COURT OF APPEALS
DECISION
DATED AND RELEASED

January 23, 1997

NOTICE

No. 96-2026-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SUSAN C. LULLING,

Defendant-Appellant.

APPEAL from an order of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed*.

DEININGER, J.[1] Susan C. Lulling appeals from an order extending her probation. She claims that the State's failure to comply with the 90-day notice provision of § 973.09(3)(b), STATS.,[2] deprived the circuit court of

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[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

[2] Section 973.09(3)(b), STATS., states in relevant part:

The department shall notify the sentencing court, any person to whom unpaid restitution is owed and the district attorney of the

jurisdiction to extend her probation. We conclude that the State's failure to notify the court of unpaid restitution at least 90 days before Lulling's probation expired did not preclude the court from extending the probation. We further conclude that Lulling received reasonable notice of the extension request and was afforded due process before the extension was ordered. Accordingly, we affirm.

BACKGROUND

Lulling was convicted in 1993 of negligently failing to provide food and water to animals in her care. Sentence was withheld and she was placed on three years probation, which was to expire on July 19, 1996. Payment of $8,485 in restitution was made a condition of her probation. In July 1995, the court ordered Lulling to pay the restitution in installments of $250 per month.

In a letter dated April 19, 1996, the Department of Corrections (DOC) requested that the circuit court extend Lulling's probation for three years because a substantial portion of the ordered restitution remained unpaid. The court did not receive the notice until April 25, 1996. Lulling was given notice of the request by her agent on May 6, 1996. On June 5, 1996, the court held a hearing on the request at which Lulling, represented by counsel, appeared and testified.

Lulling moved the court to deny the extension request because of the State's failure to notify her and the court of the status of unpaid restitution at least 90 days prior to the expiration of her probation term under § 973.09(3)(b), STATS. The circuit court denied the motion and entered an order extending

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> status of the ordered 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 ....

Lulling's probation for one year with monthly restitution payments to continue during the extended term. On this appeal, Lulling complains of the failure to give notice in compliance with the statute but does not challenge the existence of grounds for extending her probation.

ANALYSIS

The proper application of a statute to undisputed facts is a matter of law which we decide without deference to the trial court's opinion. ***State v. Michels***, 141 Wis.2d 81, 87, 414 N.W.2d 311, 313 (Ct. App. 1987).

Lulling argues that § 973.09(3)(b), STATS., is plain on its face in requiring that DOC "*shall* notify the sentencing court ... of the status of the ordered payments unpaid at least 90 days before the probation expiration date." (Emphasis added). She cites ***Bartus v. DHSS***, 176 Wis.2d 1063, 1077, 501 N.W.2d 419, 426 (1993), as authority that the notice provision specifically applies to probation extensions. Since it is undisputed that the court did not receive DOC's restitution status report and extension request until a date within 90 days of the expiration of Lulling's probation, she claims the court had no authority to extend her probation.

The State correctly notes that § 973.09(3)(b), STATS., does not require that a probationer be given the 90-day notice. Thus, the State argues that Lulling lacks standing to raise this issue because she is not an intended beneficiary of the statute. While we agree with the State that the lateness of the notice to the court did not deprive it of jurisdiction to extend Lulling's probation, we decline to analyze the issue as one of standing.[3]

[3] The State's standing argument is not necessarily wrong. *See, e.g.,* ***State v. Polinski***, 96 Wis.2d 43, 46-47, 291 N.W.2d 465, 466 (1980). The State, however, implicitly conceded Lulling's right to raise the § 973.09(3)(b), STATS., issue in the circuit court by arguing against her motion on its merits. The court thus did not consider the issue of Lulling's standing in its ruling, and Lulling has not addressed it on this appeal. Generally, any party may raise, or a court sua sponte may consider, a claim that the court lacks jurisdiction to proceed. ***Taylor v. State***, 59 Wis.2d 134, 137, 207 N.W.2d 651, 652 (1973).

Rather, we conclude that compliance with the notice provisions of the statute is not a jurisdictional prerequisite to a court order extending probation. In holding that § 973.09(3)(b), STATS., had no applicability to probation revocations, but only to court ordered extensions and modifications of probation, the supreme court in ***Bartus*** did not say that the statute should be given the preemptive effect for which Lulling argues. To the contrary, after discussing the legislative history of § 973.09(3)(b), the court concluded:

> The manifest purpose for including the notification and hearing requirement was to encourage restitution payment by notifying the court of the need to extend the term of probation; to insert a check in the probation system to prevent probationers from being discharged without having paid restitution. To the contrary, the decision of the court of appeals [holding that a failure to comply with the statute precluded revocation of probation] allows defendants to use the statute's provisions as a means for prohibiting the Department from carrying out its duties ....

Bartus, 176 Wis.2d at 1076, 501 N.W.2d at 425-26.

We conclude the statute cannot be read to allow a probationer to avoid an extension for non-payment of restitution any more than it can be read to avoid a revocation.

Section 973.09(3)(a), STATS., authorizes the sentencing court to extend or modify the conditions of probation so long as it does so: (1) "prior to the expiration of any probation period," (2) "for cause," and (3) "by order." We agree with Lulling that she must be afforded due process prior to the entry of an extension order. Both the language of the statute itself and case law support this proposition. *See* ***State v. Hays***, 173 Wis.2d 439, 446, 496 N.W.2d 645, 650 (Ct. App. 1992); ***State v. Hardwick***, 144 Wis.2d 54, 60, 422 N.W.2d 922, 925 (Ct. App. 1988). In ***Hays***, we outlined the due process rights to be accorded a probationer at a modification hearing:

> (1) to be notified of the hearing and the reasons that are asserted in support of the request to modify probation; (2) to be

> present at the hearing; (3) to be given the chance to cross-examine witnesses, present witnesses, present other evidence and the right of allocution; (4) to have the conditions of probation modified on the basis of true and correct information; and (5) to be represented by counsel if confinement to the county jail is a potential modification of the conditions of probation.

Hays, 173 Wis.2d at 447, 496 N.W.2d at 650 (footnotes omitted).

Here, Lulling was accorded all of the foregoing rights. We therefore conclude that due process was not violated. She argues, however, that "[t]he amount of notice to which a probationer is entitled for purposes of due process is logically the same amount of notice the legislature has determined that the State of Wisconsin must provide to the court, that is, 90 days."

Lulling's assertion is not a logical step from the statute; it is a leap unsupported by either the language of § 973.09(3)(b), STATS., or its legislative history. *See* ***Bartus***, 176 Wis.2d at 1075-1076, 501 N.W.2d at 425-26. If we were to accept Lulling's argument, probationers would be immunized from the extension of their probation for defaults in the payment of restitution occurring within the last 90 days of the probation term, since compliance with the notice provision of § 973.09(3)(b) would then be impossible. We reject Lulling's argument because "[w]e are obligated to read the statutes to avoid absurd results." ***Petition to Incorporate Powers Lake Village***, 171 Wis.2d 659, 663, 492 N.W.2d 342, 344 (Ct. App. 1992).

For these reasons, we conclude that the failure of DOC to notify the circuit court and Lulling of the status of unpaid restitution at least 90 days prior to the expiration of her probation term did not preclude the court from ordering Lulling's probation extended.[4]

[4] The State also argues that Lulling was well aware prior to April 19, 1996, of her restitution default from past court proceedings and meetings with her agent. Given our conclusion that a failure to comply with the 90-day notice provision of § 973.09(3)(b), STATS., did not deprive the court of jurisdiction to extend Lulling's probation, so long as she was afforded appropriate due process rights, we need not address whether Lulling's

By the Court.—Order affirmed.

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

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earlier actual knowledge of her restitution default and the potential for an extension of probation cured DOC's noncompliance with the statute.