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DISTRICT III

October 24, 2023

To:

Hon. John M. Yackel
Circuit Court Judge
Electronic Notice

Michael J. Conway
Electronic Notice

Marge Kelsey
Clerk of Circuit Court
Sawyer County Courthouse
Electronic Notice

Kathleen Henry
Electronic Notice

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

2022AP1921-CR State of Wisconsin v. Blake Allen Smith (L. C. No. 2020CF307)

Before Stark, P.J., Hruz and Gill, 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).

Blake Allen Smith appeals a judgment of conviction, challenging the circuit court's award of restitution. Smith argues that the court erred by including in its restitution award income that the victim lost due to his attendance at two restitution hearings. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition, and we summarily affirm. *See* WIS. STAT. RULE 809.21 (2021-22).¹

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

The State charged Smith with second-degree recklessly endangering safety, possession of narcotic drugs, possession of methamphetamine, and misdemeanor battery, all counts as a party to a crime. According to the criminal complaint, in November 2020, Smith, Zeb Olsen, and Christine Mazurek drove to and entered a Sawyer County residence. The homeowner had a restraining order against Olsen that prohibited Olsen from being on the premises. The homeowner's father, Henry,² confronted Olsen, Mazurek, and Smith. Following an argument, the trio left the residence and got back into their vehicle.

As the group was leaving, Henry used his cell phone to record Olsen. Olsen then pulled Henry partially into the vehicle and tried to grab his phone. Mazurek, who was driving, started backing up the vehicle, dragging Henry's feet on the ground. Henry heard a "click" and felt Smith place a metal object—which Henry believed to be a gun—on the back of Henry's head. Henry managed to extricate himself from the vehicle, but Olsen took his phone before the vehicle drove away. Law enforcement subsequently stopped the vehicle and conducted a search, during which they found methamphetamine, heroin, and two fully loaded magazines for a nine-millimeter pistol.

Pursuant to a plea agreement, the State amended the second-degree recklessly endangering safety charge to endangering safety by use of a dangerous weapon. Smith entered no-contest pleas to the amended charge and to the methamphetamine possession charge. The misdemeanor battery charge was dismissed outright, and the possession of narcotic drugs charge

² Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we refer to the victim using a pseudonym.

was dismissed and read in. Consistent with the parties' joint recommendation, the circuit court withheld sentence on both counts of conviction and placed Smith on probation.

The circuit court held open the issue of restitution, pending a restitution hearing. Henry appeared at a scheduled restitution hearing on February 22, 2022, but the hearing was continued until March 18. On that date, Henry once again appeared in court, but the hearing was continued until April 8.

Henry was again present in court for the April 8 hearing. He submitted a packet to the circuit court, which documented his request for \$8,150.28 in restitution. That amount included compensation for: (1) Henry's lost phone; (2) his past and future medical expenses arising from the incident; (3) his lost income due to attending medical appointments and court proceedings; and (4) his mileage associated with replacing the lost phone and attending medical appointments and court proceedings. In addition to the amounts documented in his packet, Henry also asked the court to award him \$878.18 for income that he lost as a result of attending the April 8 hearing.

The circuit court awarded Henry a total of \$2,376.23 in restitution. The court determined that the crimes considered at sentencing—endangering safety by use of a dangerous weapon and methamphetamine possession—lacked a causal connection to Henry's physical injuries sustained during the incident. *See State v. Canady*, 2000 WI App 87, ¶9, 234 Wis. 2d 261, 610 N.W.2d 147 (explaining that restitution requires a causal nexus between the crime considered at sentencing and the claimed damage). Consequently, the court ordered restitution only for Henry's expenses associated with his lost phone and his attendance at court proceedings. More specifically, the court awarded Henry \$485 for a replacement phone, \$413.05 for miles driven to

replace the phone and to attend court, \$600 in lost income for attending the scheduled restitution hearing in February, and \$878.18 in lost income for attending the April restitution hearing. The court did not award Henry lost income for attending the March restitution hearing because Henry was not scheduled to work that day.

Smith now appeals, arguing that the circuit court lacked authority to award Henry restitution for the income that he lost as a result of attending the February and April restitution hearings. A request for restitution is addressed to the circuit court's discretion. *State v. Gibson*, 2012 WI App 103, ¶8, 344 Wis. 2d 220, 822 N.W.2d 500. "However, whether the circuit court is authorized to order restitution pursuant to WIS. STAT. § 973.20 under a certain set of facts presents a question of law that we review de novo." *Gibson*, 344 Wis. 2d 220, ¶8.

We conclude that the circuit court had authority under WIS. STAT. § 973.20(5)(b) to award Henry lost income for attending the restitution hearings. Section 973.20(5)(b) provides that a restitution order may require the defendant to "[p]ay an amount equal to the income lost, and reasonable out-of-pocket expenses incurred, by the person against whom a crime considered at sentencing was committed resulting from the filing of charges or cooperating in the investigation and prosecution of the crime." It is undisputed that Henry is a person "against whom a crime considered at sentencing was committed." *See id.* Henry's attendance at the restitution hearings resulted from the filing of the charges against Smith and from Henry's cooperation in the prosecution of the crimes. *See id.* As such, § 973.20(5)(b) permitted the court to award Henry the income he lost as a result of his attendance at the restitution hearings.

Smith contends that this interpretation of WIS. STAT. § 973.20(5)(b) is erroneous because a restitution claim is a civil matter and, accordingly, a restitution hearing is not part of the

prosecution of a defendant's crimes. Restitution, however, "is a part of our criminal justice system." *State v. Muth*, 2020 WI 65, ¶26, 392 Wis. 2d 578, 945 N.W.2d 645. It "is not a cause of action but a sanction for criminal conduct." *Id.* Furthermore, "[i]t is a remedy that belongs to the State." *State v. Walters*, 224 Wis. 2d 897, 904, 591 N.W.2d 874 (Ct. App. 1999). As such, a restitution hearing "is part of the criminal sentencing process, and serves the goals of the criminal justice system." *State v. Sweat*, 208 Wis. 2d 409, 422, 561 N.W.2d 695 (1997). In addition, it is clear from the text of the restitution statute that restitution is criminal in nature, as § 973.20(1r) makes an award of restitution part of the criminal sentencing process and provides that restitution "is a condition of probation, extended supervision, or parole served by the defendant for a crime for which the defendant was convicted." For these reasons, we reject Smith's claim that a restitution hearing is not part of the prosecution of a defendant's crimes.

Smith also asserts that Henry's lost income from attending the restitution hearings did not "result[] from the filing of charges" against Smith because Henry "could have scheduled the restitution hearings on his days off of work." *See* WIS. STAT. § 973.20(5)(b). This argument is contrary to the purpose of restitution—that is, "to return victims of a crime to the position they were in before the defendant injured them." *State v. Johnson*, 2005 WI App 201, ¶14, 287 Wis. 2d 381, 704 N.W.2d 625. To effectuate this purpose, we must "construe the restitution statute broadly and liberally to allow victims to recover their losses resulting from the criminal conduct." *Id.*

As the State aptly notes, accepting Smith's argument that a victim is not entitled to recover lost income for attending a court hearing when the victim failed to schedule the hearing on his or her day off would render meaningless the language in WIS. STAT. § 973.20(5)(b) permitting a victim to recover lost income for attending court proceedings. Accepting Smith's

argument, if a court hearing occurred on a victim's day off of work, then the victim would not be entitled to lost income for attending that hearing because he or she would not have lost any income. But, if the hearing occurred on a workday, then the victim would also be unable to recover lost income for attending the hearing because the victim failed to schedule the hearing on his or her day off. This result would be contrary to both the plain language of § 973.20(5)(b) and the purpose of the restitution statute.

In summary, the circuit court had authority under WIS. STAT. § 973.20(5)(b) to award Henry his lost income for attending the February and April restitution hearings because Henry's attendance at those hearings resulted from the filing of charges against Smith and from Henry's cooperation in the prosecution of the crimes. Accordingly, the court's award of restitution did not constitute an erroneous exercise of discretion.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals