

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 15, 2001

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0822

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

MARCIA LEE ROESSLER P/K/A MARCIA LEE KRUEGER,

PETITIONER-RESPONDENT,

V.

MARK EDWARD KRUEGER,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Sauk County:
JAMES EVENSON, Judge. *Affirmed.*

Before Vergeront, Deininger and Zappen, JJ.¹

¹ Circuit Judge Edward F. Zappen, Jr. is sitting by special assignment pursuant to the Judicial Exchange Program.

¶1 PER CURIAM. Mark Krueger appeals from an order denying his motion to modify his child support obligation while he is incarcerated. We affirm.

¶2 When Krueger was divorced from respondent Marcia Roessler in 1995, he stipulated to a child support obligation of \$68 per week. Starting in August 1999, Krueger began serving a three-year prison term for operating a motor vehicle while intoxicated, sixth offense. He was eligible for parole in May 2000, and his mandatory release date is August 2001. Krueger moved for modification of his child support payments to an amount that would reflect his actual income during his term of incarceration.

¶3 After hearing evidence on Krueger's motion, the trial court found that Krueger's income was reduced to \$17 per month in prison, and that the parties' child was seven years old. The court noted that Krueger's incarceration was the result of his own doing, and that he had the ability to earn a substantial income of \$15.25 per hour at the time he was sent to prison. The court denied the motion to modify Krueger's support obligation, but the court did suspend enforcement of it during his prison term. The arrearages would continue to accrue, and upon release from prison, Krueger is to begin paying the arrearage at a rate of \$20 per month, in addition to his regular obligation.

¶4 On appeal, the parties agree that modification of child support is a discretionary determination to be made in accordance with WIS. STAT. § 767.32 (1999-2000).² The burden of demonstrating a substantial change in circumstances is on the party seeking modification. *Kelly v. Hougham*, 178 Wis. 2d 546, 556,

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

504 N.W.2d 440 (Ct. App. 1993). The trial court found that Krueger had established a substantial change in circumstances. However, that finding, by itself, does not require modification of the support obligation. It merely gives the court competence to exercise its discretion as to whether support should be modified. See *Voeks v. Voeks*, 171 Wis. 2d 184, 188-89, 491 N.W.2d 107 (Ct. App. 1992).

¶5 Krueger relies on *Parker v. Parker*, 152 Wis. 2d 1, 6, 447 N.W.2d 64 (Ct. App. 1989), to argue that the trial court erroneously exercised its discretion by not considering relevant factors such as Krueger's debts and Roessler's total economic circumstances. However, *Parker* stated that the trial court may consider the intentional nature of the crime, the likelihood of future income, and other relevant "evidence." *Id.* In this case, Krueger presented no evidence of his debts or Roessler's circumstances, and therefore there was nothing for the court to consider on these points.

¶6 Krueger also argues that the only factor considered by the trial court was the intentional nature of the crime which led to his incarceration. However, that is not an accurate description of the trial court's decision. The trial court clearly considered Krueger's reduced income, because that was the court's reason for suspending enforcement of the support obligation while Krueger is in prison. The court also considered Krueger's earning capacity. Krueger testified as to the wage he was earning before incarceration, and that he expected to return to that job upon his release. It was presumably on the basis of that testimony, and the relatively short length of Krueger's sentence, that the court believed it was reasonable to deny the modification request and require him to begin paying the arrearage after his release. The court's decision was consistent with *Parker* and *Voeks*, and was not an erroneous exercise of discretion.

By the Court.—Order affirmed.

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

