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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

12-12-2017

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal Nos. 2017-AP-918 CR

DANIEL E. OLSEN,

Defendant-Appellant.

On Appeal of an order extending Defendant's probation
entered in the Circuit Court of Waukesha County, The
Honorable Judge Michael P. Maxwell, Presiding.

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

Did the defendant receive notice of the extension hearing, and whether it was reversible error for the circuit court to extend the defendant's probation without allowing the defendant an opportunity to call witnesses or cross-examine the representative from the department.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent ("state") submits that oral argumentation is unnecessary because the issues can be set forth fully in the briefs. Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of the record.

ARGUMENT

I. THE DEFENDANT RECEIVED NOTICE OF THE EXTENSION HEARING IN PERSON

The defendant argues the extension was inappropriate because he did not receive written notice of the hearing. However as noted in the court record, the defendant was aware the department was considering an extension even prior to the first hearing on the issue on February 6, 2017. (R. 24:1.) The letter filed by Agent Keen notes the defendant had an outstanding restitution balance of \$30,841.68, but nevertheless believed his probation should discharge as scheduled, and not be extended. (*Id.*)

Additionally, the defendant appeared in court on February 6, 2017, where the extension was discussed and the hearing was scheduled for March 29, 2017 for the purpose of determining whether an extension would be granted. (R. 26.) The defendant was also sent a notice from the circuit court for the hearing on March 29, 2017. (R. 27.) Therefore in addition to a written notice, the defendant was constructively put on notice that the hearing on March 29 would be regarding whether his probation would be extended to facilitate payment of restitution.

In anticipation of the restitution issue being determinative of whether an extension would be ordered, the circuit court ordered the defendant to provide bank statements for any accounts receiving income for the years 2014, 2015, and 2016. Prior to the extension hearing, the department provided an update to the circuit court indicating they did not have sufficient income verification from the defendant. (R. 28.) The defendant did provide some bank statements, which caused the department to request the extension and increased monthly restitution payments, as he had not been making a good faith effort to pay the restitution. (*Id.*)

II. THE LIMITED FINANCIAL DOCUMENTATION TURNED OVER BY THE DEFENDANT PROVIDED CAUSE TO EXTEND PROBATION DESPITE NOT BEING PERMITTED TO QUESTION THE DEPARTMENT REPRESENTATIVE OR CALLWITNESSES

The department wrote the circuit court prior to the extension hearing and noted that the defendant failed to provide official income verification and/or tax information. (R. 28.) The reasonable inference to draw is that these documents would not support a claim that the defendant had been making a good faith effort to make the

victim whole and pay the restitution, which totaled \$32,556.00 at the time of sentencing. (R. 32.)

Based on the limited records the defendant did provide, the department wrote the circuit court a summary of their concern that the defendant had the ability to pay more, however did not. (R. 28.)

The defendant's own financial records, which he turned over, showed he spent money on online adult entertainment monthly, and in one 60 day period spent over \$1400 to this end. *Id.* Additionally, the department noted violations committed by the defendant including missed restitution payments (April 2016, May 2016, July 2016, September 2016, February 2017), and an unauthorized trip to Las Vegas in August of 2016. (*Id.*) These items were gleaned from the defendant's own financial records which he had access to at the time of the hearing.

Defense cites no authority that he had a right to call witnesses and cross-examine the department at an extension hearing.

Although case law supports these procedures during a hearing to modify conditions of probation, the hearing at issue in this case was not to modify conditions, but to extend probation. *State v. Hayes*,

173 Wis. 2d 439, 496 N.W.2d 546 (Ct. App. 1992). Additionally, in the *Hayes* case, the court found it significant that imprisonment was a possible outcome, and therefore additional due process applied in that case. *Id.* In this case, the circuit court had no requirement to allow such procedures.

However, should this Court disagree, any failure to allow cross examination and witness presentation was harmless error given the nature of the extension request. Whether the defendant had been making a good faith effort to pay restitution was very difficult for the department and circuit court to glean given the defendant's resistance to providing income information. The limited documents that the defendant provided spoke for themselves, and thus cross-examination of the agent would not have changed the outcome in this case. The circuit court noted ample cause to extend the defendant's probation.

The power to extend a period of probation is within the circuit court's discretion. Wis. Stats. § 973.09(3)(a). A court's discretionary decision to extend probation should be upheld when warranted by the circumstances of a case. *State v. Olson* 222 Wis. 2d

283, 292, 588 N.W.2d 256 (Ct. App. 1998). A lower court appropriately exercises its discretion to extend probation when it, “examines the relevant facts, applies a proper standard of law, uses a ‘demonstrative rational process,’ and reaches a conclusion that a reasonable judge could reach.” *Id.* at 293 (quoting *State v. Sullivan*, 216 Wis.2d 768, 780, 576 N.W.2d 30, 36 (1998)).

Section 973.09(3) of the Wisconsin Statutes provides the proper standard of law on this issue, stating,

(a) Prior to the expiration of any probation period, the court, for cause and by order, may extend probation for a stated period or modify the terms and conditions thereof.

(b) 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.

Although not raised by the defendant, it appears the Circuit Court relied on an outdated version of the above statute in its written decision. (R. 31, 2.) However, “When a party alleges an erroneous exercise of discretion because the circuit court applied an incorrect legal standard, [the court of appeals will] review that issue de novo and affirm if [it] can independently conclude that the facts of record applied to the proper legal standards support the court's decision.” *In re Rogers*, 2007 WI App 50, ¶ 7, 300 Wis. 2d 532, 538. When the correct legal standard is applied, the extension in this case should be upheld because the facts support the extension.

Although an extension is not appropriate to facilitate payment of restitution when a good faith effort was made, restitution payment can constitute valid cause when no such effort was made. *Huggett v. State*, 83 Wis. 2d 790, 803, 266 N.W.2d 403 (1978). In the case at hand, the court had ample cause to extend the defendant’s probation for failing to make a good faith effort to pay the restitution given the defendant’s own resistance to provide income verification. Furthermore, the records that the defendant did provide showed spending habits suggestive that he was capable of making higher

monthly payments given the outstanding balance of over \$30,000. Based on all the facts in the record the extension should be upheld despite the court's reliance on an outdated version of the statute.

CONCLUSION

For all the reasons stated above, the State respectfully requests that the Court affirm the circuit court's extension of defendant's probation.

Dated this ____ day of December, 2017.

Respectfully,

Abbey Nickolie
Assistant District Attorney
Waukesha County
Attorney for Plaintiff-Respondent
State Bar Number 1092722

CERTIFICATION OF BRIEF

I hereby certify that this document conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief with proportional serif font. The length of this brief is 1,347 words long.

Dated this ____ day of December, 2017.

Abbey Nickolie
Assistant District Attorney
Waukesha County
Attorney for Plaintiff-Respondent
State Bar Number 1092722

**CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)**

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated at Waukesha, Wisconsin this ____ day of December, 2017.

Abbey Nickolie
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