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April 25, 2019

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

2018AP832-CR

State of Wisconsin v. Tyler J. Hughes (L.C. # 2016CF97)

Before Lundsten, P.J., Blanchard, and Fitzpatrick, 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).

Tyler Hughes appeals an order denying his motion to amend the judgment of conviction determining that he is not eligible for the substance abuse program for a period of time. Based

upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We affirm.

In January 2017, when Hughes was first sentenced for operating while intoxicated, the court imposed an initial confinement period of 48 months, and ordered that Hughes not be eligible for the substance abuse program until after he had served 42 months of confinement.

In December 2017 Hughes filed a motion to amend the judgment. In it he stated that the practical effect of the court's eligibility date is that he will never be taken into the program. He asked that the court either eliminate the eligibility restriction entirely or reduce it to 30 months. The court construed the motion as one for sentence modification and denied it.

On appeal, Hughes argues only that the circuit court did not have the authority to set an eligibility date because an administrative rule gives that authority to the Department of Corrections. At the time Hughes filed his brief, that rule provided: "The department shall determine if placement is appropriate and when placement will occur." WIS. ADMIN. CODE § DOC 302.39(6) (Nov. 2010).

We have previously held that the sentencing court has the statutory authority under WIS. STAT. § 973.01(3g) "both to decide whether defendants are ... eligible *and to determine when the period of eligibility will begin.*" *State v. White*, 2004 WI App 237, ¶2, 277 Wis. 2d 580, 690 N.W.2d 880 (emphasis added). "Administrative rules must be construed to be harmonious with statutory law dealing with the same subject matter, if it is feasible." *DaimlerChrysler v. LIRC*,

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

2007 WI 15, ¶36, 299 Wis. 2d 1, 727 N.W.2d 311. To construe the rule that Hughes relies on as being consistent with the statute interpreted in *White*, we must conclude that the department is permitted to determine “when placement will occur” only within the eligibility limitation set by the sentencing court. In other words, regardless of the rule Hughes relies on, the circuit court did have the authority to set an eligibility date.

IT IS ORDERED that the order appealed is summarily affirmed under WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals