

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 15, 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. 2005AP2205-CR

Cir. Ct. No. 2004CF5013

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CRAIG ALLEN COLEMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN DIMOTTO, Judge. *Reversed and cause remanded with directions.*

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

¶1 PER CURIAM. Craig Allen Coleman appeals from a judgment convicting him of one count of robbery by use of force and an order denying his motion for sentence modification. Because the circuit court erroneously exercised

discretion at Coleman's sentencing and mistakenly rejected Coleman's motion for sentence modification by utilizing a checklist form, we reverse the judgment and order and remand for new sentencing.

¶2 Coleman pled guilty to one count of armed robbery by use of force. The circuit court imposed an eight-year sentence, consisting of five years of initial confinement and three years of extended supervision. Coleman moved the circuit court for sentence modification, requesting it confirm his eligibility for the Earned Release Program (ERP) established by WIS. STAT. § 302.05 (2003-04),¹ or, in the event this request was denied, provide a new sentencing proceeding addressing his eligibility for ERP. The circuit court denied the motion utilizing a checklist form. The denial was entered without a hearing or response from the State. Coleman appeals.

¶3 We begin with a brief overview of the information provided to the circuit court at Coleman's sentencing. The plea bargain underlying Coleman's guilty plea included a joint recommendation for probation. Coleman and his attorney both addressed Coleman's long-standing drug and alcohol abuse problem at sentencing. The Presentence Investigation Report (PSI) also discussed Coleman's history of drug abuse. The PSI noted that Coleman was not eligible for the Challenge Incarceration Program (CIP) due to certain physical limitations, *see* WIS. STAT. § 302.045, but that he was eligible for ERP. The PSI recommended four to five years' confinement followed by three to four years' extended supervision.

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

¶4 During the imposition of sentence, the circuit court determined that Coleman was ineligible for CIP or ERP:

I find him not eligible for the Challenge Incarceration or the E.R.P. He's going to be 40 years old, and he won't be eligible for either of those programs if he served at least three of the years behind bars on initial confinement. He'll be past the age of eligibility, as well as he's got epilepsy, and I don't know if he's able to under that circumstance with that physical diagnosis participate in that program.

¶5 Because ERP does not state a disqualification related to age or physical disability, Coleman moved the court to modify his sentence to declare him eligible for ERP or to grant him a new sentencing proceeding on the discrete issue of such eligibility. The circuit court issued a written order composed of a pre-printed form entitled "Order on Petition for Eligibility for Earned Release Program," consisting of a checklist of alternatives for denying or granting a petition for such eligibility. The court placed an "X" in boxes under the denial of eligibility option next to the following statements: that the gravity of the crime militated against participation; that the need to punish the defendant necessitated confinement; that the defendant's character suggested he would not be successful in ERP; and that confinement was necessary to protect the community.

¶6 Coleman appeals from the circuit court's judgment and order. He contends that the trial court failed to properly discharge its mandated duty to determine his ERP eligibility. We agree.

¶7 Coleman contends and the State concedes that the circuit court erroneously exercised discretion at Coleman's sentencing when it determined that he was categorically disqualified from eligibility for ERP due to his age and medical status. The circuit court's decision was based on an error of law. The

misapplication of law “constitutes an erroneous exercise of discretion.” *Sullivan v. Waukesha County*, 218 Wis. 2d 458, 470, 578 N.W.2d 596 (1998).

¶8 We further conclude that the circuit court’s utilization of a check-box form to bolster its erroneous exercise of discretion at Coleman’s original sentencing violated the clear language of WIS. STAT. § 973.017(10m) which requires a court to state reasons for its sentencing decision “in open court and on the record.” The circuit court’s utilization of a check-box form in chambers without the parties present violated both the letter and the spirit of the statute. Accordingly, we reverse the circuit court’s judgment and order and remand this cause for a new sentencing hearing on the issue of Coleman’s eligibility to participate in ERP.

By the Court.—Judgment and order reversed and cause remanded with directions.

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

