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STATE OF WISCONSIN COURT OF APPEALS, DISTRICT

08-05-2013

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

vs.

REPLY BRIEF

ERICKA S. THOMAS,

DEFENDANT-APPELLANT

APPEAL NO. 13-AP-341-CR

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING
POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT
COURT THE HONORABLE DENNIS R. CIMPL AND THE MICHAEL D. GOULEE
PRESIDING

REPLY BRIEF OF ERICKA S. THOMAS,
DEFENDANT-APPELLANT

Attorney Gregg H. Novack
State Bar No. 1045756
2575 North Oakland Avenue
Tel. (414) 801-3797
Fax (414) 231-3904

ARGUMENT

I. Ms. Thomas properly preserved the issue of ability to pay the restitution ordered.

A. The State's use of the rulings in *State v. Boffer* and *State v. Szarkowitz* to support the argument the "ability to pay issue" was not preserved because Ms. Thomas did not present evidence on the issue is specious.

The cases cited by the State do not apply because Ms. Thomas's case is factually distinguishable from those two. Moreover, Ms. Thomas preserved the "ability to pay" issue at sentencing.

Ms. Thomas is not similarly situated to the defendants in *Boffer* and *Szarkowitz*. *Boffer* was convicted of one count of receiving stolen property and was ordered to pay \$2242.07 in restitution. *State v. Boffer*, 158 Wis. 2d 655, 657-658, 462 N.W.2d 906 (Ct. App. 1990). The Court of Appeal's decision makes it clear that in post-conviction proceedings *Boffer* contended, "...the court imposed restitution without a finding on ability to pay." *Boffer* at 663. The Court of Appeals did not indicate in its decision if *Boffer* asked, at the sentencing hearing, the court to consider the issue of ability to pay; however, the court citing *Szarkowitz*, stated, "*Boffer* failed to present any

evidence on either his financial resources or his ability to pay and cannot now complain that the sentencing court failed to consider his financial circumstances." *Id* at 663. Ms. Thomas interprets this statement and the citation to *Szarkowitz* to imply that Boffer did not present the issue of ability to pay at the time of sentencing and raised it for the first time in his post-conviction motion.

Szarkowitz was convicted of one burglary count. The plea called for three burglaries and two felony theft charges from a different county to be dismissed and read-in. *State v. Szarkowitz*, 157 Wis. 2d 740, 744, 460 N.W.2d 819 (Ct. App. 1990). The total restitution requested by all eight victims was \$15,637.13. *Id* at 745. At sentencing Szarkowitz told the court his plan was to complete further education and become "a social worker or probation officer". *Id* at 745. In addition, and most importantly, Szarkowitz did not argue the issue of ability to pay restitution with the court. *Id* at 745. The court set restitution at \$15,000. *Id* at 745. The differences between Ms. Thomas and Boffer and Szarkowitz are plain.

The biggest difference between Szarkowitz and Boffer and Ms. Thomas is that Ms. Thomas raised the ability to pay issue at sentencing and the other two did not. The Court of Appeals in the Szarkowitz's decision stated, "At no time

did he (Szarkowitz) argue he would be unable to pay court ordered restitution." *Szarkowitz* at 745. Similarly, as stated above Ms. Thomas contends Boffer did not raise the issue of ability to pay with the sentencing court until his post-conviction motion. In contrast, Ms. Thomas through her attorney told the sentencing court, "Whatever the Court orders she won't be able to fully pay it, as I explained --". The circuit court interrupted Ms. Thomas's attorney and acknowledged the fact she could not pay back the full amount of restitution. Therefore unlike Szarkowitz and Boffer, Ms. Thomas put the issue of ability to pay squarely before the court at sentencing.

Another difference is in the educational backgrounds of the Ms. Thomas and Szarkowitz. Ms. Thomas at the time of sentencing was 26 and had no high school diploma. (R 21:25-22:1. A. 159-160). On the other hand Szarkowitz presented the court with specific plans for future education and well paying jobs.

The next difference is the difference in restitution amounts set by the courts. Szarkowitz was ordered to pay \$15,000 and Boffer was ordered to pay \$2242.07. These are relatively small amounts of restitution in comparison to the \$356,366.32 Ms. Thomas was ordered to pay. The difference in the size of the amounts is best illustrated

by the following example: Boffer, Szarkowitz, and Ms. Thomas pay equal amounts towards restitution per month (assume \$150/month). Using this monthly payment, Boffer pays his full restitution in just over a year, Szarkowitz pays his restitution in full in a little over 8 years. On the other hand, making the same payment, Ms. Thomas would pay off her restitution in just under 198 years. This is not reasonable.

Ms. Thomas has distinguished herself factually from Boffer and Szarkowitz. She raised the ability to pay issue with the circuit court at sentencing, she had a different education level than Szarkowitz, and the total restitution amounts is vastly different. Therefore, the State's use of *Szarkowitz* and *Boffer* supporting the waiver of the ability to pay issue is specious.

Unlike the circuit court in those cases, Ms. Thomas's sentencing judge acknowledged the ability to pay issue was before it when it said, "I know that (that Ms. Thomas won't be able to fully pay the restitution) too." Thus, Ms. Thomas's case is factually distinguishable from Boffer and Szarkowitz and those case rulings do not apply to her case.

II. The circuit court did not properly exercise its discretion in ordering the full amount of restitution \$356,366.32 for Ms. Thomas.

The failure to consider financial resources and ability to pay is reversible error unless the restitution amount is set through use of proper discretion. *State v. Foley*, 142 Wis. 2d 331, 346-347, 417 N.W.2d 920 (Ct. App. 1987) (citing *State v. Pope*, 107 Wis. 2d 726, 731, 321 N.W.2d 359, 361 (Ct. App. 1982)). In *Foley*, the trial court failed to make any finding regarding Foley's financial resources or ability to pay restitution and the case was remanded with orders to make finding on these issues.

Similarly in this case the court did not make a determination of Ms. Thomas's financial resources or her ability to pay. In fact, the court acknowledged Ms. Thomas would not be able to pay back the restitution it ordered. Instead the court listed several factors which are beyond Ms. Thomas's control: winning the lottery, receiving an inheritance, or getting a car accident settlement. (26:18; A. 156, 27:8; A. 177). The Wisconsin Supreme Court has noted that basing the successful completion of requirements of a sentence on factors outside of the defendant's control undermines the defendant's sense of responsibility. *Huggett V. State*, 83 Wis. 2d 790, 799, 266 N.W.2d 403, 407 (1978). Winning the lottery, getting an inheritance, and getting a personal injury settlement are all factors outside of Ms. Thomas's control. Thus, premising her ability to pay

restitution on these factors undermines her sense of responsibility. Thus, defeating a purpose of sentencing. Moreover, the restitution amount set in this case renders the statutory considerations of financial resources and the ability to pay meaningless. Courts are required to read statutes so as not to render any part of the statute meaningless and so that the statute is not rendered unreasonable or absurd. *State v. Achterberg*, 201 Wis.2d 291, 299, 548 N.W.2d 515 (1996). Yet, the circuit courts restitution determination in this case renders sections §973.20(13)(a)(2) and (3) regarding financial resources and ability of the defendant to pay meaningless. This is an abuse of discretion.

The State argues the restitution set by the court is appropriate, "This court should not prematurely relieve Thomas of her obligation to make the victim whole" *State's Brief* p.16. The State makes this assertion by drawing a parallel between Ms. Thomas and the defendant in *State v. Milashoski*. This parallel is unconvincing because the trial court in *Milashoski* gave the defendant a chance to seek a reduction in his fine following his release from prison. Ms. Thomas was not provided that opportunity. In other words, this is Ms. Thomas's chance to ask the court to determine a realistic restitution amount.

CONCLUSION

For the above stated reasons Ms. Thomas requests that the Court of Appeals vacate the judgment of conviction regarding the restitution amount in this case. Ms. Thomas additionally asks the Court of Appeals to order the circuit court to conduct a restitution hearing to re-determine the restitution amount using appropriate statutory factors.

August 2, 2013

Attorney Gregg H. Novack
Wisbar# 1045756

I hereby certify that this brief conforms to the rules contained in §809.19 (8)(b) and (c) for a reply brief produced with a monospaced font. The length of this brief is 7 pages.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Date: August 2, 2013

Signature:

Attorney Gregg H. Novack
Wisbar# 1045756