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DISTRICT I

April 27, 2017

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

2016AP115-CR

State of Wisconsin v. Antoine B. Lee (L.C. # 2009CF4615)

Before Brennan, P.J., Kessler and Dugan, JJ.

Antoine B. Lee, *pro se*, appeals an order of the circuit court that denied his “motion to amend or correct and or modify the restitution order.” 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 (2015-16).¹ The order is summarily affirmed.

In 2010, Lee pled guilty to and was convicted of armed burglary and armed robbery. He was sentenced to a total of thirty years’ imprisonment. He was also ordered to pay \$1115 in

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

restitution. The restitution obligation was imposed as “joint and several” with Lee’s co-defendant. Lee filed a *pro se* postconviction motion, which was denied. Lee appealed, and this court affirmed. *See State v. Lee*, No. 2012AP1042-CR, unpublished slip op. (WI App Nov. 5, 2013).

In October 2015, Lee moved to amend, correct, or modify the restitution order. He explained that he had already paid \$945 towards the total and asked for relief from any further obligation to pay the remainder. He also asserted that he should only be liable for, at most, \$557.50—half of the original award—and asked the circuit court to order reimbursement for payments in excess of that amount. The circuit court denied the motion, explaining that what Lee had requested was “not the way joint and several liability works.” Lee appeals.

As an initial matter, the State notes that Lee’s motion cited to WIS. STAT. § 973.13 and points out that the section, by its own terms, applies only “where the court imposes a maximum penalty in excess of that authorized by law,” but such is not the case here. We agree that § 973.13 does not apply. However, Lee’s motion also sought to invoke the circuit court’s “inherent powers” to modify his sentence. *See State v. Hegwood*, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983). The circuit court will exercise those inherent powers only if a defendant shows the existence of a new factor that justifies modifying the sentence. *See id.*; *see also State v. Franklin*, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989).

A new factor is a fact, or a set of facts, “highly relevant to the imposition of sentence, but not known to the [circuit] judge at the time of sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.” *State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (quoting

Rosado v. State, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Whether a fact or set of facts is a new factor is a question of law. See *Harbor*, 333 Wis. 2d 53, ¶36.

“A primary purpose of restitution is to compensate the victim.” *State v. Longmire*, 2004 WI App 90, ¶11, 272 Wis. 2d 759, 681 N.W.2d 534. “[R]estitution is the rule and not the exception and ... restitution should be ordered whenever warranted.” *State v. Madlock*, 230 Wis. 2d 324, 332-33, 602 N.W.2d 104 (Ct. App. 1999). “A request for restitution is addressed to the [circuit] court’s discretion.” See *id.* at 329.

Lee’s motion to modify the restitution order is based on his reading of the portion of WIS. STAT. § 973.20(7) that states, “If the court specifies that 2 or more defendants are jointly and severally liable, the department or the clerk to whom payments are made ... shall distribute any overpayments so that each defendant, as closely as possible, *pays the same proportion of the ordered restitution.*” (Emphasis added.) From this “same proportion” language, Lee reasons that he is only obligated to pay half of the restitution amount and that a refund of his “overpayment” above half of the total is in order.²

However, Lee’s interpretation of the statute fails to account for the sentence immediately preceding the “same proportion” language, which specifies, “If more than one defendant is ordered to make payments to the same person, the court may apportion liability between the defendants or specify joint and several liability.” See *id.* In other words, if the sentencing court had wanted to make Lee liable for only half of the restitution amount, it had the option to “apportion liability.” Instead, it imposed joint and several liability. When liability is joint and

² Of course, there are no overpayments in this case, as only \$945 of \$1115 has been paid.

several, each wrongdoer is individually responsible for the entire amount of damages. *See Wisconsin Nat. Gas Co. v. Ford, Bacon & Davis Constr. Corp.*, 96 Wis. 2d 314, 330, 291 N.W.2d 825 (1980).

Thus, the fact that Lee has paid more than half of the restitution obligation is not a new factor—it cannot be highly relevant to the imposition of a sentence that in fact contemplated Lee might pay all of the restitution. As the circuit court explained in denying Lee’s motion, the joint and several liability means that each defendant “is liable for the full amount ... in case the other person doesn’t pay, as here. In this type of restitution order, the interests of the victim are paramount[.]” Accordingly, we conclude the circuit court properly denied Lee’s motion.

IT IS ORDERED that the order is summarily affirmed.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited under WIS. STAT. RULE 809.23(3)(b).

Diane M. Fremgen
Clerk of Court of Appeals