

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

October 11, 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. 00-0165-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ROBERT A. LOHMEIER,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Walworth County:  
JOHN R. RACE, Judge. *Reversed and cause remanded with directions.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Robert A. Lohmeier appeals from a circuit court order extending his probation. Lohmeier contends that the circuit court lacked jurisdiction to extend his probation at the hearing on July 23, 1999, because his

probation had expired on July 9, 1999, prior to entry of the order. We agree. We reverse and remand for further proceedings consistent with this opinion.

¶2 On July 9, 1996, Lohmeier was placed on probation for three years following his convictions on two felony charges for fleeing an officer and bail jumping in violation of WIS. STAT. §§ 346.04(3), 346.17(3) and 946.49(1)(b) (1997-98).<sup>1</sup> Lohmeier's probation included a number of conditions, including the requirement that he serve fourteen weekends of jail time.<sup>2</sup> Approximately one month before his probation was scheduled to expire, Lohmeier filed a motion to modify the terms of his probation. At the modification hearing on July 6, 1999, Lohmeier asked the court to remove the requirement that he serve jail time. He explained to the court that he had attempted to comply with this condition, but after he served his first weekend in custody, jail officials told him not to come back because they did not know how to accommodate his weekend scheduling scheme. Lohmeier had fully satisfied all the other conditions of his probation. Lohmeier's counsel advised the court that Lohmeier's probation agent did not oppose the motion, and the probation agent did not appear at the hearing. The State did not dispute Lohmeier's difficulties with the jail authorities, but opposed his motion. The circuit court noted that probation was scheduled to expire in three days and that the State had not filed an extension request. The State indicated that it would attempt to file an extension request immediately. The circuit court then

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise indicated.

<sup>2</sup> The other terms of probation included complying with the terms of probation, no alcohol use, seventy-five hours of community service, payment of approximately \$1000 in fines, penalties and assessments, and a total of \$300 in contributions to various traffic safety programs. The court permitted Lohmeier to serve the required jail time on weekends because of his employment as an over-the-road trucker.

declined to rule on Lohmeier's motion, opting to allow his probation to expire. No request for an extension was filed.

¶3 After the hearing, the circuit court received a letter from the Department of Corrections (DOC), also dated July 6, 1999, asking the court to extend Lohmeier's probation and stating that the DOC had "stopped" Lohmeier's probation pending the court's ruling. Accordingly, the circuit court conducted a probation review hearing on July 23, 1999. The prosecutor did not appear, but the agent for the DOC asked the court to extend Lohmeier's probation and require him to complete the jail time. The agent again represented that Lohmeier's probation had been "stopped" by the DOC on July 6, 1999, such that his probation had not expired on July 9, 1999. Based on the agent's representation that the DOC had authority to stop Lohmeier's probation, the circuit court extended Lohmeier's probation for a period of one year or until the jail sentence was served. Lohmeier appeals.

¶4 Lohmeier contends that the circuit court lacked jurisdiction to extend his probation at the hearing conducted on July 23, 1999, because his probation had expired on July 9, 1999. We agree.

¶5 The State presents two arguments in support of its claim that the court retained jurisdiction to extend Lohmeier's probation. First, the State argues that Lohmeier has waived his right to challenge the circuit court's order extending his probation because on July 6, 1999, Lohmeier signed a form order asking the court to extend his probation and waiving his right to a hearing on the matter. This argument is not persuasive. It does not appear that this document was presented to the circuit court before the hearing on July 6, 1999; certainly the circuit court did not rely on it in making its decision to permit Lohmeier's

probation to expire. Because this argument was not presented to the circuit court, it is waived on appeal. See *State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997). In any event, the court did not extend Lohmeier's probation at that hearing. Rather, the court clearly communicated to the State that it was incumbent upon the State to file a request for an extension before Lohmeier's probation expired. The State failed to do so and Lohmeier's probation was allowed to expire on July 9, 1999.

¶6 Second, the State argues that the DOC effectively stopped Lohmeier's probation such that the circuit court retained jurisdiction to extend his probation. A court has statutory authority to extend probation or modify the terms of a defendant's probation up until the time probation expires. See WIS. STAT. § 973.09(3)(a).<sup>3</sup>

¶7 At the hearing, the DOC agent was unable to provide the court with the basis of the DOC's authority to stop Lohmeier's probation. On appeal, the State cites WIS. STAT. § 304.072(3) in support of this claim. Section 304.072(3) provides that "the department preserves jurisdiction over a probationer, parolee or person on extended supervision if it commences an investigation, issues a violation report or issues an apprehension request concerning an alleged violation prior to the expiration of the probationer's, parolee's or person's term of supervision." This argument was not presented to the circuit court and is waived on appeal. See *Van Camp*, 213 Wis. 2d at 144. Moreover, the record does not support a finding that the State had in fact commenced an investigation or issued a

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<sup>3</sup> The question of the DOC's authority to toll probation is not before us. See WIS. STAT. § 973.10(2); *State v. Horn*, 226 Wis. 2d 637, 648, 594 N.W.2d 772 (1999); *State v. Burchfield*, 230 Wis. 2d 348, 349, 602 N.W.2d 154 (Ct. App. 1999).

violation report or apprehension request with respect to Lohmeier before his probation expired. Compare *State ex rel. Cox v. H&SS Dep't*, 105 Wis. 2d 378, 314 N.W.2d 148 (Ct. App. 1981); *State ex rel. Avery v. Percy*, 99 Wis. 2d 459, 299 N.W.2d 886 (Ct. App. 1980); *Williams v. State*, 50 Wis. 2d 709, 184 N.W.2d 844 (1971).<sup>4</sup> The State asserts that Lohmeier was “arguably” in violation of his probation by virtue of failing to serve the required jail time and that the extension request, signed by Lohmeier on July 6, 1999, was “in essence” a violation report. However, the State produced no evidence to support a claim that obtaining a probationer’s signature on an extension request that was not filed with the court before probation expired constitutes issuance of a violation report for purposes of WIS. STAT. § 304.072(3). We conclude that these assertions, without more, are inadequate to support a finding that the DOC had met the prerequisites necessary to preserve the DOC’s jurisdiction over Lohmeier pursuant to § 304.072(3). We further conclude that Lohmeier’s probation expired on July 9, 1999, thus ending the circuit court’s jurisdiction over him. See WIS. STAT. § 973.09(3)(a). The circuit court’s August 25, 1999 order extending Lohmeier’s probation should be vacated.

¶8 In light of our conclusion that the circuit court lacked jurisdiction to extend Lohmeier’s probation after it expired, we need not address whether the court had sufficient reason to extend the terms of Lohmeier’s probation.

*By the Court.*—Order reversed and cause remanded with directions.

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<sup>4</sup> Several of these cases were decided under WIS. STAT. § 57.072 (1975), which was repealed and recreated by ch. 353, Laws of 1977. For purposes of this opinion, the changes made do not conflict with the rulings in these cases. In each of these cases, formal proceedings preceded the expiration, extension or revocation of probation.

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

