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OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Case No. 2013AP682-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DERIS D. HULEY,

Defendant-Respondent.

On Appeal From an Order Denying Restitution
Entered in Dane County Circuit Court,
the Honorable Ellen K. Berz Presiding

BRIEF OF DEFENDANT-RESPONDENT

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CASES CITED

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POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Huley does not request oral argument or publication. This is a fact-specific case, requiring application of established legal principles to the facts of the case.

STATEMENT OF THE CASE AND FACTS

For the most part, Mr. Huley agrees with the state's statement of facts. However, it should be noted that the state did not present any evidence regarding the cause of the accident at the restitution hearing. (26). The state had the other driver's mother ready to testify by phone regarding the extent and cost of her daughter's neck injury but the state concluded it did not need her to testify. (26:2-6). There is no indication the other driver's mother was present during the accident or could testify about the cause of the accident. (2).

After the court denied the state's request for restitution, it filed a motion for reconsideration based on *State v. Rodriquez*, 205 Wis. 2d 620, 556 N.W.2d 140 (Ct. App. 1996). In a written decision, the court distinguished *Rodriquez* because in that case physical evidence showed the defendant's vehicle had struck the body of the victim and the defendant accepted responsibility for the death of the victim when he pled to hit and run involving an accident causing death. (24). The court made the following findings in Mr. Huley's case:

In this case, there is no evidence as to who caused the injury to the other driver. In other words, was the Defendant's actions [sic] or the other driver's actions the cause of the injury? The Defendant's plea to Hit and Run

acknowledged that he was involved in an accident and did not stay to provide the legally required information. There is no information upon which to hold that the Defendant actually caused the injury (unlike *Rodriguez*).

(24). Therefore, the court denied the state's reconsideration motion.

ARGUMENT

I. The Circuit Court Did Not Erroneously Exercise its Discretion When it Denied the State's Request for Restitution Because the State Presented No Evidence From Which the Court Could Conclude Mr. Huley Caused the Injury.

Mr. Huley was involved in an accident with another vehicle. He left the scene without giving the other driver his information, as required by statute. The other driver sprained her neck and requested restitution. After the restitution hearing, the court decided not to order restitution because it did not have sufficient evidence to conclude Mr. Huley caused the injury to the other driver. (24). However, the state asserts the court *may* order restitution in hit and run cases regardless of whether or not the defendant caused the crash. (State's Brief, 6, 11). Although the state uses the term *may*, it does not discuss the court's exercise of discretion and applies a non-discretionary standard. According to the state's logic, the "victim" for purposes of the hit and run statute (the person that did not run), could be the sole cause of the accident but because the defendant left the scene he is liable for all injuries related to the accident, and the court has no discretion to decide otherwise.

The state misses two important points. First, the court is not required to order restitution if it finds there is no causal connection between the defendant's conduct and the victim's injury. There must be a causal nexus between restitution and the defendant's conduct. *State v. Madlock*, 230 Wis. 2d 324, 332-33, 602 N.W.2d 104 (Ct. App. 1999); *State v. Canady*, 2000 WI App 87, ¶ 8-9, 234 Wis. 2d 261, 610 N.W.2d 147; *State v. Rash*, 2003 WI App 32, ¶ 6, 260 Wis. 2d 369, 375, 659 N.W.2d 189; *State v. Johnson*, 2005 WI App 201, ¶ 13-14, 287 Wis. 2d 381, 704 N.W.2d 625. Second, the court must exercise its discretion in determining whether a causal nexus exists. *Id.* Here, the court properly exercised its discretion when it found "there is no evidence as to who caused the injury to the other driver," and therefore, did not order restitution. (24).

When determining whether restitution is appropriate, the court should do so "with an eye toward doing 'substantial justice between the parties.'" *Madlock*, 230 Wis. 2d at 336 (quoting Wis. Stat. § 973.20(14)(d)). A restitution hearing is not a full-blown civil trial. *Id.* at 335. It does not have the normal rules of evidence. *Id.* The victim carries the burden and must show by a preponderance of the evidence the amount of loss sustained and that it was "a result of the crime." *Id.* at 336.

The circuit court has the discretion to decide the amount of restitution and "whether the defendant's criminal activity was a substantial factor in causing any expenses for which restitution is claimed." *Johnson*, 287 Wis. 2d 381, ¶ 10. Restitution orders are reviewed under the erroneous exercise of discretion standard. *State v. Lee*, 2008 WI App 185, ¶ 7, 314 Wis. 2d 764, 762 N.W.2d 431. A reviewing court "may reverse a discretionary decision only if the circuit

court applied the wrong legal standard or did not ground its decision on a logical interpretation of the facts.” *Canady*, 234 Wis. 2d 261, ¶ 6.

The restitution statute states the court “shall order the defendant to make full or partial restitution under this section...unless the court finds substantial reason not to do so and states the reason on the record.” Wis. Stat. § 973.20(1r). With regard to bodily injury, the court *may* require that the defendant pay restitution for the cost of medical services or reimburse the victim for income lost due to the injury, among other things. Wis. Stat. § 973.20(3) (emphasis added).

However, before the court can order restitution ““there must be a showing that the defendant’s criminal activity was a substantial factor in causing’ [] [the] injury to the victim in a ‘but for’ sense.” *Johnson*, 287 Wis. 2d 381 at ¶ 13 (quotations omitted). The defendant’s actions must be the “precipitating cause of the injury.” *Id.* Precipitating cause means the defendant’s criminal act set into motion the events that resulted in the injury. *Rash*, 260 Wis. 2d 369, ¶ 7. The harm must have resulted from “the natural consequences of the actions.” *Id.* at ¶ 6.

Here, the court, in its discretion, concluded there was no evidence to conclude Mr. Huley caused the injury to the other driver. (24). In other words, the state did not show, by a preponderance of the evidence, that Mr. Huley’s actions were the precipitating cause of the other driver’s injury. Mr. Huley did not dispute the state’s claim that the accident caused the other driver’s injury. (26:6). However, Mr. Huley did not agree that he caused the accident (26:16), yet the state did not present any evidence to the court showing Mr. Huley’s actions caused the accident, thereby causing the injury. Put

another way, the state did not show that the other driver's injury would not have occurred "but for" Mr. Huley's actions.

Additionally, the court noted that Mr. Huley's plea only acknowledged he was involved in an accident and left the scene. (26:17; 24). In the hit and run context, causation is not easily ascertained by the plea like it is in other types of cases. For example, there is no need for additional factual findings about who caused an injury if the defendant pleads guilty to substantial battery when he is accused of punching the victim in the face and breaking the victim's nose because the elements of substantial battery include causation. *See* Wis. Stat. § 940.19(2); Wis. JI-Criminal 1222. The same is not true for hit and run cases.

Here, Mr. Huley did not admit that he caused the accident or the other driver's injury. Therefore, the court would not achieve "substantial justice between the parties" if it ordered restitution, without evidence that the defendant caused the accident. In some circumstances the court could find based on the evidence presented at the restitution hearing that the defendant is the cause of the accident and thereby the cause of the injury. However, the court here made no such finding because it did not have evidence to support a restitution order.

Whether the court should order restitution turns on the facts of each case. For example, in ***Madlock***, the defendant was convicted of operating a vehicle without the owner's consent. ***Madlock***, 230 Wis. 2d at 326. The circuit court ordered restitution for damage done to the vehicle after it was stolen. ***Id.*** at 326-27. The court of appeals noted the circuit court "believed that because Madlock's crime involved the vehicle and because the victim was entitled to be made whole, Madlock was ipso facto responsible for restitution."

Id. at 334. The circuit court’s reasoning was wrong. The court of appeals concluded that although restitution could be ordered based on the conviction in some circumstances, “each case must turn on its own facts.” *Id.* Ultimately, the court concluded the record was skeletal with regard to actual damage and it was insufficient to show the necessary nexus between the defendant’s criminal conduct and the claimed damage. *Id.* at 336.

Likewise, the state here seems to suggest Mr. Huley is automatically responsible for restitution because one of the elements of the offense involved an accident. (See State’s Brief, 6, 11). This ignores the fact that the court has to exercise its discretion when ordering restitution, each case turns on its own facts, and there must be a causal nexus between the injury and the defendant’s conduct. Here, the court properly exercised its discretion because the state did not present sufficient evidence to prove by a preponderance of the evidence that there was a causal nexus between the defendant’s conduct and the other driver’s injury.

II. The Court of Appeals’ Decision in *Rodriquez* Does Not Require That the Court Order Restitution Here.

The state repeatedly relies on *Rodriquez* as support for its claim that restitution must be ordered in this case, without regard for the circuit court’s exercise of discretion. 205 Wis. 2d 620; (State’s Brief, 6-9, 11).¹ The state’s reliance is misplaced. First, the state ignores the fact that the circuit court must exercise its discretion when deciding whether to order restitution. The circuit court was not required to order restitution in Mr. Huley’s case simply because restitution is permissible in hit and run cases. Each case turns on its own

¹ The state repeatedly refers to *Rodriquez* as a supreme court decision. It is a court of appeals decision.

facts. **Madlock**, 230 Wis. 2d at 334. In **Rodriquez**, the circuit court exercised its discretion and ordered restitution after the defendant's plea to hit and run causing death. 205 Wis. 2d at 625. It found, based on the evidence presented, that Rodriquez's actions were a cause of the victim's death. The court of appeals affirmed the order and held that restitution *may* be ordered. **Id.** at 629. It did not mandate restitution in all hit and run cases without a causal nexus, as the state suggests.

Second, the state misinterprets **Rodriquez**. It asserts the court in **Rodriquez** held restitution "may be assigned in hit and run cases regardless of which party 'caused' the crash." (State's Brief, 6). If the state's interpretation is correct then **Rodriquez** conflicts with the well-established rule that the defendant's actions must be a substantial factor in causing an expenses claimed for restitution. **Madlock**, 230 Wis. 2d at 332-33; **Canady**, 234 Wis. 2d 261, ¶ 8-9; **Rash**, 260 Wis. 2d 369, ¶ 6; **Johnson**, 287 Wis. 2d 381, ¶ 13-14. Additionally, the victim would be entitled to a windfall if the defendant leaves the scene even if the victim was 100% at fault and the injuries would have occurred regardless of the defendant's actions. Such an absurd result would be contrary to the notion that a restitution hearing should involve "substantial justice between the parties." **Madlock**, 230 Wis. 2d at 336.

The court in **Rodriquez** did not conclude restitution was required regardless of the evidence presented. Rather, it stated the circuit court may order restitution "without regard to whether there is a causal link between *a specific element* of the crime and the victim's damages." **Rodriquez**, 205 Wis. 2d at 624 (emphasis added). Meaning, the injury does not have to be linked to every element. **Id.** at 628-29. The court did not find it was permissible to order restitution

without a causal link between the defendant's actions and the injury.

Unlike the circuit court in *Rodriquez*, the court here did not find that Mr. Huley was a cause of the injury. Rather, it stated there was "no evidence as to who caused the injury to the other driver." (24). And, "there is no information upon which to hold that the Defendant actually caused the injury (unlike *Rodriquez*)." (Id.) Accordingly, the court properly exercised its discretion when it chose not to order restitution.

CONCLUSION

For all of the reasons stated above, Mr. Huley asks the court to affirm the circuit court's denial of the state's request for restitution.

Dated this 7th day of August, 2013.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,121 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 7th day of August, 2013.

Signed:

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