

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 12, 1996

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1744-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEANNE M. KOEHLER,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: WALTER J. SWIETLIK, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Jeanne M. Koehler appeals from a judgment convicting her of theft contrary to § 943.20(1)(a) and (3)(c), STATS., and from an order requiring her to make restitution for \$1582.28 in interest and penalties which her former employer, Ozaukee Day Care, had to pay for late payment of federal and state payroll taxes because Koehler's theft precluded timely payment of the taxes.

The theft charge arose out of checks which Koehler, the former administrator of Ozaukee Day Care, wrote to herself from Ozaukee's accounts. Koehler entered a no contest plea to the charge that she unlawfully and intentionally used Ozaukee's money and converted it to her own use. Due to the depleted funds, Ozaukee was unable to pay federal and state payroll taxes and was assessed interest and penalties. The trial court ordered Koehler to make restitution for the interest and penalties as an item of Ozaukee's damages resulting from Koehler's crime. On appeal, Koehler challenges this aspect of the restitution order.

Section 973.20(5)(a), STATS., permits the court to require a defendant to make restitution for "all special damages, but not general damages, substantiated by evidence in the record, which could be recovered in a civil action against the defendant for his or her conduct in the commission of the crime."

Koehler concedes that under § 973.20(5)(a), STATS., if a defendant deprived a victim of all of the funds available to pay payroll taxes in a given time period, interest and penalties arising from the failure to pay those taxes would be a proper item of damage flowing from the crime and a proper item of restitution. However, she argues that there is no evidence in the record to support the amount of payroll taxes Ozaukee owed in any given month or that her theft completely depleted Ozaukee's funds.

At the sentencing hearing, Charlene Lombardo, Ozaukee's current administrator, testified that when she began work, she discovered that Ozaukee's checking account was overdrawn by \$1800, that there was no money in the money market fund and that there were unpaid payroll taxes totaling \$18,816, not including any applicable penalties. Lombardo also testified that there were an additional \$9500 in unpaid debts.

There is an evidentiary basis in the record for the trial court's determination that Koehler's theft deprived Ozaukee of the resources needed to meet its payroll tax obligations, resulting in the imposition of penalties and interest. The record also demonstrates a sufficient link between Koehler's theft and the penalties and interest owed by Ozaukee.

The court's decision to award restitution in the amount of interest and penalties charged by taxing authorities comports with the definition of special damages in § 973.20(5)(a), STATS. Special damages are those which "may be present as the result of a wrongful act, depending on the factual circumstances" *State v. Boffer*, 158 Wis.2d 655, 660, 462 N.W.2d 906, 908 (Ct. App. 1990) (quoted source omitted). Special damages encompass "harm of a more material or pecuniary nature" and constitute the victim's actual pecuniary losses. *State v. Stowers*, 177 Wis.2d 798, 804-05, 503 N.W.2d 8, 10 (Ct. App. 1993). The interest and penalties assessed against Ozaukee as a result of its late payment of withholding taxes are actual pecuniary losses it suffered as the result of Koehler's wrongful act. Therefore, they are compensable by way of restitution under § 973.20(5)(a).

The court's restitution order was consistent with the purpose of the restitution statute, which 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." *State v. Kennedy*, 190 Wis.2d 252, 258, 528 N.W.2d 9, 11 (Ct. App. 1994).

By the Court. – Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.