

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 1, 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. 2005AP2580-CR

Cir. Ct. No. 2004CF1328

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEAN C. TREPANIER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: PETER J. NAZE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Dean Trepanier appeals a judgment, entered upon his no contest plea, convicting him of operating while intoxicated, fifth offense. Trepanier also appeals an order denying his motion for postconviction relief. Trepanier argues the trial court erred by concluding he was ineligible for the

earned release program. We reject Trepanier's arguments and affirm the judgment and order.

¶2 An amended Information charged Trepanier with operating after revocation, second offense, and operating while intoxicated and with a prohibited alcohol concentration, both counts as a fifth offense. In exchange for his no contest plea to OWI-fifth, the State agreed to dismiss the remaining charges and cap its sentence recommendation at fifteen months' initial confinement and two years' extended supervision. The circuit court ultimately sentenced Trepanier to eighteen months' initial confinement followed by two years' extended supervision. The court additionally concluded that Trepanier was statutorily ineligible for the earned release program "simply because of his age." Trepanier filed a postconviction motion challenging the court's conclusion regarding his eligibility for the earned release program. The circuit court denied the motion and this appeal follows.

¶3 Trepanier argues the circuit court erroneously exercised its discretion when it ruled that Trepanier was not eligible for the earned release program. Defendants convicted of certain crimes are per se ineligible for the program.¹ However, for all other defendants sentenced under Truth-in-Sentencing, the sentencing court must, as part of its sentencing discretion, determine whether a defendant is eligible for this program. *See* WIS. STAT.

¹ WISCONSIN STAT. § 302.05(3)(a)1. specifies that eligible inmates are those "incarcerated regarding a violation other than a crime specified in ch. 940 or §§ 948.02, 948.025, 948.03, 948.05, 948.055, 948.06, 948.07, 948.075, 948.08, or 948.095." All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

§ 973.01(3g).² We review a court’s exercise of sentencing discretion to determine whether it erroneously exercised that discretion. *State v. Echols*, 175 Wis. 2d 653, 681, 499 N.W.2d 631 (1993).

¶4 Here, the circuit court acknowledged at the postconviction motion hearing that age should not have been the basis for its decision regarding Trepanier’s ERP eligibility. The court concluded, however, that even if Trepanier were medically fit for ERP, it still would have found him ineligible based on his “multiple legal difficulties” and “significant criminal record aside from [OWI-5th].” The court continued:

In terms of his treatment, you know, the earned release program is a limited resource that the State has. And I think the priorities have to be set in terms of people who not only can use treatment ... and would need treatment—but will avail themselves of that treatment. As I noted in my remarks, Mr. Trepanier has had numerous opportunities for treatment in the past and, more ... pertinently in recent years, as recently as 2004.

...

So whether Mr. Trepanier is not eligible because of his medical needs, as indicated in the presentence report or ... based on the findings I made, I’m satisfied that he ... is not eligible for the earned release program.

² WISCONSIN STAT. § 973.01(3g) provides:

When imposing a bifurcated sentence under this section on a person convicted of a crime other than a crime specified in ch. 940 or §§ 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.

¶5 Trepanier nevertheless intimates that the inconsistency between the court's rationale at the sentencing hearing and the postconviction motion hearing is tantamount to an erroneous exercise of discretion. We are not persuaded. The circuit court retained and then exercised its discretion on the issue of ERP eligibility at the postconviction motion hearing. See *State v. Montroy*, 2005 WI App ¶¶17-18, 287 Wis. 2d 430, 706 N.W.2d 145. Any error the court may have made at sentencing was corrected by its proper exercise of discretion at that hearing. In denying Trepanier's postconviction motion, the court considered relevant factors, including Trepanier's past criminal record and treatment history, as well as the limitations on State ERP resources. Because we conclude the court properly exercised its discretion at the postconviction motion hearing, we need not search the record to determine whether the sentencing court's original ERP eligibility determination can be sustained.

By the Court.—Judgment and order affirmed.

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

