

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 8, 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. 97-3554-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JULIE DIXON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DENNIS P. MORONEY, Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Julie Dixon appeals from an order extending her probation following a conviction for forgery as party to a crime. Dixon claims the trial court erroneously exercised its discretion in extending her probation and increasing her restitution payments. Because the trial court failed to consider the

applicable law and failed to consider all the relevant facts in this case, we reverse the order and remand with directions.

I. BACKGROUND

Together with her then boyfriend, Dixon engaged in a plan to withdraw money from a customer's account at Tri City National Bank, where Dixon worked as a teller. On December 11, 1990, Dixon pled guilty to forgery as party to a crime. She was sentenced to a five-year period of probation. As a condition of probation, Dixon was ordered to make restitution payments to Tri City National Bank. The total amount of restitution was \$9,187.78.

In December 1995, when Dixon's original probation was to expire, the Department of Corrections sought a two-year extension, to which Dixon agreed. At that time, the probation agent and Dixon agreed to a monthly payment of \$10 toward the restitution, which Dixon made in a timely manner for the two-year period.

In December 1997, when the two-year extension was to expire, the Department again moved to extend the probation because the total amount of restitution had not been satisfied. At the time, Dixon had paid \$1,990 toward the restitution. Dixon objected to the request for a probation extension. The trial court held a hearing and found that Dixon had not made a good faith effort to pay the remainder, even though she had the ability to pay. The trial court extended her probation for three years, found her net monthly income was \$560, and ordered her to pay \$211.55 a month for the remainder of the probation. Dixon filed a notice of appeal and a motion for relief pending appeal. This court temporarily stayed the trial court's order and remanded the matter for consideration of Dixon's request for relief pending appeal. In that order, this court directed the circuit court

to consider two Wisconsin Supreme Court cases addressing whether a probation extension is appropriate: *State v. Davis*, 127 Wis.2d 486, 381 N.W.2d 333 (1986) and *State v. Jackson*, 128 Wis.2d 356, 382 N.W.2d 429 (1986).

On February 4, 1998, the trial court held a hearing on Dixon's motion and denied the request for a stay pending appeal. There is no indication in the record that the trial court considered either case in rendering its decision. Following the trial court's denial, Dixon filed a motion with this court requesting that the temporary stay be continued until the appeal was resolved. We granted the motion.

Dixon appeals the trial court's order extending probation and increasing the monthly restitution payments.

II. DISCUSSION

In reviewing the grant or denial of a request for a probation extension, we determine whether the trial court erroneously exercised its discretion. *See Davis*, 127 Wis.2d at 491, 381 N.W.2d at 335-36. Here, by failing to consider or apply the *Davis* and *Jackson* cases, and by failing to consider appropriate factors in setting the monthly restitution amount, the trial court erroneously exercised its discretion.

There is no indication anywhere in the record that the trial court considered the *Davis* or *Jackson* cases, despite this court's direction to do so. On remand, we direct the trial court to consider both cases in reconsidering whether to extend Dixon's probation. If the trial court, after considering the legal principles espoused in these cases, determines an extension is appropriate, it should also

recalculate an appropriate restitution payment schedule based on a consideration of all the relevant facts.

At the probation extension hearing, although the trial court attempted to calculate Dixon's ability to pay, it failed to adequately follow through on its inquiry and failed to include appropriate expenses.¹ The only expenses the trial court considered were child care, groceries and a medical prescription. The trial court disregarded other legitimate expenses, including a telephone bill, car insurance and gas, and a payment to a credit union relating to a car accident. The trial court refused to consider these items, concluding that they were luxuries. We disagree. If, on remand, the trial court determines a probation extension is appropriate, Dixon should provide documentary support for any expenses that are in dispute, so that the trial court can properly recalculate a restitution amount.

In the alternative, if the trial court determines, after considering the proper law, that an extension is not required, 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." Section 973.09(3)(b), STATS.

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

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

¹ Among other things, for example, the record reflects that the trial court initially inquired about the telephone bill but failed to include this expense when it calculated the restitution amount.

