

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 17, 2010**

A. John Voelker  
Acting 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. 2009AP2910-CR**

**Cir. Ct. No. 2008CF967**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**THEUS H. THOMAS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Brown, C.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Theus H. Thomas appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. Thomas argues that the circuit court did not properly

exercise its sentencing discretion when it sentenced him. We disagree and affirm the judgment and order.

¶2 Thomas was convicted of one count of delivery of cocaine. The court sentenced him to forty-two months of initial confinement and four years of extended supervision. The court also found Thomas not eligible for the challenge incarceration and earned release programs. Thomas moved for postconviction relief asking that his sentence be reduced and that he be found eligible for the challenge incarceration or earned release program. The circuit court denied the motion.

¶3 Thomas argues on appeal that the circuit court did not properly exercise its sentencing discretion because it did not properly explain the reasons for its sentencing decision under *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. Specifically, he argues that the court did not meaningfully evaluate or consider his character, put undue emphasis on the need to deter, and it did not explain how the length of the sentence achieved its sentencing objectives.

¶4 “The primary considerations in imposing a sentence are the gravity and nature of the offense (including the effect on the victim), the character of the defendant and public safety.” *State v. Carter*, 208 Wis. 2d 142, 156, 560 N.W.2d 256 (1997). “How much explanation is necessary, of course, will vary from case to case.” *Gallion*, 270 Wis. 2d 535, ¶39. “[W]e require that the court, by reference to the relevant facts and factors, explain how the sentence’s component parts promote the sentencing objectives.” *Id.* at ¶46. The court went on to state that it did not require mathematical precision. *Id.* at ¶49. “We do expect, however, an explanation for the general range of the sentence imposed. This explanation is not intended to be a semantic trap for circuit courts. It is also not intended to be a call

for more ‘magic words.’” *Id.* The court concluded: “The rule of law suffers when the sentencing judge’s discretion is unguided and unchecked. The rationale for sentencing decisions must be made knowable and subject to review.” *Id.* at ¶51.

¶5 The sentencing court considered the three primary factors when it sentenced Thomas. The court discussed Thomas’s character noting, among other things, that although he was not a bad person, he had done a bad thing by selling cocaine. The court also considered the number of children Thomas had, in context with the amount of child support arrearages he owed, as an indication of his lack of responsibility. The court discussed at length the affect of the crime on the community, and on children in particular, and the need to impose a lengthy jail sentence as a way to deter this kind of behavior by sending a message to others. We conclude that the court considered all of the relevant factors, and thoroughly explained the reasons for the sentence it imposed.

¶6 Thomas also argues that the circuit court erred when it found him to be ineligible for the challenge incarceration and earned release programs. He argues that he was statutorily eligible for both programs, and both programs were recommended by the author of the presentence investigation report. He further argues that the court failed to determine whether he met the requirements of the program and provided no discernible rationale for its decision to find him ineligible.

¶7 The decision of whether a defendant is eligible to participate in either of these two programs is within the sentencing court’s discretion. *See* WIS. STAT. § 973.01(3g) and (3m). Under these statutes, the court considers eligibility as part of its sentencing discretion. While a trial court must state whether the

defendant is or is not eligible for the programs, the court does not have to make completely separate findings on the reasons for eligibility “so long as the overall sentencing rationale also justifies” the decision on program eligibility. *See State v. Owens*, 2006 WI App 75, ¶9, 291 Wis. 2d 229, 713 N.W.2d 187. We have held that a sentencing court properly exercised its discretion when it found a defendant ineligible for the challenge incarceration program based on the seriousness of the offense. *State v. Steele*, 2001 WI App 160, ¶11, 246 Wis. 2d 744, 632 N.W.2d 112. And in *Owens*, we found that the court properly determined that the defendant was not eligible for the earned release program based on the need to protect the public and punish the defendant. *Owens*, 291 Wis. 2d 229, ¶11.

¶8 In this case, the court considered Thomas’s eligibility for these programs as part of its overall sentencing discretion. The court had already explained at length the objectives behind its sentence, including the need for deterrence. The court then said that Thomas was not eligible for either program “[b]ecause of the need for deterrence.” We conclude that in the context in which the statement was made, the court’s intent was clear. We reject Thomas’s argument that this was an erroneous exercise of discretion.

¶9 Thomas also argues that the circuit court erred when it denied his motion for postconviction relief. Because we have concluded that the circuit court properly exercised its discretion when it sentenced Thomas, we also conclude that it properly denied the postconviction motion for sentence modification. For the reasons stated, we affirm the judgment and order.

*By the Court.*—Judgment and order affirmed.

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

