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May 1, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP412-CR

State of Wisconsin v. Tyler J. Meier (L.C. # 2009CF12)

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

Tyler Meier appeals a judgment of conviction for felony murder that ordered Meier to pay child support for the victim's child. Meier contends that the circuit court erred by ordering child support as either restitution or as a condition of extended supervision. Meier also argues that the court failed to determine Meier's ability to pay before setting restitution. Based upon

our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We summarily affirm.

Meier pled no-contest to felony murder. At sentencing, Meier's counsel argued that Meier was remorseful and wished to make amends, and that Meier had suggested he pay child support for the victim's child. Counsel argued for an imposed and stayed sentence and eight years of probation, with one year of jail and payment of child support for the victim's child as conditions of probation. Meier personally addressed the circuit court, expressing his remorse and his feeling of duty to pay child support for the victim's child.

The circuit court rejected the suggestion of probation, and sentenced Meier to five years of initial confinement and five years of extended supervision. The court set restitution at \$56,730.53, and separately ordered Meier to pay child support for the victim's child.

Meier filed a postconviction motion, arguing that the circuit court had not followed the proper procedure or exercised its discretion before imposing restitution, and also that there was no authority for the circuit court to order Meier to pay child support for the victim's child. The circuit court held two hearings, and determined that the amount of restitution was appropriate. In addition, the court determined that it had authority to order the child support payments. The court further determined that child support to the victim's child should be set by the administrative code child support guidelines, and calculated based on the greater of the victim's income at the time of his death or Meier's actual income.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Meier contends that the circuit court lacked authority to order Meier to pay child support for the victim's child either as a condition of extended supervision or as restitution. The State responds that any error by the circuit court in ordering Meier to pay child support for the victim's child was invited by Meier's own sentencing recommendations. We agree with the State that Meier invited the error he claims on appeal, and we therefore decline to review it.² See *Shawn B.N. v. State*, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992) (explaining that an “appellant cannot complain of error induced by [the] appellant”).

Meier argues that the invited error doctrine does not apply in this case because Meier argued for a sentence of probation with an order to pay child support for the victim's child as a condition of probation. He contends that he did not argue for the circuit court to impose a prison term and order Meier to pay child support for the victim's child. However, the sentencing transcript reveals that defense counsel argued that the circuit court should consider Meier's remorse, as evidenced by his suggestion that he pay child support for the victim's child as a condition of probation. Meier expressed his remorse and stated that he felt a duty to pay child support for the victim's child. When the court questioned whether there was authority for the

² The amended judgment of conviction orders \$56,730.53 in restitution, which was the undisputed amount of restitution claimed by the victim's widow and several insurance companies. The judgment orders that, as a condition of extended supervision, Meier pay that restitution. Another condition of extended supervision requires Meier to pay child support to the victim's son until the victim's son is eighteen, and there is an amended provision providing that Meier pay child support to the victim's widow in the amount of \$353.50 a month. It appears that child support was ordered as a separate condition of extended supervision, rather than as part of the restitution order. We recognize, as Meier points out, that one reading of the judgment of conviction is that Meier has been ordered to pay child support as a condition of his extended supervision beyond the length of his extended supervision. However, the issue of the enforceability of that provision in the future is not before us in this appeal. For purposes of this opinion, because we determine that any error by the circuit court in ordering Meier to pay child support for the victim's child was invited error, we need not resolve whether the court ordered the child support as restitution or as a condition of extended supervision.

court to order the child support, defense counsel argued that it could be imposed as a reasonable condition of probation, but conceded that there was no clear law on that issue.

Thus, Meier urged the court to consider Meier's remorse and willingness to pay child support for the victim's child and to impose that condition as part of Meier's sentence. It is true, as Meier contends, that the court imposed a bifurcated sentence of initial confinement and extended supervision rather than the term of probation Meier requested. However, it remains that Meier invited any error by the court in ordering Meier to pay child support for the victim's child as part of Meier's sentence by arguing that the payment of child support would be a proper component of his sentence.

Next, Meier contends that the circuit court erred by failing to determine the exact amount of restitution Meier would have the ability to pay, including both the amount Meier would have the ability to pay during his extended supervision and the amount he would have the ability to pay in total. He also contends that the circuit court erred in considering Meier's spouse's income in determining Meier's ability to pay restitution. Finally, Meier argues that the circuit court erred by delegating to the Department of Corrections the determination of the rate that restitution would be paid upon Meier's release from prison.

The State responds that the court was not required to make specific findings as to the exact amount of restitution Meier would have the ability to pay, either during his supervision or in total. It also argues that the circuit court properly considered all of Meier's financial resources, including his spouse's income, in setting restitution. We agree with the State that the circuit court properly exercised its discretion in setting restitution. *See State v. Longmire*, 2004

WI App 90, ¶16, 272 Wis. 2d 759, 681 N.W.2d 534 (explaining that the determination of the amount of restitution to order is within the circuit court's discretion).

In *State v. Fernandez*, 2009 WI 29, ¶¶23-49, 316 Wis. 2d 598, 764 N.W.2d 509, the supreme court held that a court must consider a defendant's ability to pay in setting restitution, but that restitution is not limited by the length of the sentence. The court explained that the restitution statute "clearly permits a circuit court to order full restitution so long as it properly considers the defendant's ability to pay in setting the total restitution and, where applicable, in setting the amount that must be paid during any probation, parole, or extended supervision." *Id.*, ¶2. The court held that, because "the circuit court considered the defendant's ability to pay in ordering restitution, as the statute requires," the court's award of restitution was appropriate even though it was more than could be paid in full during the sentence. *Id.*, ¶¶1-6. Thus, under *Fernandez*, a circuit court's restitution award need not be limited by the amount a defendant is able to pay during the length of the sentence.

Here, at the restitution hearing, Meier and his spouse testified as to each of their earning histories. The court noted that Meier was able to work and was a hard and skilled worker. The court also noted that Meier had been able to sustain a significant income of between \$35,000 to \$60,000, and that there was evidence that, in some years, Meier had income of close to \$100,000. The court also noted that Meier's income was not the only income in the family, and that other income could help to support Meier. Thus, the circuit court properly considered the statutory factors, including the financial resources of the defendant, in determining the amount of restitution to order. *See* WIS. STAT. § 973.20(13)(a). Consistent with *Fernandez*, the court set a total amount of restitution after considering Meier's ability to pay, rather than an amount limited by the length of Meier's sentence. Finally, Meier has not identified any requirement under

§ 973.20 for the circuit court to set the restitution payment schedule. We discern no error by the circuit court in determining the total amount of restitution and ordering payments to be determined by the supervising DOC agent upon Meier's release to extended supervision.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals