

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 21, 2015

Diane M. Fremgen
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. 2014AP2619-CR

Cir. Ct. No. 2004CF65

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PEGGIE S. KUENNE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Iowa County:
WILLIAM D. DYKE, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 PER CURIAM. Peggie Kuenne appeals the circuit court's order extending her probation term for ten years and requiring as a condition of probation that she continue to make monthly payments toward the outstanding restitution. Kuenne argues that the circuit court erroneously exercised its

discretion because, she asserts, “the extension of [her] probation ... did not effectuate the objectives of probation.” Kuenne contends that her failure to pay restitution in full “cannot be ‘cause’ for extending probation” where, as the circuit court found, she had not violated any terms of her initial probation and had made a good faith effort to make restitution payments during the initial term of probation, she has no rehabilitative needs now, and she is unlikely to be able to pay the entire restitution amount ordered. We conclude that the circuit court, consistent with applicable law and based on the facts of record, properly decided to extend Kuenne’s probation after assessing Kuenne’s ability to pay and determining that extending probation to allow for additional restitution payments will effectuate the objectives of probation. Therefore, we affirm.

BACKGROUND

¶2 In 2004, Kuenne pled no contest to, and was convicted of, one count of theft in a business setting. The sentencing court ordered Kuenne to serve ten years of probation with conditions including payment of \$134,208.12 in restitution. The court ordered Kuenne to make restitution payments of at least \$200 per month, with such amount to be increased by the office of Probation and Parole if Kuenne’s income increased.

¶3 Shortly before the ten-year probation term was to end, the victim of Kuenne’s crime filed a motion to extend Kuenne’s probation for another ten-year term, noting that the full amount of restitution ordered by the sentencing court had not been paid and that a balance of \$106,834 remained. The circuit court held a hearing and granted the motion.

¶4 In its order granting the victim’s motion, the circuit court found that: Kuenne made all payments during her initial term of probation as requested by the

office of Probation and Parole, and the payments requested were reasonable given Kuenne's ability to pay; Kuenne had no known violations during her initial term of probation and has no rehabilitative needs as her initial term came to an end; Kuenne maintains full-time employment and a stable residence; approximately \$110,000 of restitution remains unpaid and Kuenne "will unlikely be able to pay complete restitution even if probation is extended for another 10 years." The court also found, "[h]owever, the intention of the parties at the time of sentencing was that restitution would be paid" in full and Kuenne "had a clear understanding that restitution would have to be paid under the terms of her plea agreement." The court issued an order extending probation for ten years and requiring that Kuenne continue to make the \$200 minimum monthly restitution payments.

DISCUSSION

¶5 The only issue on appeal is whether the circuit court properly exercised its discretion in extending Kuenne's probation for ten years and requiring as a condition of probation that she continue to make payments towards the outstanding restitution. Kuenne argues that the circuit court erroneously exercised its discretion because, she asserts, "the extension of [her] probation ... did not effectuate the objectives of probation." Kuenne contends that her failure to pay restitution in full "cannot be 'cause' for extending probation" where, as the circuit court found, she had not violated any terms of her initial probation and had made a good faith effort to make restitution payments during the initial term of probation, she has no rehabilitative needs now, and she is unlikely to be able to pay the entire restitution amount ordered. We conclude that the circuit court, consistent with applicable law and based on the facts of record, properly decided to extend Kuenne's probation after assessing Kuenne's ability to pay and

determining that extending probation to allow for additional restitution payments will effectuate the objectives of probation.

¶6 In the sections below, we first state the standard of review and discuss the relevant law relating to the extension of probation and restitution. We then review the circuit court’s application of that law to the facts in this case, and conclude that the decision reached by the court, to extend probation with the condition of continued minimum monthly restitution payments, was a proper exercise of discretion. Finally, we address and reject Kuenne’s arguments to the contrary.

A. Standard of Review

¶7 “A [circuit] court’s decision to extend probation is discretionary, but the extension must be warranted under [the] circumstances.” *State v. Olson*, 222 Wis. 2d 283, 292-93, 588 N.W.2d 256 (Ct. App. 1998). The 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.” *Id.* at 293 (internal quotation marks and quoted source omitted).

B. Law Relating to Extension of Probation and Restitution

¶8 The dual objectives of probation are the rehabilitation of those convicted of crimes and the protection of the state and community interest. *State v. Tarrell*, 74 Wis. 2d 647, 653, 247 N.W.2d 696 (1976).

¶9 Restitution aids an offender’s rehabilitation by strengthening the individual’s sense of responsibility. *Huggett v. State*, 83 Wis. 2d 790, 798, 266 N.W.2d 403 (1978); *see also State v. Kennedy*, 190 Wis. 2d 252, 257-58, 528

N.W.2d 9 (Ct. App. 1994) (“Restitution is an important element of the offender’s rehabilitation because it may serve to strengthen his or her sense of responsibility and teach the offender to consider more carefully the consequences of his or her actions.”). One who successfully makes restitution should have a positive sense of having earned a fresh start and will have tangible evidence of his or her capacity to alter behavior patterns to follow the law. *Huggett*, 83 Wis. 2d at 798.

¶10 “Conditioning probation on making restitution also protects the community’s interest in having the victims of crime made whole.”¹ *Id.*; see also *State v. Holmgren*, 229 Wis. 2d 358, 366, 599 N.W.2d 876 (Ct. App. 1999) (the primary purpose of restitution is to “return the victims to the position they were in before the defendant injured them”). However, “conditioning probation on the satisfaction of requirements which are beyond the probationer’s control undermines the probationer’s sense of responsibility.” *Huggett*, 83 Wis. 2d at 798-99.

¶11 “Extension proceedings recognize that there is a continuing need to further the goals of probation through extended probation.... [B]oth the state 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.” *State v. Hardwick*, 144 Wis. 2d 54, 59-60, 422 N.W.2d 922 (Ct. App. 1988) (emphasis added). Under WIS. STAT.

¹ Kuenne contends that the objectives of probation, namely the rehabilitative needs of the probationer and protection of state and community interests, do not include “ensuring payment of restitution to the victims.” Her contention is directly refuted by the language in *Huggett* that, “Conditioning probation on making restitution also protects the community’s interest in having the victims of crime made whole.” *Huggett v. State*, 83 Wis. 2d 790, 798, 266 N.W.2d 403 (1978).

§ 973.09(3)(a) (2003-2004),² “[p]rior to the expiration of any probation period, the court, *for cause* and by order, may extend probation for a stated period or modify the terms and conditions thereof.” (Emphasis added.) “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*, 83 Wis. 2d at 803 (emphasis added).

¶12 Thus, the question here is whether the circuit court properly: (1) considered whether extending probation conditioned on continued payment of restitution will effectuate the rehabilitation-of-the-offender and protection-of-community-interest objectives of probation; and (2) assessed Kuenne’s ability to make more than negligible restitution payments. We now turn to the circuit court’s decision and answer each question in the affirmative.

C. The Circuit Court’s Decision

¶13 When the sentencing court imposed probation with the condition of making \$200 minimum monthly restitution payments in 2004, the court considered and determined that requiring Kuenne to make restitution payments would promote her rehabilitation and the protection of community interest. Specifically, the court stated that it was requiring the restitution payments so that Kuenne would think about her “life-style” and “purposes,” such that she would ask herself, “Do I do without in order to try to make my former employer

² We refer to the 2003-04 version of the statute that was in effect when Kuenne committed the theft in 2003 and 2004, but we note that it is identical to the 2013-14 version.

whole?” and she would answer, ““Yes.”” The court also emphasized that making restitution was the critical consideration in imposing sentence, and stated that “[ten] years from now, if that restitution has not been paid, there could be additional periods of supervision required to make that restitution payment.”

¶14 When the circuit court extended probation in 2014, the court acknowledged that no one could “say with any certainty that Ms. Kuenne would have the ability to make [the restitution] payment in its entirety even [given] another 10 years.” But the court again considered and determined that requiring Kuenne to continue making restitution payments will promote her rehabilitation and the protection of community interest. The court stated that at the time of the plea, Kuenne made a “promise to pay ... wanted to see [restitution] paid and was willing to take on the task [of] doing that.” The court stated that Kuenne did not want to “carry around a boogyman that is reminiscent of things that she and the victims would like never to have happened.” Thus, still now, the court concluded that Kuenne should continue “making the effort to make the victim whole,” that such effort helps her to be able to say, “[T]his is who I am. I pay my bills. I pay the price for my mistake. I want to see you compensated.”

¶15 It is apparent from the circuit court’s 2014 decision that it considered the dual objectives of probation in deciding whether to extend Kuenne’s probation conditioned on continued monthly restitution payments. Recognizing that Kuenne did not want to “carry around a boogyman” and that part of Kuenne’s act of “making the effort” is to take responsibility for her actions, the court reasonably determined that extending probation will effectuate the objectives of probation,

including Kuenne's rehabilitation.³ The court also recognized that another component of Kuenne "making the effort" is to pay the victim back and to make the victim whole, and therefore extending probation will serve the purpose of protecting the community interest.

¶16 It is apparent from the circuit court's order, summarized in ¶4 above, that the circuit court also assessed Kuenne's financial situation and reasonably required her to pay a minimum of \$200 per month toward restitution. In making such a determination, the court implicitly concluded that \$200 a month is a more than negligible amount, but is not beyond her control.

¶17 In sum, the circuit court properly applied the law to the facts and reached a reasonable conclusion that extending Kuenne's probation conditioned upon continued restitution payments will effectuate the dual objectives of probation and that Kuenne can make more than negligible payments during the extended period.

D. Kuenne's Arguments

¶18 Kuenne argues that the circuit court's order is contrary to case law that holds that the extension of probation conditioned on continued payment of restitution is improper where the probationer has no rehabilitative needs and lacks the ability to pay. Specifically, Kuenne cites statements from *State v. Davis*, 127 Wis. 2d 486, 497-98, 381 N.W.2d 333 (1986) ("Debt collection ... should not be

³ Although the circuit court separately found that Kuenne "has no rehabilitative needs at this time," we understand the circuit court to mean that Kuenne does not have a need for any rehabilitative services, such as counseling or special programming. This finding is not inconsistent with the circuit court's separate discussion of how extending probation will effectuate the objectives of probation, including Kuenne's rehabilitation as a law-abiding citizen.

facilitated by continuing the criminal process of supervision when the rehabilitative purposes have been accomplished”),⁴ and *Huggett*, 83 Wis. 2d at 803 (“If 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.”). Kuenne fails to persuade us that the rehabilitative purposes have been accomplished here, such that extending probation will not effectuate the objectives of probation, or that she lacks the ability to pay. As we concluded above, the court reasonably determined both that the rehabilitative and protection of community interest objectives of probation will continue to be served by its extension order, and that the non-negligible payments ordered are reasonable in light of Kuenne’s financial situation. We proceed to address and reject Kuenne’s two arguments to the contrary.

¶19 First, Kuenne seems to argue that the rehabilitative purposes have been accomplished here, and that extending probation will not effectuate the objectives of probation, by analogizing her situation to that of the defendant in *Davis*.⁵ We understand Kuenne’s argument to be that she “has exercised good faith[,] ... made all payments requested ... and complied with all other conditions of her probation,” and therefore, her probation should not be extended. However, *Davis* does not support the blanket legal proposition that Kuenne asserts—that if a defendant has complied with her initial term of probation and has made a good

⁴ Kuenne omits the second part of this statement, “and, as in this case, when a reasonable alternative for the payment of restitution has been proposed by the defendant and the probation department.” *State v. Davis*, 127 Wis. 2d 486, 497-98, 381 N.W.2d 333 (1986). We address the significance of this second part below.

⁵ We note that the version of WIS. STAT. § 973.09 addressed in *Davis* differs from the version that applies in this case. The parties do not argue that the difference matters here, and therefore, we do not address the difference.

faith effort to pay restitution, then it is improper to extend the defendant's probation. Moreover, the facts in *Davis* are not as simple as Kuenne suggests and not comparable to the facts here.

¶20 In *Davis*, the initial probation order required that the defendant pay restitution totaling \$1,467 as directed by the Department of Health and Social Services. 127 Wis. 2d at 488. The circuit court extended probation three times, each time imposing additional requirements culminating in the requirement that the defendant “would have to get a second job or go to prison,” without any consideration of “the circumstances of the case.” *Id.* at 491-92. By the time of the third extension, the defendant had paid most of the restitution ordered. *Id.* at 494. Our supreme court held that the circuit court erroneously exercised its discretion in extending probation a third time, “because [it] based that decision on Davis’ alleged failure to comply with conditions of her probation when those conditions had never before been explicitly stated by the court to be necessary for the satisfactory completion of the probation term.” *Id.* at 487. The court noted that “no attempt had ever been made by the judge to determine whether, in the initial probation periods, restitution in reasonable amounts was scheduled or whether the payments could, or should, be made by a young woman who was the sole support for three minor children.” *Id.* at 492. The focus of the court’s holding was on the improper “continued probation based on an altered definition of ‘good faith’ [from *Huggett*] during the probation period” which “severely undermine[d] the probationer’s prospect and expectation of rehabilitation.” *Id.* at 499-500.

¶21 The facts here are distinguishable from those in *Davis* in at least two significant respects. First, Kuenne points to no such “altered definition of ‘good faith’” arising from unclear and changing conditions here. *Id.* at 499. Unlike in *Davis*, where the terms of probation were altered without any analysis of Davis’s

situation or reasoned application of the principles of *Huggett*, see *Davis*, 127 Wis. 2d at 491, Kuenne’s obligations as to restitution were clear and based on an assessment of her situation, and the circuit court engaged in a reasoned application of the principles of *Huggett*. Second, the court in *Davis* recognized as important the fact that Davis and the department had proposed a wage assignment by which Davis would continue to make payments toward the remaining balance of the restitution, outside of probation. *Id.* at 491 n.4, 498. Kuenne points to no “alternative [arrangement] for the payment of restitution” outside of probation here. See *id.* at 498. Unlike in *Davis*, where such an alternative arrangement rendered extended probation conditioned on continued payment of restitution unnecessary, no such similar arrangement appears to exist here. In sum, Kuenne’s argument that her situation is like that in *Davis* fails, and the supreme court in *Davis* never held, as Kuenne suggests, that if an offender completes a certain checklist, then extending probation could never be proper.

¶22 Turning to Kuenne’s second argument, Kuenne seems to suggest that because the circuit court “held that Kuenne would not be able to pay restitution even if [her] probation was extended another 10 years,” this means that she “lacks the capacity to pay.” We disagree. Kuenne paid over \$20,000 in restitution payments during the initial term of probation and has steady employment. The question is whether she is able to meet the monthly obligation set by the court, not whether she is likely to be able to pay the entire restitution balance within the next ten years. The court reasonably concluded that she can meet the monthly obligation, and that she does not fall into the category of someone who lacks the capacity to pay.

¶23 In sum, Kuenne fails to persuade us that the circuit court erroneously exercised its discretion when it extended probation conditioned on continued monthly restitution payments.

CONCLUSION

¶24 For the reasons stated, we conclude that the circuit court, consistent with applicable law and based on the facts of record, properly decided to extend Kuenne's probation after assessing Kuenne's ability to pay and determining that extending probation to allow for additional restitution payments will effectuate the objectives of probation. Therefore, we affirm.

By the Court.—Order affirmed.

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

