

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 21, 2009**

David R. Schanker  
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. 2008AP1479-CR**

**Cir. Ct. No. 2001CF105**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**CHRISTOPHER G. SMITH,**

**DEFENDANT-APPELLANT.**

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APPEAL from orders of the circuit court for Milwaukee County:  
TIMOTHY G. DUGAN and DENNIS P. MORONEY, Judges. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Christopher G. Smith was convicted of burglary in 2001. The court imposed and stayed a bifurcated sentence of ten years, comprised of three years of initial confinement and seven years of extended supervision, and placed Smith on probation for ten years. Smith's probation was revoked, and he

served his initial confinement term. Smith was released to extended supervision. Smith's extended supervision was later revoked, and the reconfinement court ordered that Smith serve three years in prison. Smith moved to modify his sentence to include eligibility for the Earned Release Program (ERP). The court denied Smith's motion and he appeals.<sup>1</sup> Because a reconfinement court does not have the authority to order that a defendant be eligible for ERP, we affirm.<sup>2</sup>

¶2 When Smith was first sentenced in 2001, the ERP did not exist and, accordingly, the judgment of conviction is silent as to Smith's eligibility. While serving his term of initial confinement, Smith could have asked the court to determine his eligibility for the ERP, but he did not do so. *See* WIS. STAT. § 302.05(3)(e) (2007-08).<sup>3</sup>

¶3 Smith cannot now request that a court declare him to be eligible to participate in the ERP.<sup>4</sup> In *State v. Hall*, 2007 WI App 168, ¶17, 304 Wis. 2d 504, 737 N.W.2d 13, we held that “the provisions of WIS. STAT. §§ 973.01(3g), 973.01(3m) and 302.113(9)(am) express a clear intent to restrict the sentencing

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<sup>1</sup> The court initially denied Smith's motion because of a temporary moratorium on admissions to ERP. After the Department of Corrections lifted that moratorium and Smith showed that the DOC considered Smith to be eligible, the court denied Smith's request on the merits. Smith was sentenced by the Honorable Laurence Gram; the reconfinement order was entered by the Honorable Timothy Dugan; and the sentence modification order was entered by the Honorable Dennis Moroney.

<sup>2</sup> We do not address the court's reasons determining why Smith was not eligible for the ERP. *See State v. Holt*, 128 Wis. 2d 110, 124-125, 382 N.W.2d 679 (Ct. App. 1985) (circuit court order may be affirmed on alternate ground even if the court did not invoke that ground as a basis for its order).

<sup>3</sup> All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

<sup>4</sup> Smith did not ask the reconfinement court to find him eligible to participate in the ERP. Smith's request was first made in a sentence modification motion.

discretion of the reconfinement court at a reconfinement hearing; it has no authority to consider eligibility for ... the ERP in a reconfinement hearing.” If the reconfinement court could not have declared Smith eligible for the ERP, it stands to reason that the court cannot do so in a motion to modify the sentence imposed by the reconfinement order.

*By the Court.*—Orders affirmed.

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

