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DISTRICT II

July 8, 2020

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

2019AP213-CR State of Wisconsin v. Jose M. Henriquez (L.C. #2005CF919)

Before Neubauer, C.J., Gundrum and Davis, JJ.

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).

Jose M. Henriquez appeals from an order denying his postconviction motion to vacate 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 (2017-18).[1] Because Henriquez expressly stipulated to the restitution amount, we affirm.

Henriquez pled guilty to a burglary that occurred in 2005. The sentencing court ordered a presentence investigation report (PSI). As it pertained to restitution, the PSI stated that the victims' insurance company was claiming $18,795.42 in losses and the victim's father was claiming "an additional $12,000 in personal losses, due to property depreciation." Henriquez was represented by counsel at the August 10, 2006 sentencing hearing, and he did not contest any aspect of the PSI as inaccurate.

However, there were differing reports as to the amount of restitution owed to the victims. The State initially advised that it was seeking approximately $25,000.[2] Later, the State advised that it had updated restitution information, which Henriquez's lawyer had not yet reviewed. The victim's father reported other losses and two separate claims from the insurer. Because identifying the correct amount of restitution appeared to be a "dynamic situation that was constantly changing," the circuit court explained:

> What we may have to do is provide some additional time to ultimately determine the restitution and to give Mr. Henriquez an opportunity for there to be a full hearing on it.
>
> ….
>
> I'm going to hold open the issue of restitution, whatever the information is, give the [DOC] an opportunity to review it, see it gets provided to [defense counsel]. Essentially, statutorily they have up to 90 days to make a determination.

[1] All references to the Wisconsin Statutes are to the 2017-18 version.

[2] Notably, at the outset of the hearing, Henriquez expressed his willingness to pay restitution, telling the court that he wanted to "help pay for the loss" and would "accept whatever you give me today."

> ….
>
> And what we'll do is hold open the issue of restitution, give an opportunity for it to be reviewed, make sure we have whatever is the correct number. It's in everybody's interest to try and resolve that up front. We'll see that gets provided.
>
> Certainly, Mr. Henriquez, if you're not in agreement with the request for restitution, before the restitution is set there would be the entitlement to have a hearing on that issue.

The DOC subsequently recommended an amount of $31,621.70. Henriquez did not dispute this amount. To the contrary, he stipulated to it. The Restitution Order states: "I hereby stipulate to the amount of restitution as indicated: [$31,621.70]," under which is his signature and the date, September 7, 2006. The court approved and signed the restitution order on September 13, 2006. Henriquez does not assert that he ever objected to this amount or how it was arrived at, requested a hearing, or otherwise challenged the restitution order. He did not file a direct appeal.

More than twelve years later, on November 8, 2018, Henriquez moved the court to vacate the restitution amount arguing that the circuit court had improperly delegated its determination to the DOC, which had begun deducting money without granting him a hearing. Because Henriquez stipulated to the amount, the court denied the motion. Henriquez appeals.

This case involves the interpretation and application of the restitution statute and the related scope of the circuit court's authority. Because the material facts are not in dispute, these issues are matters of law which we review de novo. *See* ***State v. Fernandez***, 2009 WI 29, ¶20, 316 Wis. 2d 598, 764 N.W.2d 509; ***State v. Baker***, 2001 WI App 100, ¶4, 243 Wis. 2d 77, 626 N.W.2d 862.

Henriquez contends the circuit court improperly delegated its responsibility to adjudicate the restitution amount to the DOC. Henriquez points out that restitution is governed by WIS. STAT.

§ 973.20 and that this statute authorizes the circuit court to choose among several methods, depending on the circumstances, for determination of the restitution amount. He argues that none of the authorized methods were used, but instead the circuit court simply handed it over to the DOC to figure out and denied him an opportunity to challenge the amount. We disagree.

The restitution statute grants some flexibility to circuit courts to either set restitution at the sentencing hearing or to proceed to impose sentence while deferring the restitution determination. WIS. STAT. § 973.20(13)(c). Specifically, the statute authorizes deferral at sentencing to seek a recommendation from another agency (such as the DOC) while additional information is gathered, which is what the circuit court did here.[3]

The court held open the determination of restitution for ninety days and noted that an additional hearing would be held before restitution was set if Henriquez did not agree to the recommended amount. The court made it clear why it was deferring the restitution determination and the statutory time frame, that it was requesting a proposal from DOC, and that Henriquez

[3] In particular, WIS. STAT. § 973.20(13)(c)1., provides in pertinent part as follows:

> (c) The court, before imposing sentence or ordering probation, shall inquire of the district attorney regarding the amount of restitution, if any, that the victim claims. The court shall give the defendant the opportunity to stipulate to the restitution claimed by the victim and to present evidence and arguments on the factors specified in par. (a). If the defendant stipulates to the restitution claimed by the victim or if any restitution dispute can be fairly heard at the sentencing proceeding, the court shall determine the amount of restitution before imposing sentence or ordering probation. In other cases, the court may do any of the following:
>
> 1. Order restitution of amounts not in dispute as part of the sentence or probation order imposed and direct the appropriate agency to file a proposed restitution order with the court within 90 days thereafter, and mail or deliver copies of the proposed order to the victim, district attorney, defendant and defense counsel.

would have an opportunity to object and have a hearing. The DOC proposed a restitution amount, to which Henriquez stipulated, and the restitution order was then submitted to the circuit court for review and approval, well within the ninety-day period. The circuit court did not delegate its approval to the DOC. The court signed the restitution order approving the amount Henriquez stipulated to.

Henriquez "cannot complain about an act to which he … deliberately consents." ***Cascade Mountain, Inc. v. Capitol Indem. Corp.***, 212 Wis. 2d 265, 269, 569 N.W.2d 45 (Ct. App. 1997). The statute expressly allows the defendant to stipulate to the restitution or to present evidence and arguments opposing it. WIS. STAT. § 973.20(13)(c). Henriquez waived a known right. *See* ***United States v. Hathaway***, 882 F.3d 638, 640-41 (7th Cir. 2018) (intentionally relinquishing a known right constitutes waiver; defendant waived right to challenge restitution by not objecting to restitution amount).

Henriquez relies on ***State v. Evans***, 2000 WI App 178, ¶¶1, 15, 238 Wis. 2d 411, 617 N.W.2d 220, in which the circuit court sent the matter of restitution to the DOC "to determine the amount," which then later began deducting monies from the prisoner's account, "leaving it to the [DOC] to determine the specific amount." As this was not authorized by the statute, we reversed. ***Id.***, ¶¶15-16. As is evident, unlike in ***Evans***, the court here determined that restitution was in order, requested the DOC to make a nonbinding recommendation as to the amount given the differing reports, which the DOC did. Once the DOC's recommendation (not an order or mandate) was received, Henriquez, the State, and the circuit court all accepted it without objection. *See* ***Baker***, 243 Wis. 2d 77, ¶18 (court in ***Evans*** erred by referring the determination of the amount of restitution to the DOC).

Lastly, while unclear, Henriquez appears to contend that a "new factor" analysis applies, as the parties overlooked the court's allegedly improper delegation to the DOC, and denied him an opportunity to challenge the amount. As explained, the premises upon which these arguments are based are wrong—the court did not delegate its statutory authority to the DOC, and Henriquez stipulated to the proposed amount. Henriquez has failed to establish by clear and convincing evidence that either the parties or the court unknowingly overlooked a new factor warranting sentence modification.[4]

Denying Henriquez's motion to vacate constituted no error.[5]

[4] A defendant seeking a sentence modification must demonstrate, by clear and convincing evidence, that there is a new factor to justify the modification. ***State v. Franklin***, 148 Wis. 2d 1, 8-9, 434 N.W.2d 609 (1989). A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original 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." ***Id.*** at 8 (citation omitted). If the defendant meets that standard, the circuit court must then determine, in its discretion, whether the new factor justifies sentence modification. ***Id.***

[5] Henriquez also complains that the DOC began deducting his monies, claiming that DOC is improperly collecting restitution. ***State v. Williams*** explained that a court "lacks the competency to address an allegedly improper disbursement of funds by the DOC." ***Williams***, 2018 WI App 20, ¶4, 380 Wis. 2d 440, 909 N.W.2d 177. An objection to the DOC's procedures starts with the Internal Complaint Review System, and the inmate cannot petition a court until administrative remedies are exhausted. ***Id.***, ¶¶4-5.

As our rejection of Hernandez' challenge to the circuit court's denial of his motion to vacate restitution is dispositive, we need not address the State's argument that Henriquez's arguments are barred by laches. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (if a decision on one point disposes of the appeal, we need not address the other issues raised); *see also* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground.").

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