

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 7, 2010**

A. John Voelker  
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. 2009AP2216**

**Cir. Ct. No. 2003CF6108**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CURTIS P. SMITH,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
JEFFREY A. CONEN, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Curtis P. Smith appeals from an order denying his postconviction motion filed under WIS. STAT. § 974.06 (2007-08).<sup>1</sup> He argues that his probation was illegally extended in violation of his due process rights and that as a result, his revocation is a nullity. We disagree and affirm.

### BACKGROUND

¶2 In 2004, Smith pled guilty to burglary of a dwelling as a party to a crime. Tracking the plea agreement, the circuit court imposed and stayed a bifurcated sentence of three years of initial confinement and three years of extended supervision and placed Smith on probation for three years. As a condition of probation, the circuit court ordered Smith jointly and severally liable with his co-actor for restitution in the amount of \$1646.

¶3 Smith paid \$10 in restitution over the nearly three years he was on probation. Prior to the expiration of Smith's probation, the Department of Corrections, through Smith's probation agent, asked the circuit court to extend Smith's probation by one year based on his failure to make a good-faith effort toward satisfying his court-ordered financial obligations.

¶4 The circuit court extended Smith's probation for one year after Smith signed a voluntary extension form waiving his hearing rights and stipulating to the requested extension. During the extended probation period, Smith violated the terms of his probation and was taken into custody. His probation was revoked and his sentence went into effect.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶5 Smith subsequently filed a postconviction motion, pursuant to WIS. STAT. § 974.06, challenging the probation extension order on grounds that he did not validly waive his right to a judicial hearing on the Department of Corrections' request for probation extension and that the Department of Corrections' request was untimely.<sup>2</sup> The court denied the motion without a hearing.

¶6 Smith then filed a motion to reconsider the court's denial. The court vacated its prior order and granted Smith an evidentiary hearing. Following the hearing at which both Smith and his probation agent testified, the court denied Smith's motion. Smith now appeals.

### ANALYSIS

¶7 As we see it, the sole issue on appeal is whether Smith voluntarily waived his right to a hearing on the extension of his probation. He challenges the voluntariness of his waiver claiming: (1) the Department of Corrections led him to believe that if he failed to sign the voluntary extension form, he would be incarcerated and revocation proceedings would commence; (2) the Department of Corrections refused him the opportunity to seek legal advice prior to signing the form; (3) the Department of Corrections did not inform him of his right to judicial review; and (4) the Department of Corrections did not inform him that he could be revoked despite signing the form.

¶8 WISCONSIN STAT. § 973.09(3)(b) sets a unique procedure for cases in which a person on probation fails to make restitution before the expiration of probation. The statute requires the circuit court to schedule a probation review

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<sup>2</sup> Smith does not pursue the latter argument on appeal.

hearing after the Department of Corrections gives notice to interested parties of the probationer's failure to make the restitution. *Id.* The circuit court may dispense with the probation review hearing only if the probationer voluntarily waives the hearing "with the knowledge that waiver may result in an extension of the probation period or in a revocation of probation." *Id.*

¶9 The validity of a waiver generally presents a mixed question of fact and law. See *Reckner v. Reckner*, 105 Wis. 2d 425, 435, 314 N.W.2d 159, 164 (Ct. App. 1981); accord *State v. Arredondo*, 2004 WI App 7, ¶12, 269 Wis. 2d 369, 383, 674 N.W.2d 647, 653 (waiver of right to testify); *Meyer v. Classified Ins. Corp. of Wis.*, 179 Wis. 2d 386, 396, 507 N.W.2d 149, 153 (Ct. App. 1993) (waiver of right to arbitrate). We uphold a circuit court's findings of fact unless they are clearly erroneous. See WIS. STAT. § 805.17(2). In contrast, "the application of the facts to a legal standard, such as waiver, is a question of law that we review independently of the [circuit] court." *Meyer*, 179 Wis. 2d at 396, 507 N.W.2d at 153.

¶10 Smith and his probation agent testified regarding the circumstances surrounding Smith's signing of the voluntary extension form. Based on the testimony offered, the court concluded that Smith's waiver was voluntary, stating: "I find nothing in any of his testimony that indicates that Mr. Smith was forced to sign his name [on the form]."

¶11 The court found that Smith's probation agent told him that revocation was a possible ramification if he did not sign the voluntary extension form but that this did not amount to an exercise of undue influence on the agent's part. As for Smith's remaining claims, although the circuit court did not make express findings, we assume that the circuit court made implicit findings in a

manner supporting its decision. *See State v. Martwick*, 2000 WI 5, ¶31, 231 Wis. 2d 801, 817, 604 N.W.2d 552, 559. Moreover, “[w]here it is clear under applicable law that the [circuit] court would have granted the relief sought by the defendant had it believed the defendant’s testimony, its failure to grant the relief is tantamount to an express finding against the credibility of the defendant.” *State v. Echols*, 175 Wis. 2d 653, 673, 499 N.W.2d 631, 637 (1993).

¶12 The form itself further supports the conclusion that Smith’s waiver was voluntary. The voluntary extension form specifically set forth the “Rights Being Waived” by Smith as follows:

I have a right to a hearing before the court on whether the Department’s request [for extension] should be granted.

I have a right to be represented by an attorney and, if I cannot afford an attorney, one will be appointed for me.

At a hearing, the Department would have to show that I have the ability to pay and that an extension will further my rehabilitation as well as the interests of the community.

If I waive these rights, the court can enter an order extending my probation or enter a judgment against me.

Smith initialed the section indicating that he was aware of these rights.

¶13 Because Smith voluntarily waived his hearing rights concerning probation extension, we conclude that his probation was lawfully extended and affirm.<sup>3</sup>

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<sup>3</sup> We have resolved this case based on the voluntariness of Smith’s waiver; consequently, we do not address the parties’ debate over the propriety of his filing of a WIS. STAT. § 974.06 motion to challenge his probation extension. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989) (“[C]ases should be decided on the narrowest possible ground.”).

*By the Court.*—Order affirmed.

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

