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DISTRICT IV

May 2, 2024

To:

Hon. Todd W. Bjerke
Circuit Court Judge
Electronic Notice

Kirk D. Henley
Electronic Notice

Tammy Pedretti
Clerk of Circuit Court
La Crosse County Courthouse
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Michael C. Sanders
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You are hereby notified that the Court has entered the following opinion and order:

2023AP617-CR

State of Wisconsin v. Otis M. East (L.C. # 2017CF1141)

Before Graham, Nashold, and Taylor, 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).

Otis East appeals a judgment of conviction and an order denying his motion for postconviction relief. The issue is whether East should be resentenced because he was not sentenced by an impartial judge. We affirm.

East was convicted of one count of a controlled substance offense. His argument on appeal is based on remarks that the circuit court made at the initial sentencing, at which the court withheld sentence and placed East on probation. After rejecting the idea of an imposed and stayed prison sentence, the court stated: "So, realistically, that just leaves me with the option of putting you on probation or sending you to prison." The court further stated:

THE COURT: Obviously, if you come back [after your probation is revoked], you know, you're looking at some significant time here ... depending on how you do. And I think part of the rationale here is, you had those other five cases coming up over this period of time That shows an inability to comply. But this here is a 15-year prison case; 10 years, I could sentence you for a maximum initial term of confinement, with 5 years' extended supervision, so that's what you're looking at if you come back. You understand?

THE DEFENDANT: Yes. Yes, sir.

THE COURT: And I'm not saying I would impose that, but that's the potential.

East's probation was later revoked and he appeared at sentencing before the same circuit court judge, who imposed eight years of imprisonment, consisting of three and one-half years of initial confinement, and four and one-half years of extended supervision. East argues that the circuit court was biased because the court stated at East's initial sentencing, in which East's sentence was withheld and he was placed on probation, that East would receive a prison sentence if his probation was later revoked. East's argument is based on case law holding that a court demonstrates bias at resentencing if the court previously informed the defendant what the court would do at resentencing. See *State v. Goodson*, 2009 WI App 107, ¶¶10-16, 320 Wis. 2d 166, 771 N.W.2d 385. A court is permitted to say what the court *could* do at sentencing, but not what the court *will* do. *Id.*, ¶17. Whether a court was biased is a question of law. *Id.*, ¶7.

East asserts that the circuit court stated in two ways that East would receive a prison sentence if his probation was revoked. First, East points to the court's statement that it felt there were only two options at the initial sentence, probation or prison. East argues that this implied that only a prison sentence would be possible after revocation. We do not agree that this statement can be interpreted as a statement of the court's intended future action. In this

statement, the court made no reference to revocation or any other future situation, but was only describing its analysis of the sentencing choices immediately before it.¹

East asserts that the circuit court was also stating that he would receive a prison sentence if he was revoked when it said, “[I]f you come back, you know, you’re looking at some significant time here.” We do not agree that this meant the court *would* impose a significant sentence of confinement. In context, it is clear that the court was explaining to East that he would be facing the *potential* for a significant sentence if his probation was revoked. This is shown by the court’s discussion of the maximum sentence that it “could” impose, and its use of the word “potential,” as quoted above. In other words, the court was alerting East to the maximum imprisonment that could be imposed, rather than informing East of the specific sentence that the court would impose.

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed under WIS. STAT. RULE 809.21.

¹ As part of the State’s response to this argument, it asserts that, upon revocation, the court was required by statute to impose a bifurcated prison sentence. However, none of the statutes cited by the State appear to provide that result. Instead, they provide only that a defendant shall be returned to the court for sentencing after revocation if sentence was not imposed earlier (WIS. STAT. § 973.10(2)(a) (2021-22)), that all sentences to state prisons shall be for a year or more (WIS. STAT. § 973.15(1)), and that the court shall impose a bifurcated sentence “whenever a court sentences a person to imprisonment in the Wisconsin state prisons.” WIS. STAT. § 973.01(1). In a case in which, as here, there is no mandatory minimum sentence, none of these provisions appear to prevent the circuit court from imposing a jail term of less than one year, *see* WIS. STAT. § 973.02, or any other available form of sentence such as a fine. The State has not cited any statute expressly providing that confinement or a bifurcated sentence is the only option after revocation of probation.

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

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

Samuel A. Christensen
Clerk of Court of Appeals