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DISTRICT II

July 1, 2015

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

2014AP2164-CR

State of Wisconsin v. Jason R. Kleba (L.C. # 2012CF1291)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Jason Kleba appeals from a judgment of conviction for taking a car and driving without the owner's consent and from the order denying his postconviction motion seeking to vacate part of restitution and the DNA surcharge. We conclude that the burden of proof at the restitution hearing was improperly shifted to Kleba and that imposition of the DNA surcharge was an erroneous exercise of discretion. We reverse in part the judgment of conviction, reverse the order denying the postconviction motion, and remand for a new restitution hearing and further proceedings on the postconviction motion to vacate the DNA surcharge.

Kleba was sentenced immediately after the circuit court accepted his no contest plea. The prosecutor indicated that the owner of the car requested restitution in the amount of \$1,601.67 and that the owner's insurance company requested \$8,110.88. Kleba's attorney asked the court to schedule a restitution hearing because "some items in the restitution request ... don't make sense." The court ordered the requested amounts as restitution and advised the defense that if it wanted to be heard on restitution amount, it would have to file a motion. The court also stated, "In addition to paying restitution, if you haven't provided a DNA sample but I assume that you have, if you haven't, you need to. Pay the costs of the DNA surcharge and we'll do that number in just a moment."

Kleba requested a restitution hearing. After the defense laid out what items in the car owner's restitution request it was challenging, the circuit court summarized that it had awarded restitution on the representations made at sentencing and asked the defense, "What evidence does your client intend to present[?]" During the owner's testimony, it came to light that the stolen car had been recovered. The owner did not know what the insurance company did with the car. Kleba argued that the insurance company had not shown the amount of the loss or the amount, if any, that it recouped from having recovered the car after paying \$8,110.88 to the owner. Kleba asked the court to reduce restitution to the insurance company to zero. Believing it was just speculation that there was any value to the recovered car which would offset the amount the insurance company paid to the owner, the court refused to reduce the restitution award to the insurance company.¹

¹ The amount of restitution to the car's owner was reduced and no issue is raised on appeal about the restitution owed to the owner.

In his postconviction motion, Kleba asked the circuit court to vacate the restitution awarded to the insurance company and the DNA surcharge. The court denied the motion. It rejected the argument that it had shifted the burden of proof to Kleba since it had given the defense an opportunity to present witnesses and the defense chose not to do so. Regarding the DNA surcharge, the court noted that although Kleba was represented by able counsel at sentencing, no objection had been made at sentencing when the surcharge was imposed and no showing was made that Kleba could not afford the surcharge.

Kleba argues that the circuit court failed to recognize that the burden of establishing its loss was on the insurance company.² We agree. WISCONSIN STAT. § 973.20(14)(a) (2013-14),³ provides that “The burden of demonstrating by the preponderance of the evidence the amount of loss sustained by a victim as a result of a crime considered at sentencing is on the victim.” Kleba was challenging the amount of restitution; it was the insurance company’s burden to demonstrate the loss and the insurance company did not appear and offer any evidence. Moreover, by first asking Kleba at the restitution hearing what evidence he had to offer, the court was looking to Kleba to prove that the amount of restitution the court had already awarded at sentencing was incorrect. Kleba established that the stolen car had been recovered and raised the possibility that some amount of the loss paid by the insurance company had been recouped. That some amount should have been offset may have been speculation but it was speculation on which the insurance company had the burden of proof because it was the insurance company’s burden to demonstrate

² Kleba first argues that the circuit court used the wrong procedure in determining restitution at sentencing when Kleba requested a hearing on the issue. We need not address this issue because a restitution hearing was eventually conducted.

³ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

the amount of loss. We reverse that part of the judgment of conviction awarding restitution of \$8,110.88 to the insurance company and the postconviction order denying Kleba's motion regarding the award. We remand for a new hearing on the restitution to be awarded the insurance company, if any, utilizing the proper allocation of the burden of proof. See *State v. Kayon*, 2002 WI App 178, ¶12, 256 Wis. 2d 577, 649 N.W.2d 334.

Under WIS. STAT. § 973.046(1g) (2011-12),⁴ the circuit court had discretion to impose a DNA surcharge on Kleba's felony conviction. In cases where the decision to impose the surcharge is discretionary, we have held that the circuit court must explain its decision. *State v. Cherry*, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393 (“[I]n exercising discretion, the trial court must do something more than stating it is imposing the DNA surcharge simply because it can.”). We have explained that the court “should consider any and all factors pertinent to the case before it, and ... should set forth in the record the factors it considered and the rationale underlying its decision for imposing the DNA surcharge” *Id.* at ¶9. Here Kleba argues, and we agree, that the court did not state any rationale for imposing the surcharge. At the postconviction motion hearing, the court did not offer any explanation.⁵

Although the circuit court erroneously exercises discretion when it fails to delineate the factors that influenced its determination, “[r]egardless of the extent of the trial court's reasoning, we will uphold a discretionary decision if there are facts in the record which would support the

⁴ Kleba was sentenced March 14, 2013, before the effective date of statutory changes reflected in the 2013-14 statutes.

⁵ To the extent the circuit court deemed the challenge forfeited by Kleba's failure to object at sentencing, the State does not argue forfeiture on appeal.

trial court's decision had it fully exercised its discretion." *State v. Payano*, 2009 WI 86, ¶41, 320 Wis. 2d 348, 768 N.W.2d 832 (quoting *State v. Shillcutt*, 116 Wis. 2d 227, 238, 341 N.W.2d 716 (Ct. App. 1983), *aff'd*, 119 Wis. 2d 788, 350 N.W.2d 686 (1984)). Indeed, this court has rejected the notion that the court must explicitly describe its reasons for imposing a DNA surcharge or otherwise use "magic words." *State v. Ziller*, 2011 WI App 164, ¶¶12-13, 338 Wis. 2d 151, 807 N.W.2d 241. The court's entire sentencing rationale may be examined to determine if imposition of the DNA surcharge is a proper exercise of discretion. *See id.*, ¶¶11-13.

We are unable to discern any rationale for imposing the DNA surcharge in the circuit court's entire sentencing rationale. At the postconviction hearing the court questioned whether Kleba had any proof that he had previously paid the surcharge but nothing was said at sentencing to tie the surcharge to the actual cost of providing a DNA sample. *See State v. Long*, 2011 WI App 146, ¶8, 337 Wis. 2d 648, 807 N.W.2d 12 (that certain costs are incurred in obtaining the sample is an acceptable reason for imposing the surcharge). The court also questioned Kleba's claim that the surcharge was a financial hardship even though it had not imposed the surcharge for the reason that Kleba could afford to pay it. *See Ziller*, 338 Wis. 2d 151, ¶11 (it is reasonable to impose the surcharge where there is the ability to pay). We reverse the postconviction order denying Kleba's motion to vacate the DNA surcharge and remand for further proceedings on that part of the postconviction motion.

Upon the foregoing reasons,

IT IS ORDERED that pursuant to WIS. STAT. RULE 809.21, the judgment is summarily reversed in part, the order is summarily reversed, and the cause remanded for further proceedings.

Diane M. Fremgen
Clerk of Court of Appeals