

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 30, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-1303-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

BRUCE R. POLCZYNSKI,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Jefferson County:
WILLIAM F. HUE, Judge. *Reversed and cause remanded with directions.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

¶1 PER CURIAM. The State of Wisconsin appeals from a judgment convicting Bruce R. Polczynski of operating a motor vehicle while intoxicated, sixth offense. The issue is whether the circuit court may place Polczynski on

probation under the statutes that were in effect at the time of his offense. We conclude that probation is not available. We reverse and remand for resentencing.

¶2 WISCONSIN STAT. § 346.63 (1997-98)¹ prohibits operating a motor vehicle while intoxicated (OWI). The penalty for a fifth or subsequent offense includes a prison term of not less than six months nor more than five years. WIS. STAT. § 346.65(2)(e). At the time of Polczynski's offense, WIS. STAT. § 973.09(1)(d) provided in relevant part that "[i]f a person is convicted of an offense that provides a mandatory or presumptive minimum period of one year or less of imprisonment, a court may place the person on probation.... This paragraph does not apply if the conviction is for any violation under s. 346.63." All other offenders may receive probation except those convicted of crimes punishable by life imprisonment. Section 973.09(1)(a), (c). Section 973.09(1)(d) has since been amended to bar probation only for those convicted of operating a motor vehicle while intoxicated as a second or third offense. 1999 Wis. Act 9, § 3205d.

¶3 Polczynski argues that an ambiguity exists, not in the language of WIS. STAT. § 973.09(1)(d), but in the interpretation and application of that provision when read in context with other statutes. However, he does not identify any specific ambiguity, and we see none. The plain meaning of § 973.09(1)(d) bars probation for those convicted of the offense of operating while intoxicated.

¶4 Polczynski also argues that we should allow his probation to stand because the legislature later amended WIS. STAT. § 973.09(1)(d) to allow

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

probation for the offense of which he has been convicted. However, he offers no legal authority for the proposition that we may disregard an unambiguous statute simply because it was amended later to produce a different result. We decline to disregard the statute as it existed at the time of Polczynski's offense. Therefore, we reverse the judgment and remand for resentencing.

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

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

