

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 1, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-1710-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHN A. CLEMENTS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ John A. Clements appeals from a judgment of conviction and order denying postconviction relief. Clements was convicted of

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

misdemeanor home improvement fraud in violation of ATCP 110.02(6)(m). He does not challenge his conviction, but instead challenges restitution ordered by the trial judge.

Alleged Math Error

¶2 In sections I and III of his appellate brief, Clements asserts that he was entitled to reconsideration and modification of the restitution order under WIS. STAT. § 805.17(2), because the trial judge’s calculation of restitution was “clearly erroneous.” He asserts that the trial judge should have applied the “clearly erroneous” standard found in WIS. STAT. § 805.17(2), because a restitution hearing is analogous to a trial to the court. He asserts that the trial judge wrongly applied WIS. STAT. § 806.07(1) in denying his motion.

¶3 Clements’ complaint that the trial judge should have applied the “clearly erroneous” standard found in WIS. STAT. § 805.17(2) is misguided. Trial judges are not limited by the “clearly erroneous” standard found in that statute when reviewing their own fact finding. The statute provides: “Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” This standard, typically used by a reviewing court, does not limit a trial judge when the judge reviews his or her own previous factual findings in the context of a motion for reconsideration. Trial judges may revise their own factual findings regarding restitution in this context without first finding that an earlier finding was “clearly erroneous.” If, on the other hand, Clements is arguing that a trial judge *must* always reverse his or her own prior factual finding if a party later demonstrates that such finding is “clearly erroneous,” then Clements has failed to provide legal support for the argument.

¶4 Moreover, it is strange that Clements complains about the trial judge's reliance on WIS. STAT. § 806.07(1), because this statute provides a favorable standard to litigants seeking reconsideration of an order. This statutory section "recognizes the circuit court's broad discretionary powers and permits a motion for reconsideration upon a showing of '[a]ny other reason[] justifying relief from the operation of the judgment.'" *Dietrich v. Elliott*, 190 Wis. 2d 816, 822, 528 N.W.2d 17 (Ct. App. 1995). Thus, it appears that the trial judge in this case believed he had broad discretion to revisit the restitution order. More to the point here, any failure to rely on WIS. STAT. § 805.17(2) had nothing to do with the trial judge's decision to let his earlier restitution order stand.

¶5 In any event, this court believes the germane questions relating to the allegedly erroneous math error are these: (1) Did the trial judge properly exercise his discretion when he declined to revisit and reassess the calculation? and (2) Should this court overturn or modify the restitution order because the calculation was clearly erroneous? We answer both questions in the negative because we find that Clements waived his objection to the restitution calculation by failing to make a timely objection.

¶6 The gist of Clements' complaint is that the trial judge's restitution calculation produced a restitution figure of \$33,684.40 when the correct number is \$27,286.40, a discrepancy of \$6,398. This alleged error is supposedly owing to a simple math error on the part of the prosecutor and inattention on the part of the trial judge.

¶7 Clements has waived this complaint by failing to bring this alleged error to the attention of the trial judge at the time of the restitution hearing. The case law is clear that in the absence of a timely objection to amounts in a

restitution order, and where a defendant has been afforded an opportunity to respond to claimed restitution, the trial court is entitled to proceed on the assumption that the amounts are not in dispute. *State v. Szarkowitz*, 157 Wis. 2d 740, 749, 460 N.W.2d 819 (Ct. App. 1990). Accord *State v. Leighton*, 2000 WI App 156, ¶¶ 54-56, 237 Wis. 2d 709, 616 N.W.2d 126; *State v. Hopkins*, 196 Wis. 2d 36, 42-43, 538 N.W.2d 543 (Ct. App. 1995).

¶8 In addition, Clements did not at any time present to the trial judge with reasonable clarity the argument he now makes on appeal. Neither Clements' motion for reconsideration, nor his argument at the hearing on his motion, contained the argument he now makes regarding the specific amount of money the victim paid on the contract. So far as this court has found, there is only a single reference to the topic, and that reference is a single sentence in Clements' affidavit. That single sentence does not come close to apprising the trial judge of the argument now made on appeal. Issues raised for the first time on appeal generally will not be considered, *State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997), and this court finds waiver in this case.

¶9 Clements contended before the trial court, and appears to claim on appeal, that his failure to object to the restitution calculation was excusable due to his depression. Apparently, he contends that the trial judge misused his discretion by failing to accept the depression explanation as an adequate excuse for Clements' earlier failure to contest the restitution figure. We find no misuse of discretion.

¶10 The trial court found that Clements failed to support his factual assertion that depression substantially interfered with his ability to assist in his own defense at the time of the restitution hearing. As the trial judge noted, the

only evidence indicating that Clements was unable to assist his attorney prior to and at the restitution hearing was the vague statement in a letter from a psychiatrist that Clements' depression "negatively affected" his ability to accomplish tasks. This evidence falls far short of proving that Clements was significantly impaired at the time of the restitution hearing.

¶11 Even if this court were to reach the merits of Clements' argument, it would not reverse. This record does not show that the trial judge's factual finding was clearly erroneous. Clements' argument hinges on the assumption that Exhibit 7, produced at the restitution hearing, presents a complete picture of all monies paid to him by the victim under the contract. That may or may not be true; this court cannot tell. The failure of Clements to object at the time the victim testified regarding this exhibit, and Clements' subsequent failure to direct the trial judge's attention to this narrow factual issue during the hearing on his motion for reconsideration, leaves a void in the record. It may be that the victim paid money to Clements that is not reflected in Exhibit 7. This court will not find that the trial judge's finding regarding this amount is clearly erroneous based solely on an apparent misunderstanding by the prosecutor or a self-serving assertion by Clements which was not accepted as true by the trial judge.

¶12 Furthermore, this court notes that the error Clements complains about is only an isolated part of a much more complicated whole. In this case, the trial judge correctly observed that he was forced to estimate several parts of the restitution calculation because Clements himself had failed to maintain proper records of the work he performed. Even if this court were to remand this case for a new restitution hearing, it is far from clear that Clements would walk away with a lower restitution order.

Alleged Erroneous Order to Pay Interest

¶13 Clements argues that the trial judge erroneously included in the restitution order an amount covering “interest.” He claims that a trial court is not authorized to impose interest as part of a restitution award under WIS. STAT. § 973.20 as that statute is interpreted in *State v. Hufford*, 186 Wis. 2d 461, 522 N.W.2d 26 (Ct. App. 1994).

¶14 Here, again, Clements has waived his challenge. In fact, he raises this issue for the first time on appeal. As noted above, this court generally does not address issues raised for the first time on appeal. *Caban*, 210 Wis. 2d at 604.

¶15 Furthermore, even if the issue had not been waived, Clements’ claim would fail. The part of the restitution order that Clements challenges here is not comparable to the order at issue in *Hufford*.

¶16 In *Hufford*, the trial judge determined that the loss suffered by the victim was \$1,622.80. 186 Wis. 2d at 463. The judge ordered restitution in that amount and also ordered that the defendant pay interest at a rate of 10% annually on any unpaid monies until the \$1,622.80 was paid in full. *Id.* The *Hufford* court held that the order to pay interest on the unpaid balance of the principal amount of the loss was not authorized by statute. The court explained that this interpretation of the statute was strongly supported by legislative history showing that a prior version of the restitution statute had expressly provided for this sort of payment, but had been repealed by the legislature. *Id.* at 465. The act which repealed that provision also included language allowing a defendant who had been ordered to pay such interest prior to the effective date of the repeal to petition the court for removal of such an interest requirement. *Id.* The court explained that this open-

ended interest payment provision was written out of the statute because of the administrative difficulty of computing the interest. *Id.* at 469-70. An interest order of that type is a moving target; it changes every day. *Id.* at 470 n.10.

¶17 The order in this case is fundamentally different. Clements was not ordered to pay interest on the outstanding balance of an ordered restitution amount. Rather, the judge in this case properly determined that a difference in interest expense to the victim was a component in determining the victim's true loss. The judge used this additional interest expense to the victim to determine a fixed amount of restitution. Clements was not ordered to pay interest on any outstanding balance; he was ordered to pay an out-of-pocket expense incurred by the victim as a result of Clements' crime. Consequently, the legislative concern which prompted repeal of the interest provision discussed above is not implicated in this case.

¶18 Clements also complains, in two brief paragraphs, about the precise calculation of the expense incurred by the victim to obtain financing for the cost of finishing that part of the project which the victim had already paid Clements to finish. However, Clements has failed to explain with reasonable clarity or detail just how the trial judge supposedly erred or what alternative approach would have more closely approximated the victim's true loss. This court's review of the record reveals that the trial judge used reasonable assumptions in calculating the victim's expense.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.

