

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 27, 2010

A. John Voelker
Acting 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. 2010AP332-CR

Cir. Ct. No. 2007CM695

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES ROBERT THOMAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Reversed and cause remanded with directions.*

¶1 HOOVER, P.J.¹ James Thomas appeals a judgment of conviction for disorderly conduct and misdemeanor bail jumping, both charges as a repeater, and an order denying his motion for resentencing. Thomas argues the circuit court exhibited objective bias when, consistent with its earlier promise, the court sentenced him to the maximum term of imprisonment after his probation was revoked. We agree and reverse and remand for resentencing before a different judge.

BACKGROUND

¶2 Thomas pled guilty to both charges. The circuit court withheld sentence and placed him on probation. At that initial sentencing hearing, the court advised Thomas:

[I]f ... you blow this probation and you're revoked ... if you blow it, I'm going to give you the maximum amount and I'm telling you ahead of time you're getting the maximum.

I'll tell you one thing, you deserve—you probably deserve prison time for what you've done collectively. But I'm going to give [you] the rope here, a leeway here, but you're not going to get any more easy sentencing from me. You've told me that in the past, and I got talked into that. But today you're ... coherent as I've never seen you, so I feel you're going to try to make this work. But if it doesn't work, it's just incarceration, whether it's jail or prison, it really doesn't matter to me

¶3 When Thomas's probation was later revoked, the court imposed the maximum bifurcated sentence for each offense and ordered them served consecutively. The resulting sentence was three years' initial confinement and one year extended supervision. The court set forth appropriate reasons for the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

sentence and did not refer to its earlier promise. Neither did the court disavow reliance on its earlier promise, however. The court concluded its sentence remarks indicating, “[Y]ou’ve done lots of bad things over a course of time, and eventually you have to pay for those things, and this is the time that you’re going to have to pay for those things.”

¶4 Thomas moved for resentencing, arguing the court exhibited objective bias by prejudging the sentence, as in *State v. Goodson*, 2009 WI App 107, 320 Wis. 2d 166, 771 N.W.2d 385. The circuit court denied the motion, reasoning the present case was distinguished from *Goodson* because there the court explicitly stated it was enforcing its earlier promise to mete out the maximum sentence.

DISCUSSION

¶5 The outcome of this case is dictated by our decision in *Goodson*. There, we observed objective bias can exist in two forms: where there is an appearance of bias, or where “there are objective facts demonstrating the trial judge in fact treated the defendant unfairly.” *Id.*, ¶9 (quoting *State v. McBride*, 187 Wis. 2d 409, 416, 523 N.W.2d 106 (Ct. App. 1994), and citing *State v. Gudgeon*, 2006 WI App 143, ¶¶23-24, 295 Wis. 2d 189, 720 N.W.2d 114) (punctuation omitted). In *Goodson*, which involved facts similar to those present here, we concluded both forms were present. *Id.*, ¶¶10, 16.

¶6 As in *Goodson*, here “the court unequivocally promised to sentence Goodson to the maximum period of time if he violated his supervision rules.” *Id.*, ¶13. Consistent with that promise, the court then sentenced Thomas to the maximum, consecutive imprisonment. “A reasonable person would conclude that a judge would intend to keep such a promise—that the judge had made up his [or

her] mind about [Thomas's] sentence before the [sentencing after revocation] hearing.” See *id.* Because this constitutes an objective appearance of bias that reveals a great risk of actual bias, we must reverse for resentencing. See *id.*, ¶¶9, 13-14, 18.

¶7 However, unlike the second, alternative basis for our objective bias conclusion in *Goodson*, this case is not one of those rare instances where actual bias is demonstrated on the record. In *Goodson*, the circuit court freely acknowledged it had prejudged the outcome and was enforcing its earlier promise to impose the maximum sentence. In contrast, here the court did not explicitly invoke its earlier promise to impose the maximum when providing its sentencing reasons.²

By the Court.—Judgment and order reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

² Thomas argues the harmless error rule does not apply here because there was structural error. The State responds: “[The h]armless error analysis should not be reached in this case.”

