

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 28, 1997

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. 97-0608-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARY E. SCHOATE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
ROBERT DE CHAMBEAU, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

VERGERONT, J.¹ Mary Schoate appeals from an order extending
her probation for a period of two years and ordering that she pay restitution in

¹ This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

fixed amounts per month—\$25 per month from December 1, 1996 through April 1, 1997, and, upon completion of a job training program, \$100 per month commencing April 15, 1997. The challenged order also “authorized 60 days to be served in the Dane County Jail for any failure to pay.” Schoate contends on appeal that the trial court erroneously exercised its discretion in extending her probation because she had made a good faith effort to make restitution payments and that the specific modification penalizes her because of her indigency. We conclude the trial court did not erroneously exercise its discretion in extending probation, but we also conclude that the record does not support the specific amounts ordered and that jail time may not be imposed for “any failure to pay” but only a failure to pay coupled with the absence of a good faith effort to pay. We therefore affirm in part, reverse in part and remand for further proceedings.

On January 31, 1995, Schoate was convicted upon her plea of no contest to two counts of issuing worthless checks in violation of § 943.24(1), STATS. Sentence was withheld and she was placed on probation for two years. She was ordered to pay \$497.83 in court costs and \$4,978.34 in restitution. The court amended the order on April 19, 1995, changing these amounts to \$5,368.43 and \$536.84.

On September 19, 1996, Schoate’s probation agent wrote to the court requesting a probation review hearing. In the request, the agent stated that Schoate paid only \$148 toward the court-ordered financial obligation, with the last payment on January 10, 1996. The agent expressed the view that this was “not even approaching a good faith effort on her part.” He did not believe Schoate had any intention to pay back “even a good share of the money.” The agent stated that on August 12, 1996, Schoate was placed on probation in Green County for issuing worthless checks (for incidents occurring before the convictions in this case) and

was ordered to pay approximately \$500 in restitution. The agent also stated that Schoate was remiss in making scheduled report days and being available for home visits.

At the October 30, 1996 probation review hearing, Schoate's attorney, the probation agent, and Schoate provided these facts about Schoate's financial situation. Schoate had three children, two in school all day and the youngest in school half days. Schoate received A.F.D.C. for the entire period of probation, except that for the two months preceding the hearing she did not receive an A.F.D.C. grant because she did not have enough hours in the Jobs Program. Her A.F.D.C. grant was \$617 per month. In addition, she received food stamps of \$236 per month. Her rent was \$500 per month. While on probation, Schoate did work for hotels doing some cleaning, but for the most part she was unemployed. At the time of the hearing, she was attending the Jobs Program and starting on November 4, she was to receive training in medical records at M.A.T.C. Upon completing that program, which was four months, she was to receive assistance in getting a job at Physicians Plus, where she expected to be employed full time beginning in March or April of 1997. As long as she continued to attend the Jobs Program and the training, she would receive her A.F.D.C. grant until she became employed full time.

The prosecutor asked that the court extend probation for two years; require a fixed payment of \$100 per month; and order a substantial jail time—sixty days—if Schoate did not make the monthly payment unless she convinced her probation agent that she was making a good faith effort. Schoate's attorney argued that Schoate did not make more payments because she did not have any money at the end of the month and that she was never going to be able to pay a substantial amount of the court-ordered amount, even if she were working full

time, because of the expenses in providing for her three children. The court asked if Schoate wished to say anything, and she responded “no.”

The trial court decided that probation should be extended two years to allow Schoate the opportunity to make some good faith effort to pay the court-ordered restitution. The court ordered payments of no less than \$25 per month from December 1, 1996 through April 21, 1997, and, upon completion of the job training program, beginning April 15, 1997, payments were to be \$100 per month. The court also stated:

If you miss any of those payments, Ms. Schoate, I will assume that Mr. Gapinski will be back in court on either a revocation or for a further modification.

But beginning with the April 15th payment, if you miss a payment, the Court will authorize the probation agent to place you in custody for up to 60 days.

The prosecutor asked the court whether the agent was authorized not to institute the sixty-day jail time if, in the probation agent’s view, a payment less than that ordered was nevertheless a good faith effort. The court asked the probation agent if he thought he needed such authorization and the agent answered “no.” When Schoate’s attorney asked for clarification of the agent’s response, the court responded:

THE COURT: What I’m saying to him is my expectation is she pays \$25 a month until she’s working, then she pays \$100 a month. And my view of it is that is a showing of good faith. Anything less than that I don’t think is good faith.

The court went on to explain that Schoate had not yet been held accountable for her offenses; this was necessary to her rehabilitation; and the intent of the order was to hold her accountable.

The written order extending probation for two years provides in part:

IT IS FURTHER ORDERED that defendant, Mary E. Schoate, shall make payment on restitution due and owing as follows:

Commencing December 1, 1996 through April 1, 1997 payments of \$25 per month

Upon completion of job training program, commencing April 15, 1997 payments of \$100 per month

The Court authorized 60 days be served in the Dane County Jail for any failure to pay.

Schoate first contends that the trial court erred in extending her probation because she made a good faith effort to make restitution payments but was unable to pay more solely because of her poverty. A trial court may extend probation if the probationer has not made a good faith effort to discharge court-ordered payment obligations. Section 973.09(3)(c)1, STATS. However, if a probationer lacks the capacity to pay court-ordered restitution and has made a good faith effort to pay, failure to pay the restitution may not be a cause for extending probation. *Huggett v. State*, 83 Wis.2d 790, 803, 266 N.W.2d 403, 409 (1978).

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). We affirm discretionary decisions where the record shows the trial court considered the facts of record and reasoned its way to a reasonable conclusion that is consistent with the applicable law. *Burkes v. Hales*, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991). If the trial court does not fully set forth its reasoning, we independently review the record to determine whether the record provides a basis for the trial court's exercise of discretion. We conclude that the

record supports the trial court's decision to extend probation on the ground that Schoate did not make a good faith effort to pay the court-ordered restitution. We also conclude this is a reasonable decision and consistent with the applicable law.

Schoate argues that the only reason she did not pay was because of her minimal income. However, it is her burden to demonstrate that she made a good faith effort. *See Jackson*, 128 Wis.2d at 365 n.5, 382 N.W.2d at 433 n.5. It is undisputed that she made payments totaling \$148 for the first year of probation—from January 31, 1995 through January 10, 1996. However, she does not explain why she made no payments after that, and the evidence does not indicate that anything changed in her financial circumstances during her second year of probation so as to make her unable to continue to pay an amount equivalent to \$148 per year, or \$12 per month.

A reasonable inference from the financial information presented is that her income was the same throughout the term of probation, except for the two months preceding the hearing when she did not receive an A.F.D.C. grant because of insufficient hours with the Jobs Program and, except, perhaps, for a short period of time when she had income from employment with hotels. If her income from hotel employment adversely affected her financial situation, such as by a reduction or termination of her A.F.D.C. grant, and if that affected her ability to make payments, it was her burden to present that to the court. Since she did not do so, the court could reasonably infer that her income did not decrease after January 10, 1996, except for the two months preceding the hearing. Similarly, if her expenses increased after January 10, 1996, making her unable to continue even the minimal payment level, she had an obligation to present that to the court. Since she did not, the court could reasonably infer that her expenses did not increase after

January 10, 1996, and that she therefore continued to have the ability to pay at least \$12 per month after January 10, 1996.

The court could also reasonably infer that, since she had the ability to make some payment when she was receiving her A.F.D.C. grant, and since she was entitled to her A.F.D.C. grant if she complied with the Jobs Program, her failure to receive a grant due to noncompliance demonstrated a lack of good faith in meeting her obligation rather than an inability to make any payment. Again, if there were reasons beyond her control that prevented her compliance, it was incumbent on her to present that evidence. Finally, the agent's statement, which Schoate did not dispute, that she was not keeping her appointments with him, also supports the trial court's determination that Schoate was not making good faith efforts to discharge her court-ordered financial obligation.

Since the record supported the determination that Schoate had not made a good faith effort to make payments, the trial court could reasonably conclude that an extension of probation was necessary for rehabilitative purposes—to hold Schoate accountable by requiring her to make a good faith effort to discharge her obligation. We now turn to the payment requirements and other conditions the court imposed in extending probation.

In her main brief on appeal, Schoate argues that the requirement that she serve sixty days in jail for any failure to make the payments specified in the order violates the equal protection clause because a state may not jail a person who is unable to pay a fine because of indigency. In support of this argument, Schoate cites *State ex rel Pedersen v Blessinger*, 56 Wis.2d 286, 295, 201 N.W.2d 778, 783 (1972) (it is unconstitutionally discriminatory to imprison a person who is unable to pay a fine to coerce payment). Schoate interprets the order to

automatically impose sixty days in jail for failure to pay \$100 per month, regardless of a good faith effort to pay. The State responds that the order does not say this but rather authorizes the agent to impose sixty days in jail if \$100 per month is not paid, with the understanding that the agent need not do so if the failure is due to circumstances beyond her control.² The State concedes that it would be improper to order Schoate to spend time in jail for any failure to make the court-ordered payment.

In her reply brief, Schoate informs us that after the court ordered her probation extended, she was unable to make the payments and, fearing she would be put in jail, stopped reporting to her agent. Schoate states that she was “on absconder status for approximately six months” and, as an alternative to probation revocation “her agent is having her serve the sixty day jail sentence previously ordered by the court.” Schoate concludes that for these reasons, the challenge to the court’s authorization of a jail sentence for any failure to pay is moot. The reply brief is dated August 1, 1997.

We do not understand the mootness argument. Schoate has not advised us that the order challenged on this appeal has been modified since the appeal was filed, so we assume it is still in effect. The order authorizes more than one sixty-day period in jail, since such is authorized “for any failure to pay.” Therefore, even if Schoate is not challenging the jail time she is presently serving, the issue may again arise during the remainder of her probation whether she may be required to serve jail time for failure to pay \$100 per month even if she has made a good faith effort to pay that amount and is unable to pay. Her probation

² We note that the written order authorizes the sixty-day jail term for “any failure to pay,” not simply the failure to pay \$100 per month after April 15, 1997.

extends to January 31, 1999. For these reasons, we do not agree that the issue is moot, and, since the parties have briefed it, we address it.

As noted above, the State conceded that the court may not order Schoate to spend time in jail for failure to make the court-ordered payments without taking into account her good faith effort and her ability to make the payments. We accept that concession as a correct statement of the law. However, we do not agree that this is what the written order says. The State points to the agent's response to the court's question—that he did not need authorization not to institute jail time if there was a nonpayment or a lesser payment with an accompanying good faith effort—as an indication that the agent correctly understood that jail time is not legally permissible if there was a good faith effort to make the court-ordered payments. The agent may have understood that, but the court's comments following the answer, which we have quoted above, indicate that in the court's view failure to pay the court-ordered amount in itself would conclusively establish lack of a good faith effort. The wording of the written order also indicates this intent. Although it “authorizes” rather than “requires” the jail time, the jail time is authorized “for any failure to pay.” The plain language of the order would permit the agent to impose jail time even if the failure to pay was accompanied by a good faith effort to pay.

In order to completely resolve this issue, we must address the payment requirements themselves. We do so because when the agent takes into account Schoate's ability and efforts to make the court-ordered payments in deciding whether to impose the authorized jail time, the underlying presumption—expressed in the written order and in the court's oral comments—is that Schoate has the ability to make those payments based on the record developed at the review hearing. However, we conclude that the record does not support a

determination that Schoate has the ability to pay \$25 per month until April 1, 1997, and \$100 per month beginning April 15, 1997.

It appears that no determination was made of Schoate's ability to pay and no payment schedule was established when the court entered the original and amended orders for restitution. When imposing restitution, the court is to consider the defendant's ability to pay, among other factors. *See Huggett v. State*, 83 Wis.2d 790, 800, 266 N.W.2d 403, 407 (1978); *see also* § 973.20(13)(a), STATS., (the financial resources of the defendant, the present and future earning ability of the defendant, and the needs and earning ability of the dependents of the defendant are factors, among others, which the court "shall consider" in determining whether to order restitution and the amount). It appears that Schoate and the State agreed to the amount of restitution, and perhaps for that reason the court did not make the determination referred to in § 973.20(13)(a) at the time the restitution was initially ordered.

In any event, at the probation review hearing, the court properly intended to require payments that were within Schoate's ability to pay—hence the lower payment until April 15, 1997, the date on which Schoate anticipated she would be fully employed. However, the record does not support the amounts ordered by the court.

As we discussed above, the record supports a determination that Schoate was able to pay \$148 per year, or approximately \$12 per month. It does not support a finding that, while continuing to receive only an A.F.D.C. grant and food stamps, she could pay more than that per month, nor does it support a finding that she could, at the time of the hearing, be earning from employment more than her A.F.D.C. grant. We do not agree with the State that a reasonable inference

from Schoate's failure to receive an A.F.D.C. grant for two months—because of her noncompliance with the Jobs Program requirements—is that she did not need the \$1,234 and hence could pay more than \$12 per month. As we have explained above, her noncompliance is evidence of her lack of a good faith effort and it should not justify an inability to pay what she could pay if she had complied and received her grant for those two months. The lack of an A.F.D.C. grant for two months, however, does not create a reasonable inference that she could pay more during those two months than she can pay when she is receiving her A.F.D.C. grant.

The record also does not support a finding that Schoate will be able to pay \$100 per month once she is working full time. There was no testimony at the hearing about the amount of either her income or her expenses once she is employed. We do not fault Schoate for not presenting this evidence, as she may well not have had this information at the time of the hearing. Rather than order a payment amount in the absence of such information, the court should have either continued the hearing until closer to the completion date of the training when the information would be available or ordered the agent to establish an amount once the information was available.

In summary, we conclude that the trial court properly exercised its discretion in extending probation for two years. The court had the authority to impose specific amounts to be paid, based on Schoate's ability to pay, and to authorize the agent to determine that Schoate should serve sixty days in jail if the agent determined that Schoate did not pay the court-ordered amount and did not make a good faith effort to do so. However, the record does not support the determination that Schoate had the ability, or after April 15, 1997, would have the ability, to pay the amounts ordered. And, the language of the written order

authorizes imposition of the jail time for any failure to pay, rather than imposition only if failure to pay results from lack of a good faith effort to pay. On remand, the court should conduct whatever further proceedings are necessary to arrive at an order consistent with this decision. We provide no more specific directions because of our uncertainty over what events have occurred pending this appeal and how those may affect proceedings on remand.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

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

