

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 23, 2005**

Cornelia G. Clark  
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. 2004AP2812-CR**

**Cir. Ct. No. 2000CF1238**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOHN H. MACLIN,**

**DEFENDANT-APPELLANT.**

---

APPEAL from orders of the circuit court for Milwaukee County:  
JEAN W. DI MOTTO, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. John Maclin appeals orders of the circuit court that worked to impose a restitution obligation on him. He contends the court lost the authority to order restitution because the State failed to file its proposed restitution

order within ninety days, contrary to WIS. STAT. § 973.20(13)(c)1.<sup>1</sup> We conclude that under *State v. Ziegler*, 2005 WI App 69, 695 N.W.2d 895, Maclin has failed to demonstrate he has been prejudiced by any delay and accordingly, we affirm the orders.

### **Background**

¶2 Maclin was charged in March 2000 with eight counts of robbery as party to a crime and six counts of theft from a person as party to a crime. Pursuant to a plea agreement, Maclin pled guilty to two counts of robbery and four counts of theft. One count of each type was dismissed, and the other counts were dismissed and read-in at sentencing.

¶3 At sentencing in September 2000, Maclin was given indeterminate three-year sentences on each theft count, consecutive to each other. On each robbery count, Maclin received an indeterminate ten-year sentence, consecutive to each other and to the theft sentences.

¶4 The State informed Maclin and the court of the amounts it believed Maclin should pay to his victims. The court ordered restitution would be paid from up to twenty-five percent of Maclin's prison wages and would further be a condition of his probation. Pursuant to WIS. STAT. § 973.20(13)(c)1,<sup>2</sup> the court did not set the amount of restitution at the sentencing hearing but asked the State

---

<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

<sup>2</sup> WISCONSIN STAT. § 973.20(13)(c)1 provides that one way the court may set a restitution order is to “[o]rder restitution of amounts not in dispute ... and direct the appropriate agency to file a proposed restitution order with the court within 90 days thereafter ....”

to provide a proposed order. Under the statute, the State had ninety days to submit the order.

¶5 The court never received the proposed order. In the meantime, Maclin filed a direct appeal, which we resolved against him in July 2002. In October 2002, Maclin filed a motion to vacate the restitution order that essentially remained open and undetermined.<sup>3</sup> The court denied Maclin's motion but vacated the order to the extent that it was dependent on the State's proposal. The court then set a restitution hearing to determine Maclin's obligation. At the hearing in January 2003, the court received the State's report and Maclin renewed his objection to the court's authority to proceed with a restitution order. The court requested briefs, and ruled in February 2003 that it had the authority to proceed.

¶6 The restitution hearing was finally completed in July 2003. Maclin's victims testified telephonically. Maclin also testified, explaining that because of physical limitations he was not employed in the prison and that he had no property, no savings or investments, and no living family to send him money. In summation, he argued that the State failed to meet its burden of proof on the amounts he owed and alternatively asked the court to limit the award because of his incarceration and financial outlook.

¶7 The court ruled Maclin had agreed at his sentencing hearing to pay restitution. The court further determined the amount was reasonable and ordered Maclin to pay a total of \$2,564.11. Maclin appeals the 2003 order for restitution

---

<sup>3</sup> According to the record, Maclin had also filed a pro se motion in March 2002 to vacate the restitution order. It was evidently denied off the record, and that motion's denial is not at issue in this appeal.

and the October 2002 order denying his motion to vacate the September 2000 order.

### Discussion

¶8 The scope of the trial court’s authority to order restitution presents us with a question of statutory interpretation that we review de novo. *See Ziegler*, 695 N.W.2d 895, ¶10. The amount of a restitution order is left to the trial court’s discretion. *Id.* When the court orders restitution but does not determine the amount at sentencing, WIS. STAT. § 973.20(13)(c) sets out four options the court may use to finalize the amount. *See State v. Johnson*, 2002 WI App 166, ¶8, 256 Wis. 2d 871, 649 N.W.2d 284.

¶9 Each of the four options includes a timeframe for finalizing the restitution order. The time guidelines in WIS. STAT. § 973.20(13)(c) are directory, not mandatory. *See Ziegler*, 695 N.W.2d 895, ¶14; *Johnson*, 256 Wis. 2d 871, ¶8; *State v. Perry*, 181 Wis. 2d 43, 53, 510 N.W.2d 722 (Ct. App. 1993). Therefore, we have held “restitution orders resulting from proceedings held outside of the statutory time period for valid reasons may be upheld, provided that doing so will not result in harm or injury to the defendant.” *Ziegler*, 695 N.W.2d 895, ¶14; *see also Perry*, 181 Wis. 2d at 56-57. *Perry* thus created a two-prong test. The court may impose restitution outside the statutory timeframe if: (1) valid reasons exist for the delay and (2) the defendant is not prejudiced by the delay. *See Perry*, 181 Wis. 2d at 56-57; *see also Johnson*, 256 Wis. 2d 871, ¶¶8-14.

¶10 In *Ziegler*, however, we took a closer look at the *Perry* test and asked: “Is there a ‘pecking order’ between the two prongs or are they analyzed collectively?” *Ziegler*, 695 N.W.2d 895, ¶17. Ultimately, we concluded, “the two-pronged *Perry* test is akin to a balancing test; in each case, the court must

balance the length and the reasons for the delay against the injury, harm or prejudice to the defendant resulting from the delay.” *Id.*, ¶18.

¶11 Here, there is no valid reason for the nearly three-year delay in fixing Maclin’s restitution obligation. In fact, the State has suggested no reason at all for the delay.

¶12 However, Maclin has shown absolutely no prejudice resulting from the delay. As the court noted, Maclin agreed to pay restitution as part of his plea agreement. The 2003 restitution order was nearly identical to the total Maclin had been advised of in 2000, so the overall amount, even if never formalized in 2000, would not have been a surprise to him.

¶13 Most of the reasons why we reversed the restitution order in *Ziegler* are also lacking here. The trial court in *Ziegler* had concluded, ten years after Ziegler was sentenced, that it could not impose restitution and vacated that portion of Ziegler’s judgment of conviction ordering restitution. *Id.*, ¶5. Here, the court consistently ruled that it had the authority to impose restitution and never vacated Maclin’s obligation to pay. Unlike Ziegler, Maclin had no reasonable expectation that the restitution issue had been finally settled.

¶14 In this case, all the relevant documentation of the victims’ claimed losses appears to be available and intact. Ziegler’s victim had disposed of some documentation of his losses because they pertained to a business that had since closed. The disposal there was understandable, however, considering the fourteen-year gap between Ziegler’s initial conviction and the restitution order we addressed. *Id.*, ¶¶7, 16.

¶15 Ziegler had also already been paroled at the time he was ordered to pay restitution. That, coupled with the earlier vacation of a restitution order, led us to rule that Ziegler was entitled to conclude the corrected judgment of conviction removing his restitution obligation was final. *Id.*, ¶20. Here, Maclin remains in prison, still awaiting the probation for which restitution will be a condition.

¶16 Additionally, as the State points out, “even if the trial court had set restitution within the statutory time limits, he would not have been paying it between that time and the restitution hearing in July 2003.” The court had ordered restitution paid from his prison wages, but Maclin’s physical limitations have prevented him from obtaining employment within the prison. Thus, there is no prejudice relative to his ability to reduce his debt because whether he had been ordered to pay the final amount in 2000 or 2003, there is currently no income from which to pay the restitution. Apparently, there will not be any income until Maclin’s release from prison at the earliest.

¶17 Because Maclin has demonstrated no prejudice, even though the State has no valid reason for the three-year delay in finalizing the restitution order, it would be inappropriate to reverse the restitution order. Although it is important that our trial courts adhere to statutory timelines under WIS. STAT. § 973.20(13)(c) whenever possible, even if they are directory, precluding the State from seeking restitution in the absence of prejudice to the defendant “would effectively frustrate the [restitution] statute’s primary goal of facilitating complete restitution of the victim and secondary goal of rehabilitating the defendant.” *Ziegler*, 695 N.W.2d 895, ¶18.

*By the Court.*—Orders affirmed.

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

