

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

June 25, 1996

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.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 96-0154-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**THOMAS DEFFKE,**

**Defendant-Appellant.**

APPEAL from an order of the circuit court for Milwaukee County:  
CHARLES F. KAHN, JR., Judge. *Affirmed.*

WEDEMEYER, P.J.<sup>1</sup> Thomas Deffke appeals from an order directing him to pay restitution for funeral expenses after he pleaded no contest to one count of contributing to the delinquency of a child, contrary to § 948.40(1), STATS. Deffke claims that the trial court erroneously exercised its sentencing discretion when it ordered him to pay the funeral expenses. Because the trial court did not erroneously exercise its sentencing discretion in ordering Deffke to pay the funeral expenses as restitution, this court affirms.

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<sup>1</sup> This appeal is decided by one judge pursuant to § 752.31(2), STATS.

## I. BACKGROUND

This case arises from the events surrounding a high school graduation party hosted by Deffke on June 11, 1994. The decedent, Greta Abraham, was a minor who attended the party and drank alcohol provided by Deffke. Abraham also attended other parties on the night of June 11, 1994.

On June 12, 1994, at approximately 2:25 a.m., a marked police car observed Abraham driving erratically. The police officer attempted to pull her over, but she failed to stop. Shortly thereafter, Abraham crashed the vehicle she was driving into a tree and was killed.

Deffke was charged with contributing to the delinquency of a minor for providing Abraham with alcohol. Deffke was convicted and sentenced to six months incarceration, ordered to pay \$750 to the D.A.R.E. program and restitution. A separate hearing was held to determine the appropriate amount of restitution. At the hearing, the trial court ordered Deffke to pay \$5,996.63 for the funeral expenses of Abraham. Deffke appeals the restitution order.

## II. DISCUSSION

In reviewing a trial court's sentence, including an order for restitution, this court's role is limited to determining whether the trial court erroneously exercised its discretion in imposing sentence. *See State v. J.E.B.*, 161 Wis.2d 655, 661, 469 N.W.2d 192, 195 (Ct. App. 1991), *cert. denied*, 503 U.S. 940 (1992). The trial court is afforded great latitude in sentencing. *Id.* at 662, 469 N.W.2d at 195. This latitude is limited by the requirement that the trial court must consider three primary factors: (1) the gravity of the offense; (2) the character of the offender; (3) and the need to protect the public. *Id.*

The discretion a trial court exercises "contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards." *McCleary v. State*, 49

Wis.2d 263, 277, 182 N.W.2d 512, 519 (1971). Against this backdrop, the law provides that the trial court shall impose restitution unless it finds substantial reason not to do so. See § 973.20(1), STATS.<sup>2</sup> Moreover, § 973.20(4), STATS., specifically provides that “[i]f the crime resulted in death, the restitution order may also require that the defendant pay an amount equal to the cost of necessary funeral and related services.”

Deffke does not claim that the trial court failed to consider the primary factors. Rather, he argues that the trial court erred in ordering him to pay funeral expenses as restitution because: (1) he is exempt from civil liability; (2) the trial court did not properly consider Deffke's financial circumstances and death was not an element of the offense of contributing to the delinquency of a minor; and (3) ordering Deffke to pay the funeral expenses as restitution was excessive. This court addresses each contention *seriatim*.

A. *Civil Liability Exemption.*

Deffke first claims that the trial court erroneously exercised its sentencing discretion by ordering him to pay the funeral expenses because he is exempt from civil liability pursuant to § 125.035(2), STATS.<sup>3</sup> Deffke argues that because he is exempt from civil liability for providing Abraham with alcohol, that this immunity should also operate as a defense to an order of restitution based on providing a minor with alcohol. This court is not convinced that

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<sup>2</sup> Section 973.20(1), STATS., provides in pertinent part:

When imposing sentence or ordering probation for any crime, the court, in addition to any other penalty authorized by law, shall order the defendant to make full or partial restitution under this section to any victim of the crime or, if the victim is deceased, to his or her estate, unless the court finds substantial reason not to do so and states the reason on the record.

<sup>3</sup> Section 125.035(2), STATS., provides in pertinent part:

(2) A person is immune from civil liability arising out of the act of ... dispensing or giving away alcohol beverages to another person.

§ 125.035(2) makes the trial court's restitution award an erroneous exercise of discretion.

In response to this argument, the trial court ruled:

Therefore, in the event that this were a civil action, I would be ruling that Mr. Deffke is by section 125.035(2) immune from liability. However, I find in this case that on the question of restitution arising out of criminal conduct that section 125.035 does not close the issue.... I think that the statutes themselves are a little unclear, and frankly I am personally troubled by the possibility that this statute could strike out the valuable rehabilitative effects of Mr. Deffke paying restitution to Greta Abraham's estate. In other words, I think that the language in the case State vs. Dugan makes a lot of sense. That rehabilitation here is a key issue....

... I cannot rule in this case that after the crime committed by Mr. Deffke ended that evening in the death of Greta Abraham that this civil immunity from liability statute would prevent the criminal court from ordering restitution.... [R]elying on the purposes of sentencing in a criminal case, the purposes of restitution in a criminal case, the moderate level of guidance we have from the Court of Appeals in the case of State v. Dugan and the basic concepts which I'm going to add in here without additional guidance of the law of common sense and justice and the need for a Court to do justice in each case, I do rule that Mr. Deffke has the right to raise the issue of the immunity from civil liability. However, that does not rule this case, and restitution may be ordered by the Court despite the existence of this statute.

In sum, the trial court balanced the purposes of restitution in a criminal case against the immunity provided in civil cases pursuant to § 125.035(2), STATS., and concluded that § 125.035(2) does not control the trial court's authority to impose restitution.

Further, § 125.035(2), STATS., does not provide immunity to a provider of alcoholic beverages if the provider knew that the person he was furnishing alcohol to was under the legal drinking age. *See* § 125.035(4)(b), STATS. The record demonstrates that Deffke was aware that Abraham was under the legal drinking age. The statutory exception to immunity, together with the trial court's conclusion that the civil immunity statute should not operate to subvert the purposes of restitution in a criminal case convince this court that the trial court did not erroneously exercise its discretion in concluding that § 125.035(2) does not apply.

*B. Financial Circumstances/Death as Element of Offense.*

Deffke next claims that the trial court's restitution award was erroneous because the trial court did not properly consider Deffke's financial circumstances and because funeral expenses should only be ordered as restitution when death is an element of the offense.

The record demonstrates that the trial court inquired as to whether there were any additional materials regarding Deffke's ability to pay. The trial court considered the issue. The burden to provide the trial court with information relevant to this factor lies with Deffke. *See* § 973.20(14)(b), STATS. Because there is evidence in the record that the trial court considered Deffke's financial circumstances prior to ordering the restitution, and because any lack of information on this factor is attributable to Deffke, this court cannot say that the trial court erroneously exercised its sentencing discretion on these grounds.

This court is not persuaded by Deffke's additional argument that death must be an element of the offense before the trial court can award funeral expenses as restitution. The statute provides that funeral expenses may be ordered as restitution, "[i]f the crime resulted in death." Section 973.20(4), STATS. The trial court ruled:

Mr. Deffke's conduct and the crime he committed led to and resulted in the death of Greta Abraham, and I'm making that quite explicit...

....

... First of all, what I am saying is, Mr. Deffke, that your conduct led to her death and those are the real words that I mean to use "led to her death."

Because the statute does not limit funeral expenses to only those circumstances where an element of the crime is death, and because the trial court clearly found that Deffke's conduct led to Abraham's death, this court cannot say that the trial court's restitution order constituted an erroneous exercise of discretion.

*C. Excessiveness.*

Finally, Deffke claims that ordering him to pay funeral expenses constituted an excessive sentence, in light of the other components of his sentence. "The test for determining whether a sentence constitutes cruel and unusual punishment is whether the sentence is 'so excessive and unusual, and so disproportionate to the offense committed, as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *State v. Larsen*, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987) (citation omitted).

The other components of Deffke's sentence included six months incarceration and a \$750 contribution to D.A.R.E. The offense that Deffke was convicted of was contributing to the delinquency of a minor. Although this offense may seem insignificant when compared to the multitude of more serious offenses plaguing society, in the context of this case, the offense led to the death of a young woman. Accordingly, this court cannot say that the restitution ordered in this case, together with the other components of the sentence are so excessive, unusual or disproportionate to the offense that the order is shocking to the public sentiment. Therefore, this court rejects Deffke's claim that the restitution order was excessive.

*By the Court.* – Order affirmed.

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