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**DISTRICT II**

January 24, 2024

To:

Hon. Gerad Dougvillo  
Circuit Court Judge  
Electronic Notice

John D. Flynn  
Electronic Notice

Rebecca Matoska-Mentink  
Clerk of Circuit Court  
Kenosha County Courthouse  
Electronic Notice

Nathan Michael Jurowski  
Electronic Notice

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

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2022AP2149-CR	State of Wisconsin v. Aaron J. Busse (L.C. # 2021CF633)
2022AP2150-CR	State of Wisconsin v. Aaron J. Busse (L.C. # 2021CF1166)

Before Neubauer, Grogan and Lazar, 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).**

In these consolidated appeals, Aaron J. Busse appeals judgments of conviction for possession of narcotic drugs, possession of methamphetamine, retail theft, and felony bail jumping, all with the repeater enhancer. He also appeals orders denying postconviction relief. Busse argues the circuit court erroneously exercised its sentencing discretion when it denied him eligibility for the Challenge Incarceration Program (“CIP”) or the Substance Abuse Program

(“SAP”).<sup>1</sup> 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. We affirm.

In Kenosha County case No. 2021CF633, Busse pled guilty to possession of narcotic drugs and possession of methamphetamine, both as a repeater. In Kenosha County case No. 2021CF1166, Busse pled guilty to retail theft and felony bail jumping, both as a repeater. Before sentencing, the Department of Corrections (“DOC”) filed a pre-sentence investigation (“PSI”) report. The report noted that Busse was statutorily eligible for both the CIP and the SAP.<sup>2</sup> The PSI author stated Busse is “in need of treatment which can most effectively be provided in a confined setting at this time.” At a combined sentencing hearing, the circuit court sentenced Busse to prison. In both cases, the court determined that because Busse had “been placed on probation six different times over the last six years, the Court is not going to find you eligible for CIP or SAP.”

Busse filed a postconviction motion, asking the circuit court to reconsider its CIP and SAP eligibility determinations because the PSI report stated he was in need of treatment that could “most effectively be provided in a confined setting.” The circuit court denied Busse’s

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<sup>1</sup> Busse refers to the SAP as the earned release program. However, the legislature renamed the program from the earned release program to the SAP. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 302.05 (2021-22).

All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

<sup>2</sup> The SAP and CIP are programs where an inmate may attain early release to extended supervision by having a portion of their confinement time changed to extended supervision time. WIS. STAT. §§ 302.045(3m), 302.05(3). The SAP “is a substance abuse program administered by the Department of Corrections.” *State v. Owens*, 2006 WI App 75, ¶5, 291 Wis. 2d 229, 713 N.W.2d 187 (citing WIS. STAT. § 302.05). Similarly, the CIP is a DOC-administered boot-camp type of program. WIS. STAT. § 302.045(1). Participants who successfully complete either program have a portion of their confinement converted to extended supervision.

motion in a written decision without a hearing. The court concluded that making Busse eligible for the CIP or the SAP “would undermine the punish aspect of this sentence and unduly depreciate the seriousness of the offense.” The court explained it “specifically denied such programing at the time of sentencing citing the defendant’s prior opportunities for programing while on probation in the past.”

Sentencing decisions—including decisions on a defendant’s eligibility for the CIP and the SAP—are discretionary; this Court reviews only whether the circuit court erroneously exercised its discretion. See *State v. Owens*, 2006 WI App 75, ¶7, 291 Wis. 2d 229, 713 N.W.2d 187. “In imposing sentence, the court must consider at least the three primary factors or objectives: the gravity and nature of the offense, including the effect on the victim; the character and rehabilitative needs of the offender; and the need to protect the public.” *Id.*, ¶8. Further, the court may consider appropriate additional factors, “including the defendant’s prior record, need for ‘close rehabilitative control,’ and aggravated nature of the crime.” *Id.* “Punishment of the defendant is also a valid sentencing objective.” *Id.* “[W]hile the trial court must state whether the defendant is eligible or ineligible for the program[s],” the court is not required to make “completely separate findings on the reasons for the eligibility decision, so long as the overall sentencing rationale also justifies the [program-eligibility] determination.” *Id.*, ¶9.

On appeal, Busse first argues the circuit court erred at sentencing by failing to explicitly determine on the record whether Busse was statutorily eligible for the CIP or the SAP. This argument is a nonstarter. No one disputed at sentencing that Busse was statutorily eligible for the CIP and the SAP. This is why the circuit court took the step of determining whether, in the exercise of its sentencing discretion, it would make Busse eligible or ineligible for these programs. Indeed, in Busse’s postconviction motion, he “acknowledges that, even after the court

has reviewed these preliminary criteria, the eligibility determination still falls within the sole discretion of the sentencing court.” We will not consider this argument further.

Busse then argues the circuit court erroneously exercised its sentencing discretion by failing to state the relevant and material factors that influenced its decision to make him ineligible for the programs. He also contends the circuit court should have given more weight to what he characterizes as the PSI report’s recommendation that he be made eligible for these programs.<sup>3</sup>

However, as previously stated, the circuit court is not required to make “completely separate findings on the reasons for the eligibility decision, so long as the overall sentencing rationale also justifies the [program-eligibility] determination.” *Owens*, 291 Wis. 2d 229, ¶9. Further, sentencing is within the circuit court’s discretion. See *Ocanas v. State*, 70 Wis. 2d 179, 183-84, 233 N.W.2d 457 (1975). To the extent that the PSI statement can be interpreted as a recommendation that Busse participate in both the CIP and the SAP, the circuit court was not bound by this recommendation.

The record reflects that the circuit court considered the proper sentencing factors when imposing its sentence. The circuit court explicitly considered both the CIP and the SAP and decided the programming was inappropriate for Busse based on his failure to participate in programming while he was on probation. The court emphasized Busse had been on probation six times in the last six years and that while on probation, Busse did not remain crime-free long

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<sup>3</sup> The State argues in its brief that the PSI writer never made a recommendation that Busse be permitted to participate in the CIP or the SAP. In reply, Busse concedes that although the PSI writer did not make “an affirmative recommendation,” the writer still advised the court that Busse’s need for treatment could most effectively be provided in a confined setting.

enough to become involved in any treatment. The court believed that allowing eligibility in these cases would undermine the seriousness of the offenses. We conclude the circuit court did not erroneously exercise its discretion at sentencing by making Busse ineligible for the CIP and the SAP.

Upon the foregoing,

IT IS ORDERED that the judgments and orders of the circuit court are summarily affirmed.

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

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*