STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2013AP341-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERICKA S. THOMAS,

Defendant-Appellant.

ON 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 HONORABLE MICHAEL D. GOULEE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

CASES CITED

Page

Page

STATUTES CITED

STATE OF WISCONSIN

C O U R T O F A P P E A L S

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of defendant-appellant Ericka S. Thomas, the State exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

Thomas was charged with twenty-one counts of Medicaid fraud for making false statements of material fact in an application for payment from the Medical Assistance Program, in violation of Wis. Stat. § 49.49(1)(a)1, and with ten counts of unauthorized use of personal identification information in connection with the Medicaid fraud scheme, in violation of Wis. Stat. § 943.201(2) (2:1-13; A-Ap. 109-21). She was convicted following her *Alford*[1] pleas of guilty to four counts of Medicaid fraud (14:1; 25:3, 7-9, 16, 26; A-Ap. 187). The remaining twenty-seven counts were dismissed and read in (25:26). The court sentenced Thomas to four consecutive terms of one year of initial confinement and two years of extended supervision and ordered her to pay restitution of $356,366.32 (14:1; 26:18, 28; A-Ap. 156, 166, 187).[2]

Thomas filed a postconviction motion asking the court to "reconsider the amount of restitution ordered in this case" (17:1; A-Ap. 184). Following a

[1]*North Carolina v. Alford*, 400 U.S. 25 (1970).

[2]The Honorable Dennis R. Cimpl presided at the plea and sentencing hearings.

nonevidentiary hearing, the court denied the motion (18:1; 27:6-11; A-Ap. 175-80, 182).[3]

Thomas argues on appeal that the circuit court erroneously ordered her to pay restitution of $356,366.32 because she lacks the ability to pay that amount. This court should decline to review that issue because Thomas failed to preserve it by offering any evidence to support her claim. Were the court to reach the merits of the claim, it should conclude that the sentencing court properly exercised its discretion when it determined the amount of restitution Thomas must pay.

I. THOMAS DID NOT PRESERVE THE ABILITY TO PAY ISSUE.

Thomas acknowledges that "Wisconsin case law states that the issue of ability to pay must be raised in the circuit court or it is waived." Thomas's brief at 5. She notes correctly that in *State v. Johnson*, 2002 WI App 166, ¶12, 256 Wis. 2d 871, 649 N.W.2d 284, "the court determined the defendant waived the right to challenge his ability to pay because he specifically did not challenge that issue at sentencing." Thomas's brief at 5.

Thomas argues that she preserved the issue of her ability to pay because her trial counsel, at the sentencing hearing, "presented statements that Ms. Thomas's work history consisted of low paying jobs" and because counsel "told the court, 'Whatever the Court orders she won't be able to fully pay it as I explained – .'" Thomas's brief at 5. That was not enough to preserve the issue.

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[3]The Honorable Michael D. Goulee presided over the postconviction proceedings.

A defendant who argues that she is unable to pay court-ordered restitution must present evidence to that effect and may not rely solely on the arguments of her lawyer. *State v. Boffer*, 158 Wis. 2d 655, 663, 462 N.W.2d 906 (Ct. App. 1990). The court explained in *Boffer*:

> Boffer's final contention is that the court imposed restitution without a finding of an ability to pay. Section 973.20(14)(b), Stats., places the burden upon the defendant to present evidence as to his financial resources and his present and future ability to pay. Boffer did not present any evidence at the sentencing hearing. Instead, he relied upon argument of his counsel and, apparently, also upon information contained in the presentence investigation report (PSI).
>
> The party who has the burden of proof cannot rely upon the PSI or argument of counsel to fulfill this obligation. 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.

Boffer, 158 Wis. 2d at 663 (citing *State v. Szarkowitz,* 157 Wis. 2d 740, 460 N.W.2d 819, 823 (Ct. App. 1990)).

In *Szarkowitz*, the court of appeals held that even though the sentencing court had before it information on the defendant's work record and future employment plans, that was not enough to carry his burden of presenting evidence on the issue of his inability to pay. The court stated:

> As to Szarkowitz's argument that the court failed to solicit any information with respect to his ability to pay the ordered restitution, we conclude that the statute clearly allocates the burden of proof on this

> matter to Szarkowitz. *See* sec. 973.20(14)(b), Stats. The court is obligated, under the mandatory language of sec. 973.20(13)(a), to consider any evidence introduced by Szarkowitz with respect to his ability to pay when determining the amount of restitution. It is also obligated, under sec. 973.20(13)(c), to "give the defendant the opportunity . . . to present evidence and arguments on the factors specified in par. (a)." Szarkowitz was given this opportunity throughout the sentencing hearing, and he made no attempt to present such evidence or make any offer of proof with respect to these issues. We do note that there was a significant amount of information before the court as to Szarkowitz's ability to pay the ordered restitution, both in the presentence report and in Szarkowitz's own testimony concerning his prior work record and future employment plans. Where a defendant has been given the opportunity, but fails to offer any evidence on the issue of his inability to pay amounts claimed as restitution, he has failed in his assigned burden of proof under sec. 973.20(14)(b), and the trial court is entitled to award restitution under sec. 973.20(13)(c). In such a case, the trial court need not make detailed findings with respect to factors two through four listed in sec. 973.20(13)(a) because the defendant's inability to pay claimed restitution is not an issue before the court.

Szarkowitz, 157 Wis. 2d at 749-50.

In this case, Thomas's lawyer asserted during his sentencing argument that a factor relevant to Thomas's character was her history of supporting herself by working at various jobs (26:10; A-Ap. 148). He said that those were "not high paying jobs, it is stuff to make ends meet on jobs like these" (*id.*). When the issue of restitution arose, counsel told the court, "Whatever the Court

orders she won't be able to fully pay it as I explained – " (26:18; A-Ap. 156).

Thomas presented no evidence relating to her ability to pay, however, and she may not rely on the arguments of counsel to carry her burden of showing an inability to pay restitution. *Boffer*, 158 Wis. 2d at 663. Because Thomas "failed to present any evidence on either [her] financial resources or [her] ability to pay," she "cannot now complain that the sentencing court failed to consider [her] financial circumstances." *Id*.

Thomas also argues that she preserved the issue because her postconviction motion "was based primarily on her inability to pay the full restitution amount." Thomas's brief at 5. However, the time for raising that issue was at the restitution hearing, which in this case was at sentencing (26:17-18; A-Ap. 155-56). *See* Wis. Stat. § 973.20(14)(b).[4] Thomas does not provide any legal authority to support her assertion that raising the ability to pay issue in a postconviction motion is sufficient to preserve the issue. *See State*

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[4]Wis. Stat. § 973.20(14)(b) provides in relevant part:

> **(14)** At any [restitution] hearing under sub. (13), all of the following apply:
>
> * * *
>
> (b) The burden of demonstrating, by the preponderance of the evidence, the financial resources of the defendant, the present and future earning ability of the defendant and the needs and earning ability of the defendant's dependents is on the defendant. . . .

v. Pettit, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered.").

In any event, even if a postconviction motion could theoretically resurrect a forfeited issue, Thomas's motion did not. Thomas's motion contained three paragraphs addressing her ability to pay (17:2; A-Ap. 185). Those three paragraphs provide counsel's estimate of Thomas's future earning capacity based on her education, life expectancy, expected retirement age, criminal history, and Federal Bureau of Labor Statistics data (*id.*). But the postconviction motion contains no evidence; it only presents the argument of Thomas's postconviction counsel (*id.*).

In the final sentence of her postconviction motion, Thomas stated that, "[i]n the alternative, the defendant asks the court for the ability to submit additional documentation to aid the court in re-determining a restitution amount" (17:3; A-Ap. 186). There is no apparent reason, however, why Thomas could not have submitted any documentation she deemed appropriate with her motion. At the hearing on the postconviction motion, Thomas did not ask the court for an opportunity to present any documents or other evidence regarding her financial resources or earning capacity (27:2-11; A-Ap. 171-80).

In short, as Thomas says in her brief, "Ms. Thomas argues that counsel's statements properly preserved her challenge to the restitution based on her ability to pay." Thomas's brief at 5. *Boffer* and *Szarkowitz* hold that because the defendant bears the burden on the ability to pay restitution, the defendant must present evidence on that point.

Arguments of counsel are not enough to preserve the ability-to-pay issue for review, and that is all that Thomas can point to here.

II. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT ORDERED THOMAS TO PAY RESTITUTION FOR THE FULL AMOUNT OF THE LOSS FOR WHICH SHE WAS RESPONSIBLE.

"A request for restitution, including the calculation as to the appropriate amount of restitution, is addressed to the circuit court's discretion and its decision will only be disturbed when there has been an erroneous exercise of that discretion." *State v. Gibson*, 2012 WI App 103, ¶8, 344 Wis. 2d 220, 822 N.W.2d 500; *see also State v. Fernandez*, 2009 WI 29, ¶50, 316 Wis. 2d 598, 764 N.W.2d 509. An appellate court may reverse a discretionary decision if the trial court applied the wrong legal standard or did not ground its decision on a logical interpretation of the facts. *Fernandez*, 316 Wis. 2d 598, ¶50.

Thomas argues that the circuit court "failed to properly consider her financial resources and her present and future earnings ability when determining restitution" and that the court "considered inappropriate factors when setting restitution and denying her post-conviction motion to reduce the restitution." Thomas's brief at 6-7. The record demonstrates, however, that the court properly exercised its discretion.

When the parties discussed restitution at the sentencing hearing, the State asked the court to order that the restitution be made joint and several with that of the other participants in the scheme (26:18; A-Ap. 156). Defense counsel told the court that "we don't know how much of that Ms. Thomas received," to which the court responded, "[t]hose are the checks made payable to [Thomas]" (*id.*).

Defense counsel then said that "[w]hatever the Court orders she won't be able to fully pay it, as I explained" (*id.*). The court responded, "I know that too" (*id.*). The court then said:

> I am going to make an 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. [F]ernandez* says I don't have to order this then I have to consider all of 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 *[F]ernandez*.

(*Id.*) Defense counsel responded, "I have no objection to that" (*id.*).

In her postconviction motion, Thomas did not claim that she should not be ordered to pay any restitution. Rather, she asked the court to "reconsider the amount of restitution" (17:1; A-Ap. 184), but did not suggest any particular amount (17:1-3; A-Ap. 184-86).

The postconviction court explained why it would not amend the amount of restitution that had been ordered at sentencing:

It's always a dilemma when we have these cases, but as I indicated before, there are other aspects to this. There is the deterrent aspect to other people knowing that they would have to pay back. There is also the form of punishment and calling for responsibility from the defendant to make someone whole by their act. It is a very egregious act, 356,000 plus, and she -- I read the Complaint, she was a very active participant throughout this. There are other people who may or may not pay it, too, but to say we should just wash it out because she does not have the -- lacks the ability here to pay it now, nor can we speculate she can in the future. It's hard to tell. She will have at least 12 years to, when she is under the control of the State, to make attempts at paying what she can pay, and they don't take everything away. They take percentages. They should even be taking percentages from her canteen fund and her wages up in prison. I don't know if the judge ordered that, but that's one way of doing that, and they do not take the whole thing. They take a small percentage. But every time she is forced to pay, she is forced to remember that she damaged someone, to-wit; the State of Wisconsin, the citizens who pay taxes, et cetera, and that is part of her rehabilitation. To just say, "Well, we'll just throw it away because we don't think you can pay," would be a wrong message. So let me just say that -- So she has got 12 years. Who knows what's going to happen in those 12 years.

The order is appropriate under the circumstances and under the gravity of the offense, the blatant gravity of stealing this money through a scam, and she was an active part of that. Although she claimed less, she got a cut and also had her part, so, and we don't know what will happen when she is off the paper. I would think the government would get a judgment against her. We surely will not allow them to extend her probation for the non-payment. I would never to that.

> This probation period -- Extended Supervision, is more than enough time for a woman her age, so I can put that caveat in that this Court will not extend the probation for lack of payment of fees and restitution, but this Court will allow for a judgment if it is not paid.
>
> 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. Other people should not have to pick that up for them and let them do whatever. So let's be hopeful that she will be a prosperous person and will pay her share and each defendant will do the same and maybe her share will be less if they all pony up their shares, so the motion is denied. I think the Court views its discretion properly, and I do the same thing in every case I have here.
>
> It used to be, I can tell you, I would look at Social Security recipients and say, "Well, we won't order them to pay," but then I thought that is not fair to all those other people who are not Social Security recipients and they may, at some future, be able to pay, so I like to treat everybody equally. Everybody gets to pay their costs of disbursements and restitution, and then we look at the time when they haven't paid it and their term is done what happens, and I told you already what I think should happen. So that's the order of the Court. The State can draft an order denying the motion, and you might want to indicate some of those other caveats for the Probation and Parole Department.

(27:6-9; A-Ap. 175-78.)

At the conclusion of the court's remarks, Thomas's lawyer told the court, "I just want to make clear that Ms. Thomas's position was not to eliminate that restitution entirely, just reduce it to a more reasonable amount" (27:10; A-Ap. 179). Again, Thomas did not suggest what that amount might be (27:2-11; A-Ap. 171-80).

The restitution statute requires a circuit court to consider a defendant's ability to pay. *See Fernandez*, 316 Wis. 2d 598, ¶¶23-24 (citing *Huggett v. State,* 83 Wis. 2d 790, 266 N.W.2d 403 (1978)). In this case, the record shows that the court did consider what little information it had that was relevant to Thomas's ability to pay and determined that she should be responsible in restitution for the entire amount of the money she fraudulently obtained from the State and shared with her associates.

Thomas's argument is based on the implicit premise that the circuit court must give controlling weight to a defendant's ability to pay. The restitution statute lists five factors circuit courts must consider when determining how much restitution to order: 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 earning ability of the defendant; 4) the needs and earning ability of the defendant's dependants; and 5) any other factors which the court deems appropriate. *See* Wis. Stat. § 973.20(13)(a). But the statute does not specify how much weight a circuit court must give to those factors related to a defendant's ability to pay. Nor does the statute require circuit courts to cap restitution based on a defendant's ability to pay.

At one time, Wisconsin case law stated that the restitution statute "contemplate[s] that the court order at sentencing an amount of restitution that it determines the defendant will be able to pay before the completion of the sentence." *State v. Loutsch,* 2003 WI App 16, ¶25, 259 Wis. 2d 901, 656 N.W.2d 781. In *Fernandez*, however, the supreme court overruled that portion of *Loutsch*. *See Fernandez*, 316 Wis. 2d 598, ¶¶4-5.

The supreme court began its discussion in *Fernandez* with the observation that "[b]ecause Fernandez would have us interpret the statute as imposing a limit on the amount of restitution a court can order, we begin by noting that full or partial restitution is mandatory under the statute 'unless the court finds substantial reason not to do so and states the reason on the record.'" *Id*, ¶21 (quoting Wis. Stat. § 973.20(1r)). The court said that the statute thus demonstrated that the legislature "recognized that there would be circumstances where all the necessary restitution amounts often would not and could not be paid before the completion of the sentence or probationary period." *Id*., ¶2. The supreme court concluded that "when a court has considered the defendant's ability to pay in setting restitution, the length of the term of probation or of the sentence does not have any limiting effect on the total amount of restitution that may be ordered." *Id*., ¶3.

In rejecting the language in *Loutsch* that limited restitution to the amount the defendant will be able to pay before completion of the sentence, the supreme court found it significant that the legislature provided for converting unpaid restitution to civil judgments. *Id*., ¶2; *see* Wis. Stat. § 973.20(1r). The court said that that

demonstrated that the legislature "recognized that there would be circumstances where all the necessary restitution amounts often would not and could not be paid before the completion of the sentence or probationary period." *Fernandez*, 316 Wis. 2d 598, ¶2. The supreme court concluded that "when a court has considered the defendant's ability to pay in setting restitution, the length of the term of probation or of the sentence does not have any limiting effect on the total amount of restitution that may be ordered." *Id*., ¶3.

Fernandez's holding that the defendant's inability to pay does not limit the amount of restitution that the court may order does not directly control the specific issue presented here, which is whether a defendant's ability to pay during his or her lifetime limits the amount of restitution that may be ordered. But the court's reasoning in *Fernandez* applies with equal force to that issue. The court said that "[b]ecause Fernandez would have us interpret the statute as imposing a limit on the amount of restitution a court can order, we begin by noting that full or partial restitution is mandatory under the statute 'unless the court finds substantial reason not to do so and states the reason on the record.'" *Id.*, ¶21 (quoting Wis. Stat. § 973.20(1r)). Like Fernandez, Thomas asks the court to interpret the statute to impose a limit on the amount of restitution a court can order. As the supreme court did in *Fernandez*, this court should reject that argument. Thomas's ability to pay is a factor for the court to consider; it is not a limit on the amount of restitution the court may order.

The requirement that the circuit court consider a variety of factors when setting restitution is analogous to another discretionary

decision: sentencing. Circuit courts are required to consider three "primary" sentencing factors – the severity of the offense, the defendant's character and rehabilitative needs, and public protection – but they are not required to give the factors any particular weight. *See State v. Harris*, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409 ("Sentencing courts have considerable discretion as to the weight to be assigned to each factor."); *Anderson v. State*, 76 Wis. 2d 361, 367, 251 N.W.2d 768, 771 (1977) ("imposition of a particular sentence can be based on any one or more of the three primary factors").

Treating the ability to pay restitution as a mandatory cap rather than a consideration for restitution decisions would undercut the policies behind the restitution statute. It would hinder circuit courts' ability to use restitution to make victims financially whole. It would curtail circuit courts' ability to order restitution when defendants lack financial resources or job prospects at the time of sentencing. It also would disproportionately hurt the most harmed victims.

Thomas argues that the court relied on an improper factor when it noted that it was possible that she could receive money by winning the lottery, receiving an inheritance, or a settlement from a car accident. But this court employed a similar rationale in *State v. Milashoski*, 159 Wis. 2d 99, 464 N.W.2d 21 (Ct. App. 1990), *aff'd*, 163 Wis. 2d 72, 471 N.W.2d 42 (1991), when it declined to review the defendant's argument that "because he was indigent at the time of sentencing, it was error for the trial court to have imposed a $15,000 fine – the maximum fine." *Id.* at 118-19. The court wrote:

> The state concedes that Milashoski is presently unable to pay the fine. However, the state also contends that, by modifying the judgment to allow Milashoski up to sixty days from his release from prison to either pay the fine or seek reduction in the amount, the trial court in effect imposed an indeterminate fine. We agree. An indeterminate fine presents a matter of hypothetical fact. We do not address such questions. It is not inconceivable that subsequent events could materially bear upon Milashoski's ability to pay the fine. We should not prematurely relieve him of this portion of the sentence.

Id. at 119.

The same rationale applies here. Thomas is a young woman – she will be thirty years old when she finishes the confinement portion of her sentence.[5] As the circuit court stated, "let's be hopeful that she will be a prosperous person and will pay her share and each defendant will do the same and maybe her share will be less if they all pony up their shares" (27:9; A-Ap. 178). This court should not prematurely relieve Thomas of her obligation to make the victim whole.

Finally, Thomas argues that the restitution order defeats one of the purposes of restitution, rehabilitation. *See* Thomas's brief at 11-12. However, the circuit court did consider Thomas's rehabilitation. It observed that "every time she is forced to pay, she is forced to remember that she damaged someone, to-wit; the State of Wisconsin, the citizens who pay taxes, et cetera, and that is part of her rehabilitation" (27:7; A-Ap. 176). That the circuit court had a different view than Thomas

[5]Thomas was twenty-six years when she was sentenced to a total of four years of initial confinement with 148 days of sentence credit (26:18, 28; A-Ap. 158, 166).

of the rehabilitative value of the restitution order does not mean that the court erroneously exercised its discretion. *See Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (our inquiry is whether discretion was exercised, not whether it could have been exercised differently).

CONCLUSION

For the reasons stated above, the court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 17th day of July, 2013.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,245 words.

_____
Jeffrey J. Kassel
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 17th day of July, 2013.

_____
Jeffrey J. Kassel
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