

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 2, 2003

Cornelia G. Clark
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 Nos. 02-2031-CR
02-2032-CR**

**Cir. Ct. Nos. 99-CF-922
99-CF-5116**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HOWARD L. GOODMAN,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Howard Goodman appeals judgments sentencing him after revocation of his probation and an order denying his motion for sentence modification. The issues are: (1) whether the circuit court was biased; (2) whether the circuit court properly denied defense counsel's motion for a

competency evaluation; and (3) whether the sentence was based on inaccurate information. We affirm.

¶2 Goodman first contends the circuit court was unfairly biased against him. “A person’s right to be tried by an impartial judge stems from [the] fundamental right to a fair trial guaranteed by the due process clause of the fifth amendment of the United States Constitution.” *State v. Hollingsworth*, 160 Wis. 2d 883, 893, 467 N.W.2d 555 (Ct. App. 1991). “A litigant is denied due process only if the judge, in fact, treats him or her unfairly.” *Id.* at 894. “A litigant is not deprived of fundamental fairness guaranteed by the constitution either by the appearance of a judge’s partiality or by circumstances which might lead one to speculate as to his or her partiality.” *Id.* “Whether the judge’s partiality, if any, violated [the defendant’s] due process rights presents a legal issue which we review *de novo.*” *Id.* at 893.

¶3 Goodman’s complaint focuses on remarks made by the circuit court at his December 13, 1999 sentencing hearing on his judgment of conviction, before he was revoked. Among other things, the circuit court told Goodman that his “life is a life of human beings who are no more than cockroaches and rats.” The circuit court asked Goodman if he knew “how nauseating” he was. The circuit court also mocked Goodman’s speech and made comments about Goodman’s inability to control his sexual impulses in the following exchange:

DEFENDANT: I don’t have excuse, I just don’t have nobody to take care of my kids.

THE COURT: You don’t have nobody to take care of your kids but you keep making them? Do you know what? Maybe something else of yours should be taken care of. Did you ever think of that?

DEFENDANT: Yes, ma’am.

THE COURT: Because for some reason your time and your wallet and your good status doesn't seem to be keeping up with another part of you.

DEFENDANT: Yes, ma'am.

¶4 The circuit court's comments about Goodman during this hearing were inappropriate and made with a level of impatience and sarcasm unbecoming a trial judge. Even so, the comments made by the circuit court regarding Goodman's inability to control his sexual impulses addressed a matter that was factually accurate and appropriate to consider in the context of assessing Goodman's character—the fact that he had many children that were not being adequately cared for and who were living in foster care and under CHIPS orders as a result. Because these comments were grounded in fact, the circuit court's decision to attach significance to Goodman's character deficiencies in this regard does not show bias, however inappropriately expressed by the circuit court. As for the circuit court's other intemperate remarks, they reflect poorly on the circuit court, but do not lead us to believe that the court was biased against Goodman *in particular*. The circuit court used the same short-tempered tone with counsel. Our conclusion that the circuit court was not biased against Goodman in particular is bolstered by the fact the circuit court's subsequent remarks at the sentencing hearing after revocation, from which this appeal is taken, do not display the same degree of intemperance.

¶5 Goodman next argues that the circuit court erroneously exercised its discretion by denying his defense counsel's motion at the sentencing hearing for a competency evaluation. “No person who lacks substantial mental capacity to understand the proceedings or assist his or her own defense may be tried, convicted or sentenced for the commission of an offense so long as the capacity endures.” WIS. STAT. § 971.13(1) (2001-02). A person is competent if he or she

“has sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational understanding—and ... has a rational as well as factual understanding of the proceedings.” *State ex rel. Haskins v. County Courts*, 62 Wis. 2d 250, 265, 214 N.W.2d 575 (1974) (quotation omitted). To determine whether a defendant is competent, “[w]hat prosecution, defense counsel, and court need to know are the facts relevant to the decisions they must make: In what ways the accused’s mental condition would affect his ability to understand the particular legal proceedings in prospect and to cooperate with his counsel.” *Id.* (quotation omitted). “Elaborate diagnoses or elaborate psychiatric evaluations directed to the ultimate treatment of the subject are of little use to a court in determining this question.” *Id.*

¶6 Again, we conclude that the circuit court acted inappropriately, but did not commit error. The circuit court repeatedly interrupted counsel, refused to listen to counsel’s arguments, and made contradictory statements about the level of specificity it expected from counsel regarding her basis for questioning Goodman’s competency. Nevertheless, the circuit court’s colloquy with Goodman shows that Goodman understood the proceedings and was able to assist his counsel; the circuit court had the benefit of extended prior contact with Goodman, enhancing its ability to determine Goodman’s understanding and abilities. We note, too, that Goodman has not provided us with specific information on appeal that the court did not know or did not learn because the court interrupted defense counsel that might lead us to conclude that there was an error. Therefore, we reject this argument.

¶7 Finally, Goodman argues that the sentence was based on inaccurate information. “A defendant has a due process right to be sentenced on the basis of true and correct information.” *State v. Anderson*, 222 Wis. 2d 403, 408, 588

N.W.2d 75 (Ct. App. 1998). “A defendant who requests resentencing must show that specific information ... was inaccurate and that the court actually relied upon the inaccurate information in sentencing.” *Id.*

¶8 Goodman argues that the circuit court incorrectly believed that he had not been to any AA meetings. When Goodman brought the motion to modify his sentence, he presented proof that he had attended the meetings, which had been in his probation file before sentencing, but was overlooked by his probation officer. Goodman also contends that the circuit court believed that he failed to report to his probation officer because he was intentionally disregarding his sentence, when in fact he was just confused about when to report. He points to documentation that he mistakenly presented himself to the House of Correction to serve a stayed jail sentence during the same time period as his failure to report for probation as evidence of his confusion.

¶9 In the order denying Goodman’s motion for sentence modification, the circuit court explained that, even if this new information had been presented at sentencing, it would not have changed the sentence imposed because the sentence was primarily based on Goodman’s lengthy prior criminal history and his failure on probation. Our review of counsel’s arguments at sentencing and the circuit court’s explanation for its sentence supports the circuit court’s ruling. Goodman’s AA attendance and his failure to report for probation, while important, were but two of many items discussed and were not the primary focus at sentencing. Because the erroneous information did not provide the basis for the sentence, we reject Goodman’s argument that he should be resentenced.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5 (2001-02).

