

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 2, 1999

Marilyn L. Graves
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 § 808.10 and RULE 809.62, STATS.

No. 98-2740-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BENITO DELBOSQUE,

DEFENDANT-APPELLANT.

APPEAL from orders and a judgment of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Affirmed.*

CANE, C.J. The sole issue in this case is whether a circuit court has authority to extend probation beyond the original two-year limitation for misdemeanor convictions. Because the circuit court may extend probation in misdemeanor cases beyond the original two-year limitation, the orders denying the petition for certiorari and motion to dismiss the case, and the judgment of conviction are affirmed.

The facts are undisputed. On March 12, 1996, Delbosque was convicted of battery and placed on one year's probation. On March 6, 1997, the circuit court extended the probation for two additional years because Delbosque had not paid the fine, costs and surcharges. Later, on May 14, 1998, the Department of Corrections revoked Delbosque's probation and required him to appear before the court for sentencing. At the hearing, Delbosque never challenged the basis for the initial extension or revocation, but rather objected to the court's jurisdiction, alleging that the maximum term of probation was limited to a total of two years and therefore any extension beyond March 12, 1998, was null and void. The circuit court rejected his argument and sentenced him to nine months in the county jail, giving him credit for time previously served.

Delbosque's contention is uncomplicated and straightforward. Delbosque reasons that under § 973.09(2)(a)1, STATS., the term of probation is limited to two years for misdemeanor convictions and under § 973.09(2m), STATS., a probation term in excess of two years is void. Thus, Delbosque concludes that the most the court could have extended his probation was to March 12, 1998, two years from the initial imposition of probation. If he is correct, his probation had expired as a matter of law, the Department of Corrections had no authority to revoke him, and the trial court was without jurisdiction to impose a sentence. *See State v. Stefanovic*, 215 Wis.2d 310, 318, 572 N.W.2d 140, 143-44 (Ct. App. 1997). On the other hand, if he is wrong and the court could extend his probation for two additional years thereby making his total probation longer than two years, the court acted within its jurisdiction at the time of sentencing.

Section 973.09, STATS., provides in relevant part:

(2) The original term of probation shall be:

(a)1. Except as provided in subd. 2., for misdemeanors, not less than 6 months nor more than 2 years.

....

(2m) If a court imposes a term of probation in excess of the maximum authorized by statute, the excess is void and the term of probation is valid only to the extent of the maximum term authorized by statute. The term is commuted without further proceedings.

(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.

Construction of a statute or its application to undisputed facts is a question of law this court decides de novo. *Truttschel v. Martin*, 208 Wis.2d 361, 364-65, 560 N.W.2d 315, 317 (Ct. App. 1997). The primary purpose of statutory construction is to determine and give effect to the legislature's intent. *DeMars v. LaPour*, 123 Wis.2d 366, 370, 366 N.W.2d 891, 893 (1985). Courts are to determine the legislature's intent by "examining the language of the statute and the scope, history, context, subject matter and purpose of the statute." *State ex rel. Sielen v. Circuit Court*, 176 Wis.2d 101, 106, 499 N.W.2d 657, 659 (1993). When the language the legislature chooses is clear and unambiguous, courts arrive at the legislature's intent by "giving the language its plain, ordinary and accepted meaning." *State v. Mendoza*, 96 Wis.2d 106, 114, 291 N.W.2d 478, 483 (1980). If a statute clearly sets forth the legislative intent, courts simply apply the statute to the facts presented. See *Cox v. DHSS*, 184 Wis.2d 309, 316, 517 N.W.2d 526, 528 (Ct. App. 1994). Appellate courts determine the meaning of words and phrases in a statute in light of the statute as a whole. *State v. Sweat*, 208 Wis.2d 409, 416, 561 N.W.2d 695, 698 (1997). Also, statutes relating to probation must

be given a reasonable, common-sense construction. *State v. Gloude mans*, 73 Wis.2d 514, 518, 243 N.W.2d 220, 222 (1976).

Here, a plain reading and common-sense construction of the statutes relating to probation indicate that the term limits for probation apply to the initial probation imposed at the time of sentencing. When the legislature in § 973.09(2)(a)1, STATS., limited the probation term for misdemeanors to a maximum of two years, it specifically referred to it as the *original* term of probation. As the State notes, the word *original* means "relating to, or constituting an origin or beginning : INITIAL, not secondary, derivative or imitative." See WEBSTER'S NEW COLLEGIATE DICTIONARY 810 (8th ed. 1977). Thus, the two-year maximum in this section refers to the initial probation period imposed at the time of sentencing.

Similarly, this court is not persuaded that § 973.09(3)(a), STATS., restricts the court's authority to imposing a total of no more than two years probation. This section allows a court, before the expiration of any probationary period, to extend or modify the terms of probation upon a showing of cause.¹ However, when extending the period of probation, a plain reading of this section read in conjunction with the provisions of § 973.09(2)(a)1 and (2m), STATS., see *Sweat*, 208 Wis.2d at 416, 561 N.W.2d at 698, means that any such extension is not to exceed two years. Here, the circuit court stayed within this restriction by extending the probation to a two-year period. It therefore follows that the probation had not expired before the revocation, and the court was within its jurisdiction to impose the sentence.

¹ Delbosque does not argue there was no cause to extend the original one year probation period.

Additionally, this court agrees with the State that to accept Delbosque's argument would mean that the circuit court would be without authority to extend the original probation term established at the statutory maximum when attempting to rehabilitate a defendant who does not merit incarceration, but needs additional time on probation. Such an interpretation would be contrary to the general principle that the courts should be given great latitude if probation is to be an effective tool of rehabilitation. *See Prue v. State*, 63 Wis.2d 109, 114, 216 N.W.2d 43, 45 (1974).

Accordingly, this court agrees with the circuit court that its extension of Delbosque's original probation for two additional years was within its statutory authority. Also, because the revocation occurred before the expiration of Delbosque's probation, the circuit court correctly denied his motion to dismiss the action and the petition for certiorari. Therefore, the sentence is affirmed.

By the Court.—Orders and judgment affirmed.

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

