

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 13, 2010

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2009AP1548-CR

Cir. Ct. No. 2004CF102

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIK A. COCHRAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Washburn County:
EUGENE D. HARRINGTON, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Erik Cochran appeals an order extending his term of probation. Cochran argues the circuit court erroneously exercised its discretion

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

because it extended probation based solely upon Cochran's failure to make larger monthly restitution payments even though Cochran made a good faith effort to pay. We reject Cochran's argument and affirm.

BACKGROUND

¶2 Cochran pled guilty to two misdemeanors for twice striking a coworker in the back with a sledgehammer. As part of his plea agreement, Cochran paid \$5,000 in restitution upfront, with further restitution to be paid as determined by the circuit court. Cochran was ordered to serve two years' probation. The court determined Cochran owed a total of \$21,835.76. Thus, he still owed \$16,835.76 at the commencement of his probation.

¶3 Near the end of his two-year probation term, Cochran consented to a one-year extension of his probation to allow him to make further restitution payments. At that time, he had paid an additional \$235 in restitution. The following year, the State petitioned for an additional two-year extension and the circuit court held a review hearing. Amanda Martin, Cochran's probation officer who had supervised him for the last eleven months, testified at the hearing. She reported he had been paying \$20 monthly, and more recently, \$30. Cochran also paid a monthly \$20 supervision fee.

¶4 Cochran's mother, Lissa Madeen, also testified. She managed Cochran's finances because he was unable to do so on his own. Cochran worked seasonally, for varied hours, at his parent's dumpster cleaning business, grossing \$9,927 the prior year, plus \$2,547 in unemployment payments. In the two previous years, his annual income was \$10,852 and \$8,133, respectively.

¶5 Madeen also owned the home Cochran rented. She testified Cochran had the following monthly expenses, in addition to the \$50 he was currently paying for supervision and restitution: \$250 rent, approximately \$260 utilities (gas/electric/water/phone), \$100 car payment, \$20 life insurance, and \$200 personal loan. This totaled \$880 per month including the legal obligations. However, Madeen indicated Cochran's winter income, consisting of unemployment and military disability, was only \$851 monthly. She also noted the \$880 figure excluded his payments of property taxes on the home, auto insurance, homeowner's insurance, groceries, clothing, and personal toiletries.

¶6 The circuit court found Cochran had an ability to make larger restitution payments and that his budget had been deliberately structured so as to minimize the availability of funds. The Court also found it significant that Cochran made no additional restitution payments from his annual tax refunds, which were about \$900 to \$1,000 the past three years. Further, the court concluded restitution payments should be prioritized over the monthly \$200 personal loan repayments to Madeen.²

¶7 In addition, the court concluded Cochran had failed to realize the rehabilitation expected of a probationer because he still had unresolved mental disorders, including an explosive personality disorder, and consistently complained to Martin about having to pay restitution.³ The court emphasized

² Madeen testified the loan consisted of the \$5,000 initial restitution payment and \$1,000 bond. Although not discussed by the circuit court, we note a \$6,000 personal loan would have been paid off after thirty monthly payments of \$200. Thus, after Cochran's nearly three years of probation, the loan should have already been repaid.

³ Cochran does not challenge the court's reliance on his failure to resolve mental disorders. Even excluding that basis, the court's decision is adequately supported.

Cochran did not feel the victim deserved restitution and became upset whenever Martin explained it was his duty to pay. The court explained:

It's not the money. This isn't about money. It's about his willingness to pay, his good effort to pay. It's partly about that. But more importantly, probation is there for rehabilitation, rehabilitative services, a change in an offender's thought process about crime, the crime, crime in general, and punishment. And it is clear that Mr. Cochran hasn't had that appropriate change

Thus, the court extended Cochran's probation for an additional two years and ordered him to pay \$250 restitution monthly. Cochran appeals, requesting an immediate discharge from probation.

DISCUSSION

¶8 A circuit court may extend probation if the probationer has not made a good faith effort to discharge court-ordered payment obligations. WIS. STAT. § 973.09(3)(a), (3)(c)1. A sentencing court's decision whether to extend probation is discretionary. *State v. Olson*, 222 Wis. 2d 283, 292, 588 N.W.2d 256 (Ct. App. 1998). "Failure to make restitution within the original probation period might constitute cause for extending probation and continuing restitution if there is a basis for believing that additional restitution would effectuate the objectives of probation and that [the probationer] could make more than negligible payments during the extended period." *Huggett v. State*, 83 Wis. 2d 790, 803, 266 N.W.2d 403 (1978). However, "[i]f the probationer lacks the capacity to pay and has demonstrated a good faith effort during probation, failure to make restitution cannot be 'cause' for extending probation." *Id.*

¶9 Cochran argues the court erred in extending his probation because he demonstrated a good faith effort to pay and lacked the capacity to make larger

restitution payments. Cochran emphasizes his regular monthly restitution payments, physical and mental disabilities, and limited income. He asserts the probation was extended for the sole purpose of collecting a debt. Cochran, however, ignores the circuit court's express findings that he did have the ability to make more significant restitution payments and that the ten dollar, and, later, twenty and thirty dollar per month, payments did not constitute a good faith effort. Significantly, Cochran also does not argue the court's findings were clearly erroneous.

¶10 Extension proceedings recognize the continuing need to further the goals of probation through extended probation. *State v. Hardwick*, 144 Wis. 2d 54, 59, 422 N.W.2d 922 (Ct. App. 1988). “[B]oth the [S]tate and the probationer have an interest in seeing that the rehabilitative goals of probation are not unnecessarily interrupted, resulting in the termination of an otherwise successful but incomplete effort at rehabilitation.” *Id.* at 59-60. The payment of restitution effectuates the goals of probation because it aids in rehabilitating offenders by strengthening their sense of responsibility and helping them learn to consider the consequences of their actions more carefully. *State v. Jackson*, 128 Wis. 2d 356, 363, 382 N.W.2d 429 (1986).

¶11 While we recognize the goals of probation will be undermined if a probationer is ordered to pay restitution exceeding his or her reasonable ability to do so, *see id.*, that is not the case here. A court exercises the appropriate discretion 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. *Olson*, 222 Wis. 2d at 293. Here, the court examined the evidence and concluded Cochran had the ability to pay restitution and had not made a good

faith effort to pay, failing in the rehabilitative goals of probation. Its conclusions were not unreasonable. Thus, the court properly exercised its discretion.

¶12 Furthermore, Cochran failed to file a reply brief. Consequently, he did not respond to the State's assertions that the circuit court found he had the ability to pay and did not make a good faith attempt, nor the State's argument the court properly exercised its discretion on those bases. Thus, we deem the State's position conceded. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

