

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 6, 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. 2009AP535-CR

Cir. Ct. No. 2007CF6264

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARVIN LAVELL FISHER,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Marvin Lavell Fisher appeals from a judgment of conviction, entered upon his guilty plea, for one count of burglary to a building or dwelling as party to a crime. He also appeals an order denying his postconviction motion for resentencing. Fisher contends the circuit court erroneously exercised

its discretion when it deemed him ineligible for the challenge incarceration and earned release programs. We reject Fisher's argument and affirm the judgment and order.

¶2 Fisher and a co-actor were interrupted by police during a residential burglary-in-progress on December 24, 2007. Fisher had entered the home through an unlocked window, and the pair had lined up items near the door for removal. Fisher fled the scene, but police apprehended the co-actor, who identified Fisher. The pair managed to steal money from a change jar, a watch, and the remote control for a new television. The watch was recovered and the total amount of restitution was later stipulated to be \$290. At the time of the burglary, Fisher was on probation for forgery, the result of a plea bargain that saw an earlier burglary charge dismissed and read in at sentencing.

¶3 The court ultimately imposed a sentence consisting of eighteen months' initial confinement and eighteen months' extended supervision, as recommended by the State, consecutive to the sentence Fisher received following probation revocation. The court also ruled that Fisher was ineligible for participation in either the challenge incarceration program or the earned release program because, it stated, "I feel those programs are somewhat privileges and you have already had the privilege of probation on the other case, an opportunity to work on your drug problems outside of confinement. That didn't work. I don't think you should have this further privilege."

¶4 Fisher moved for resentencing. He alleged the court based the eligibility decisions on his status "as a person who had been revoked prior to sentencing rather than any individual factors" and argued that nothing in the statutes "renders an individual who was on probation at the time of a new offense

inherently ineligible for either program.” The court denied the motion, explaining that it considered Fisher’s high risk of re-offense; the public’s interest in punishment, protection, and deterrence; the fact that Fisher committed this new burglary only five months into his probation term; and Fisher’s long-standing, unaddressed mental health and substance abuse issues. Fisher appeals.

¶5 The challenge incarceration program and the earned release program are both treatment programs that, upon successful completion, permit an inmate serving a bifurcated sentence to convert his or her remaining initial confinement time to extended supervision time. *See* WIS. STAT. §§ 302.045(3m)(b)1. & 302.05(3)(c)2.a. The total length of the sentence remains unchanged. *See* §§ 302.045(3m)(b)2. & 302.05(3)(c)2.b.

¶6 The challenge incarceration program is commonly referred to as “boot camp” and its participants engage in “manual labor, personal development counseling, substance abuse treatment and education, military drill and ceremony, counseling, and strenuous physical exercise ... in preparation for release on parole or extended supervision.” *See* WIS. STAT. § 302.045(1); *see also State v. Steele*, 2001 WI App 160, ¶6, 246 Wis. 2d 744, 748, 632 N.W.2d 112, 115. The earned release program is a substance abuse treatment program. *See* WIS. STAT. § 302.05; *see also State v. Owens*, 2006 WI App 75, ¶5, 291 Wis. 2d 229, 233, 713 N.W.2d 187, 189.

¶7 There are certain statutory eligibility requirements for each program. *See* WIS. STAT. §§ 302.045(2) & 302.05(3)(a). One requirement for both programs is the circuit court’s determination that the offender is eligible to participate. *See* §§ 302.045(2)(cm) & 302.05(3)(a)2. The circuit court makes an eligibility determination “as part of the exercise of its sentencing discretion[.]”

See WIS. STAT. §§ 973.01(3g)-(3m). Even if the offender fulfills the other eligibility requirements, the circuit court retains the discretion to declare an offender ineligible for the programs. *See Steele*, 2001 WI App 160, ¶8, 246 Wis. 2d at 749, 632 N.W.2d at 115. Separate findings on eligibility are not required so long as the overall sentencing rationale also justifies the eligibility determinations. *See Owens*, 2006 WI App 75, ¶9, 291 Wis. 2d at 234, 713 N.W.2d at 189.

¶8 The circuit court's obligatory considerations during sentencing are well-established: the court must consider primary factors including the gravity of the offense, the offender's character and rehabilitative needs, and the public's need for protection. *See id.*, ¶8, 291 Wis. 2d at 233, 713 N.W.2d at 189; *see also Steele*, 2001 WI App 160, ¶10, 246 Wis. 2d at 750, 632 N.W.2d at 116. Additional related secondary factors may also be considered if the court deems them appropriate. *See Owens*, 2006 WI App 75, ¶8, 291 Wis. 2d at 234, 713 N.W.2d at 189.

¶9 On appeal, Fisher repeats his claim that the circuit court determined him to be ineligible for the programs based on his status as a probationer who was revoked prior to sentencing and not based on factors individual to him. We are not persuaded that any such inference is possible from a fair reading of the transcript.

¶10 A review of the entire sentencing decision reveals the following. Using the sentencing guidelines worksheet as a starting point, the court noted that burglary, as a Class F felony, was a mid-level offense in this state's overall penalty structure. The court considered the offense aggravated because it was a residential burglary and because of the emotional toll on the victim, who had lived in the city only four months at the time and who had to postpone Christmas celebrations with

his family. However, the court also considered that the low value of the items taken presented a mitigating factor.

¶11 The court considered Fisher’s character and rehabilitative needs. Fisher was twenty-two years old at the time of the burglary and had begun daily marijuana use at age nine. The court observed that Fisher needed both mental health and drug treatment. It also noted Fisher’s four prior convictions, “one of those being assaultive.”¹

¶12 Based on this history, the court concluded that Fisher presented a high risk of re-offense and that his drug habit was likely the driving force behind his crimes. The court stated that this force was Fisher’s biggest problem, which he should have addressed on probation.² Instead, he committed a new crime. Fisher’s risk of re-offense and the failure to appropriately utilize probation led the court to reject probation in this case. The court then commented on the importance of the public-protection objective, noting that individuals without money to support a drug habit often turn to crimes—like burglary and forgery—that affect whole communities.

¶13 After articulating all of these concerns, the court deemed Fisher ineligible for the challenge incarceration and earned release programs. It stated

¹ Fisher also complains—briefly—that the court denied his eligibility based on the “assaultive nature” of his crimes and that this represented an impermissible “mechanistic sentencing policy.” See *State v. Ogden*, 199 Wis. 2d 566, 572, 544 N.W.2d 574, 576 (1996). It appears the court only used the word “assaultive” once, to refer to one of Fisher’s prior convictions while examining the various aggravating factors in this case. The record reveals the “assaultive” nature of a single prior conviction was one of many factors weighing on the court’s decision.

² Fisher’s implication that the “more lax” and “less intense” structure of probation is somehow an explanation for, or a justification of, his failure on probation is unavailing.

that it viewed the programs “somewhat like privileges,” but Fisher had already been given, and squandered, the privilege of probation. Further, the court specifically determined the programs were insufficient to meet Fisher’s rehabilitative needs, finding he would “need a longer period of time, much longer than what would be presented by these programs to address the drug problem.”³

¶14 The circuit court considered only proper sentencing factors and imposed a sentence authorized by law. The denial of eligibility for the programs is adequately supported by the decision articulated on the record.

By the Court.—Judgment and order affirmed.

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

³ Contrary to Fisher’s appellate argument, this observation is not akin to a finding that Fisher could not benefit from the programs.

