

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 25, 2018

Diane M. Fremgen
Acting 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. 2017AP918-CR

Cir. Ct. No. 2013CF332

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL E. OLSEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Jefferson County:
MICHAEL P. MAXWELL, Judge. *Affirmed.*

¶1 LUNDSTEN, P.J.¹ Daniel Olsen appeals the circuit court’s order extending Olsen’s probation and increasing Olsen’s monthly restitution payment. Olsen states the issue on appeal as follows:

Was it reversible error and denial of due process of law for the trial court to modify and extend Defendant-Appellant Olsen’s probation without allowing him to call witnesses and cross-examine the department [of corrections] and present evidence of his own at the probation review hearing and without an “official” pleading/request/motion to extend said probation having ever been filed with the court or served upon Defendant-Appellant Olsen?

For the reasons that follow, I affirm.

Background

¶2 On April 1, 2015, Olsen was convicted and sentenced on two counts of “reckless driving-cause bodily harm.” The sentencing court imposed two years of probation, concurrent as to each count. As a condition of probation, the court ordered \$32,556 in restitution and further ordered that Olsen pay \$100 per month toward this obligation during the two-year probation period.

¶3 Before Olsen’s two-year probation period expired, the circuit court held a hearing and entered the order at issue here. The order extended Olsen’s probation for one year and increased Olsen’s monthly payment to \$200 per month. The court appeared to base its ruling on allegations that Olsen had missed restitution payments despite having the ability to pay more per month than he had previously been ordered to pay.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 2015-16 version.

Discussion

¶4 Generally speaking, a circuit court’s decision to extend probation or modify the conditions of probation is discretionary, although it must be “for cause.” See WIS. STAT. § 973.09(3)(a) (“Prior 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.”); see also *State v. Olson*, 222 Wis. 2d 283, 292-93, 588 N.W.2d 256 (Ct. App. 1998) (“[The] decision to extend probation is discretionary, but the extension must be warranted under a case’s circumstances.”).

¶5 Here, however, Olsen challenges the circuit court’s order on due process grounds. Whether a defendant’s due process rights were violated is a question of law that appellate courts review de novo. *State v. Zamzow*, 2017 WI 29, ¶10, 374 Wis. 2d 220, 892 N.W.2d 637.

¶6 Olsen’s issue statement, quoted above, appears to raise two distinct due process arguments, namely (1) that Olsen was denied the opportunity to present evidence to show that his probation should *not* be extended (or, if extended, that his restitution payment should not be modified), and (2) that Olsen did not receive adequate notice of a request to extend his probation. I address each argument in separate sections below. To the extent that Olsen means to raise other arguments, I deem those arguments insufficiently developed and decline to consider them as a possible basis for reversal. See *State v. Pettit*, 171 Wis. 2d 627,

646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not consider inadequately developed arguments).²

A. Opportunity to Present Evidence

¶7 Olsen first argues that I should reverse the circuit court because the court denied Olsen the opportunity to present evidence. Olsen relies on *State v. Hays*, 173 Wis. 2d 439, 496 N.W.2d 645 (Ct. App. 1992), a case stating that a probationer has due process rights at a hearing to modify probation conditions. Those rights, according to *Hays*, include the right “to be given the chance to cross-examine witnesses, present witnesses, [and] present other evidence.” *See id.* at 447.

¶8 I reject Olsen’s opportunity-to-present-evidence argument because Olsen fails to sufficiently explain what evidence he would have presented that could have made a difference. In lieu of holding a formal evidentiary hearing, it appears that the circuit court relied on a probation agent’s allegations and unsworn assertions that, in 2016, Olsen missed some of his \$100 monthly restitution

² The State notes that the circuit court appeared to rely on an outdated version of the applicable statute, but asserts that Olsen has “not raised” this reliance on the outdated statute as an issue. The State further asserts, as I understand it, that the court’s reliance on this outdated statute turned out not to matter under the circumstances here.

I agree with the State that the circuit court appears to have relied on an outdated statute, apparently by relying on an older version of the applicable statute, as cited and discussed in *State v. Jackson*, 128 Wis. 2d 356, 364-65 & n.5, 382 N.W.2d 429 (1986). I further agree with the State that Olsen does not squarely raise the court’s reliance on an outdated statute as a stand-alone issue. Although Olsen quotes the correct version of the statute and asserts that the court “disregard[ed] ... applicable law,” Olsen does not compare the old and new statutory language, explain how this statutory change might affect case law interpretations of the statute, or explain how the statutory change might tie in to his due process arguments. Thus, I conclude that Olsen fails to make a developed legal argument relating to the circuit court’s reliance on an outdated version of the statute.

payments even though Olsen had the ability to easily make those payments, as shown in part by bank statements reflecting that Olsen spent money on online adult entertainment, including a total of \$1,405.56 in one 60-day period. In his brief, Olsen does not explain with reasonable specificity what evidence he might have presented that could have refuted these allegations. Rather, Olsen presents ambiguous assertions suggesting that there were written records showing that, by early 2017, Olsen had paid a *total* amount equal to his required payments. Such records would not show that Olsen timely made all payments when due in 2016.

B. Notice

¶9 I turn to Olsen’s argument that he received inadequate notice of the request to extend his probation. I find Olsen’s notice argument difficult to understand, but it appears to be based on the assertion that the notice Olsen received was insufficiently formalized. Olsen asserts that no “‘official’ pleading/request/motion to extend” was ever filed or served. I reject Olsen’s notice argument for two reasons.

¶10 First, Olsen points to no authority that requires such formal notice for purposes of extending probation. On the contrary, the case law that Olsen cites supports the proposition that something less than formal notice is required. *See Hays*, 173 Wis. 2d at 447 n.2 (“It is not the form of the notice that is important ...”).

¶11 Second, as I now explain, I conclude that Olsen had *actual* notice of the extension request far in advance of the pertinent hearing. As the State points out, the record reflects that Olsen was present at a February 6, 2017 hearing during which the department of corrections requested an extension based on “the amount of restitution still owed.” That request was not heard until March 29, 2017. The

State argues that this actual notice was adequate. Olsen, for his part, has not filed a reply brief or otherwise addressed the State's actual notice argument. I take this failure as a concession that Olsen had actual notice. *See United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in reply brief to an argument made in responsive brief may be taken as a concession).

Conclusion

¶12 For the reasons above, I affirm the circuit court's order extending Olsen's probation for one year and increasing Olsen's restitution payment during that one-year period to \$200 per month.

By the Court.—Order affirmed.

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

