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**WISCONSIN COURT OF APPEALS**
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

**DISTRICT II**

July 19, 2017

*To*:

Hon. Kathryn W. Foster
Circuit Court Judge
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Hon. Ralph M. Ramirez
Circuit Court Judge
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Kathleen A. Madden
Clerk of Circuit Court
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Sarah Burgundy
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Timothy T. Kay
Kay & Kay Law Firm
675 N. Brookfield Rd., Ste. 200
Brookfield, WI 53045

Susan Lee Opper
District Attorney
515 W. Moreland Blvd., Rm. G-72
Waukesha, WI 53188-2486

You are hereby notified that the Court has entered the following opinion and order:

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2016AP1793-CR State of Wisconsin v. Andrew Wapp, III (L.C. # 2015CF107)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Andrew Wapp, III, appeals from a judgment of conviction for delivery of schedule II narcotics and an order of the circuit court denying postconviction relief.[1] Based upon our review

[1] The Honorable Kathryn W. Foster presided over the trial and entered the judgment of conviction. The Honorable Ralph M. Ramirez entered the order denying postconviction relief.

of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[2]

In January 2015, Wapp, along with his father, mother, and sister, was arrested on drug-related charges. Wapp pled guilty to one count of delivery of schedule II narcotics, a Class E felony, for which the statutory maximum sentence is "a fine not to exceed $50,000 or imprisonment not to exceed 15 years, or both." WIS. STAT. § 939.50(3)(e).

The presentence investigator recommended that Wapp serve three to four years of probation, with one year condition time and a stayed sentence of three to four years of initial confinement and four years of extended supervision. The circuit court speculated that this recommendation was based on Wapp's apparent completion of past probations.[3] However, the circuit court reviewed the report and observed that "while on probation you used, you drove while impaired, you got your Huber lost and, therefore, lost your job … that makes this more aggravated." The court also noted that his rehabilitative needs seemed to indicate that confinement would be more beneficial, because the life he would return to was "permeated with drug usage." The court accepted the opinion of the presentence investigator that he was not "some kind of monster on the outside," but Wapp was "a drug dealer" and had therefore "distributed poison in this community for years." He was sentenced to six years of initial confinement, with four years of extended supervision. Although he was made eligible for the

[2] All references to the Wisconsin Statutes are to the 2015-16 version.

[3] Wapp had three other drug-related convictions. As part of the plea agreement, in exchange for pleading guilty to the delivery charge, the second and subsequent enhancer was struck and four other counts were dismissed as read-ins. As a result, his maximum sentence was reduced by fifty-seven years and sixty days.

substance abuse program, he was not allowed to apply for the program until he completed four years of initial confinement. His father and mother were both made eligible for the substance abuse program immediately.

Wapp filed a postconviction motion for modification of his sentence in July 2016. He asked the court to modify his sentence to make him eligible for the substance abuse program before he completed four years of initial confinement. He asserted in a cursory fashion that requiring him to serve four years before he could apply for the substance abuse program was unduly harsh and unconscionable. The waiting period was unduly harsh, he argued, because he had greatly benefitted from his time in prison, the presentence investigator had suggested a lighter sentence, and his family received eligibility for the substance abuse program. Alternatively, Wapp argued that the court should consider his personal reform in prison to be a new factor that justified modification of his sentence to make him eligible for the substance abuse program earlier. The circuit court denied the motion. Wapp copied his arguments, verbatim, in his appeal to this court.

Wapp does not dispute the length of sentence,[4] but rather argues that the circuit court's decision to postpone his eligibility for the substance abuse program for four years is unduly harsh and unconscionable. He requests that his sentence be amended to allow him to participate in the program after two years.

[4] Wapp's brief does comment on the length of his sentence by pointing out that his presentence investigator advised a lighter sentence and that his family received lighter sentences. However, nowhere does he suggest he is seeking a modification of his prison sentence.

"As part of the exercise of its sentencing discretion," the sentencing court shall "decide whether the person being sentenced is eligible or ineligible to participate in the earned release program." WIS. STAT. § 973.01(3g). The sentencing court also has discretion to decide when eligibility will begin, and may impose a waiting period if the court deems it necessary. ***State v. White***, 2004 WI App 237, ¶¶8, 10, 277 Wis. 2d 580, 690 N.W.2d 880. So long as it is "based upon the facts of record and in reliance on the appropriate law," a discretionary decision will be affirmed. ***State v. Owens***, 2006 WI App 75, ¶7, 291 Wis. 2d 229, 713 N.W.2d 187. Additionally, there is both a presumption that the court acted reasonably and "a strong public policy against interfering with the trial court's sentencing discretion." ***Id.*** Thus, this court will find an erroneous exercise of sentencing discretion "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted).

In this case, the sentencing judge took notice of all the relevant factors and chose to impose a waiting period before allowing Wapp to apply for the substance abuse program. The imposition of the waiting period is not so unusual or so disproportionate to the offense that public sentiment would be shocked. Thus, the sentence is not unduly harsh and the sentencing court did not abuse its discretion in imposing a waiting period on Wapp.

Furthermore, Wapp's argument that his self-improvement in prison should be considered a new factor is without merit. Although Wapp appears to show continued improvement in prison, it is black letter law that, "'an inmate's progress or rehabilitation while incarcerated' is not a 'new factor.'" ***State v. McDermott***, 2012 WI App 14, ¶15, 339 Wis. 2d 316, 810 N.W.2d

237 (citation omitted). Accordingly, we are satisfied that the circuit court appropriately denied the motion for postconviction relief.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction and order of the circuit court denying postconviction relief are affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Diane M. Fremgen*
*Clerk of Court of Appeals*