

RECEIVED

For Official Use

05-31-2013

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

**Brief
Cover**

STATE OF WISCONSIN, COURT OF APPEALS, DISTRICT I _____

State of Wisconsin _____)

_____)

(party designation) Plaintiff- Respondent)

-vs-)

Ericka S. Thomas _____)

_____)

(party designation) Defendant-Appellant)

Case No. 2013-AP-341 CR

ON APPEAL FROM THE CIRCUIT COURT FOR Milwaukee COUNTY,

THE HONORABLE (name of Judge) Dennis R. Cimpl, Michael D. Guolec, PRESIDING

BRIEF OF Ericka S. Thomas, Defendant-Appellant *

Name: Gregg H. Novack
State Bar No., if applicable: 1045756
Address: 2575 North Oakland Avenue, Milwaukee, WI
53211
Telephone No.: 414-801-3797

BRIEF COVERS, FRONT AND BACK, MUST BE THE FOLLOWING COLORS:

- Appellant's Brief: **BLUE**
- Respondent's Brief: **RED**
- Reply Brief: **GRAY**
- Separate Appendix: **WHITE**

* STATE THE PARTY'S STATUS in the circuit court *and* in the appellate court (e.g., Plaintiff-Appellant, Defendant-Appellant, Plaintiff-Respondent, etc.).

CERTIFICATION OF MAILING

I certify that this brief or appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on (date of mailing) 5/28/13. I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

Date: 5/28/13

Signature

OR

CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on (date of delivery to carrier) _____, this brief or appendix was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify that the brief or appendix was correctly addressed.

Date: _____

Signature: _____

NOTE: You may also file an affidavit of mailing or delivery, setting forth the same information. See §809.80(4), Wis. Stats.

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a [choose one] monospaced or proportional serif font.

The length of this brief is 13 pages [if a monospaced font is used] or _____ words [if a proportional serif font is used].

Date: 5/25/13

Signature: _____

Notes:

This form and length certification must be included at the end of each brief. See also Wis. Stat. § (Rule) 809.50(4), 809.51(4) and 809.62(4) for additional form and length requirements.

Examples of fonts acceptable under §809.19(8)(b):

A monospaced font must be 10 characters per inch; double-spaced; a 1.5 inch margin on the left side and 1 inch margins on all other sides. This font is Courier New-12.

A proportional serif font must have a minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of a minimum 2 points, maximum of 60 characters per full line of body text. This font is Times New Roman, 13 point.

APPELLANT'S BRIEF APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names or persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Date: 5/25/13

Signature: _____

Note: This certification must be appended to the appendix.

Note: An appendix certification is also required if a respondent or cross-appellant files a supplemental appendix (809.19(3)(b) and 809.19(6)(f)).

ISSUES

- I. Did the court err by denying Ms. Thomas's post-conviction motion request to reconsider the amount of restitution ordered in this case?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary in this case. Not recommended for publication.

FACTS

1. STATEMENT OF THE CASE

Ms. Thomas pled guilty to four counts of Medicaid fraud (a class H felony). At sentencing, the Honorable Dennis R. Cimpl ordered restitution to be set in the amount of \$356,366.32. Judge Cimpl sentenced Ms. Thomas to four consecutive 3 years sentences consisting of 1 year of initial confinement and 2 years of extended supervision on each count. This is an appeal from a final order signed by the Honorable Michael D. Guolee denying Ms. Thomas's post-conviction motion request to adjust restitution.

2. STATEMENT OF THE FACTS

George Woods (Ms. Thomas's boyfriend's cousin), asked Ms. Thomas to apply to be a durable medical equipment (DME)

provider with the Wisconsin Department of Health Services (DHS). (R.2:29) (A.137:¶19). George Woods presented as a clean cut, well dressed, and honest businessman. (R.26:11) (A.149:14-17). In November 2009, the DHS approved this application and issued Ericka's Medical Supply authorization to bill the Medicaid Program for DME. (R. 2:16) (A.124:¶9).

Between November 2009 and May 2010 Ericka's Medical Supply submitted claims for DME to the DHS. The DHS reimbursed Ericka's Medical Supply \$356,366.33, for the bills the company submitted. (R. 2:17) (A.125:¶13). Ms. Thomas did not submit any of the reimbursement requests. (R.26:29-30) (A.167:25-168:4). At Mr. Woods's request, Ms. Thomas opened several bank accounts in the Milwaukee area to cash the DHS reimbursement checks. (R.26:11) (A.149:18-21). The checks would arrive at Ms. Thomas's residence, Mr. Woods would drive her to the various banks and she would deposit or cash the checks. (R.2:30) (A.138:¶19). Ms. Thomas would then give all of the money to Woods, who would then give Ms. Thomas a cut. (R.2:30) (A.138:¶19). Ms. Thomas estimated she received approximately \$52,000, for her part in the enterprise. (R.26:15) (A.153:6-10).

The State believed that Mr. Woods and two others were the masterminds of the fraudulent scheme. (R.26:14) (A. 152:10-16). Ms. Thomas admitted to filling out the initial DHS application, going to the bank and cashing the checks; however, she believed that Woods's business was legitimate. (R.2:30) (A.138:¶19). Ms. Thomas was 23 when she filled out the DHS paperwork. (R.2:16) (A.124:¶9). Ms. Thomas did not have any children or a high school diploma at the time of sentencing. (R.26:6) (A.144:22-24). She reads at a 6th grade reading level and has had sporadic employment. (R.26:22) (A.160:22-25). Prior to this case she had one conviction for retail theft in Waukesha County. (R.26:23) (A.161:5-9).

She was individually charged with 21 counts of Medicaid fraud and 9 counts of unauthorized use of personal ID. (R.2) (A.109-138). There were no co-defendants listed in the criminal complaint. (R.2) (A.109). She ended up entering an Alford plea on four of the Medicaid fraud counts, the rest of the counts were dismissed and read-in. (R.16) (A.187-189). The court sentenced her to 12 years of prison (4 years IC and 8 years ES). (R.16) (A.187-189). The court also ordered joint and several restitution of \$356,366.32, to be paid back during Ms. Thomas's sentence. (R.26:18) (A.156:10-11). The record does not indicate who else besides Ms.

Thomas is included in the joint and several liability. The court further ordered that the restitution amount convert to a civil judgment if it is not paid during the course of the sentence. (R.26:18) (A.156:18-19).

ARGUMENT

I. Ms. Thomas's restitution should not be set at \$356,366.32.

A. STANDARD OF REVIEW

Calculations of restitution by a trial court are discretionary decisions. *State v. Boffer*, 158 Wis.2d 655, 658, 462 N.W.2d 906, 907-08 (Ct.App.1990). A discretionary decision may be reversed if the trial court applied the wrong legal standard or did not ground its decision on a logical interpretation of the facts. *State v. Fernandez*, 2009 WI 29, ¶20, 764 N.W.2d 509 (2009). (Citing *State v. Behnke*, 203 Wis.2d 43, 58, 553 N.W.2d 265 (Ct.App.1996); *State v. Rogers*, 196 Wis.2d 817, 829, 539 N.W.2d 897 (Ct.App.1995)).

B. ARGUMENT

1. Ms. Thomas preserved the ability to pay restitution issue.

Ms. Thomas addressed her ability to pay at the

sentencing hearing. Wisconsin case law states that the issue of ability to pay must be raised in the circuit court or it is waived. *State v. Johnson*, 2002 WI App 166, ¶12, 256 Wis. 2d 871, 649 N.W.2d 284. In *Johnson*, the court determined the defendant waived the right to challenge his ability to pay because he specifically did not challenge that issue at sentencing.

At sentencing in this case, trial counsel, presented statements that Ms. Thomas's work history consisted of low paying jobs. (R.26:10) (A.148:14-23). In addition, trial counsel told the court, "Whatever the Court orders she won't be able to fully pay it, as I explained—" (R.26:18:8-9) (A.156:8-9). In addition, Ms. Thomas's post-conviction motion was based primarily on her inability to pay the full restitution amount. (R.17) (A.184-186). Ms. Thomas argues that counsel's statements properly preserved her challenge to the restitution based on her ability to pay.

It should be noted that counsel did state he did not object just after the court determined restitution; however counsel's statement must be looked in context. After determining the amount of restitution the court stated, "So I will order it (restitution) paid during the sentence I give her and if it is not paid it will result in a judgment and I think that complies with the dictates of

Hernandez (sic).” (R.26:18) (A.156:18-20). Immediately following the court’s statement trial counsel said, “I have no objection to that.” (R.26:18) (A.156:21). Ms. Thomas argues trial counsel’s statements in the proper context indicate that he did not object to the unpaid restitution amount being converted to a civil judgment at the end of Ms. Thomas’s sentence; and not that waived his objection to the restitution amount based on Ms. Thomas’s inability to pay.

2. Wisconsin Statute §973.20(13) (a) mandates the factors a court must consider when determining a restitution amount.

Wisconsin Statute §973.20(13) (a) states,

“The court, in determining whether to order restitution and the amount thereof, **shall** consider all of the following:

- 1) The amount of loss suffered by any victim as a result of a crime considered at sentencing.
- 2) The financial resources of the defendant.**
- 3) The present and future earnings ability of the defendant.**
- 4) The needs and earning ability of the defendant’s dependants.
- 5) Any other factors which the court deems appropriate. (Emphasis added)”

Ms. Thomas argues that the court failed to properly consider her financial resources and her present and future earnings ability when determining restitution. She further

asserts that the trial court considered inappropriate factors when setting restitution and denying her post-conviction motion to reduce the restitution.

3. The trial court did not consider Ms. Thomas's limited financial resources when determining restitution.

At the time of sentencing Ms. Thomas had very limited financial resources. Ms. Thomas was determined to be indigent and counsel was appointed to represent her in this case by the State Public Defender. (R.1:4) (A.104). Ms. Thomas concedes that she received approximately \$52,000 in 2010 for her part in the scam, but this money was gone by the time Ms. Thomas was taken into custody in early 2012. In addition, Ms. Thomas was confined during the pendency of this action. (R.1:4-6) (A.104-106). When the case started Ms. Thomas had extremely limited financial resources. It is a reasonable inference that because she was incarcerated her financial resources did not increase by the time of sentencing.

4. The trial court did not consider Ms. Thomas's present and future earning ability when determining restitution.

Ms. Thomas contends the trial court did not

appropriately consider her present and future earnings when determining restitution. Ms. Thomas concedes that the court acknowledged she had a sporadic work history and no GED/high school diploma. (R.26:22) (A.160:21-25). The court was also informed that Ms. Thomas's work history consisted of fast food type jobs, doing hair, daycare worker, and exotic dancing. (R.26:10) (A.148:14-23). In other words her present earnings were extremely limited. These factors were ignored when the court ordered the entire \$356,366.32.

As Ms. Thomas argued in her post-conviction motion her future earnings are limited as well. In her post-conviction motion, Ms. Thomas determined her after-tax earnings to be \$26,229 per year. (R.17:2) (App.185). She calculated this per year earnings by utilizing Federal Bureau of Labor Statistics on average earnings for high school graduates and applying the current tax rates to the average earning (\$33,840). (R.17:2) (App.185). As noted in the post-conviction motion, this earnings number does not take into consideration that Ms. Thomas's four felony convictions will further reduce her future earnings. Regardless, using the inflated salary calculation, to pay back her restitution Ms. Thomas would have to work over 13.5 years and give every penny she made to pay off her restitution. Put another way, if she paid \$6500 per year (1/4 of her

hypothetical annual earnings) it would take her over 54 years to pay the full amount of restitution. Presuming she worked every year full-time, she would have the entire restitution paid off when she is about 84 years old. This is not reasonable and indicates that the court did not engage in a full scale analysis of Ms. Thomas's ability to pay the restitution.

5. The trial courts did not use appropriate factors in determining Ms. Thomas's ability to pay.

Both the trial court and the post-conviction court did not consider appropriate factors when considering Ms. Thomas's ability to pay. Wisconsin Statute §973.20(13)(a)5 mandates that a court consider, "Any other factors which the court deems appropriate." The trial court acknowledged that Ms. Thomas would not be able to pay back the restitution ordered absent extraordinary factors/occurrences.

Attorney: Whatever the court orders she won't be able to fully pay it as I explained—

Court: I know that too. I am going to make and order of \$356,366.32 and I understand when I make that order that she's never going to pay during the term of this sentence; but now State v. Hernandez (sic) says I don't have to order this then I have to consider all the factors in 973.20 and certainly, a woman of 26 years of age has the ability to win the lottery or

something like that so there is always the possibility she could. So I will order it paid during the sentence I give her and if it is not paid it will result in a judgment and I think that complies with the dictates of Hernandez (sic). (R.26:18) (A.156:8-20).

The court, in upholding the restitution amount at the post-conviction hearing, stated,

"Now, judgments can be held open for at least 20 years and they can be renewed. Who knows what's going to happen in those periods of time. And people have talked about the lottery. That is just one aspect. She might get an inheritance. She might get involved in a car accident and get a settlement. There are a lot of things that people may come into in the future and they should pay for their acts of the past." (R. 27:8-9) (App.177:19-178:1).

In essence, the trial courts reasoned that the possibility of "striking it rich" is an appropriate factor to consider when determining restitution.

The examples relied on by the trial court are so extraordinary and remote in possibility, as to render them irrelevant in determining ability to pay. Wisconsin courts have held that when a judge relies on improper or irrelevant factors when exercising sentencing discretion an abuse of discretion results. *McCleary v. State*, 49 Wis. 2d 263, 278, 182 N.W.2d 512, 520 (Wis. 1971). Statistically, it is not likely Ms. Thomas will win the lottery, get a large legal settlement, or inherit a large sum of money. If these are legitimate considerations for a trial court, then there is no need for §973.20(13)(a), because considering

extraordinary factors/occurrences renders subsections 2 and 3 of §973.20(13)(a) meaningless. The court ignored the purpose of §973.20(13)(a), which mandates that trial courts consider a defendant's limited ability to pay when determining restitution. In this case the court instead relied on the irrelevant factors of "striking it rich". Because the court relied on irrelevant factors, the restitution determination of the court is a result of the trial court's abuse of discretion.

Additionally, the court's erroneous exercise of discretion in determining restitution flies in the face of one of the purposes of restitution: rehabilitation of the defendant. In this case, ordering full restitution trivializes the importance of the rehabilitation of Ms. Thomas. The purpose of restitution is two-fold: 1) to make the victim whole; and 2) rehabilitating the defendant. *State v. Sweat*, 208 Wis. 2d 409, ¶21, 561 N.W.2d 695 (Wis. 1997). Ms. Thomas concedes that \$356,366.32 will make the victim (The State of Wisconsin) whole; however, this amount does not rehabilitate Ms. Thomas. In fact, by setting the amount so high as to be unachievable, the court has inadvertently minimized the importance of paying restitution. The court acknowledged at sentencing that it was giving Ms. Thomas a Sisyphean task by ordering her to

repay \$356,366.32. (R.26:18) (A.156:8-10). The court went a step further when it said the only way Ms. Thomas could complete the task was if she wins the lottery, gets an inheritance, or is awarded a large legal settlement. By setting the amount of restitution so high the court has implicitly told Ms. Thomas she has no chance at redeeming herself (unless some statistical long-shot occurs) which defeats the secondary purpose of rehabilitating Ms. Thomas.

CONCLUSION

For the above stated reasons Ms. Thomas requests the Court of Appeals reverse the judgment of conviction regarding the restitution amount and order the circuit court to hold a new hearing to determine restitution based on Ms. Thomas's ability to pay.

May 25, 2013

Attorney Gregg H. Novack
Wisbar# 1045756

CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c), Wis. Stats., for brief procedure using the following font: Monospaced font: 12 point font; double-spaced; 1.5-inch margin on the left side and 1-inch margins on the other three sides. The length of this brief is 13 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 as per §809.19(12).

May 25, 2013

Attorney Gregg H. Novack
Wisbar# 1045756

Attorney Gregg H. Novack
2575 North Oakland Avenue
Milwaukee, WI 53211
TEL. (414) 801-3797
FAX (414) 231-3904

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

ISSUES..... 1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION..... 1

FACTS..... 1

 1. Statement of the Case..... 1

 2. Statement of the Facts..... 1

ARGUMENT..... 4

 I. Ms. Thomas’s restitution should not be
 set at \$356,3666.32..... 4

 A. Standard of Review..... 4

 B. Argument..... 4

 1. Ms. Thomas preserved the ability to
 pay restitution issue.....4

 2. Wisconsin Statute §973.20(13) (a)
 Mandates the factors a court must
 Consider when determining a
 restitution amount.....6

 3. The trial court did not consider
 Ms. Thomas’s limited financial
 resources when determining restitution.....7

 4. The trial court did not consider
 Ms. Thomas’s present and future earning
 Ability when determining restitution.....7

 5. The trial courts did not use appropriate
 Factors in determining Ms. Thomas’s
 ability to pay.....9

CONCLUSION..... 12

LENGTH AND EFILE CERTIFICATION..... 13

INDEX TO APPENDIX..... 100

TABLE OF AUTHORITIES

TABLE OF CASES

State v. Boffer, 158 Wis.2d 655, 462 N.W.2d 906,
(Ct.App.1990)..... 4

State v. Fernandez, 2009 WI 29, 764 N.W.2d 509 (2009)..4

State v. Behnke, 203 Wis.2d 43, 58, 553 N.W.2d 265
(Ct.App.1996)..... 4

State v. Rogers, 196 Wis.2d 817, 539 N.W.2d 897
(Ct.App.1995).....4

State v. Johnson, 2002 WI App 166, 256 Wis. 2d 871,
649 N.W.2d 284.....5

Mcleary v. State, 49 Wis. 2d 263, 182 N.W.2d 512
(Wis. 1971).....10

State v. Sweat, 208 Wis. 2d 409, 561 N.W.2d 695
(Wis. 1997).....11

STATUTES

Wis. Stats. §973.2(13)(a)..... 6, 10, 11