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August 29, 2018

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

2017AP2040-CR

State of Wisconsin v. Scott R. Deichsel (L.C. #2001CF62)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Scott R. Deichsel appeals an order denying his postconviction motion which sought to vacate a restitution order on grounds that it was untimely and unlawfully imposed. 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 Because Deichsel has not shown

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

the determination of the restitution amount violated any applicable statutory procedure and has not, in any event, shown prejudice due to the delay in entering the restitution dollar amount on a signed court order, we affirm.

BACKGROUND

In April 2001, Deichsel pled no contest to attempted first-degree intentional homicide. At the June 18 sentencing hearing, the circuit court determined that Deichsel's crime was extremely severe, giving him the maximum sentence of forty years of initial confinement and twenty years of extended supervision. It ordered that restitution was "to be determined by the DA's Office within 30 days."

On July 17, 2001, twenty-nine days later, the district attorney moved for determination of restitution in the amount of about \$47,000. Through his counsel, Joseph Hildebrand, Deichsel objected, and the court ordered him to contact a mediation service.

By August 2001, and before the deadline for mediation, Hildebrand sent letters asking for clarification on certain claimed items, but indicating that they were not contesting medical expenses and wage loss. The court scheduled a restitution hearing for October. The hearing was rescheduled several times as Hildebrand and the district attorney continued to negotiate.

The parties eventually reached an agreement and, on November 7, 2001, a stipulation signed by both counsel was filed with the court stating the restitution amount for the medical bills and wage loss of \$33,019.70 should be included on the judgment of conviction. The judgment of conviction, however, was not amended to include the stipulated amount.

Deichsel's wife at the time, Corrina Deichsel, pled guilty to being a co-conspirator to commit homicide. As part of her sentence, she was ordered to pay restitution, jointly and severally, in the same amount—\$33,019.70. That order was signed by the circuit court in her case (Case No. 01CF294) on May 16, 2002.

In July 2015, the department of corrections alerted the circuit court that the restitution amount had not been entered into an amended judgment of conviction. The State moved for an order of restitution for \$33,019.70 to be paid jointly and severally by Scott and Corrina Deichsel, attaching a copy of the signed stipulation from Scott's case and the signed order from Corrina's case. The court granted the motion.

Deichsel moved to vacate the restitution order, arguing that the statutory procedure for determining restitution was not followed and his restitution was illegally imposed outside of the time limits set in WIS. STAT. § 973.20. At a court hearing, Deichsel claimed he never saw or agreed to the stipulation and that amending his judgment of conviction prejudiced him as he could no longer contest the amount. Deciding it could not resolve the issue without additional legal argument and information, the court set the matter for another hearing.

The State submitted documents from 2001 showing negotiations between the district attorney and Hildebrand over items of restitution and an affidavit from Hildebrand swearing that he spoke with Deichsel about the matter. In his affidavit, Hildebrand stated that Deichsel did not dispute the medical bills or most of the wage loss. He stated that he did not specifically recall if he had spoken with Deichsel immediately before signing the stipulation, but he "believed that [he] was authorized by Mr. Deichsel from the beginning to approve restitution for medical bills

and modified wage loss.” Once the district attorney agreed to remove the disputed items, Hildebrand approved and signed the stipulation.

The circuit court determined that Hildebrand had communicated with Deichsel regarding restitution and had the authority to sign the stipulation, reasoning that Hildebrand had been “very specific as to what he says Mr. Deichsel is disputing.... The court would find it difficult [to believe] that Mr. Hildebrand would come up with those specific issues without having specifically spoken with Mr. Deichsel about those issues.” The court also determined the delay in amending the judgment of conviction did not prejudice Deichsel, as the amount was agreed to back in 2001, it reflected what the court would order under the circumstances, and the court had not ordered restitution be paid during any specific time period due to Deichsel’s long prison sentence. The court denied the motion to vacate, and Deichsel appeals.

DISCUSSION

“This court reviews restitution orders under the erroneous exercise of discretion standard of review.” *State v. Lee*, 2008 WI App 185, ¶7, 314 Wis. 2d 764, 762 N.W.2d 431. For the findings made by the circuit court on disputed facts, we use the clearly erroneous standard. *State v. Walli*, 2011 WI App 86, ¶14, 334 Wis. 2d 402, 799 N.W.2d 898. For the interpretation and application of the restitution statute on a given set of facts, we use the de novo standard. *Lee*, 314 Wis. 2d 764, ¶7.

Restitution is aimed at returning crime victims to their position before the defendant injured them. *State v. Johnson*, 2005 WI App 201, ¶14, 287 Wis. 2d 381, 704 N.W.2d 625. To allow victims to recover their losses, we construe the restitution statute broadly and liberally. *Id.*

“When a circuit court orders restitution but does not determine the amount of restitution at sentencing, WIS. STAT. § 973.20(13)(c) sets forth a list of procedures that the court may use to finalize the amount due.” *State v. Johnson*, 2002 WI App 166, ¶8, 256 Wis. 2d 871, 649 N.W.2d 284. Each of these procedural options has a time frame. *Id.* The time frames “are directory, not mandatory,” and yet they are not “merely discretionary or permissive.” *Id.*; *State v. Fernandez*, 2009 WI 29, ¶56, 316 Wis. 2d 598, 764 N.W.2d 509 (citation omitted). “The legislature intended that the time limit be followed, despite its intent that the defendant not avoid his or her obligation to pay restitution.” *Fernandez*, 316 Wis. 2d 598, ¶56 (citation omitted). So, the time frames are directory in the sense “that the legislature did not intend that the court be required in all cases to vacate the restitution order for a violation of the statutory time limitation.” *Id.* (citation omitted).

Deichsel argues the circuit court did not comply with any of the four statutory options, leading to an untimely and unlawful imposition of restitution. We disagree. In June 2001, the court, after sentencing Deichsel to prison, decided to impose restitution, but did not determine an amount because the district attorney asked for thirty days to consider and arrive at an amount, which it would then present to the court and Deichsel. The court agreed, directing the district attorney to file a proposed restitution order within thirty days. This approach squares with the first statutory option when the restitution amount is not determined at the time of sentencing—the court can “direct the appropriate agency to file a proposed restitution order with the court within 90 days.” WIS. STAT. § 973.20(13)(c)1. (1999-2000). The district attorney, as the appropriate agency, followed through in a timely manner, filing the agreed-upon amount in a stipulation twenty-nine days later.

Deichsel fails to explain how the foregoing procedure violated WIS. STAT. § 973.20(13)(c) (1999-2000). Indeed, the circuit court actually directed the proposed restitution order be filed in less than half of the time permitted by the statute (thirty days rather than ninety). *See id.* Thereafter, Deichsel had an opportunity, through his counsel, to dispute the amount and items listed in the proposed order. Hildebrand did so, and after a series of communications questioning various items, the parties stipulated to \$33,019.70, which was about \$14,000 less than originally proposed. This stipulation was filed with the court on November 7, 2001.

To say “the Circuit Court ordered ... and imposed restitution 14 years beyond the statutory time” period is semantics rather than reasoned argument. Restitution was imposed back in 2001. At that time, both (1) restitution was ordered by the court and (2) the restitution amount was determined by agreement of the parties and submitted to the court.

In those cases where the statutory time limits for determining restitution have been violated, courts generally must undertake a two-part analysis to decide whether the restitution order should be vacated: courts must balance the length and reasons for the delay against the prejudice that resulted to the defendant. *Johnson*, 256 Wis. 2d 871, ¶8. But that two-part analysis has been applied when restitution was ordered or the amount was determined outside of a statutory time limit. As discussed above, Deichsel has not shown how the stipulation to \$33,019.70 violated any applicable time limit.

Even had there been such a violation, however, the lengthy passage of time between the stipulation’s filing and the amount’s entry into a signed court order resulted in no prejudice to Deichsel. The district attorney dropped all of the items questioned by Deichsel, the final amount was about one-third less than what had been claimed, the circuit court found that Deichsel gave

Hildebrand the necessary authority to make the stipulation, and the passage of fourteen years to insert the amount into a court order or judgment is less significant when it is considered with the length of Deichsel's prison term, which is forty years.

Deichsel also argues that he never agreed, in 2001 or otherwise, to the restitution amount, implying that the restitution order should be vacated for this reason. Deichsel asserts he was not aware of the restitution negotiations between Hildebrand and the district attorney, never authorized Hildebrand to settle the restitution amount, and never waived his rights to a hearing or to contest the amount.

The circuit court addressed Deichsel's allegation directly and, we believe, without error, finding that Hildebrand was authorized to enter into the stipulation. After being told that Deichsel was unaware of the 2001 restitution negotiations and resolution, the court specifically set the matter over so that the parties could provide briefing and the court could consider evidence. Both parties submitted briefs, including affidavits from Hildebrand and Deichsel.

After reviewing the submissions, holding a hearing (at which Deichsel appeared for himself by video), and noting the dispute between the affidavits of Deichsel and Hildebrand, the circuit court found Hildebrand's statements that he had communicated with Deichsel regarding restitution and had authority to settle on the stipulated amount to be credible, as they were corroborated by specific details within Hildebrand's correspondence to the district attorney. In his July 27, 2001 letter, Hildebrand stated he "received a communication from Mr. Scott Deichsel that he has objection to" five specific items on the restitution request. Hildebrand's August 23, 2001 letter acknowledged difficulty meeting with Deichsel, who was in prison, but that he "did have a chance to go through things with him thoroughly." The letter identified no

less than six specific items (different than those identified in the July letter) and asked for more information about them. Hildebrand's September 4 letter stated that he "had a chat with Scott [Deichsel]" about the restitution issues, pointing out that most items were uncontested, but they did want some explanation with regard to others. Hildebrand's October 30 letter again stated that there was no dispute over certain amounts, but that he could not determine whether the other items were proper. Moreover, the exact same restitution amount was determined and ordered as part of the sentence of Deichsel's co-conspirator—to be paid jointly and severally with Deichsel, further corroborating Hildebrand's statements. We cannot conclude that the court's findings with regard to Hildebrand's communications with Deichsel and his authority to enter into the stipulation were erroneous, much less clearly erroneous.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals