,” aggravated nature of the crime, *id.* at 623-24, and punishment of the defendant, *State v. Gallion*, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. The weight to be given to each of the factors is within the trial court’s discretion, and after considering all of the relevant factors, the sentence may be based on any one of the primary factors. *State v. Krueger*, 119 Wis. 2d 327, 338, 351 N.W.2d 738 (Ct. App. 1984).

¶10 The exercise of a sentencing court’s discretion requires a demonstrated process of reasoning based on the facts of the record and a conclusion based on a logical rationale. *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). Even if the trial court fails to adequately set forth its reasons for imposing a particular sentence, the reviewing court will not set aside the sentence for that reason alone, but is “obliged to search the record to determine

whether in the exercise of proper discretion the sentence imposed can be sustained.” *Id.* at 282.

¶11 A defendant also has a constitutional due process right to be sentenced based on accurate information. *State v. Lechner*, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998). A defendant alleging that he or she was sentenced based on inaccurate information must establish by clear and convincing evidence “that the information was inaccurate and that the court relied on it.” *State v. Groth*, 2002 WI App 299, ¶122, 258 Wis. 2d 889, 655 N.W.2d 163 (citation omitted). We accept the circuit court’s findings of fact unless they are clearly erroneous, Wis. STAT. § 805.17(2), but whether a constitutional violation has occurred is a question of law, *State v. Littrup*, 164 Wis. 2d 120, 126, 473 N.W.2d 164 (Ct. App. 1991).

¶12 In addition, when a person is convicted and sentenced under the truth-in-sentencing guidelines, “the court shall, 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 program....” WIS. STAT. § 973.01(3g);<sup>3</sup> *see* WIS. STAT. § 302.05(3)(a);<sup>4</sup> *State v. White*, 2004 WI App 237,

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<sup>3</sup> WISCONSIN STAT. § 973.01(3g) provides:

**(3g) EARNED RELEASE PROGRAM ELIGIBILITY.** When imposing a bifurcated sentence under this section on a person convicted of a crime other than a crime specified in ch. 940 or s. 948.02, 948.025, 948.03, 948.05, 948.055, 948.06, 948.07, 948.075, 948.08, or 948.095, the court shall, 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 program under § 302.05 (3) during the term of confinement in prison portion of the bifurcated sentence.

<sup>4</sup> WISCONSIN STAT. § 302.05(3)(a) provides:

(continued)

¶¶9-11, 277 Wis. 2d 580, 690 N.W.2d 880. The Earned Release Program is a substance abuse program administered by the Department of Corrections. *See* WIS. STAT. § 302.05. “[A] judge may deny eligibility to a defendant even if the defendant meets all of the other eligibility criteria” because “the legislature intended to provide greater judicial discretion for judges imposing bifurcated sentences and considering [Earned Release Program] eligibility.” *State v. Lehman*, 2004 WI App 59, ¶16, 270 Wis. 2d 695, 677 N.W.2d 644.<sup>5</sup> If the trial court finds the defendant eligible, it is then up to the Department of Corrections to determine whether he or she will actually participate in the program. Sec. 302.05(3)(c). If an inmate completes the Earned Release Program, the period of initial confinement remaining of his or her sentence is converted into extended supervision, and he or she is released to extended supervision within thirty days. *Id.* Completion of the program does not shorten the total length of the sentence, rather it merely shortens the time the inmate spends in initial confinement. *Id.*

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In this subsection, “eligible inmate” means an inmate to whom all of the following apply:

1. The inmate is incarcerated regarding a violation other than a crime specified in ch. 940 or s. 948.02, 948.025, 948.03, 948.05, 948.055, 948.06, 948.07, 948.075, 948.08, or 948.095.
2. If the inmate is serving a bifurcated sentence imposed under s. 973.01, the sentencing court decided under par. (e) or s. 973.01 (3g) that the inmate is eligible to participate in the earned release program described in this subsection.

<sup>5</sup> Although *State v. Lehman*, 2004 WI App 59, ¶16, 270 Wis. 2d 695, 677 N.W.2d 644, applied specifically to the Challenge Incarceration Program, in *State v. White*, 2004 WI App 237, 277 Wis. 2d 580, 690 N.W.2d 880, we recently held that “[t]o the extent that the [Challenge Incarceration Program] and [Earned Release Program] provisions are linked by nearly identical language, similar subject matter and parallel function in the Truth-in-Sentencing scheme, they are related statutes whose meaning must be harmonized.” *Id.*, ¶10.



¶13 Fuller first argues that the court’s initial determination that he was ineligible for the Earned Release Program was made based on inaccurate information because he did have a drug problem. In support of his contention, he asserts that “[t]he court clearly stated that it was making its finding that Mr. Fuller was not eligible for the earned release because Mr. Fuller had stated that he did not have a drug problem,” and claims that in reality he “stated that he did have a drug problem when he was on supervision.” He maintains that he exposed the trial court’s error in his postconviction motion by providing documentation from the Department of Corrections to support the assertion. On this basis, he contends that there is no evidence that the trial court actually considered the arguments he raised when it denied his motion by merely checking boxes on a form, and that, as a result, the trial court’s failure to explain its reasoning was a failure to exercise discretion, amounting to a violation of his due process rights. We disagree.

¶14 At the sentencing hearing, the court specifically told Fuller that he could be eligible for the Earned Release Program only if he had a drug problem. The court asked Fuller whether he did, and Fuller responded that while on extended supervision he had problems related to his use of marijuana, but that his drug problem ceased as soon as he was re-incarcerated on the charges in this case: “my whole time on extended supervision I had a marijuana problem, but that stopped due to the fact that I would have been—was going to get revoked when I

got locked up for this.”<sup>6</sup> The court clearly suspected that drugs or alcohol could have been the reason for Fuller’s criminal behavior, and repeatedly asked Fuller whether that was the case. Still, Fuller insisted that drugs or alcohol had nothing to do with his crimes. Nonetheless, the court clearly knew, at the very least through Fuller’s own admission, that while he was on extended supervision Fuller used marijuana.

¶15 We agree with Fuller that the specific reason the court articulated for finding him ineligible for the Earned Release Program was that it concluded that he had been unable to meet the most basic requirement: a drug problem. We also agree that that determination was based on Fuller’s own statement disputing that he had a drug problem. We disagree, however, that Fuller’s postconviction motion or the records he submitted along with that motion do anything to change this. The records from the Department of Corrections show that while on extended supervision, Fuller tested positive for marijuana on five occasions, and missed drug treatment on four occasions. The drug tests took place between December 3, 2002, and March 17, 2003, and he missed treatments between January 23, 2003, and March 20, 2003. The offense in this case took place on June 15, 2003, and Fuller was sentenced on May 12, 2004. Drug tests and missed

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<sup>6</sup> In his postconviction motion, Fuller claimed that he was confused during the sentencing hearing “because the court asked more than one question at a time, interspersed with questions about Mr. Fuller’s prior convictions,” and that “[a]s a result of this confusion and [his] limited command of the English language, his answers conveyed the impression that, apart from some marijuana usage he did not have a drug problem.” Although Fuller does not explicitly reraise this argument on appeal, because he challenges the denial of this postconviction motion, we note that Fuller never explained exactly how his statement “my whole time on extended supervision I had a marijuana problem, but that stopped due to the fact that I would have been— was going to get revoked when I got locked up for this,” shows confusion, a limited command of the English language, or implies something other than that Fuller’s marijuana use, and therefore the problem, ceased as soon as he was taken into custody.

treatments from three months or more before the offense and from more than a year before sentencing do not demonstrate that Fuller has a drug problem and is now in need of treatment.<sup>7</sup> The records do nothing more than corroborate what appears undisputed, what Fuller himself affirmed at the sentencing hearing, and of which the court was well aware: that while on extended supervision Fuller used marijuana. Most importantly, the records do not disprove Fuller's other statement, that his alleged drug problem ended as soon as he was "locked up" for this crime. The records thus do not show that the court's determination was based on inaccurate information. *See Groth*, 258 Wis. 2d 889, ¶22.

¶16 We are also unpersuaded by Fuller's argument that the use of a form order to affirm the court's previous determination implies that the court failed to exercise discretion. Even if Fuller were able to show that the trial court's conclusion that he lacked a drug problem was erroneous, the court properly exercised its discretion in denying his postconviction motion. The Earned Release Program is not a program in which an inmate has a right to participate. Rather, the Earned Release Program is merely a program for which the court must, at sentencing, declare a defendant either eligible or ineligible. The court determines eligibility "as part of the exercise of its sentencing discretion," WIS. STAT. § 973.01(3g), and consequently, "a judge may deny eligibility to a defendant even

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<sup>7</sup> In his reply brief, Fuller claims that the records he submitted along with this postconviction motion do show that Fuller has a drug problem because "drug use plus failed treatment equals continuous problem," and "[d]rug problems don't just go away without treatment." While it is possible that these assertions could be true, Fuller has provided nothing to substantiate them, and they are nothing more than conclusory statements. Such statements in particular do not make the records from the Department of Corrections relevant for purposes of showing that Fuller currently has a drug problem that warrants treatment.

if the defendant meets all of the other eligibility criteria,” *Lehman*, 270 Wis. 2d 695, ¶16.

¶17 At the sentencing hearing, the trial court, as explained, focused on Fuller’s own statements that steadfastly denied that he had a drug problem and concluded that Fuller could not be found eligible for a substance abuse program because he was unable to satisfy the most basic requirement—a drug problem. Thus, when ruling on Fuller’s postconviction motion, even assuming that Fuller had been able to show that the trial court incorrectly concluded that he lacked a drug problem, it was still within the court’s discretion to deny the motion. *See id.*

¶18 In denying Fuller’s postconviction motion, the trial court went further, however, and considered two other factors beyond the threshold question of a drug problem. In addition to denying the motion because it declined to change its original determination, the court provided two additional reasons for refusing to find Fuller eligible for the Earned Release Program: “The gravity of the crime militates against allowing participation”; and “The need to punish the defendant necessitates confinement.”

¶19 In sentencing Fuller, the trial court provided an extensive explanation for how the gravity of the crime and the need to punish Fuller influenced the sentence. The court called Fuller’s offense “extremely serious,” and found it “disturbing” that Fuller had aggressively taken the car of a seventy-six-year-old man and eluded police. *See Harris*, 119 Wis. 2d at 623. The court felt Fuller’s criminal record, consisting of robbery and forgery convictions, was “bad,” particularly for someone so young. *See id.* The court also explicitly noted that “[t]here has to be a punishment aspect,” calling the recommended sentence “light” and “a slap on the wrist.” *See Gallion*, 270 Wis. 2d 535, ¶40. Given that

the trial court had referred to Fuller's offense as "extremely serious," and emphasized the need for punishment, and in light of the fact that the Earned Release Program is not merely a drug treatment program, but a program that leads to the early release of an inmate who successfully completes it, it is hardly surprising that the court chose not to change its mind and find Fuller eligible. Adding two new justifications for denying Fuller's postconviction motion, both of which it had addressed in detail at Fuller's sentencing hearing, was a proper exercise of discretion by the trial court. *See Lehman*, 270 Wis. 2d 695, ¶16.

¶20 Therefore, because the trial court's determination that Fuller was ineligible for the Earned Release Program was not erroneous, and because the trial court properly exercised its discretion in denying Fuller's postconviction motion, we affirm.

*By the Court.*—Judgment and order affirmed.

Not recommended for publication in the official reports.

