

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 2, 1999

Marilyn L. Graves
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 § 808.10 and RULE 809.62, STATS.

No. 98-3668-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LONNY W. SYLTE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dunn County:
ROBERT RASMUSSEN, Judge. *Affirmed.*

CANE, C.J. Lonny Sylte appeals a judgment extending his probation for two years. The sole issue is whether the circuit court erroneously exercised its discretion when it found cause to extend Sylte's probation. Sylte argues that the court erred because: (1) he made a good-faith effort to comply with his restitution and complied with all other conditions of his probation; and (2) the extension was merely for debt collection. See *State v. Davis*, 127 Wis.2d

486, 381 N.W.2d 333 (1986); *State v. Olson*, 222 Wis.2d 283, 588 N.W.2d 256 (Ct. App. 1998). Based on the circuit court's factual finding that Sylte failed to make a good-faith effort to discharge his restitution, this court concludes that the circuit court properly exercised its discretion by extending Sylte's probation. Accordingly, the judgment is affirmed.

I. BACKGROUND

Sylte was convicted in September 1996 of hit and run with a motor vehicle contrary to § 346.67, STATS. The circuit court withheld sentence and placed him on two years' probation with the conditions that he pay restitution of \$300 per month or 25% of his gross wage and attend alcohol treatment. At that time, restitution was estimated at approximately \$29,000, but the amount was later fixed at 28,594.40.

In an August 1998 letter, Sylte's probation officer advised that Sylte complied with his probation conditions and paid \$7,366.23 in restitution, an average of \$306.92 per month. The letter further requested that Sylte be discharged from his probation and that the court order a civil judgment for the restitution balance. The court scheduled a restitution hearing for September 1998.

At the hearing, the probation officer's testimony was consistent with her letter, but she acknowledged that although Sylte had paid approximately \$300 per month, he had not paid 25% of his gross income. She further stated that Sylte had gotten "a little bit behind in paying the clerk of court," but was "trying to catch up." In addition, she testified that Sylte had been involved in a domestic abuse incident during his probation for which he completed counseling.

A victim of the hit and run testified that he was having financial difficulties because his insurance company denied coverage for the property damage he sustained in the hit and run; therefore, the victim requested that the court extend Sylte's probation. Initially, the State argued that because it appeared Sylte had made a good-faith effort to discharge his obligations, under § 973.09(3)(c), STATS., the court should order a civil judgment for the unpaid restitution, not extend his probation. *See* § 973.09(3)(a)4, STATS. Later, the State suggested that the court extend Sylte's probation because he had failed to pay 25% of his gross income and been involved in a domestic abuse incident. Sylte asked the court to end his probation and order a civil judgment.

Based on Sylte's income, the circuit court calculated that 25% of his income totaled approximately \$400 per month. The court then stated: "The fact is that the total amount that has been paid apparently is somewhere in the neighborhood of \$7,200 or \$7,500 when, in effect, it could have been substantially higher than that had there been a 25 percent payment." After the court expressed concern that Sylte could discharge a civil judgment in bankruptcy and thus prevent the victims from being "made whole," the court remarked:

I recognize, Ms. Liegel [Sylte's probation officer] that you have a lot of people on your caseload and that you don't like maintaining people on your caseload to be a civil debt collector. On the other hand, it is very clear public policy coming from Madison in terms of the new victims' rights legislation and otherwise that the legislature wants all reasonable efforts to be made to make victims whole. And that may include converting probation agents into civil debt collectors in certain cases. This is one of them.

With these remarks, the court extended Sylte's probation for two years and told the parties that if the court was to "revisit the issue," it wanted a "definitive answer"

regarding the discharge of a civil judgment in bankruptcy because that “is really a critical issue here as far as I am concerned.” Sylte then filed this appeal.

II. ANALYSIS

The precise issue here is whether the record contains facts to support the circuit court's decision to extend Sylte's probation for Sylte's lack of good faith effort to discharge his restitution. A circuit court's decision to extend probation is discretionary. *See Davis*, 127 Wis.2d at 499, 381 N.W.2d at 339. Underlying the discretionary decision, however, may be factual determinations and legal questions. *See Michael A.P. v. Solsrud*, 178 Wis.2d 137, 153, 502 N.W.2d 918, 925 (Ct. App. 1993). If a challenged decision is really a factual determination, the test on appeal is whether the finding of fact is clearly erroneous. *Wiederholt v. Fischer*, 169 Wis.2d 524, 531, 485 N.W.2d 442, 444 (Ct. App. 1992). In contrast, appellate courts review legal determinations without deference to the trial court's conclusions. *See Weiss v. Weiss*, 122 Wis.2d 688, 692, 365 N.W.2d 608, 610-11 (Ct. App. 1985). If the trial court's decision is based on an incorrect view of the law, it is an erroneous exercise of discretion. *Kuhlman v. Kuhlman*, 146 Wis.2d 588, 590, 432 N.W.2d 295, 296 (Ct. App. 1988).

Probation is the deprivation of a liberty and can require the probationer to follow rules and regulations directly affecting the manner in which he lives. *See State v. Tarrell*, 74 Wis.2d 647, 654, 247 N.W.2d 696, 700-01 (1976). Failure to comply with the terms of probation may result in extension of probation. Under § 973.09(3)(c)1, STATS., for example, probation may properly be extended if “[t]he probationer has not made a good faith effort to discharge court-ordered payment obligations or to pay fees owed” This rule notwithstanding, our courts have repeatedly warned that the criminal justice

system should not be employed to perform the functions of a debt collection agency. See **Davis**, 127 Wis.2d at 497, 381 N.W.2d at 338.

Although the circuit court commented that it might be appropriate to extend Sylte's probation to collect a debt, it also found that Sylte had not made payments equivalent to 25% of his gross income. This, and the court's observation that the total restitution paid to date should been substantially higher, are tantamount to a factual finding that Sylte had not made a good-faith effort to discharge his restitution. The circuit court need not recite the "magic words." See **Michael A.P.**, 178 Wis.2d at 151, 502 N.W.2d at 924. Its factual finding that cause exists to extend probation due to Sylte's lack of good faith is not clearly erroneous and provides a reasonable basis for extending his probation.

Contrary to Sylte's contention, **Olson** and **Davis** are distinguishable. Unlike in **Olson** or **Davis**, in which neither the State nor the court articulated any legitimate reason other than debt collection to extend probation, **Olson**, 222 Wis.2d at 296, 588 N.W.2d at 261; **Davis**, 127 Wis.2d at 497-98, 381 N.W.2d at 338-39, the circuit court here calculated Sylte's income and found that he had failed to pay 25% of his gross income when, in fact, he could have done so. This court stresses that probation must not be used solely to collect a debt and that a probationer's ability to discharge a civil judgment in bankruptcy is irrelevant to whether cause exists to extend probation. However, the record contains facts to support the circuit court's decision to extend probation for Sylte's lack of a good faith effort to discharge his restitution. See § 973.09(3)(c)1, STATS. Therefore, the judgment is affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.

