

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 2, 2010

David R. Schanker
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. 2009AP1922-CR

Cir. Ct. No. 2005CF413

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM JENSEN, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Barron County:
TIMOTHY M. DOYLE, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. William Jensen, Jr., appeals an amended judgment of conviction extending and modifying his probation. Jensen argues he was not afforded due process because he did not receive notice of the proceedings. We agree. We therefore reverse and remand for the circuit court to vacate the

amended judgment of conviction and enter an order terminating Jensen's improperly extended probation.

BACKGROUND

¶2 Jensen pled guilty to a charge of failing to pay child support and was ordered to serve a three-year term of probation. As conditions, he was ordered to make a reasonable effort to pay child support and diligently pursue social security disability benefits. The circuit court also authorized Jensen to serve his probation in Michigan. Near the end of Jensen's probation term, the Wisconsin Department of Corrections submitted a letter to the court requesting a probation review hearing. The department alleged Jensen had not complied with his conditions and requested a one-year probation extension.

¶3 An attorney appointed by the state public defender's office appeared at the review hearing, held sixteen days after the date on the department's letter, and opposed the request. Jensen's counsel argued there was an insufficient record to show that Jensen had received notice of the hearing and an opportunity to demonstrate he was complying within his ability, noting Jensen's significant mental and physical disabilities. Jensen's counsel further stated he had not yet been in contact with Jensen. Counsel informed the court he called the Michigan probation office that day and learned Jensen had recently moved to a new address in a different Michigan county and, therefore, had been assigned a new probation officer. The court nonetheless denied counsel's request to reschedule the hearing and, based on Jensen's sporadic payment history, extended Jensen's probation

term by one year and granted the department's oral request to modify the probation conditions.¹

DISCUSSION

¶4 At a hearing to modify probation, a probationer has the following due process rights:

- (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.

State v. Hays, 173 Wis. 2d 439, 446, 496 N.W.2d 645 (Ct. App. 1992) (footnotes omitted).

¶5 Jensen argues he was denied the first three rights. The State responds that Jensen forfeited his due process argument by failing to present that argument in the circuit court. We disagree. While counsel did not use the magic words “due process,” he clearly articulated the basic tenets of due process: notice and an opportunity to be heard. See *Sweet v. Berge*, 113 Wis. 2d 61, 64, 334

¹ Jensen further argues that even if he had received the department's letter, it failed to give notice that the department was also requesting modification of the probation conditions. We need not reach this argument. See *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (cases should be decided on the narrowest possible grounds).

N.W.2d 559 (Ct. App. 1983). The circuit court was not deprived of the opportunity to address these concerns. For the same reason, to the extent Jensen's failure to phrase his objections as a due process violation could constitute forfeiture of his right to appeal, we would exercise our discretion to reach the issue.

¶6 The State argues we should reject Jensen's argument because notice was sent to the State's last known address for him and he was represented by counsel at the hearing. Any failure by the Michigan authorities to advise Wisconsin of Jensen's new address and agent cannot be visited upon Jensen. Indeed, the State could have obtained Jensen's current address by contacting his Michigan probation officer. Further, neither the State nor the circuit court identified any reasons why the hearing could not be rescheduled. As counsel argued below, Jensen's probation was not scheduled to expire for several months. The State's argument regarding Jensen's counsel's presence at the hearing also rings hollow. It fails to address Jensen's personal right to appear at the hearing or account for the fact counsel never spoke with Jensen.

¶7 Finally, the State argues Jensen was not prejudiced by his failure to appear. Prejudice is inherent in the failure of notice. Jensen had no opportunity to demonstrate he was paying within his ability and had diligently pursued disability benefits.

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

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

