

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 7, 2012

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. 2010AP2628-CR

Cir. Ct. No. 2007CF1033

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ANDREY APONTE,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Andrey Aponte appeals from an order denying his motion to modify the text of a judgment of conviction that he claims does not conform to the order for restitution pronounced by the circuit court. He alternatively seeks relief from the restitution obligation on the ground that the

circuit court ordered restitution without first determining his ability to pay it. Because the modification motion is groundless and the motion for relief from the restitution obligation is raised for the first time on appeal, we affirm.

BACKGROUND

¶2 Aponte pled guilty to the felony offense of first-degree reckless homicide while armed. He also pled guilty to two misdemeanors, namely, criminal trespass to a dwelling while armed, and pointing a firearm at a person. At the outset of the sentencing hearing, Aponte advised the circuit court through his counsel that he would stipulate to restitution of \$11,260.26, the amount sought by the State. The circuit court questioned Aponte, who personally confirmed his stipulation, and the circuit court then stated that it would “set that [amount] as restitution.” Next, the circuit court heard statements from the attorneys, from Aponte’s family members, and from the victim’s relatives. Aponte then exercised his right to allocution, during which he entreated the court and the victim’s family to tell him about “anything [he] can do to help with anything.... Anything.”

¶3 After these remarks, Aponte’s counsel again reminded the circuit court that Aponte “stipulate[s] to the amount of restitution.” The circuit court acknowledged the stipulation, stating that “because this is a prison case, the court will order that [restitution] to be paid up to 25 percent of his prison earnings.” The court next discussed various sentencing factors and then imposed an aggregate term of thirty-five years and nine months of imprisonment, bifurcated as twenty-six years and nine months of initial confinement and nine years of extended supervision.

¶4 Near the end of the sentencing hearing, the State asked the circuit court whether Aponte had an obligation to pay restitution after completing his

initial confinement. The State prefaced its inquiry by stating: “[a]nd restitution, the court orders twenty-five percent prison wages to apply as to count one.” The State then asked: “[a]nd the remainder if not paid would be on extended supervision and if not paid when that’s over with [will] revert to a civil judgment?” The circuit court answered, “yes.”

¶5 The judgment of conviction provides for restitution of \$11,260.26, and states that the money shall be “collected by the DOC from 25% of funds under WIS. STAT. § 973.05(4)(b). Any balance due and owing to revert to civil judgment if not fully paid during the period of extended supervision.”

¶6 Aponte, *pro se*, moved the circuit court for relief, alleging that the judgment of conviction contains an error.¹ He asserted that “the State established with the [circuit] court the manner in which defendant was to pay restitution.” Relying on the prosecutor’s description of his restitution obligation, Aponte argued that the judgment of conviction should be amended to require payment only from his “prison wages and not from his incoming monies received from family and friends.” The circuit court rejected the claim, concluding that a correction was not needed.

¶7 Aponte appeals, raising two issues. He first contends that only his prison wages should be subject to the restitution order and that his other sources of income, such as gifts and sales of hobby items, should be shielded. He further

¹ Aponte litigated a postconviction motion for plea withdrawal with the assistance of counsel before initiating the *pro se* motion underlying this appeal. The State concedes that the earlier litigation does not bar Aponte’s claims. *Cf. State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994) (discussing limits on serial postconviction litigation). We accept the concession.

contends that the circuit court erred by ordering restitution at sentencing without determining his ability to pay.

DISCUSSION

¶8 Whether the sentence portion of a written judgment of conviction should be corrected presents a question of law. *State v. Prihoda*, 2000 WI 123, ¶8, 239 Wis. 2d 244, 618 N.W.2d 857. We review questions of law *de novo*. *State v. Ploeckelman*, 2007 WI App 31, ¶8, 299 Wis. 2d 251, 729 N.W.2d 784.

¶9 “[A] court may ... order a defendant to pay restitution out of all funds held or available to a defendant, including gifted funds.” *State v. Greene*, 2008 WI App 100, ¶12, 313 Wis. 2d 211, 756 N.W.2d 411. Aponte thus does not suggest that the circuit court lacked the authority to impose an order requiring him to pay restitution from the entirety of his financial resources. Rather, Aponte argues that the circuit court ordered him to pay restitution exclusively by deductions from his “prison wages” and that the judgment of conviction permitting deductions from his “funds” must be amended to conform to the circuit court’s pronouncement. We disagree.

¶10 Aponte’s position relies on an argument that the phrase “prison wages” means only money for prison employment. In support of his position, he offers a dictionary definition of the word “wage.” Because the circuit court did not use the phrase “prison wages” when imposing restitution, Aponte’s reliance on this argument is misplaced.

¶11 The circuit court ordered Aponte to pay restitution from twenty-five percent of his “prison earnings.” The State, not the circuit court, used the phrase “prison wages.” The State’s imprecise reiteration of the circuit court’s words,

offered merely to preface an inquiry, did not establish the terms of the circuit court's restitution order.

¶12 Aponte offers no argument that the phrase “prison earnings” encompasses less than all of the funds received by a person in prison. We decline to construct an argument for him. *See State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (we cannot act as both advocate and judge).

¶13 Moreover, a circuit court may enter an amended order clarifying the mechanics of satisfying a restitution obligation if the amended order does not affect the total amount of restitution originally imposed. *See Greene*, 313 Wis. 2d 211, ¶¶18-20. In *Greene*, a victim's parents wrote to the sentencing court complaining that they were not receiving restitution payments from the incarcerated defendant. *Id.*, ¶3. The circuit court responded by entering an amended order requiring immediate payments from the defendant's “wages, earnings and accounts’ at a rate of twenty-five percent,” and the defendant objected. *Id.*, ¶4. The circuit court reduced the disbursement percentage to ten percent but otherwise denied relief. *Id.* We affirmed.

¶14 In resolving *Greene*, we concluded that an order arguably requiring payment of restitution only during extended supervision could later be amended to state that the defendant must pay restitution from his or her prison accounts while incarcerated. *See id.*, ¶¶18-20. We explained that the amended order in *Greene* merely “clarified when [the defendant] would be required to start paying the restitution established in the original order” and “d[id] not increase [the defendant's] sentence by any measure.” *See id.*, ¶¶19, 20. We held that such an amendment neither modifies the sentence nor effects an unconstitutional resentencing. *Id.*, ¶20.

¶15 Here, the judgment of conviction similarly clarifies the mechanics of how Aponte must pay restitution. When Aponte moved to amend that judgment, the circuit court reviewed the matter and determined that no amendment was required. In light of *Greene*, nothing in Aponte’s submissions persuades us that a judgment of conviction entered after an oral pronouncement may not include clarifying language such as the circuit court approved here.

¶16 Aponte mounts a second argument in this court. He asserts that the circuit court erred because it “failed to take Aponte’s ability to pay into account when it ordered restitution.” Aponte did not raise this issue in his postconviction motion. He cannot raise it for the first time on appeal. *See Shadley v. Lloyds of London*, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

