COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2006

Cornelia G. Clark
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 No. 2005AP916-CR **Cir. Ct. No. 2001CF189**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT A. LUDTKE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: DONALD J. HASSIN, JR., Judge. *Affirmed*.

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Scott Ludtke appeals from the order that denied his motion to modify his judgment of conviction to state that he is eligible for the Earned Release Program (ERP). Because we conclude that the circuit court properly denied the motion, we affirm.

¶2 In 2002, Ludtke was convicted of robbery with threat of force with some penalty enhancers and sentenced to twelve years in prison. The sentence is an indeterminate sentence and not one imposed under Truth In Sentencing (TIS), WIS. STAT. § 973.01 (2003-04).[1] Ludtke subsequently moved the circuit court to find him eligible for the ERP under WIS. STAT. § 302.05(3). The ERP provides earlier parole for those inmates who successfully complete the program. Sec. 302.05(3)(b). The circuit court denied the motion, concluding that the statute did not apply to Ludtke because the statute was not retroactive.

¶3 Ludtke argues that WIS. STAT. § 302.05(3)(b) applies to prisoners with indeterminate sentences, and consequently the statute is retroactive. The statute states:

> (b) Except as provided in par. (d), if the department determines that an eligible inmate serving a sentence other than one imposed under [WIS. STAT. §] 973.01 has successfully completed the treatment program described in sub. (1), the parole commission shall parole the inmate for that sentence under s. 304.06, regardless of the time the inmate has served. If the parole commission grants parole under this paragraph, it shall require the parolee to participate in an intensive supervision program for drug abusers as a condition of parole.

Sec. 302.05(3)(b). Because this section of the statute refers to inmates who are serving sentences that were not imposed under § 973.01, we agree that it must apply retroactively and not just to inmates sentenced under the TIS statute. This, however, is not the precise question presented in this appeal.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 The precise issue here is whether Ludtke qualified under the statutes to go to court to seek a judicial declaration of his eligibility for the ERP. The history of the ERP is important to understanding this case. The ERP was in existence prior to the new sentencing laws. *See* WIS. STAT. § 302.05 (2001-02). Under the former ERP statute, the Department of Corrections determined eligibility for the program. *See* § 302.05(1) (2001-02). When the sentencing laws were changed, *see* 2003 Wis. Act 33, the legislature also enacted some changes to the ERP. Under the new procedures, the court determines eligibility for the ERP when it imposes a bifurcated sentence. *See* WIS. STAT. § 973.01(3g). In 2003 Wis. Act 33, § 9310(2), the legislature specifically provides that this section first applies to people sentenced on the effective date of the act. Since Ludtke was not sentenced under the TIS statute, this section does not apply to him.

¶5 Ludtke instead relies on WIS. STAT. § 302.05(3)(b). Under para. (b) the Department of Corrections has the authority to determine eligibility for the ERP, not the courts. Ludtke, therefore, is not entitled under this statute to seek a judicial determination of his eligibility, and the circuit court properly denied his motion. The other paragraphs of the statute, § 302.05(3)(c), (d), and (e), do not apply to Ludtke.[2]

¶6 Ludtke also asserts that the Department of Corrections erred when it determined that he was not eligible for the ERP. Specifically, he argues that the Department does not have the authority to limit his eligibility for the program because he committed a crime involving a gun. The State responds that Ludtke

[2] Paragraphs (c) and (e) of WIS. STAT. § 302.05(3) apply to inmates serving bifurcated sentences, and para. (d) applies to inmates in the intensive sanctions program.

cannot raise this argument on appeal because he did not first raise it in the circuit court. *See* ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983). Ludtke argues that he made some statements that suggested that he was challenging the Department's determination of his eligibility. We question whether these statements were sufficient to indicate to the trial court that he wanted more than a judicial determination of his eligibility.

¶7 Even if Ludtke had properly raised the issue, however, we also agree with the State that he cannot succeed in this case because he must first pursue an administrative appeal. Ludtke responds that because of the nature of the relief he sought, he could not be expected to pursue the issue through the administrative review process. Ludtke is required by statute to exhaust administrative remedies before pursuing a claim concerning the conditions of his confinement in the circuit court. *See* WIS. STAT. § 801.02(7)(b). The ERP is a treatment program administered by the Department of Corrections that bears directly on the conditions of his confinement. This is just the type of matter the statute requires to go through the administrative process before coming to the courts. Consequently, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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