COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No.   2006AP1283-CR

STATE OF WISCONSIN

Cir. Ct. No. 2004CF5612

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

   PLAINTIFF-RESPONDENT,

V.

BOOKER T. SIMMONS,

   DEFENDANT-APPELLANT.

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

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

¶1   PER CURIAM. Booker Simmons appeals from a judgment of conviction and an order denying his motion for postconviction relief. We affirm.

¶2   The first issue relates to whether Simmons is eligible for the earned release program under WIS. STAT. § 302.05 (2005-06).[1]   A requirement for eligibility is that the court has found the person eligible.   WIS. STAT. §§ 302.05(3)(a).   Courts are required to determine eligibility at sentencing.   WIS. STAT. § 973.01(3g).   At Simmons' sentencing the court addressed the issue as follows: "I believe you could possibly, depending on how you conduct yourself, qualify for the earned release program."   The judgment of conviction stated that Simmons "may be eligible" for this program.   After sentencing, in reviewing a different issue, the court stated that it did not make a finding of eligibility at sentencing, and that it was finding Simmons ineligible.

¶3   Simmons argues that the court improperly changed its original finding of eligibility.   He recognizes that the court's oral statement at sentencing is ambiguous as to whether it is a finding of eligibility, and that the judgment of conviction does not clarify the matter.   However, he argues that the ambiguity is resolved in his favor by the "written explanation of determinate sentence" form (CR-234), on which the checkbox was marked to indicate eligibility.

¶4   We conclude that, although the checkbox form is indeed some evidence in support of Simmons' interpretation, it is not conclusive, and is not sufficient to resolve the ambiguous state of the record as a whole.   The record is silent as to who prepared that form, when, or what the intent of the preparer was.   Given the ambiguous state of the record, we cannot say that the circuit court erred by later concluding that it had not made an eligibility determination.   Accordingly,

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[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

the circuit court properly, and even necessarily, made such a determination when the issue came to the court's attention later.

¶5   Simmons also argues that the court should have granted his motion for sentence modification on the basis of a new factor. A new factor is a fact or set of facts highly relevant to the imposition of sentence, but not known to the judge at the original sentencing, either because it was not then in existence or because even though it was then in existence, it was unknowingly overlooked by the parties. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975).

¶6   In this case, Simmons argues that the new factor was the post-sentencing re-discovery of the precise written terms of a plea offer made by the State, but never accepted by Simmons, which he asserts included a sentencing recommendation lower than was ultimately given by the State at sentencing. We conclude that this is not a new factor. At sentencing, Simmons' attorney attempted to refer to the prior offer, but the State objected, and the court questioned the relevance of any prior offer. Because the court determined at sentencing that the offer was not relevant, it was not a fact highly relevant to the imposition of sentence, nor one unknowingly overlooked by the parties.

By the Court.—Judgment and order affirmed.

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