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DISTRICT IV

June 16, 2015

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

2014AP2430-CR State of Wisconsin v. Sarah B. Nelson (L.C. # 2013CF176)

Before Lundsten, Higginbotham and Kloppenburg, JJ.

Prior to sentencing in this case, Sarah Nelson paid her crime victim $112,274, which was some or all of the money that she had stolen over several years. Nelson stole the money by taking advantage of her position as treasurer for her local volunteer fire department. At sentencing, the circuit court ordered Nelson to pay $112,274 in restitution, while at the same time acknowledging that the ordered restitution had already been satisfied. On appeal, Nelson challenges the circuit court's authority to order restitution. The restitution order matters to Nelson because, under WIS. STAT. § 973.06(1)(g), it carries with it an additional obligation to pay

a 10% restitution surcharge.[1] After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. The arguments Nelson makes are raised for the first time on appeal. For the reasons below, we deem the arguments forfeited, and we summarily affirm the circuit court.

Background

Nelson was charged with 13 counts relating to the theft of money from the Saxeville-Springwater Volunteer Fire Department. As a result of plea negotiations, Nelson agreed to repay $112,274 to the fire department.

The parties appear to agree that, prior to sentencing, Nelson, through her attorney, paid that amount to the Waushara County Clerk of Court for distribution to the "victims."

At sentencing, the attorneys informed the circuit court that the restitution was the subject of a stipulation and that the County had already received the stipulated amount. Later, the circuit court stated: "I direct restitution be paid in the amount of $112,200, but determine restitution has been fulfilled. The record must establish in my judgment the payment of the restitution. It is a condition of your probation. I am ordering it be fulfilled in finding that it has been." The court inquired about the specific restitution amount, and Nelson's attorney responded and the district attorney agreed that the amount was $112,274, which the court then adopted as the restitution amount.

[1] All references to the Wisconsin Statutes are to the 2013-14 version.

The judgment of conviction that was subsequently prepared lists various costs, including an item denoted "other" in the amount of $11,279.40. An explanatory note states: "Restitution in the amount of $112274.00 paid directly to the Clerk of Court's Office prior to sentencing. The 10% surcharge in the amount of $11,227.40 still due and owing – same repayment conditions apply as noted below for the Costs."

The day after sentencing, Nelson's attorney sent a letter to the circuit court questioning the surcharge portion of the total $13,309.40 in costs. The short letter asserted that a surcharge "should not be applicable since the [Department of Corrections] has no obligation to collect any monies already paid." The letter requested that "the surcharge be corrected."

Approximately one week later, Nelson's attorney again wrote to the circuit court. The second letter pointed out that the circuit court did not order the surcharge at the sentencing hearing. The second letter was longer and made various arguments directed at the surcharge. However, like the first letter, it contained no suggestion that the circuit court erred by ordering restitution.

The circuit court responded by letter. The court wrote: "This obligation [the surcharge] is always imposed, regardless of whether restitution has been paid before judgment is entered and irrespective of whether unpaid restitution is being collected by the Clerk of Courts [or] the Department of Corrections." The "deciding factor [in ordering the surcharge] is that a restitution obligation existed, not if, when or to whom restitution was paid."

Nelson then appealed.

Discussion

Nelson believes that she should not be required to pay a 10% restitution surcharge as ordered in her judgment of conviction. On appeal, Nelson no longer focuses on the surcharge itself. Rather, Nelson now implicitly acknowledges that, when restitution is ordered, the surcharge is automatic under WIS. STAT. § 973.06(1)(g).

Nelson now directs her attention at the underlying restitution order. Nelson argues that the circuit court lacked authority to order restitution in the first place. She contends that the restitution statutes do not authorize the imposition of restitution that corresponds to amounts a defendant has already paid. Nelson argues that here, because she paid the entire stipulated restitution amount prior to sentencing, the circuit court lacked authority to order restitution. Nelson argues in the alternative that, if the circuit court was authorized to order restitution, the circumstances here required that the restitution amount be zero. Under either argument, according to Nelson, she has no obligation to pay a 10% restitution surcharge.

The problem with Nelson's arguments is that she raises them for the first time on appeal. When the circuit court ordered restitution during the sentencing hearing, Nelson did not object. Indeed, far from objecting, Nelson's attorney supplied the $112,274 restitution figure so that the court's ordered restitution amount would be accurate.

It is true that, after sentencing, Nelson's attorney sent two letters to the circuit court complaining about the imposition of the 10% surcharge. But neither letter asked the circuit court to vacate the restitution order or suggested that the circuit court erred by ordering restitution. Rather, the letters complained about the imposition of the 10% surcharge, and made arguments not repeated on appeal.

In contrast with the letters Nelson sent to the circuit court following sentencing, Nelson's briefing on appeal reflects an understanding that, *if* the circuit court properly ordered $112,274 as restitution, *then* a 10% surcharge is automatic and proper under WIS. STAT. § 973.06(1)(g). Nelson now argues for the first time that the circuit court's restitution order was error. Arguments made for the first time on appeal are generally deemed forfeited. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) ("The general rule is that issues not presented to the circuit court will not be considered for the first time on appeal.").

We could ignore forfeiture. The forfeiture rule is one of judicial administration, and appellate courts have the authority to ignore forfeiture when a case presents an important and recurring issue. *See* ***Olmsted v. Circuit Court for Dane Cnty.***, 2000 WI App 261, ¶12, 240 Wis. 2d 197, 622 N.W.2d 29. Absent an important and recurring issue, however, judicial efficiency favors applying forfeiture:

> The necessity of lodging an adequate objection to preserve an issue for appeal cannot be overstated. We have written on numerous occasions that in order to maintain an objection on appeal, the objector must articulate the specific grounds for the objection unless its basis is obvious from its context. This rule exists in large part so that both parties and courts have notice of the disputed issues as well as a fair opportunity to prepare and address them in a way that most efficiently uses judicial resources.

State v. Agnello, 226 Wis. 2d 164, 172-73, 593 N.W.2d 427 (1999) (citations omitted).

We choose not to ignore forfeiture here for the following reasons.

First, the parties themselves seem not to view this issue as one in need of resolution in a published opinion. Neither party requests publication. Nor do the parties seem to view this issue as one that commonly occurs.

Second, the topic Nelson now belatedly raises, as Nelson at least partially appreciates, is complicated. We wonder about potential issues and problematic implications of the statutory interpretations advanced by Nelson. We give one example in the paragraph below.

Regardless whether a defendant is sentenced or given probation, under WIS. STAT. § 973.20(1r) courts must impose restitution "unless the court finds substantial reason not to do so." Nelson seems to argue that, whenever a restitution amount is paid by a defendant prior to sentencing, that situation is always a "substantial reason" not to order restitution. But suppose the prosecutor and victim both agree on a restitution amount and the defendant pays the victim that amount prior to sentencing. Suppose further that there are circumstances that cause the circuit court to be concerned that the defendant might later sue the victim in an attempt to recoup some or all of the restitution. Why could a sentencing court not state that, to avoid any future dispute over the defendant's obligation, the court chooses to incorporate the restitution obligation in the judgment? Undoubtedly Nelson would have an argument on this topic, but we give this example by way of explaining that we do not view the statutory interpretation questions presented as straightforward. For that matter, we do not view the briefing before us as having fully explored the implications of the holdings Nelson requests.

Therefore,

IT IS ORDERED that the circuit court's judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals