

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 10, 2010

A. John Voelker
Acting 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. 2009AP2813-CR

Cir. Ct. No. 2006CF134

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SEAN A. NICHOLS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Sean A. Nichols appeals from a judgment of conviction for failure to pay child support and an order denying his motion for postconviction relief. Nichols argues that the circuit court did not follow the proper procedures for entering an order for restitution, and argues that he is

entitled to a restitution hearing. We conclude that Nichols is attempting to collaterally attack the amount of child support arrearages that he owes, and we affirm the judgment and order.

¶2 Nichols entered *Alford*¹ pleas to a variety of charges, including two counts of felony non-support and two counts of misdemeanor non-support. As part of a plea agreement, the circuit court withheld sentence on the two felony counts and placed Nichols on probation with a condition of probation that he pay the arrearages with interest. On appeal, Nichols only challenges the restitution ordered for the felony counts.

¶3 When Nichols entered his plea, the court asked him if he understood that a condition of probation would be that he pay the arrearages with interest, and he said that he understood.² The State explained to the court that the victim wanted the arrearages paid, and that the reason it was recommending probation was with the hope that Nichols would pay the arrearages owed. The State did not know the exact amount of arrearages at the time of the plea colloquy. The court subsequently entered a restitution order for the amount of the arrearages.

¶4 Nichols then brought a postconviction motion asking the court to vacate the restitution order and hold a restitution hearing at which he could present evidence. At the hearing on the motion, Nichols argued that the non-support

¹ *North Carolina v. Alford*, 400 U.S. 25 (1970).

² At sentencing, Nichols reiterated this promise. He said: “I never having [sic] been given a court order to pay child support has gotten me here, I admit even though I wasn’t aware of the order, I could have paid anyway, knowing it was the right thing to do. I’m asking the Court for just one chance now that I’ve been in court and have a copy of the order, there is no excuse not to fulfill my obligation.”

statute, WIS. STAT. § 948.22 (2007-08),³ contains a penalty provision that requires the court to order the defendant to pay arrearages, and that this section was separate from the restitution statute, § 973.20. He argued that the agreement between the parties was that Nichols would pay arrearages under § 948.22, but there was no agreement to pay restitution under § 973.20, that the court erred when it entered an order for restitution without following the statutory procedures, and that he was entitled to a restitution hearing at which he could argue about the amount of restitution. Further, he argued that if the restitution order is allowed to stand, he could be responsible for arrearages under both statutes, for double the amount of arrearages.

¶5 The circuit court denied the motion. The court noted that its acceptance of the plea agreement hinged on Nichols' agreement to pay restitution, that Nichols' argument about restitution and arrearages was a distinction without a difference, and it rejected the argument that Nichols could be made to pay the arrearages twice.

¶6 Nichols renews his argument to this court that the restitution and non-support statutes conflict. He argues that the circuit erred because it did not follow the "mandatory and permissive instructions" under WIS. STAT. § 973.20 "that assist in ascertaining the proper amount of restitution," and that he is entitled to a new hearing at which he could argue "the propriety" of the restitution award. He explains that if the restitution statute is the machinery by which he is held

³ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

responsible for the penalty imposed by the failure to support statute, then he is entitled to the procedural safeguards provided by the restitution statute.

¶7 We conclude that Nichols has received the benefit of the procedural safeguards to which he was entitled. The restitution order was based on a family court order for child support. Nichols could have contested the order for support when it was entered in the family court, but he did not. Further, the failure to support statute contains an affirmative defense that would have allowed Nichols to argue that he did not have the ability to pay the amount of support he owed. WIS. STAT. § 948.22(6). Nichols chose to forgo that defense when he entered his plea. *See State v. Kazee*, 192 Wis.2d 213, 219, 531 N.W.2d 332 (Ct. App. 1995) (generally, a guilty or no contest plea waives all non-jurisdictional defects and defenses.)⁴

¶8 Nichols made the choice not to pursue the process available to him to challenge the amount of arrearages he owed both in the family court and in the criminal court. Further, Nichols has received the benefit of the plea bargain. Nichols' argument now is nothing more than an attempt to collaterally attack the amount that he owes under the family court order, and we will not allow him to do so.

¶9 We acknowledge that entering a restitution order may not have been the best way to enforce Nichols' agreement to pay the amount of arrearages. But

⁴ We are not holding, as Nichols suggests in his reply brief, that a plea agreement always waives a challenge to a restitution order. He claims that he could not have waived this challenge because the restitution order was entered after he entered his plea. The record establishes, however, that one of the conditions of the plea was Nichols's agreement to pay the amount of arrearages that he owed. He was certainly aware at the time he entered his plea that he would be required to pay what he owed.

we also agree with the State that under the circumstances presented here, the argument Nichols makes about the difference between paying restitution under WIS. STAT. § 973.20 and paying arrearages under § 948.22 is a distinction without a difference. Nichols had the opportunity to challenge the order requiring him to pay support, and did not. He also had the opportunity to argue as a defense to the charges against him that he could not pay the amount he owed. He again did not do so. After forgoing the process available to him, we will not allow him to collaterally attack the order now. For the reasons stated, we affirm the judgment and order.

By the Court.—Judgment and order affirmed.

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

