

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 14, 2011**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

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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. 2010AP653-CR**

**Cir. Ct. No. 2006CF20**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**GEORGE P. BOYER, JR.,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Dane County: DAVID T. FLANAGAN, III, Judge. *Affirmed.*

Before Vergeront, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. George P. Boyer appeals from an order clarifying his sentence on revocation for Operating a Motor Vehicle Without the Owner's Consent (OMVWOC). Boyer contends that the circuit court resentenced him in

violation of his due process and double jeopardy rights. We conclude the court properly modified Boyer's sentence to correct legal errors, and affirm.

### *Background*

¶2 In October 2006, Boyer pled guilty to two counts of OMVWOC, and received three years' probation, sentence withheld. The judgment was later amended to include eight months of jail time as a condition of probation, as an alternative to revocation.

¶3 On February 2, 2009, Boyer entered an Alford plea in a theft case. The charges in the theft case had triggered revocation proceedings in this case and a burglary case. As part of the plea agreement in the theft case, Boyer agreed to waive revocation proceedings in this case and the burglary case and the State agreed to follow the sentence recommendation of the probation agent on sentencing following revocation. The agent recommended four years' initial confinement and four years' extended supervision in the burglary case, and a consecutive sentence in this case of eighteen months' initial confinement and eighteen months' extended supervision. The State informed the court that the recommendation was for Boyer's total initial confinement on revocation to be five and one-half years. Boyer agreed with the State's description of the joint recommendation.

¶4 On May 5, 2009, the court held a hearing on sentencing following revocation. The parties agreed that the plea agreement in the theft case had been to jointly recommend eighteen months' initial confinement and eighteen months' extended supervision following revocation in this case, as recommended by the probation agent. The parties disputed, however, whether there had been an agreement as to sentence credit. Boyer asserted that the State had agreed to

recommend that sentence credit apply to reduce the sentence in this case so that Boyer would have no confinement time in addition to the four years he would serve on the burglary case, and the State asserted the agreement was limited to a recommended length of initial confinement, not a recommendation as to sentence credit. The probation agent informed the court that when he made the recommendation of eighteen months' initial confinement on revocation, he was aware that Boyer was entitled to a significant amount of sentence credit; that he was not certain how the credit would apply, but that he believed that the credit would apply so that the four years' confinement in the burglary case would be the controlling sentence; and that his intent was not for Boyer to serve any additional confinement time in this case.

¶5 The court stated that it would impose a sentence that came as close to what it discerned as the parties' agreement at the time of the plea in the theft case as it could, noting that it was difficult to accomplish exactly what the parties and the probation agent intended. The court initially stated that it had decided to sentence Boyer to eighteen months of initial confinement and eighteen months of extended supervision, in accord with the parties' joint recommendation. However, after the parties further disputed how sentence credit would apply and its effect on Boyer's period of initial confinement, the court sentenced Boyer to eight months of initial confinement and eighteen months of extended supervision, consecutive to Boyer's sentence of four years' initial confinement and four years' extended supervision on revocation in the burglary case. The court determined that Boyer was entitled to eight months of sentence credit in this case based on the conditional jail time he served on the alternative to revocation, but that Boyer was not entitled to an additional 385 days of disputed sentence credit, because that credit had been applied to the burglary sentence.

¶6 After sentencing, the DOC wrote the circuit court that under WIS. STAT. § 973.01(2)(b) (2009-10),<sup>1</sup> the term of initial confinement had to be at least one year, because OMVWOC is a felony conviction. Boyer responded personally with a letter to the court, suggesting ways to restructure his sentence. The court entered an amended judgment of conviction on September 2, 2009, sentencing Boyer to eighteen months of initial confinement and eighteen months of extended supervision, with 300 days of sentence credit. The DOC then wrote the court that the 300 days of sentence credit appeared duplicative to credit granted in the burglary case, which the DOC understood to run consecutively, violating *State v. Boettcher*, 144 Wis. 2d 86, 423 N.W.2d 533 (1988). Boyer again wrote the court personally, stating that he had interpreted the amended judgment of conviction as ordering the sentences in this case and the burglary case to run concurrently. Boyer's attorney also wrote the court, stating that the DOC had not proceeded according to the court's intentions in imposing sentence. The DOC wrote the court again, seeking clarification of the court's intent.

¶7 On January 15, 2010, the circuit court issued an order clarifying the sentence in this case. The court noted that at a restitution hearing in the theft case in October 2009, it had requested the parties submit written arguments on their ongoing dispute over the sentence in this case, and the parties had not done so. The court also said it had received additional information from the DOC that Boyer received 801 days of sentence credit in the burglary case, so that it would appear that any credit in this case would be duplicative under *Boettcher*.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶8 The court stated that it had reviewed the transcript of the February 2, 2009 plea hearing in the theft case and determined that Boyer was incorrect in his assertion that the State had agreed to recommend that sentence credit be applied to preclude Boyer from serving any additional time on revocation in this case. The court stated that it had initially imposed a sentence of eight months' initial confinement under its mistaken understanding of the parties' agreement. The court determined that it was the intent of the parties in the theft case to jointly recommend a total sentence on revocation of five and one-half years of initial confinement. The court explained that its intent had always been to follow the joint recommendation of the parties. The court also stated that the five and one-half year total period of initial confinement reflected the court's concern over the seriousness of Boyer's pattern of criminal conduct and the need to protect the public. Thus, the court determined that the proper sentence in this case is eighteen months of initial confinement and eighteen months of extended supervision, consecutive to the four years of initial confinement in the burglary case, as stated in the September 2009 amended judgment of conviction; and that Boyer is not entitled to any sentence credit. The court entered a second amended judgment of conviction, reflecting the elimination of sentence credit. Boyer moved for reconsideration, and the court denied the motion. Boyer appeals.

#### *Standard of Review*

¶9 We review claims of constitutional error de novo, independently applying the facts of a case to constitutional standards. See *State v. Turner*, 136 Wis. 2d 333, 344, 401 N.W.2d 827 (1987).

*Discussion*

¶10 Boyer contends that the circuit court violated his due process and double jeopardy rights in its order and amended sentence in January 2010, by modifying the sentence the court originally entered in May 2009.<sup>2</sup> He contends that the sentence the court originally imposed—eight months of initial confinement and eighteen months of extended supervision—followed the joint recommendation of the parties. Boyer asserts the court continued to follow the intent of the parties in September 2009 when it amended the sentence to eighteen months’ initial confinement with 300 days of sentence credit.<sup>3</sup> He asserts, however, that when the court clarified the sentence in January 2010, eliminating any sentence credit in this case, the court violated his due process rights by resentencing him without a hearing. He also asserts that the court’s modification to eliminate sentence credit in January 2010 violated his double jeopardy rights, apparently because Boyer had already begun serving his sentence and had an expectation of finality in that sentence. Finally, Boyer contends that he is entitled to reversal in the interest of justice because the real controversy has not been fully tried. We reject each of these contentions.

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<sup>2</sup> Boyer raises his claims of circuit court error in terms of due process and double jeopardy violations for the first time on appeal. Generally, issues raised for the first time on appeal are deemed forfeited. See *Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superseded on other grounds by* WIS. STAT. § 895.52. However, the State does not assert that Boyer has forfeited these arguments and, in any event, we conclude that Boyer’s arguments lack merit.

<sup>3</sup> Boyer does not contend that the circuit court erred in entering the amended sentence in September 2009, nor did he appeal from the sentence entered at that time. However, his overall argument appears to be that the court erred in ultimately deviating from the May 2009 sentence. We therefore address the modifications to the sentence in September 2009 and January 2010.

¶11 First, we conclude that Boyer was not denied due process when the circuit court modified his sentence without a hearing. The court had authority to modify the sentence to correct legal errors: first, to correct a felony sentence of less than one year, contrary to WIS. STAT. § 973.01(2)(b); and then to eliminate improperly granted sentence credit under *Boettcher*.<sup>4</sup> See *Hayes v. State*, 46 Wis. 2d 93, 101-02, 175 N.W.2d 625 (1970) (overruled on other grounds) (“[A] court has the power to correct formal or clerical errors or an illegal or a void sentence at any time.”). Even assuming the court erred in modifying Boyer’s sentence without a hearing, we conclude that error was harmless. See *State v. Kleser*, 2010 WI 88, ¶94, 328 Wis. 2d 42, 786 N.W.2d 144 (“An error will not warrant reversal if the error does not affect the substantial rights of the adverse party. An error affects the substantial rights of a party if there is a reasonable probability of a different outcome, meaning a ‘probability sufficient to undermine confidence in the outcome’” (citations omitted)).

¶12 Boyer was afforded a full sentencing hearing in this case in May 2009, where he exercised his right to be heard on sentencing following revocation, and presented his arguments on the joint recommendation of the parties. See *State v. Stenseth*, 2003 WI App 198, ¶¶17-20, 266 Wis. 2d 959, 669 N.W.2d 776 (error in failing to have defendant present at resentencing following illegal sentence harmless where defendant was afforded full hearing at original sentencing, and court continued to apply original sentencing intent). The court modified the sentence because it was contrary to statute, and then because it improperly

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<sup>4</sup> Boyer does not contend that a felony sentence of eight months of initial confinement is a proper sentence under WIS. STAT. § 973.01(2)(b) or that he is entitled to sentence credit in this case.

awarded sentence credit; the court made clear throughout the proceedings that it was attempting to follow the parties' joint recommendation within legal parameters, rather than changing its intent in sentencing. *See id.*; *see also State v. Maron*, 214 Wis. 2d 384, 388, 571 N.W.2d 454 (Ct. App. 1997) (“A court’s authority in sentencing ... is controlled by statute.”). Additionally, Boyer does not now assert that he would have presented any evidence at a hearing that would have altered the outcome of the sentence, instead continuing to argue that the court was bound by the sentence it imposed in May 2009. *See Stenseth*, 266 Wis. 2d 959, ¶19. The court invited briefs before it ruled, but Boyer filed none. On this record, we perceive no due process violation.

¶13 Next, we conclude that the facts of this case do not implicate double jeopardy concerns. Not every modification of a sentence implicates double jeopardy. *See State v. Sepulveda*, 119 Wis. 2d 546, 566, 350 N.W.2d 96 (1984). Here, “[t]he modification did not subject [Boyer] to ‘embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent’ through the [S]tate’s repeated attempts to obtain a conviction.” *Id.* at 566-67 (citation omitted). Boyer also was not subjected to “a greater sentence than the legislature has authorized for the offenses for which [he] was convicted.” *Id.* at 567. Accordingly, Boyer’s double jeopardy rights have not been violated.

¶14 Lastly, we perceive no basis to reverse in the interest of justice. We have explained that the circuit court acted within its authority to modify the sentence in this case to correct legal errors, and that any error in the sentencing process was harmless.

*By the Court.*—Judgment and order affirmed.



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

