

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 5, 2008

David R. Schanker
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. 2007AP1105-CR

Cir. Ct. No. 2005CF2109

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUANA O. TOSTADO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed.*

Before Curley, P.J., Wedemeyer¹ and Fine, JJ.

¹ This opinion was circulated and approved before Judge Wedemeyer's death.

¶1 PER CURIAM. Juana O. Tostado appeals from a judgment of conviction for two thefts, and from a postconviction order summarily denying her motion to modify the amount of restitution. The issue is whether the trial court was obliged to *sua sponte* consider Tostado's ability to pay the \$204,687 it ordered in restitution. We conclude that Tostado waived her objection by failing to present evidence of her inability to pay the ordered restitution. Therefore, we affirm.

¶2 The State charged Tostado, a former employee of the United Migrant Opportunity Service, with four counts of theft for intercepting checks from that organization to various government aid recipients, and for misappropriating those funds to her own use.² Incident to a plea bargain, Tostado pled guilty to two counts of theft of movable property, in violation of WIS. STAT. § 943.20(1)(a), in exchange for the dismissal and reading-in of the other two charged thefts.³ For one of the thefts, the trial court imposed and stayed a ten-year sentence in favor of a five-year probationary term; for the other, the trial court imposed a consecutive eight-year, six-month sentence, comprised of three years and six months of initial confinement and five years of extended supervision. The trial court ordered Tostado to pay restitution of \$204,687. Tostado moved for postconviction relief to modify restitution, which the trial court summarily denied.

² Tostado claims to have a gambling addiction.

³ These thefts occurred over a fifteen-month period. One of the thefts occurred between October 1999 and December 1999; Tostado was thus not charged or sentenced for that offense under Truth-In-Sentencing, which became effective for offenses committed after December 31, 1999. 1997 Wis. Act 283. The other theft occurred between January 2000 and December 30, 2000; Tostado was charged and sentenced for that theft under Truth-In-Sentencing.

¶3 Tostado appeals, contending that the trial court failed to consider her ability to pay the ordered amount, and alternatively that trial counsel was ineffective for failing to present such evidence. We reject both contentions.

¶4 The trial court is obliged to order a defendant “to make full or partial restitution” to the victim of any crime “considered at sentencing ... unless the court finds substantial reason not to do so and states the reason on the record.... Restitution ordered ... is a condition of probation, extended supervision, or parole served by the defendant.” WIS. STAT. § 973.20(1r) (2005-06).⁴ After the defendant’s term of probation, extended supervision or parole has been terminated the “restitution ordered ... is enforceable in the same manner as a judgment in a civil action by the victim.” *Id.* The trial court is obliged to consider various factors involving the defendant, including his or her financial resources, present and future earning ability, and the needs and earning ability of the defendant’s dependents. *See* § 973.20(13)(a). The defendant bears the burden of proving the foregoing factors. *See* § 973.20(14)(b).

¶5 The trial court ordered restitution at the conclusion of the sentencing hearing. The trial court’s remarks to Tostado on restitution were:

Restitution certainly is a critical factor here, and it must be addressed, but it is not a factor that should outweigh or overweigh the severity of this crime and the circumstances surrounding it.

....

⁴ These thefts were committed in 1999 and 2000; however, this prosecution did not commence until 2005. We refer to the 2005-06 version of the Wisconsin Statutes because the restitution statute, despite several amendments, remained unchanged in any relevant respect to this case during the relevant time period. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

You are to pay restitution in the amount of \$204,687.

....

The restitution and costs will begin to be deducted from your prison wages thereafter obviously upon release you will have to make regular payments that are suitable to your circumstances. But that amount of money should be paid back if there is any amount of money that is available now regarding any items that you may have that could be utilized for restitution, that should be addressed immediately.

The trial court concluded its sentencing remarks to Tostado:

You are also to maintain gainful employment and as indicated obviously you must make restitution. Fortunately you have the ability and the education and the work history to be able to do that here. You still upon release can be a constructive member of society. You certainly owe it to your family to do so.

¶6 The trial court asked counsel if there was “[a]nything further,” to which defense counsel replied, “I don’t believe so.” Prior to the trial court’s comments and imposition of sentence and its ordering restitution, defense counsel urged the trial court to impose probation as opposed to prison, telling the trial court that

[i]f [Tostado] were to spend 42 months in prison, that would be 42 months that she would not be making restitution payments to these programs that are so important.

Her whole adult life she’s always been employed.... She’s always worked. After this came to light and was in the media and so forth she’s had a hard time finding a job, but I believe she’s found a job now. She told me that she starts Monday at C3 Graphics.

And it seems to me that if we can protect the public from this crime being committed again while she is on probation, everything is served by allowing her to continue to make restitution. And I think we need to face the fact.... Two hundred some thousand isn’t about the restitution that might take the rest of Ms. Tostado’s life to pay at any

reasonable amount. I think this would be a large mortgage for somebody. And so I think the more time spent paying off that restitution, the better the community is, the better Ms. Tostado is and I think everybody is served by allowing her to do that.

....

I think the court is pretty much assured that the lady will be allowed and she will be making restitution payment, it seems to me that that is the intelligent thing to do especially when you consider the fact that Ms. Tostado has minor children that she is still caring for and if she goes to prison there is a good chance that those kids will become, you know, a burden on the community as well which again I don't think makes any sense.

She is, you know, tremendously humiliated by finding herself in this position, and I think that is part of the reason why it's difficult to say in a public way that you were involved in this. But I think Ms. Tostado has come to face the music so[to] speak. She acknowledges her involvement in these repeated thefts. She is here to accept responsibility. She wants to put it behind her, begin making restitution.

And so I encourage the court to impose a prison sentence but stay it so that she has the proverbial hanging over her head to make sure she does stay employed and does make the restitution payments. But from what I know about her, that threat, that fear of having to go prison will be sufficient to make sure that she stays employed, that she continues to make these restitution payments and continues to address her gambling problem. So it seems to me that ...[probation is] the appropriate sentence.

¶7 Tostado moved for postconviction relief, namely to modify the amount of restitution to an amount that she can “reasonably be expected to pay during the course of her sentence.” The trial court summarily denied the motion, ruling that Tostado had waived “any objection to the amount or her ability to pay.” The trial court explained that

[it] expects her to get a job and pay the entire amount back through regular payments upon release from prison. Further it is wholly unknown what the defendant's income will be after she is released from prison, and she will have a

continuing duty while on supervision for both counts to pay the full amount. It may very well take her the rest of her life, but the victim should not be shortchanged because of the defendant's actions.

The trial court also relied on *State v. Dugan*, 193 Wis. 2d 610, 625, 534 N.W.2d 897 (Ct. App. 1995), insofar as the defendant's ability to pay "should not be restricted to the offender's financial condition only at the moment of sentencing." The trial court also referred to *Dugan* when it reminded Tostado that she may "[seek] modification in the future if ... she is unable to meet her restitution obligation." The trial court also determined that Tostado, like Dugan, failed to object to the amount or the ability to pay that amount. Insofar as Tostado's alternative argument on a correlative ineffective assistance of counsel claim for waiving her objection is involved, the trial court found that

there is no evidence that the defendant ever told counsel that she couldn't pay, and she has submitted no factual showing at this time that she would be unable to pay the amount during the term of her sentence and or during her probationary period. In addition, there is no showing that she won't have the means to acquire employment when she is released on extended supervision.

¶8 We conclude that Tostado waived her objection to the amount of restitution ordered. See *State v. Szarkowitz*, 157 Wis. 2d 740, 749-50, 460 N.W.2d 819 (Ct. App. 1990). Tostado contends that she did not waive her objection, rather the trial court erred in failing to consider evidence of her inability to pay the ordered amount as required by WIS. STAT. § 973.20(13)(a) and *State v. Loutsch*, 2003 WI App 16, ¶25, 259 Wis. 2d 901, 656 N.W.2d 781. Tostado claims that she was essentially deprived of her opportunity to present evidence of her inability to pay, which she also claims was obvious because her counsel explained that the aggregate amount of the victims' losses, over \$200,000, would take her "a lifetime" to repay. She also contends that in its postconviction order

the trial court contradicted itself by finding that there was no showing of inability to pay while acknowledging that repaying the victims “may very well take her the rest of her life.”

¶9 We reject Tostado’s claims. The defendant bears the burden of proof to offset paying less than the full amount of restitution, such as his or her financial circumstances, including the ability to pay. *See* WIS. STAT. § 973.20(14)(b). Although the trial court is obliged to consider the defendant’s ability to pay, it is not an obligation the court assumes *sua sponte*; if no evidence is presented, the trial court is not required to solicit such evidence. *See Szarkowitz*, 157 Wis. 2d at 749-50.

¶10 At sentencing, the focus was on whether the trial court should impose time in prison, or place Tostado on probation. After the trial court ordered restitution of \$204,687 however, it inquired if there was “[a]nything further” from either counsel. While this inquiry may have been perfunctory, defense counsel had the opportunity to proffer evidence or address Tostado’s ability to pay. Instead, he simply said, “I don’t believe so.” The entire defense presentation at sentencing focused on imposing probation rather than a prison term, and the principal reason presented for doing so was to enable Tostado to pay restitution. A sentencing presentation seeking probation to facilitate the payment of restitution while simultaneously pleading inability to pay the full amount of restitution, resulting from Tostado’s “complex scheme” of systematically (over three hundred times) misappropriating funds from government aid recipients, may not have been the most persuasive approach to seek probation rather than prison.

¶11 We also do not view the trial court’s statements that there was “no factual showing at this time that [Tostado] would be unable to pay the amount

during the term of her sentence and or during her probationary period,” or that “there [wa]s no showing that she won’t have the means to acquire employment when she is released on extended supervision,” as contradicting the trial court’s acknowledgement that paying restitution “may very well take her the rest of her life.” There is no question that paying restitution of \$204,687 is a significant financial liability. There is also no question however, that Tostado continually and repeatedly stole funds totaling that amount. Tostado had a college education and had “always worked.” While Tostado considered her inability to pay the amount ordered as “obvious,” she did not seek to present information on her inability to pay. That the trial court did not offset the full amount of restitution where there was no evidence from the party bearing the burden of proof on that offset is not error. *See id.*

¶12 Tostado contends that if we decide that she has waived her objection to the amount of restitution and her opportunity to present evidence of her inability to pay, that her trial counsel was ineffective for waiving that objection. We reject Tostado’s ineffective assistance claim. First, she has presented no evidence that she told her trial counsel that she did not or would not have the ability to pay restitution. Second, trial counsel may not have sought to present such evidence to avoid the trial court viewing it as inconsistent with the defense presentation urging imposition of probation, and characterizing restitution as the punishment and lesson learned from committing these thefts. Matters of reasonably sound strategy, without the benefit of hindsight, are “virtually unchallengeable,” and do not constitute ineffective assistance. *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984).

By the Court.—Judgment and order affirmed.

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

