

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOVEMBER 19, 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

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

No. 96-1705-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRENDA J. HESSEY,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Marathon County: MICHAEL W. HOOVER, Judge. *Reversed in part and cause remanded.*

CANE, P.J. Brenda Hessey appeals the trial court's judgment of conviction ordering her to pay \$7,458.51 in restitution, of which Hessey claims \$3,542.11 is attributed to uncharged thefts she has neither admitted nor agreed to for read-in purposes. The State originally charged Hessey with two counts of theft from Papillon's Pizza where she was employed. The first count alleged that between August 1, 1994, and October 6, 1994, Hessey stole cash from her employer. The second count alleged that she took cash from Papillon's on October 7, 1994. Pursuant to a plea bargain, Hessey pled no contest to the first count and the second count was dismissed and read in for sentencing purposes. She denied taking any money prior to August 1994.

At sentencing, the trial court rejected Hessey's objection to being required to pay restitution for any thefts from Papillon's occurring prior to August 1994. It then ordered her to pay restitution for the thefts from Papillon's occurring since April 1994, totaling \$7,458.51. Hessey claims the portion attributable to the April to August period is \$3,542.11.

The sole issue on appeal is whether the trial court has the authority to order that Hessey pay restitution for thefts she was neither convicted of nor admitted. The State has not filed a brief in response to Hessey's appeal challenging that part of the judgment ordering restitution. Because this court agrees with Hessey, that portion of the judgment ordering restitution for money stolen from Papillon's prior to August 1994 is reversed.

Section 973.20(1), STATS., permits the trial court to order the defendant to pay restitution to any victim of the crime. The term crime includes both the crime of conviction and any crime read in at sentencing. See *Garski v. State*, 75 Wis.2d 62, 71-72, 248 N.W.2d 425, 430-31 (1977). Hessey correctly points out that the term "crime" for restitution purposes has never been interpreted as to include an uncharged offense the defendant does not admit.

Wisconsin cases have consistently required that the defendant be convicted of the crime or admit to the uncharged misconduct before restitution can be ordered. In *State v. Scherr*, 9 Wis.2d 418, 101 N.W.2d 77 (1960), a case almost identical to the present case, the State charged the defendant with stealing property between September 15, 1956 and August 10, 1957. Scherr pled guilty, but disputed the amount of restitution. The trial court, however, ordered restitution for items stolen since 1955. The supreme court reversed when it concluded that "It was error for the court to require restitution for the entire period of dealing between the parties when the information charged a definite period and the defendant had not consented either to the period or the amount." *Id.* at 427, 101 N.W.2d at 82. Also, in *State v. Mattes*, 175 Wis.2d 572, 581, 499 N.W.2d 711, 715 (Ct. App. 1993), we refused to allow restitution for victims of crimes not included in the complaint or any read-ins.

Therefore, in order for the trial court to order restitution for acts outside the charged crime, the defendant must admit or consent to the restitution. Here, the trial court ordered Hessey to pay restitution for crimes she was neither convicted of nor admitted, money stolen prior to August 1, 1994.

Accordingly, this court reverses that part of the judgment ordering restitution and remands the matter to the trial court to order that Hessey pay restitution for the money stolen from Papillon's between August 1, 1994, and October 7, 1994.

By the Court. – Judgment reversed in part and cause remanded.

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