

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 28, 2011

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. 2010AP3151-CR

Cir. Ct. No. 1996CF960232A

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MYRON ELCADO EDWARDS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JEFFREY A. CONEN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Myron Elcado Edwards, *pro se*, appeals from an order of the circuit court denying his motion to rescind or modify restitution. Edwards contends that his restitution obligation should be rescinded because he is

not eligible for probation and because he cannot pay, now or in the future. We agree with the circuit court that Edwards' motion should be denied, so we affirm.

¶2 Edwards is incarcerated for convictions on one count of attempted armed robbery, five counts of armed robbery, one count of attempted first-degree intentional homicide, and two counts of first-degree intentional homicide, all as party to a crime. He was sentenced to two consecutive terms of life imprisonment without the possibility of parole and seven additional consecutive terms totaling another 260 years' imprisonment, with credit for 155 days of time served.

¶3 When Edwards was sentenced on June 6, 1996, the circuit court ordered him to pay restitution from twenty-five percent of his prison funds. Restitution, determined to be over \$53,000, was set at a later date. Restitution was ordered to be joint and several with Edwards' co-defendants.

¶4 On November 22, 2010, Edwards moved for "modification of sentence of restitution." He asserted that his restitution obligation for the intentional homicide charges should be rescinded, claiming the State "waived its remedy of seeking restitution for these particular counts" because Edwards will never be eligible for release. He also claimed that the restitution order should be rescinded because he cannot pay it. The circuit court denied the motion, noting that when restitution was set, the court at that time specifically acknowledged that Edwards might never be able to pay the full amount.

¶5 Edwards essentially renews the same arguments on appeal. The State asserts that his claims are barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), because they could have been raised previously. Edwards responds that a different case specifically permits him to seek modification of the restitution based on his inability to fulfill the obligation.

We conclude that Edwards' motion is partially procedurally barred and, to the extent that it is not, we also conclude that the circuit court properly denied the motion.

¶6 Restitution is an equitable remedy ““under which a person is restored to his or her original position prior to loss or injury, or placed in the position he or she would have been in, had the [event] not occurred.”” See *State v. Dugan*, 193 Wis. 2d 610, 621, 534 N.W.2d 897 (Ct. App. 1995) (citation omitted). Restitution awards in criminal cases are authorized and governed by WIS. STAT. § 973.20 (2009-10).¹ “The restitution statute ... reflects a strong equitable public policy that victims should not have to bear the burden of losses if the defendant is capable of making restitution.” *Dugan*, 193 Wis. 2d at 622. The primary purpose of restitution ““is not to punish the defendant but to compensate the victim.”” See *id.* at 623-24 (citation and emphasis omitted).

¶7 We discern three distinct arguments from Edwards' current motion and appellate brief. First, he contends that, because he will never be eligible for probation or parole on the first-degree intentional homicide charges, the State has waived a right to claim restitution, so the circuit court erroneously exercised its discretion in refusing to rescind his obligation for either count. Second, Edwards asserts that the court that set restitution did so improperly, because there was no evidence that he would have any future ability to pay, and it was improper for that court to rely on speculation that he someday might be able to pay. Third, Edwards appears to assert that the circuit court erroneously exercised its discretion in

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted. Any changes to the restitution statute between Edwards' sentencing and now are not relevant to this appeal.

denying his current motion to modify restitution because there is still no evidence that Edwards will ever be able to pay off his restitution obligation.

¶8 The State urges us to deem Edwards' challenges procedurally barred under *Escalona*, which generally requires a defendant to raise all grounds for relief in his original, supplemental or amended motion for postconviction relief, unless sufficient reason is shown for failing to raise the issues earlier. See *id.*, 185 Wis. 2d at 181. Edwards responds that *Dugan*, 193 Wis. 2d at 625, allows him to bring a motion to modify his restitution for lack of ability to pay at any time.

¶9 *Escalona* discusses the nature of postconviction remedies available through WIS. STAT. § 974.06 after the time for direct appeal has expired or been exhausted. Claims for relief under § 974.06 are generally limited to claims of constitutional or jurisdictional dimension, see *State v. Lo*, 2003 WI 107, ¶23, 264 Wis. 2d 1, 665 N.W.2d 756, though the language of § 974.06(1) also appears to contemplate a challenge “that the sentence was in excess of the law or is subject to collateral attack on some other basis[,]” see *State v. Henley*, 2010 WI 97, ¶54, 328 Wis. 2d 544, 787 N.W.2d 350.

¶10 To that end, we agree with the State that Edwards' challenge to restitution on the first two grounds we have identified from his motion and brief are barred by *Escalona*. Edwards brought a *pro se* motion to modify restitution in 2007, alleging that the circuit court had failed to comply with the procedures required by WIS. STAT. § 973.20 for setting restitution. The arguments that the

State “waived” restitution on the homicides² or that the circuit court imposed restitution without appropriate evidentiary considerations³ go to the propriety—not the amount—of restitution, and they could have been raised at least in Edwards’ 2007 motion, assuming they were not required to be raised even earlier in his 2005 direct appeal.⁴

¶11 That leaves Edwards’ third contention, that the restitution order ought to be rescinded because he still cannot pay. He relies on *Dugan*, which says:

[I]f in the future Dugan believes that he is unable to meet his restitution obligation, he can bring a motion for modification of the sentence at that time.... The offender’s ability to pay restitution should not be restricted to the offender’s financial condition only at the moment of sentencing. Circumstances might change during the

² To support his claim that the State waived its right to seek restitution from him, Edwards cites a portion of *State v. Fernandez*, 2009 WI 29, 316 Wis. 2d 598, 764 N.W.2d 509, which states, in part: “It is true that restitution in a criminal case is a remedy that belongs to the state, not to the victim. Termination of probation, however, signals the state’s disavowal of any penal or rehabilitative interests.” *Id.*, ¶48 (citation omitted). This paragraph is part of the supreme court’s explanation rejecting Fernandez’s assertion that if probation was ordered, then the restitution statute caps restitution at the amount payable during the probationary period. *Id.*, ¶¶39-40. It does not stand for the proposition that the State waives a “right” to restitution when it is anticipated that a defendant will never be released from confinement.

³ To the extent that Edwards previously challenged the circuit court’s failure to determine his restitution obligation by considering the factors set forth in WIS. STAT. § 973.20, like his ability to pay, this issue is also barred under *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (“A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.”). Moreover, while Edwards complained in his motion that the court was “simply intent, by any-means-necessary, to get something for the victims” out of “pure vindictiveness,” we observe that “full or partial restitution is *mandatory* under the statute ‘unless the court finds substantial reason not to do so and states the reason on the record.’” *Fernandez*, 316 Wis. 2d 598, ¶21 (quoting WIS. STAT. § 973.20(1r)) (emphasis added).

⁴ Though Edwards was convicted in 1996, his direct appeal rights were reinstated in 2001.

offender's sentence, probation or parole which bear upon that question.

Id., 193 Wis. 2d at 625.

¶12 Assuming without deciding that *Escalona* does not also bar Edwards' third issue and that *Dugan* allows him to bring a new motion based on his inability to pay the restitution at this time, we conclude that the circuit court did not erroneously exercise its discretion in denying modification. *Dugan* requires showing a change of circumstances. Edwards has not shown that he cannot continue to pay twenty-five percent of his prison funds, if any, towards his restitution obligation.

¶13 The circuit court here observed that the restitution-setting court had already factored in the likelihood of a long period of non-payment. In other words, circumstances had not changed so significantly from the time restitution was imposed that the circuit court here should have been moved to change the status quo. Edwards is presently thirty-five years old, and it is not unreasonable to have an ongoing anticipation that he will eventually be able to contribute to his victims' compensation. The circuit court properly declined to relieve him of that obligation.

By the Court.—Order affirmed.

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

