COURT OF APPEALS
DECISION
DATED AND RELEASED

AUGUST 13, 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(1), STATS.

NOTICE

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Nos. 96-0179-CR
96-0180-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL H. FRASCH,

Defendant-Appellant.

APPEAL from an orders of the circuit court for Brown County: N. PATRICK CROOKS, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. Daniel Frasch appeals an order for $4,162 in restitution to a burglary victim months after the charge was dismissed and handled as a "read-in" at sentencing on other charges, and an order denying sentence modification. Frasch maintains that the court was precluded from making the order for failure to comply with statutory provisions relating to restitution and because the order constitutes double jeopardy. Frasch alternatively contends that the court should have considered the order for restitution a "new factor" for purposes of considering a sentence modification

for the crimes for which he was imprisoned. This court rejects Frasch's arguments and affirms the orders.

Frasch was originally sentenced to prison upon his plea and conviction for several serious felonies. The State dismissed a count of party to the crime of burglary with the understanding it would be used as a read-in for sentencing on other charges. The court sentenced Frasch to several concurrent prison sentences, including a fifteen-year sentence for an armed burglary. At sentencing the court remarked:

> The court is not going to require any restitution in this matter. I think that, frankly, that would be inappropriate given the length of the sentence on Count one. I'll leave it to the insurance company to pursue the issue of restitution, if desired, through the civil branches of the circuit court. But I'm satisfied that it is not appropriate given these circumstances to order restitution.

Under § 973.20(1), STATS., a court imposing sentence or ordering probation "for any crime" is required to order the defendant to make full or partial restitution to "any victim of the crime ... unless the court finds substantial reason not to do so and states the reason on the record." The reference to "any victim" includes those who were the target of a crime to which the defendant admits as a part of the read-in procedure. ***State v. Szarkowitz***, 157 Wis.2d 740, 754, 460 N.W.2d 819, 834 (Ct. App. 1990). Section 973.20(13)(c)2 specifies that the court may "[a]djourn the sentencing proceedings for up to 60 days pending resolution of the amount of restitution ...." This time period is directory and not mandatory. ***State v. Perry***, 181 Wis.2d 43, 55, 510 N.W.2d 722, 726 (Ct. App. 1993). The conclusion that it is directory does not mean that the legislature did not intend that the court in all cases be required to vacate an untimely restitution order. ***Id.*** at 57, 510 N.W.2d at 727. Thus, in ***Perry***, the fact that two people were charged with causing the victim's injury and that it would make judicial sense to hold a single restitution hearing permitted a delay beyond the sixty-day period. ***Id***. at 56, 510 N.W.2d at 727. Similarly, in ***State v. Borst***, 181 Wis.2d 118, 510 N.W.2d 739 (Ct. App. 1993), the fact that there had been no mention in either the plea agreement or the plea questionnaire allowed the court to consider restitution beyond the statutory time. ***Id.*** at 120, 510 N.W.2d a

740. ***Borst*** reasoned that because consideration of restitution is mandatory, the subsequent sentence is "'illegal' in the sense that it was incomplete without restitution or the explanation required by the statute ...." ***Id.*** at 122, 510 N.W.2d at 741.

Frasch distinguishes ***Borst*** on the theory that the court in this matter expressly considered restitution and gave a valid reason for rejecting it. Were this a completely accurate view of what transpired, we would certainly agree.

As the State points out, however, Judge Crooks later explained that his remarks at the original sentencing were not directed at the read-in burglary offense. The court stated:

> [I]t was my recollection that no one brought to the Court's attention a question of restitution in regard to [the read-in burglary case] and that the first time anything like that was brought to the Court's attention was when we got the letter from Agent Bornbach, which would have been in March of 1995.
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> ....
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> ... the Court has taken the opportunity to review the Perry case and the Borst case and also to review pertinent portions of these files.
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> ....
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> But the State, defense counsel, Mr. Frasch, no one brought up the question of restitution concerning the [read-in burglary case]. It was first brought to the Court's attention by the March 2, 1995 letter from Agent Bornbach.
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> ... And it seems to me that the fact that it was never raised, never brought to the Court's attention, no indication was made that there was any type of request for restitution, certainly gives this Court a compelling reason ....

Following a lengthy discussion of the ***Perry*** and ***Borst*** decisions, the court concluded that a failure to consider the issue of restitution in a read-in case permitted the court to consider it outside the statutory time frame.

This court considers the trial court's statement that it did not make reference to the read-in when it stated that restitution was inappropriate to be a finding of fact based upon its review of the records of its own proceedings. The trial court determined that the meaning of its original comment at sentencing was that Frasch should not receive a lengthy prison sentence for a crime and also be burdened with restitution arising out of the same conduct. This finding is not clearly erroneous. Because the court did not consider restitution for the read-in at the original sentence, it did not violate the relevant statutory provisions relating to restitution.

We also reject Frasch's challenge to the sentence based upon double jeopardy grounds. This issue was resolved contrary to Frasch's contention in ***Perry.*** The court therein held that an increase or addition to restitution after the original sentence did not constitute double jeopardy where the defendant did not have any reasonable expectation that restitution would not be imposed. ***Id.*** at 57-58, 510 N.W.2d at 727. The trial court in this case found that the only reasonable expectation Frasch could have had concerning restitution was that none would be ordered in the armed burglary for which he was being sentenced. Because the question of restitution in the read-in burglary had not been raised or discussed, this court agrees.

As an alternative, Frasch suggests the court improperly denied the order for restitution as a new factor justifying sentence modification. The trial court agreed with the parties that the restitution order arguably qualified as a new factor for purposes of sentence modification. Nevertheless, the court decided that the serious nature of the crimes for which Frasch was sentenced, and the fact that he received considerably less than the maximum prison time allowed by law, caused the court to defer to the Department of Corrections regarding Frasch's release.

Sentence modification on grounds of a "new factor" is a two-step process. ***State v. Franklin***, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989). Even if a new factor is proven, the second step requires the circuit court to determine whether that factor warrants a modification. ***Id.*** This decision is reviewed on

an erroneous exercise of discretion standard. ***Id.*** The trial court's decision that the modest restitution order did not render Frasch's prison sentence unfair or unjust was a "reasoned application of the appropriate legal standard to the relevant facts in the case." ***Hedtcke v. Sentry Ins. Co.***, 109 Wis.2d 461, 471, 326 N.W.2d 727, 732 (1982). We therefore uphold the court's discretionary decision.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.