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August 10, 2016

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

2015AP1717-CR

State of Wisconsin v. James D. Leach (L.C. # 2014CF307)

Before Neubauer, C.J., Reilly, P.J. and Hagedorn, J.

James Leach appeals *pro se* from circuit court orders denying his motions seeking eligibility for the Earned Release Program. 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 (2013-14).¹ We affirm because the circuit court properly exercised its sentencing

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

discretion when it declared Leach ineligible for the Earned Release Program.²

The complaint alleged that Leach, as party to the crime, committed a home invasion in a search for drugs. During the robbery, Leach severely battered the victim. Leach pled no contest to burglary as a party to the crime. During the plea hearing, Leach conceded that the complaint accurately described what happened during the crime. Leach affirmed that he understood party to the crime liability. At sentencing, the victim described the beating she received and its long-lasting physical, emotional and financial effects.

In sentencing Leach, the court considered the severity of the offense, Leach's significant prior record, including assaultive behavior, his prior failures on probation and extended supervision, his rehabilitative needs, and the need to protect the public. The court found the crime very severe and aggravated and even if Leach denied actually battering the victim, Leach pled no contest as party to the crime, which rendered him culpable. The court imposed a ten-year sentence (five years of initial confinement and five years of extended supervision consecutive to any other sentence). In light of the severe battery that occurred during the burglary, the court found that "this is definitely not a case for which Challenge Incarceration or

² The appellant's brief indicates that Leach had the assistance of a "jailhouse lawyer." Leach signed the brief, but an inmate signed the WIS. STAT. RULE 809.19(2)(b) (2013-14) appendix certification in the appellant's brief and the certifications accompanying the reply brief. While we assume without deciding that Johnson may receive assistance from a fellow inmate, see *Johnson v. Avery*, 393 U.S. 483, 489-90 (1969) (right to receive assistance from other inmates is conditioned upon a showing that the prisoner had no alternative means of access to courts available), only a member of the Wisconsin bar may appear on behalf of another in state courts, *State v. Kasuboski*, 87 Wis. 2d 407, 421, 275 N.W.2d 101 (Ct. App. 1978). Documents filed by a non-lawyer on behalf of another are of no effect. *Jadair Inc. v. United States Fire Ins. Co.*, 209 Wis. 2d 187, 204, 562 N.W.2d 401 (1997). Therefore, we strike the certifications from the briefs. In the future, documents signed by a non-lawyer and filed in this court may be stricken, which could result in a brief failing to comply with RULE 809.19.

the Earned Release program would be appropriate.” The court deemed Leach ineligible for both programs.

Leach filed a *pro se* sentence modification motion asking the court to deem him eligible for the Earned Release Program. The circuit court denied the motion, noting that the decision was within the court’s discretion at sentencing, and the court stated its reasons for deeming Leach ineligible in light of “the assaultive nature of the offense” and the need to protect the public. These considerations outweighed any treatment needs that could be met in the Earned Release Program.

Leach sought reconsideration and claimed that there was no evidence of injuries to the victim consistent with a beating. In addition, he argued that his co-defendant was deemed eligible for the Earned Release Program. The circuit court declined to reconsider. Leach appeals.

On appeal, Leach argues that his co-defendant was deemed eligible for the Earned Release Program, there is a sentencing disparity between co-defendants, and the evidence did not support the court’s finding that Leach beat the victim. Leach’s arguments lack merit.

A court must impose an individualized sentence. *State v. Toliver*, 187 Wis. 2d 346, 362-63, 523 N.W.2d 113 (Ct. App. 1994). Eligibility for the Earned Release Program is within the sentencing court’s discretion. *State v. Lehman*, 2004 WI App 59, ¶16, 270 Wis. 2d 695, 677 N.W.2d 644. We review for a misuse of that discretion. *State v. Owens*, 2006 WI App 75, ¶7, 291 Wis. 2d 229, 713 N.W.2d 187. We will affirm a decision to deny Earned Release Program eligibility if the overall sentencing rationale justifies the decision. *Id.*, ¶¶9, 11. The court is not

required to base its sentencing decision on the sentence received by co-actors. *State v. Tappa*, 2002 WI App 303, ¶20, 259 Wis. 2d 402, 655 N.W.2d 223.

We conclude that the circuit court properly exercised its discretion when it deemed Leach ineligible for the Earned Release Program. Discretionary decisions to deny Earned Release Program eligibility have been upheld when the court considered the aggravated nature of the offense, the need to protect the public and the need to punish the defendant. *Owens*, 291 Wis. 2d 229, ¶11. The court considered these factors in fashioning Leach's sentence and rendering him ineligible for the Earned Release Program.

The circuit court considered Leach's significant prior criminal record, which included assaultive behavior, and his prior failures on probation and extended supervision. The court found that the public requires protection from Leach's conduct. The court imposed an individualized sentence based upon the record, and its sentencing rationale supports its Earned Release Program decision.

We reject Leach's challenge to the circuit court's consideration of the fact that the victim was beaten during the burglary. The complaint alleged that Leach beat the victim, an allegation the victim made consistently throughout the proceeding. During his plea colloquy, Leach conceded that the complaint accurately stated the facts of the crime. Leach cannot now take a contrary position on appeal with regard to his involvement in the beating. *Cf. Cross v. State*, 45 Wis. 2d 593, 605, 173 N.W.2d 589 (1970) ("An accused cannot follow one course of strategy ...

and if that turns out to be unsatisfactory complain he should” have relief).³ The circuit court did not rely upon inaccurate information to sentence Leach. *State v. Tjepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1.

The circuit court’s individualized sentence supports its decision regarding the Earned Release Program. We see no sentencing disparity between co-actors.

Upon the foregoing reasons,

IT IS ORDERED that the orders of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

³ To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). (“An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”). This includes the assertion that Leach should have been eligible for the Challenge Incarceration Program, a claim he raises for the first time on appeal. If we were to address this claim, we would conclude that it lacks merit for the reasons we cite in upholding the circuit court’s discretionary decision to deem Leach ineligible for the Earned Release Program.