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COURT OF APPEALS OF WISCONSIN

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2017AP918-CR

v.

DANIEL E. OLSEN,

Defendant-Appellant.

BRIEF OF APPELLANT

Jefferson County Circuit Court

Case Number 2013CF332

Judge Michael P. Maxwell presiding

Submitted by:

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Was it reversible error and denial of due process of law for the trial court to modify and extend Defendant-Appellant Olsen's probation without allowing him to call witnesses and cross-examine the department and present evidence of his own at the probation review hearing and without an "official" pleading/request/motion to extend said probation having ever been filed with the court or served upon Defendant-Appellant Olsen?

STATEMENT CONCERNING ORAL ARGUMENT AND PUBLICATION OF OPINION

Oral argument is not necessary. The opinion in this case should not be published.

STATEMENT OF THE CASE

1. On April 1, 2015, Defendant-Appellant Daniel E. Olsen (hereinafter referred to as Olsen), appeared before Judge Michael Bohren, Branch 8, Waukesha Circuit Court, and entered pleas of no contest and was found guilty to Amended Count 1, § 346.62(3), W.S.A., Reckless Driving-Cause Bodily Harm, Misd. U, and Amended Count 2, § 346.62(3), W.S.A., Reckless Driving-Cause Bodily Harm, Misd. U. At the sentencing portion of the hearing, the Court found that restitution was owed to Victim Elizabeth Patterson in the sum of \$32,556.00; Olsen did not contest the restitution amount. As a condition of his probation, Olsen was ordered by the Court to pay \$100.00 per month toward restitution.
2. On January 17, 2017, Chelsey Keen, Probation and Parole Agent #11302, State of Wisconsin, Department of Corrections, Division of Community Corrections (hereinafter referred to as Keen), filed with the Waukesha Circuit Court, a probation status report wherein "[t]he Department of Corrections request[ed] a review hearing of Olsen's supervision terms based on (certain) items." The review made no specific requests to modify or extend Olsen's probation. (Appendix P.8)
3. On February 6, 2017, in response to the January 17, 2017, probation status report, a hearing was held before Judge Michael P. Maxwell, Branch 8, Waukesha Circuit Court. At the conclusion of the hearing, the matter was set for further hearing before Judge Maxwell on March 29, 2017. (Appendix P.11-28)
4. On March 21, 2017, Keen wrote a letter to Judge Maxwell. Keen's letter made no request to extend Olsen's probation. (Appendix P. 65)
5. On March 29, 2017, a hearing was held before Judge Maxwell. (Appendix P.29-57)
6. On March 31, 2017, Judge Maxwell, entered an Order wherein Olsen's probation was extended until April 1, 2018; 2) Olsen's restitution payment was increased from \$100.00 per month to \$200.00 per month, beginning April 1, 2017; 3) Olsen was ordered to pay restitution payment arrears of \$300.00 within 30 days of the date of the order. Failure to pay the arrears mandated the imposition of fifteen days condition time with Huber; 4) Beginning May 1, 2017, and continuing during the period of probation, Olsen was ordered to provide to his Probation Agent a monthly detailed accounting of all income received by Olsen regardless of source and all expenses paid by Olsen regardless of manner in which the payment is made by the 5th of the

month for the preceding motions income and expenses. The accounting had to be supported by documentation such as bank statements, deposit slips, and receipts. Failure to submit the monthly accounting in a timely manner results in the imposition of fifteen days condition time with Huber at Keen's discretion; and 5) The Court ordered to set this matter for a review hearing approximately sixty days before April 1, 2018. (Appendix P. 4-6)

ARGUMENT

1. It was reversible error and denial of due process of law for the trial court to modify and extend Olsen's probation without allowing him to call witnesses and cross-examine the department and present evidence of his own at the probation review hearing and without an "official" pleading/request/motion to extend said probation having ever been filed with the court or served upon Olsen.
2. Pursuant to § 973.09(3), W.S.A., prior to the expiration of any probation period imposed as part of a criminal sentence by the Court, the Court, for cause and by order, may extend probation for a stated period or modify the terms and conditions thereof. The department shall notify the sentencing court, any person to whom unpaid restitution is owed and the district attorney of the status of the ordered restitution payments unpaid at least 90 days before the probation expiration date. If payment as ordered has not been made, the Court shall hold a probation review hearing prior to the expiration date, unless the hearing is voluntarily waived by the probationer with the knowledge that waiver may result in an extension of the probation period or in a revocation of probation. If the Court does not extend probation, it shall issue a judgment for the unpaid restitution and direct the clerk of circuit court to file and enter the judgment in the judgment and lien docket, without fee, unless it finds that the victim has already recovered a judgment against the probationer for the damages covered by the restitution order. If the Court issues a judgment for the unpaid restitution, the Court shall send to the person at his or her last-known address written notification that a civil judgment has been issued for the unpaid restitution. The judgment has the same force and effect as judgments entered under s. 806.10.
3. At a court review hearing to consider extension of probation based on unpaid restitution, the department has the burden of proving, by a clear preponderance of the evidence that there is cause to modify the terms and conditions of probation. Should the Court find that the department has met the legal burden of proof, the Court may, by order, extend the period of probation for a stated period or modify the terms and conditions of probation. Pursuant to § 973.09(4)(c)(1), W.S.A., a finding by the court that the probationer has not made a good faith effort to discharge court-ordered payment obligations may constitute cause for the extension of probation. The law permits the Court to modify the conditions of probation *for cause*, which requires that the proponent of the modification meet the burden to show why the conditions should be modified. See *State v. Gerard*, 57 Wis.2d 611, 205 N.W. 2d 374 (1973). In this case, the department, the proponent for modification and extension of probation, failed to meet its burden.
4. In the Judicial Council Note, 1987, setting forth specific grounds for extending probation, it was stated, the availability of a civil judgment for unpaid restitution enforceable by the victim under § 973.20 (1), stats., substantially reduces the necessity of extending probation solely for the purpose of enforcing court-ordered payments, a practice of questionable cost-effectiveness. See

legislative audit bureau report No. 85-10, April 15, 1985, at 17-18. Probation may, however, be extended upon stipulation of the defendant, to enforce community service in satisfaction of restitution, or when the probationer has not made a good faith effort to make restitution or other payments. *Huggett v. State*, 83 Wis.2d 790, at 803, 266 N.W.2d 403 (1978). [87 Act 398]

5. Simple failure to make restitution alone is not cause for extending probation under sub. § 973.09(3), W.S.A., if the probationer demonstrates good faith effort to pay but lacks the capacity to do so during probation. *Huggett v. State*, 83 Wis.2d 790, 266 N.W.2d 403 (1978).

6. Wisconsin courts have extended certain due process rights to a probationer at revocation hearings, *State v. Gerard*, 57 Wis.2d at 671, 205 N.W.2d at 377-78, *State v. Pope*, 107 Wis.2d 726, 730, 321 N.W.2d 359, 361 (Ct. App. 1982) and at probation extension hearings. See *State v. Hardwick*, 144 Wis.2d 55, 422 N.W.2d 922 (Ct. App. 1988).

7. At a review hearing to extend/modify probation, the probationer is entitled: 1) to notice of the hearing and the reasons for the requested change; 2) to be present; 3) to cross-examine and present witnesses; 4) to have conditions modified based on correct information. *State v. Hayes*, 173 Wis.2d 439, 496 N.W.2d 645, (Ct. App. 1992). In this case, there was no notice of the request to extend probation given to Olsen. The Court refused to let Olsen cross-examine or present witnesses or inquire concerning evidence present by the department.

8. At the time of the March 29, 2017, the Court was ill-prepared and ignorant of the applicable statutory and case law governing modification and extension of probation as well as of even the purpose of the hearing. The Court's total lack of preparation and understanding of the "review hearing" on March 29, 2017, was demonstrated when the Court inquired "Mr. Olsen, do you think probation and parole doesn't have the ability set the restitution amount?" (Appendix P. 40, L. 21-23) And again, when the Court questioned Olsen where authority to change/modify restitutions lies; "You believe it lies with the court to change the restitution payment?" (Appendix P. 42, L. 5-6)

The Court seemed to demonstrate a lack of comprehension as to the purpose of the hearing, when stating, "Well, we're not at the point of whether we are extending the probation." (Appendix P. 44-45, L. 25-1) Judge Maxwell demonstrated further confusion of the purpose of the hearing when he inquired halfway into the hearing, "well, probation is not asking me to extend (Olsen's) probation at this time, right?" (Appendix P. 45, L. 8-10) This against a backdrop of the hearing on February 6, 2017, wherein Keen told the Court "We are requesting you please examine the defendant's probation extension possibility. ...we have a discharge date for Mr. Olsen of April 1st of 2017." (Appendix P. 24, L. 15-19) There was then discussion on the record and an acknowledgement by the department that there was no "official" request to extend Olsen's probation. On February 6, 2017, the Court set the matter for "hearing to extend probation possibly" on March 29, 2017. (Appendix P. 26-27, L. 16-10) The Court ruled "...two weeks prior to [March 29, 2017, hearing], that the Department file a letter and serve Mr. Olsen with what it is they are asking the court to do..." (Appendix P. 27, L. 5-10)

Per the court's ruling at the February 6, 2017, hearing, Keen filed a letter with the Court dated March 21, 2017, wherein it was requested Olsen provide certain tax and income documents as well as restitution payments be increased to "at least \$400.00 per month." (Appendix P.65) At no time up to the present date of this brief has there ever been a pleading/request/notice/motion by the department to extend Olsen's probation beyond April 1, 2017.

9. The evidence that was presented to the Court by Keen on behalf of the department at hearing on March 29, 2017, was that for the 24 months Olsen was on probation, he had paid a total of \$2,200.00 toward restitution – the equivalent of \$100.00 per month as ordered by Judge Bohren at the time of sentencing. (Appendix P. 40, L.11-16) [At the hearing, Olsen had receipts/records from the department demonstrating \$2,400.00 had actually been paid toward restitution; however, because of the Court's ruling, Olsen was unable to present that evidence.] Keen also acknowledged that "[t]he prime reason for (extending probation) is to collect restitution....That's the sole intention for the extension of probation." (Appendix P. 47, L. 14-20) The department presented no evidence to the Court whatsoever as to Olsen's earnings/income or reasonable and necessary living expenses during the 24-month time period he was on probation nor anything to demonstrate what had been paid in restitution by Olsen was anything other than a good faith history of payments that was compliant with Judge Bohren's order of \$100.00 per month based on his ability to pay at the time of sentencing.

10. During the March 27, 2017, hearing, Olsen attempted to call Keen as a witness. (Appendix P. 45, L. 20-25) The Court refused to allow Olsen to call any witnesses or present any evidence. (Appendix P. 46 L. 18-24) The Court asked Olsen, "Do you want to have an evidentiary hearing?" (Appendix P. 46, L. 24-25) To which Olsen answered in the affirmative. (Appendix P. 47, L. 1-6) During this portion of the hearing, the Court indicated it would look for a hearing date within 30 days. The Court further ruled, "The court will enter an order today that extends probation until that date. It will be after the 1st." (Appendix P. 47, L. 10-13)

11 Thereafter, on March 31, 2017, the Court entered written orders as set forth above without affording Olsen any due process of law. The Court simply accepted the information presented by the department. Olsen was denied his due process right to present witnesses and evidence on his own behalf as well as precluded from cross-examining Keen and contesting the department's evidence. The Court's total disregard for the applicable law and total abuse of discretion resulted in findings and the entry of a ruling/order based on a one-sided process of reasoning using only those facts that were presented by the department and only those inferences that could be derived from those facts. The Court further did so though the department failed to ever file a pleading/request/notice/motion to extend Olsen's probation ever being filed with the Court.

CONCLUSION

For the reasons set forth herein, Defendant-Appellant Olsen asserts it reversible error and denial of due process of law for the trial court to modify and extend Olsen's probation without allowing him to call witnesses and cross-examine the department and present evidence of his own at the probation review hearing and without an "official" pleading/request/motion to extend said probation having ever been filed with the court or served upon Olsen and this Court should vacate the Orders of March 31, 2017, and terminate Olsen's probation effective immediately.

Dated September 27, 2017

A handwritten signature in black ink, appearing to read 'D. Olsen', with a stylized flourish at the end.

Daniel E. Olsen, Defendant-Appellant

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 5 pages. I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.