

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 21, 2012

Diane M. Fremgen
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. 2011AP2750-CR

Cir. Ct. No. 2005CF164

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRENCE E. BOSWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Burnett County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Terrence Boswell appeals a judgment sentencing him after revocation of probation and an order denying his motion for resentencing. He argues that the sentencing court demonstrated objective bias because it fulfilled its “promise” to sentence him to three years’ initial

confinement and three years' extended supervision if his probation was revoked. We reject the argument and affirm the judgment and order.

¶2 At Boswell's initial sentencing hearing, the court withheld sentence and placed Boswell on probation and warned:

If they revoke you, you come back here. And if it's another drunk driving case, indeed you will go to prison for three years and three years on extended supervision. If you commit a bunch of things, small things that aren't alcohol related and are subsequently revoked and no violence and there's no alcohol, you probably won't end up with three years in prison. But if I need to do it at some future date you go back to prison.

Boswell's probation was revoked based on allegations of domestic violence and alcohol consumption. The court sentenced Boswell to three years' initial confinement and three years' extended supervision.

¶3 Boswell contends the court's keeping its "promise" deprived him of his right to an impartial judge because the judge was objectively biased. Objective bias can exist in two situations: first, when there is an appearance of bias, and second, when there is actual bias. Boswell alleges both forms of bias. He contends a reasonable person would interpret the court's "promise" to mean the court made up its mind before the hearing on the sentence after revocation. While a court may tell a defendant what *could* happen if his probation is revoked, telling him what *will* happen imperils the defendant's due process right to an impartial judge. See *State v. Goodson*, 2009 WI App 107, ¶11, 320 Wis. 2d 166, 771 N.W.2d 385.

¶4 *Goodson* is distinguishable because the court there warned the defendant that he would get the maximum sentence if his supervision was revoked. Then after revocation, the court imposed the maximum sentence because

of the “agreement” made at the time of the initial sentencing. *Id.*, ¶¶2, 5. Here, the court made no reference to its earlier statements when it imposed the sentence after revocation. Rather, it specifically considered the primary factors that relate to sentencing, the gravity of the offense, Boswell’s character and rehabilitative needs, and the need to protect the public. *See State v. Paske*, 163 Wis. 2d 52, 62, 471 N.W.2d 55 (1991).

¶5 While the court’s statement at the initial sentencing hearing could be construed as prejudgment when taken out of context, considering the record as a whole, nothing suggests that the court prejudged the outcome or merely followed through on a previous “promise” to impose the maximum sentence. The court’s comments demonstrate its attempt to “scare Boswell straight” rather than a promise to impose the maximum sentence. This was borne out by the court’s careful consideration of the sentencing factors and its failure to reference its earlier remarks. The court based Boswell’s sentence on his blood alcohol content, between .17 and .19 %, not less than 8.5 times the legal limit set out in WIS. STAT. § 340.01(46m) (2009-10). The court noted that Boswell had been placed on supervision seven times with revocation occurring five of those seven times. Boswell also failed to consistently follow the rules of his probation regarding drinking and attending Alcoholics Anonymous meetings. These considerations, not the court’s earlier remarks, constitute the basis for Boswell’s sentence.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

