

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 26, 2010

David R. Schanker
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. 2009AP18-CR

Cir. Ct. No. 2002CF1089

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARK A. ADELL,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
JOHN A. FRANKE, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Mark A. Adell appeals from orders denying his related motions for a redetermination of his eligibility for the Earned Release Program (“Program”) and for reconsideration. The issues are whether the trial court erroneously exercised its discretion when it found him ineligible for the

Program at sentencing, and when it denied his subsequent motions in which he belatedly admitted a substance abuse problem, contradicting his denial of that problem at sentencing. We conclude that Adell's current claim, contradicting his earlier one, is barred by issue preclusion and by judicial estoppel; consequently, we do not address the trial court's exercise of discretion or its denial of his new sentencing factor claim. Therefore, we affirm.

¶2 A jury found Adell guilty of three burglaries, each as a habitual criminal. On direct appeal we held that "Adell validly waived his right to counsel and elected to proceed immediately thereafter to sentencing; he further demonstrated his competence to represent himself, as he assured the trial court that was what he wanted to do." *State v. Adell*, No. 2007AP1423, unpublished slip op. ¶3 (WI App Aug. 12, 2008). At sentencing, the trial court asked him if he had a drug or alcohol problem; Adell said that he did not. The trial court then explained to Adell how it was compelled to rely in "large degree, on [his] self-disclosure." Adell confirmed his understanding and the fact that he may have had a problem in the past, but that at sentencing, he had no such problem. The trial court imposed a thirty-two-year aggregate sentence, comprised of twenty-two- and ten-year respective aggregate periods of initial confinement and extended supervision. The trial court found that Adell was not eligible for the Challenge Incarceration or Earned Release Programs.

¶3 This court affirmed the judgment and postconviction order on direct appeal, and held that Adell validly waived his right to counsel. *See Adell*, No. 2007AP1423, unpublished slip op. ¶10. In that appeal, Adell did not pursue his challenge to the trial court's eligibility determination. *See id.*, unpublished slip op. ¶3.

¶4 Adell then moved for a redetermination of his eligibility for the Program, now disclosing why he denied his alleged alcohol and drug problem at sentencing. The trial court denied the motion, ruling that it had already denied Adell's eligibility and declined to reconsider that determination. Adell then moved twice to reconsider, which the trial court denied. It is from the trial court's orders denying his motions for a redetermination and for reconsideration that Adell now appeals.

¶5 Adell's eligibility for the Program was determined at sentencing based in part on his admission that he did not have a drug or alcohol problem.¹ The Program allows an eligible inmate, who successfully completes the Program, to be released early from prison to extended supervision. *See* WIS. STAT. § 302.05(3)(c)2. (2007-08).² The trial court's reasoning at sentencing also demonstrated that it would not favor early release for Adell. The trial court explained:

At this stage in the game, [the trial court] barely ha[s] good choices for first, and second and third offenders; but for Mr. Adell, with his track record here, incarceration, even at the risk that this will warehouse him, is a necessary choice.

[The trial court] suppose[s] it is possible that things would work out differently this time, [the trial court] suppose[s] it is possible if we took the chance he would now find a stable life, and meaningful employment and all

¹ The Earned Release Program is also known as the Wisconsin Substance Abuse Program and serves as a treatment program for eligible inmates. *See* WIS. STAT. § 302.05(1)(am) (2007-08).

² The time remaining on the confinement portion of the inmate's sentence is then converted to extended supervision so only the confinement portion is reduced, not the total sentence. *See* §§ 302.05(3)(c)2. (2007-08) and 973.01(3g) (amended Apr. 3, 2008). All further references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

of that, but the risks that that will not happen are just extraordinarily high and the only clear thing that could be done here is to incarcerate him so that the community is protected.

The trial court originally found that Adell was ineligible for the Program. It reaffirmed its decision in a postconviction order. This court affirmed that determination and confirmation on direct appeal. See *Adell*, No. 2007AP1423, unpublished slip op. ¶¶1-2.

¶6 This issue has been decided previously. Issue preclusion bars its relitigation. See *Michelle T. v Crozier*, 173 Wis. 2d 681, 687, 495 N.W.2d 327 (1993).

¶7 Adell contends that his belated admission contradicting his earlier one, namely, that he had a drug and alcohol problem at sentencing despite his denial, was his misguided attempt to not jeopardize his legal position in that a substance abuse problem could have been viewed as a motive for the burglaries. First, a party is judicially estopped from manipulating the legal system by taking inconsistent positions. See *State v. Gove*, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989). Second, Adell cannot blame his misguided strategy on his *pro se* representation because we have already held that he validly waived his right to counsel and that he was competent to proceed *pro se*. See *Adell*, No. 2007AP1423, unpublished slip op. ¶¶9-10.

¶8 Adell contends that he is not procedurally barred from raising this issue by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994) (bars successive postconviction motion if defendant does not provide a “sufficient reason” for failing to raise issue in previous postconviction motion or on direct appeal). Although we hold that Adell is procedurally barred from

seeking reversal of his ineligibility determination, our decision is not predicated on *Escalona*. Our decision is predicated on issue preclusion and judicial estoppel, which also renders unnecessary our analysis of Adell's erroneous exercise of sentencing discretion and new factor claims.

By the Court.—Orders affirmed.

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

