

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 13, 2017

Diane M. Fremgen
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. 2016AP2171-CR

Cir. Ct. No. 2006CF1399

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARMOND L. MESSNICK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
MICHAEL J. APRAHAMIAN, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Armond L. Messnick appeals the circuit court’s order extending his probation term for one year. Messnick argues that the circuit court erroneously exercised its discretion as it extended his probation based only on his failure to pay restitution despite his good faith effort to make payments. Given our discretionary standard of review, we affirm.

Background

¶2 Messnick was convicted of three counts of securities fraud in 2008. At sentencing, the circuit court concluded that there is “very little question prison is warranted in this case.... The problem is ... if I send you to prison today, the likelihood of there being any meaningful restitution to any of these victims from here on out is very limited, if not zero.” The circuit court imposed and stayed consecutive sentences of three years’ initial confinement and two years’ extended supervision on each count and placed Messnick on probation for eight years. Messnick was ordered to pay restitution to his victims in the total amount of \$275,000. At sentencing, the court applied \$80,000 provided by Messnick and ordered the balance of the restitution to be paid at \$2500 per month, which would have paid off the balance approximately one year before the end of Messnick’s probationary period.¹

¹ In February 2010, a stipulation and order was entered by the court reducing the monthly restitution payments from \$2500 to \$500 until July 2010 when payments were scheduled to resume as previously ordered. The record reflects that several times between 2011 and 2013, the restitution payment amount came before the court for review. Each time, the \$500 per month payment schedule was continued by the court due to a change in Messnick’s financial circumstances. Messnick explained at the review hearing that after his conviction, a lucrative business deal was cancelled, which necessitated the reduction of the monthly payment to \$500.

¶3 In July 2016, two months before the end of Messnick’s probationary term, Messnick’s probation agent forwarded a request for a probation review hearing. The memorandum explained that Messnick had “an unpaid balance of restitution totaling \$129,415.88.” The agent expressed his opinion that Messnick “made a good faith effort in complying with the court ordered monthly payments” and “does not have any correctional needs at this time.” The agent explained, however, that he had “received several calls from the many victims of the offender expressing their concern over whether or not they would continue to receive regular payments from the offender” and “[a]fter speaking with the victims and listening to their concerns, this agent does have reservations about a civil judgment being granted over an extension.” The circuit court extended Messnick’s probation for an additional year.

Discussion

¶4 The only issue on appeal is whether the circuit court properly exercised its discretion in extending Messnick’s probation for an additional year.² Messnick claims “the record fails to reveal any failures on probation or criminal conduct whatsoever during the 8-year period of probation, except for the fact that he has not been able to make restitution in full during that period.” “A [circuit] court’s decision to extend probation is discretionary, but the extension must be warranted under [the] circumstances.” *State v. Olson*, 222 Wis. 2d 283, 292-93, 588 N.W.2d 256 (Ct. App. 1998). The circuit court “exercises the appropriate

² We note that Messnick repeatedly refers to the circuit court’s conduct as an “abuse of discretion.” In 1992, we changed the terminology we employ when reviewing a discretionary decision of the circuit court. *State v. Plymesser*, 172 Wis. 2d 583, 585 n.1, 493 N.W.2d 367 (1992). We now use “erroneous exercise of discretion” instead of the phrase “abuse of discretion.” *Id.* The standards we utilize to review the decision have not changed. *Id.*

discretion when it examines the relevant facts, applies a proper standard of law, uses a ‘demonstrative rational process,’ and reaches a conclusion that a reasonable judge could reach.” *Id.* at 293 (citation omitted).

¶5 “The dual goals of probation are ‘the rehabilitation of those convicted of crime and the protection of the state and community interest.’” *Huggett v. State*, 83 Wis. 2d 790, 798, 266 N.W.2d 403 (1978) (quoting *State v. Tarrell*, 74 Wis. 2d 647, 653, 247 N.W.2d 696 (1976)). Conditioning probation on restitution “can aid an offender’s rehabilitation by strengthening the individual’s sense of responsibility.... One who successfully makes restitution should have a positive sense of having earned a fresh start and will have tangible evidence of his or her capacity to alter old behavior patterns and lead a law-abiding life.” *Huggett*, 83 Wis. 2d at 798. Requiring that the offender make restitution to the victims “also protects the community’s interest in having the victims of crime made whole.” *Id.*

¶6 WISCONSIN STAT. § 973.09(3)(a) provides that “[p]rior 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.” (Emphasis added.) Section 973.09(3)(c)1. further provides that probation may be extended if the probationer has not made a good faith effort to pay restitution. The principal purpose of restitution is to “return the victims to the position they were in before the defendant injured them,” and we construe restitution statutes broadly and liberally to allow victims to recover their losses. *See State v. Holmgren*, 229 Wis. 2d 358, 366, 599 N.W.2d 876 (Ct. App. 1999).

¶7 Messnick cites to our supreme court’s decisions in *Huggett* and *State v. Davis*, 127 Wis. 2d 486, 381 N.W.2d 333 (1986), for the proposition that

extending probation for the collection of a debt alone is an erroneous exercise of discretion. In *Huggett*, the probationer claimed that her probation was continued only because of her indigency and failure to pay the full court-ordered restitution. *Huggett*, 83 Wis. 2d at 799. Our supreme court agreed that “the criminal justice system should not be employed to supplement a civil suit or as a threat to coerce the payment of a civil liability or to perform the functions of a collection agency.” *Id.* at 803-04. The court concluded, however, that “[f]ailure to make restitution within the original probation period *might* constitute cause [under WIS. STAT. § 973.09(3)(a)] for extending probation and continuing restitution,” and remanded the case for such a finding. *Id.* at 803 (emphasis added). According to the court, a reviewing court may not find cause to extend probation “[i]f the probationer lacks the capacity to pay and has demonstrated a good faith effort during probation.” *Id.*

¶8 Similarly the court in *Davis*, citing *Huggett*, reversed and remanded the case to the circuit court to discharge Davis from supervision based on its finding that she had “faithfully follow[ed] the requirements” of probation and the only “deficiency is recognized as a mere debt.” *Davis*, 127 Wis. 2d at 500. “Debt collection,” explained the court, “should not be facilitated by continuing the criminal process of supervision when the rehabilitative purposes have been accomplished and, as in this case, when a reasonable alternative for the payment of restitution has been proposed by the defendant and the probation department.” *Id.* at 497-98. The circuit court had extended Davis’ probation three times, each time basing the decision on what our supreme court called “Davis’ alleged failure to comply with conditions of her probation when those conditions had never before been explicitly stated by the court to be necessary for the satisfactory completion of the probation term.” *Id.* at 487. According to the court, “the

continuation of probation for [the purpose of payment of restitution] alone constitutes an [erroneous exercise of discretion].” *Id.* at 499.

¶9 In this case, the circuit court’s decision to extend Messnick’s probation for a year was an appropriate exercise of discretion and one that a reasonable judge could reach under the circumstances. Unlike in *Davis*, the court did not agree that the “rehabilitative purposes have been accomplished” or that “a reasonable alternative for the payment of restitution has been proposed.” *Id.* at 497-98. The record reflects that both the victims and the probation agent expressed concern that the victims would not be able to collect on a civil judgment. The court explained, “I don’t believe that a civil judgment is going to protect these victims from recovering on the restitution which is something that absolutely needs to be paid to make them whole and not only to make them whole but to rehabilitate Mr. Messnick which is the key to probation.” The circuit court was not satisfied with Messnick’s suggestion of a promissory note as the victims would need to sue to collect on the promissory note, resulting in another judgment.

¶10 The court based its decision extending probation on its belief that “additional restitution would effectuate the objectives of probation” and that Messnick “could make more than negligible payments during the extended period.” See *Huggett*, 83 Wis. 2d at 799, 803. According to the court, “[t]he basis for [the extension] is ... to rehabilitate this defendant by paying the restitution to the victims which I think is paramount and one of the prime purposes of the judgment that was originally entered.” Messnick stands at a very different posture than the defendants in *Huggett* and *Davis*; Messnick is not indigent or on a fixed income and he is capable of making a sizable monthly payment toward the remaining restitution.

¶11 The court also considered whether Messnick had demonstrated good faith in making the restitution payments. We acknowledge that Messnick claimed at the review hearing that he had not missed any payments. We also note that the probation agent represented to the court that Messnick had “made a good faith effort in complying with the court ordered monthly payments, having made payments totaling in excess of \$70,000 during his eight year term.” Under WIS. STAT. § 973.09(3), however, the circuit court must make an independent determination whether “cause” exists and whether the defendant has shown “good faith” based on the facts in the record. As the court explained, “I understand the Department of Corrections is satisfied with the good faith effort. I’m not satisfied with that.” The court found “some problems with the payments given what I’ve seen here ... and there are some months where there is no payment made.” Our own independent review of the record demonstrates that Messnick failed to make full payments during some months and fell behind in the amount owed as a result.

¶12 In summary, we recognize that our supreme court’s decisions in *Huggett* and *Davis* caution that the circuit court’s judicial resources are not best utilized “perform[ing] the functions of a collection agency.” *Huggett*, 83 Wis. 2d at 804. Continuing probation for the purpose of compelling payment of restitution alone is not an appropriate exercise of discretion. In this case, the record demonstrates that Messnick had the ability to make restitution payments and the circuit court found that he failed to satisfy the requirements of probation to the full extent. Under our discretionary standard of review, the circuit court had a reasonable basis for extending his probation for an additional year.

By the Court.—Order affirmed.

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

