COURT OF APPEALS
DECISION
DATED AND RELEASED

November 14, 1996

NOTICE

No. 95-1747-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRI L. LYONS,

Defendant-Appellant.

APPEAL from an order of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Reversed and cause remanded*.

Before Eich, C.J., Vergeront, J., and Paul C. Gartzke, Reserve Judge.

PER CURIAM. Terri L. Lyons appeals from an order extending her probation for failure to make court-ordered restitution payments.[1] Because the trial court failed to determine on the record that she had not made a good-

[1] An amended judgment of conviction was entered by the court, reflecting the extension of probation.

faith attempt to comply with the terms of the restitution order, ***State v. Davis***, 127 Wis.2d 486, 498, 381 N.W.2d 333, 339 (1986), we reverse and remand for reconsideration.

Lyons forged several checks totaling approximately $550. Upon her conviction, sentence was withheld and she was placed on probation and required to make restitution. When various fines and court fees were added, the total she was required to pay exceeded $1200. When she failed to make the required payments, the trial court extended her probation for an additional two years, and she appeals.

Whether to extend probation is committed to the discretion of the trial court. ***State v. Jackson***, 128 Wis.2d 356, 365, 382 N.W.2d 429, 433 (1986). "[W]here the record shows that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree." ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991) (footnote omitted). We will, therefore, review a discretionary ruling to determine whether it is the product of "a reasoning process which considers the applicable law and the facts of record, leading to a conclusion a reasonable judge could reach." ***Schneller v. St. Mary's Hosp.***, 155 Wis.2d 365, 374, 455 N.W.2d 250, 254 (Ct. App. 1990), *aff'd*, 162 Wis.2d 296, 470 N.W.2d 873 (1991).

Because the decision reached by the trial court in this case does not meet those tests, we reverse and remand to permit the court to determine whether Lyons made a good-faith attempt to comply with the restitution order.

In ***Davis***, the supreme court held: "`If the probationer lacks the capacity to pay and has demonstrated a good faith effort during probation, failure to make restitution cannot be "cause" for extending probation.'" ***Davis***, 127 Wis.2d at 498, 381 N.W.2d at 338 (quoting from ***Huggett v. State***, 83 Wis.2d 790, 803, 266 N.W.2d 403, 409 (1978)).

The trial court grounded its decision in this case on the following factors: (1) Lyons had two children out of wedlock; (2) she received public

assistance in an amount that the court somehow extrapolated to be the equivalent of $18,000 in tax-free annual income; (3) her income placed her above federal poverty guidelines; (4) in the court's opinion, "[t]he only reason she isn't working is because she's getting welfare ...."; and (5) "[a]ll of [her] problems are self-imposed," and the court saw no reason that she could not "get a degree" and "work 80 hours a week" at two jobs to make the ordered payments.

We do not believe the "factors" outlined by the trial court reasonably lead to the conclusion that Lyons failed to exercise good faith with respect to efforts to comply with the restitution order. The court's analysis fails to consider Lyons's two small, seriously ill children, both of whom experienced extensive hospitalization and are under close, continuing doctor's care. There was also evidence that, due to their medical needs, child care costs for Lyons's children would exceed any amount she could earn at her current educational level, regardless of the number of hours she worked. Additionally, some of Lyons's income is in the form of social security disability, which is exempt from attachment or execution. ***Langlois v. Langlois***, 150 Wis.2d 101, 105, 441 N.W.2d 286, 288 (Ct. App. 1989).

Because the trial court's decision does not indicate consideration of these and other evidentiary facts, we conclude that it did not meet the standards we discussed above, and we remand to the court for reconsideration consistent with this opinion.[2]

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[2] In so doing, we note the supreme court's admonition in ***Huggett v. State***, 83 Wis.2d 790, 803-04, 266 N.W.2d 403, 409 (1978), that the criminal justice system is not well used as a "threat to coerce payment of a civil liability or to perform the functions of a collection agency."

We also note that the probation statute, § 973.09(3)(b), STATS., formerly required that, before a probationer could be released, the court must find a "substantial reason not to continue to require payment" of any restitution condition. § 973.09(3)(b), STATS., 1985-86. The present statute deletes that language and provides instead that the court may direct issuance of a civil judgment for the unpaid amount of restitution. The change, according to a Judicial Council Note, was intended to "reduce[] the necessity of extending probation solely for the purpose of enforcing court-ordered payments, a practice of questionable cost-effectiveness." Judicial Council Note 1987 to § 973.09.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.