COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 1, 1996

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(1), STATS.

NOTICE

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

No. 95-3049

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

IN THE MATTER OF RESTITUTION IN STATE V. CHALLONER MORSE MCBRIDE:

CHALLONER MORSE MCBRIDE,

Appellant,

v.

EULALIA I. ADDISON and STATE OF WISCONSIN,

Respondents.

APPEAL from orders of the circuit court for Door County: PHILIP M. KIRK, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. Challoner Morse McBride was originally convicted of four counts of felony theft committed against her elderly client, Eulalia Addison. McBride was a lawyer and Addison was her client. At sentencing, the State introduced evidence that from 1982 through 1991, McBride and her

husband obtained in excess of $247,000 from Addison. The State, however, restricted its request for restitution to the amount reflected by the four counts for which McBride was actually convicted. The trial court therefore ordered restitution in the amount of $85,531.

In a postconviction motion, McBride successfully argued that the trial court lacked authority to impose restitution in the amount of $55,000 as to the count for which McBride was sentenced to prison. She argued that when the $55,000 theft occurred in 1986, the law prevented the court from imposing both a prison sentence and restitution. The State conceded this argument, and the court amended the judgment of conviction and sentence, reducing the court-ordered restitution from $85,531 to $30,531.

While the criminal action against McBride was pending, Addison sued McBride in a civil action alleging damages in excess of $141,000, based on a variety of claims beyond the criminal misconduct. Eight days before McBride filed a postconviction motion for relief in the criminal case, she and her insurance carrier settled the $141,000 civil suit for $25,000.

Although McBride had an earlier opportunity in her postconviction motion or direct appeal to raise this $25,000 payment as a setoff against the court-ordered restitution, she did not. However, McBride subsequently requested the trial court in the criminal case to reduce the restitution order to $5,531, based on her claim that she should be given credit for the $25,000 settlement to Addison. The trial court refused and now McBride appeals this order denying her the $25,000 credit. We affirm the order denying the additional $25,000 credit.

The trial court denied McBride's request for the $25,000 credit because under § 973.20(8), STATS., it was procedurally barred from granting her setoff request. We agree. The restitution statutes contain a special procedure designed to provide the relief McBride seeks. The statutory section governing restitution allows a defendant to reduce civil damages pursuant to a restitution order. Section 973.20(8), STATS.[1] In ***Olson v. Kaprelian,*** 202 Wis.2d 377, 383, 550

[1] Section 973.20(8), STATS., provides:

(8) Restitution ordered under this section does not limit or impair the right of a victim to sue and recover damages from the defendant in a civil

N.W.2d 712, 715 (Ct. App. 1996), we read this statute to likewise enable a defendant to try to reduce the amount he or she owes because of a restitution award during settlement negotiation on the companion civil case. Section 973.20(8) provides that "[t]he court trying the civil action shall hold a separate hearing to determine the validity and amount of any setoff asserted by the defendant." The statute places the burden on the defendant to establish that the outstanding restitution order has been included in the calculation of any civil settlement. ***Olson,*** 202 Wis.2d at 383-84, 550 N.W.2d at 715. Thus, in order for a defendant to establish a setoff against a restitution order, the defendant is required to establish the validity and amount of this setoff in a hearing before the trial court conducting the civil action. ***Id.***

In fact, as the State points out, the civil settlement agreement specifically noted that the victim, Eulalia Addison, was opposed to any such setoff. The settlement agreement stated that both parties disputed whether the payment should be credited toward McBride's restitution obligation and would leave it up to the criminal court to determine the applicability of the $25,000 settlement. For some reason, McBride never requested or petitioned the court approving the civil settlement for a setoff hearing as required under § 973.20(8), STATS. Regardless of her strategy, the plain meaning of this statute required her to petition for a setoff hearing before the court conducting the civil case. Thus, we agree with the trial court and the State that McBride is procedurally barred from later requesting relief in the criminal court.

Even if we were to agree with McBride that the criminal court had authority to determine the applicability of the $25,000 as a setoff against the restitution order, the State correctly points out that she failed to raise the setoff issue in her original motion for postconviction relief or when she filed her direct appeal. This failure also constitutes a waiver of her claim. We are not to accept her motions on a piecemeal basis. *See* ***State v. Escalona-Naranjo,*** 185 Wis.2d 168, 517 N.W.2d 157 (1994).

(..continued)

> action. The facts that restitution was required or paid are not admissible as evidence in a civil action and have no legal effect on the merits of a civil action. Any restitution made by payment or community service shall be set off against any judgment in favor of the victim in a civil action arising out of the facts or events which were the basis for the restitution. The court trying the civil action shall hold a separate hearing to determine the validity and amount of any setoff asserted by the defendant.

Finally, we note that McBride has failed to demonstrate that, by virtue of the civil settlement, Addison has been unfairly reimbursed for the precise financial losses for which restitution was ordered in the criminal case. In fact, the record demonstrates that the civil settlement involved claims beyond the ordered restitution. Addison claimed financial losses exceeding $141,000 because of McBride's negligence and misconduct. McBride's insurer paid $25,000 under its errors and omissions policy which excluded claims for fraud or misrepresentation. Obviously, the $25,000 settlement did not represent reimbursement to Addison for the full value of her financial losses caused by McBride's criminal misconduct.

Because of our conclusion, it is unnecessary to address McBride's argument that the trial court should have stayed payment of the $25,000 to the victim, Addison. The order denying a $25,000 setoff against the court-ordered restitution is therefore affirmed.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.