

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 6, 2003

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. 01-3009-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00-CF-704

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KENNETH R. METZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
STEPHAN A. SIMANEK, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Kenneth R. Metz appeals from a judgment of conviction in which the circuit court ordered restitution for the cost of surveillance equipment installed prior to Metz's crime of theft. Metz argues that the circuit

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

court erred in ordering this restitution because no causal nexus was established between his theft and the victim's expenditure of funds. We disagree and affirm the circuit court.

FACTS

¶2 On August 26, 2000, a surveillance tape revealed Metz inside the business of Horizon Retail Construction (Horizon). Metz admitted entering the building with another person, Griffin Eckert; Eckert had the key to the building. Eckert had informed Metz that he had to pick up some things from his father's desk but Metz readily admitted that after he entered the business with Eckert, he decided to steal a watch from another person's desk.

¶3 Two weeks before Metz committed his theft, Horizon had installed a video surveillance system because there had been several thefts from the building after someone had gained unauthorized entrance to the business. An August 31, 2000 criminal complaint charged Metz with two counts of burglary as a party to a crime, contrary to WIS. STAT. § 943.10(1)(a). An information filed on September 14, 2000, charged the same.

¶4 On February 18, 2001, pursuant to a plea agreement, Metz entered a plea of guilty to a single count of misdemeanor theft. At the conclusion of the plea hearing, the circuit court adjourned the matter for a restitution hearing and sentencing. On March 2, 2001, the court withheld sentence and placed Metz on probation for one year. As a condition of probation, the court ordered Metz to pay restitution in the amount of \$2000 for the cost of the security equipment installed by Horizon two weeks prior to Metz's offense. The court reasoned that this restitution order was authorized by WIS. STAT. § 973.20(5)(c), which provides for

reimbursement of amounts paid as rewards for information leading to the apprehension and conviction of a defendant.

¶5 Metz unsuccessfully objected to this restitution order at the time it was imposed, arguing that the installation and expenditure of funds for the security system occurred prior to the time the theft was committed. Metz filed a timely notice of appeal and his original appellate counsel filed a no-merit report pursuant to WIS. STAT. § 809.32 and *Anders v. California*, 386 U.S. 738 (1967). On September 25, 2002, we rejected this no-merit report, concluding that there were arguably meritorious issues, specifically whether there is arguable merit to challenge the restitution order issued in this matter.

DISCUSSION

¶6 Metz argues that the circuit court erred in ordering restitution for the surveillance equipment installed prior to his crime because no causal connection can be established between his theft and the expenditure of the funds by the victim. The State counters that the restitution was ordered as a condition of probation and it is within the circuit court's discretion to allow such conditions "as the court may consider reasonable in each case." The State argues that the probation condition of restitution imposed must only be considered reasonable and appropriate under WIS. STAT. § 973.09(1)(a). We agree with the State.

¶7 We review the terms of a restitution order for the erroneous exercise of discretion. *State v. Holmgren*, 229 Wis. 2d 358, 366, 599 N.W.2d 876 (Ct. App. 1999). Underlying discretionary determinations may be findings of fact and conclusions of law. *Id.* We will not overturn findings of fact unless they are clearly erroneous. *Id.* We review questions of law de novo. *Id.*

¶8 Probation is not a matter of right but instead is a privilege. *State v. Heyn*, 155 Wis. 2d 621, 627, 456 N.W.2d 157 (1990). WISCONSIN STAT. § 973.09(1)(a) grants to the circuit court broad discretion to place a convicted person on probation and to “impose any conditions which appear to be reasonable and appropriate” on that probation. *Heyn*, 155 Wis. 2d at 627. The Wisconsin Supreme Court has held that requiring a convicted person to pay restitution is one of many permissible conditions of probation. *Id.* Section 973.09(1)(b) requires the circuit court to order a convicted person to pay restitution designed to compensate the victim’s pecuniary loss resulting from the convicted person’s criminal activity in all appropriate cases. *Heyn*, 155 Wis. 2d at 627.

¶9 We have stated that even if the condition at issue cannot be characterized as restitution under WIS. STAT. § 973.09(1)(b), it may nevertheless be upheld as a reasonable and appropriate condition of probation under § 973.09(1)(a). *State v. Connelly*, 143 Wis. 2d 500, 505, 421 N.W.2d 859 (Ct. App. 1988); *see also Heyn*, 155 Wis. 2d at 629. In *Connelly*, we described the relationship between § 973.09(1)(a) and (1)(b) and stated:

The statute does not state that the only time a probationer can be required to pay out funds as a consequence of his or her criminal activity is to provide restitution to a crime victim. It simply requires that if there is an ascertainable victim, he or she must be compensated under the guidelines therein stated. The adoption of the mandatory victim restitution provisions of sec. 973.09(1)(b) did not inhibit or restrict the authority of a trial court to impose “reasonable and appropriate” conditions of probation, as generally authorized by sec. 973.09(1)(a). The provisions of secs. 973.09(1)(a) and (1)(b) are cumulative and concurrent; the latter section neither usurps nor abridges the former.

Connelly, 143 Wis. 2d at 505.

¶10 The validity and reasonableness of a condition of probation must be measured by how well the condition serves to effectuate the objectives of probation. *Heyn*, 155 Wis. 2d at 629. The dual objectives of probation are the rehabilitation of those convicted of crime and the protection of the state and community interest. *Id.* The Wisconsin Supreme Court has observed that conditioning probation on the satisfaction of requirements which are beyond the convicted person's control undermines the rehabilitation of the offender. *Id.* Thus, a condition of probation which requires the convicted person to pay out funds as a consequence of his or her criminal activity must be fairly related to the damage caused by the offender and to his or her ability to pay. *Id.*

¶11 In *Heyn*, we concluded that the rehabilitative objectives of probation were furthered when the circuit court required the convicted person to pay the cost of the installation of a burglar alarm in the home of the victim as a condition of probation. *Id.* at 629-30. Such a condition aids the offender's reformation by educating him or her that a burglary is not just a taking or destruction of personal property "but is also an unjustifiable and unlawful personal intrusion which greatly diminishes or destroys the sense of security that each person has a right to expect." *Id.* at 630. This condition therefore impresses upon the convicted person the full extent of the injury caused by his or her criminal activities and teaches him or her to consider more carefully the consequences of his or her actions in the future. *Id.*

¶12 Admittedly, in *Heyn* the convicted person was ordered to pay for a surveillance system installed after the burglary and here, Metz was ordered to pay for a surveillance system that was installed prior to his crime. However, in *Holmgren*, 229 Wis. 2d at 372, we specifically held that expenditures incurred in investigating a crime could be ordered as restitution. The purpose behind

restitution guides our review of the circuit court's restitution order. *Id.* at 366. We construe the restitution statutes broadly and liberally to allow victims to recover their losses resulting from the defendant's criminal conduct. *Id.* Here, requiring Metz to pay for the installation of the surveillance equipment is reasonable and appropriate as the dual objectives of probation, the rehabilitation of those convicted of a crime and the protection of the state and community interest, are served. The circuit court was within its discretion when it ordered this condition of probation.

By the Court.—Judgment affirmed.

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

