STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2013AP000682-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

Deris D Huley,

Defendant-Respondent.

PLAINTIFF-APPELLANT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 11, THE HONORABLE ELLEN BERZ, PRESIDING

Emily L. Thompson
Assistant District Attorney
Dane County, Wisconsin
Attorney for Plaintiff-Appellant
State Bar No. 1056423

215 South Hamilton Street
Dane County Courthouse, Room 3000
Madison, WI 53703
Telephone: (608)266-4211

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT ON PUBLICATION AND ORAL ARGUMENT . . . v

STATEMENT OF THE ISSUE 1

FACTS 2

ARGUMENT 6

I. THIS COURT SHOULD REVERSE THE CIRCUIT COURT'S ORDER BASED UPON THE WISCONSIN SUPREME COURT'S HOLDING IN *STATE V. RODRIGUEZ*, 205 WIS. 2D 620, 556 N.W.2D 140 (1996). 6

II. WISCONSIN LAW REQUIRES COURTS TO ASSIGN RESTITUTION BASED ON A DEFENDANT'S CRIMINAL CONDUCT AND ALLOWS COURTS TO TAKE AN ENTIRE COURSE OF CONDUCT INTO ACCOUNT; BECAUSE RESTITUTION STATUTES ARE TO BE CONSTRUED LIBERALLY IN ORDER TO MAKE THE VICTIM WHOLE, THE COURT SHOULD ASSIGN RESTITUTION TO THE VICTIM IN THE CASE AT HAND. 10

III. THE CASE AT HAND IS CLEARLY DISTINGUISHABLE FROM *STATE V. LEE*, 2008 WI APP 185, 314 WIS. 2D 764, 762 N.W.2D 431, WHICH WAS CITED BY DEFENSE IN HIS ARGUMENT. 12

CONCLUSION 15

CERTIFICATION 16

APPENDIX CERTIFICATION 17

CERTIFICATE OF COMPLIANCE 18

APPENDIX 19

TABLE OF AUTHORITIES

CASES CITED	**PAGE(S)**
State v. Rodriguez, 205 Wis. 2d 620, 556 N.W.2d 140 (1996)	6-9, 11, 14, 15
State v. Longmire, 2004 WI App 90, 272 Wis. 2d 759, 681 N.W.2d 534	10, 11
State v. Anderson, 215 Wis. 2d 673, 573 N.W.2d 872 (Ct. App. 1997)	10
State v. Johnson, 2002 WI App 166, 256 Wis. 2d 871, 649 N.W.2d 284	10
State v. Madlock, 230 Wis. 2d 324, 602 N.W.2d 104 (1999)	10-11
State v. Rash, 2003 WI App 32, 260 Wis. 2d 369, 659 N.W.2d 189	11
State v. Lee, 2008 WI App 185, 314 Wis. 2d 764, 762 N.W.2d 431	12-13

STATUTES CITED	
Wis. Stat. § 346.67(1)	4, 6, 9
Wis. Stat. § 973.20(1)	6, 13
Wis. Stat. § 939.12	7
Wis. Stat. § 973.20(1r)	7
Wis. Stat. § 973.20(3)(a)	7
Wis. Stat. § 973.20(3)(b)	7
Wis. Stat. § 973.20(3)(c)	7
Wis. Stat. § 973.20(1g)(a)	13
Wis. Stat. § 973.20(1r)	13

OTHER AUTHORITIES CITED

Jury Instruction 2670 9

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The appellant does not request publication or oral argument.

STATEMENT OF THE ISSUES PRESENTED

1. Whether restitution can and should be ordered to be paid by a defendant upon a conviction for the crime of Hit and Run of an Attended Vehicle, committed in violation of Wisconsin Statutes Section 346.67(1).

FACTS

On November 14, 2011, at approximately 11:27 p.m., Dane County Sheriff's Deputies Erich Schenkenberg and Trent Schafer were dispatched to a hit and run crash that had occurred on the exit ramp from Highway 12, also known as the Beltline, and Stoughton Road, also known as Highway 51, in the Town of Blooming Grove, Dane County, Wisconsin (2:1; *see* Appendix 1, Criminal Complaint).

Upon arrival, Deputy Schenkenberg made contact with the passenger in the victim vehicle, whom he identified as Tucker Everson (2:2). Everson told the deputy that they had been stopped for a red light at the intersection of the off ramp and Highway 51, and that they had been struck from behind by another vehicle (2:2). Everson said that after the impact, the driver of the other vehicle got out and appeared to stumble around before getting back into his car and driving away (2:2). Everson described the driver of the other vehicle as a black male, approximately 5'9" to 5'10" in height, with dredlocks, wearing a hat (2:2).

Deputy Schenkenberg then made contact with the driver of the vehicle, whom he identified as Crystal Seefeldt (2:2). Seefeldt said she recalled being struck from behind, and the driver of the other vehicle was a black

male wearing a coat (2:2). Seefeldt was transported to the hospital via EMS (2:2).

While en route to the crash scene, Deputy Shafer reported that he was informed that the offending vehicle was an older Chevy Impala bearing Wisconsin license plate registration 625-TJU (2:2). After arriving at the crash scene, Deputy Schafer was advised that a vehicle matching that description had been stopped by Sun Prairie police on Highway 151 at approximately 11:39 p.m. (2:2). Deputy Schafer went to that location and found a 1977 Chevrolet Caprice bearing Wisconsin license plate registration 625-TJU, which was operated by a black male with dreadlocks wearing a coat and a hat (2:2). That driver, identified as Deris Huley, the defendant herein, told Deputy Schafer that he was alone in the vehicle and no one else had driven it in the last forty-five minutes (2:2). Deputy Schafer observed some marks that appeared to be scratches on the defendant's vehicle (2:2).

The driver of the victim vehicle, Seefeldt, received a sprained neck as a result of the crash, was prescribed pain medication, and missed approximately two weeks of work because of her injury (2:2).

The complaint in this matter was filed on December 27, 2011 (2). The defendant was originally charged with Hit

and Run Causing Injury, a felony (2). On July 23, 2012, the defendant entered a plea of "no contest" to an amended charge of misdemeanor Hit and Run of an Attended Vehicle, as a repeater, contrary to Wis. Stat. § 346.67(1) (17; *see* Appendix 2, Judgment of Conviction). The parties made a joint recommendation to the court that the sentence should include two years of probation, thirty days in the Dane County Jail, completion of a driver safety course, no contact with the victim, and payment of costs and restitution (17:1). The State was allowed ninety days to prepare a restitution order (17:1).

The restitution order, when filed, requested a total amount of $4,064.83, all relating to injuries the victim received as a result of the crash (26:5, 26:18, 3-7; *see* Appendix 3, Transcript of Restitution Hearing).

On October 22, 2012, the defendant filed an Objection to Restitution Order (20; *see* Appendix 4, Defendant's Objection to Restitution Order). A restitution hearing was held on December 14, 2012 (26). At that hearing, the defendant claimed that "the injury was not caused by leaving the scene of the accident purely and simply. The injury was caused by the automobile accident, which is a noncriminal event. The automobile accident was factually

entirely completed before the crime was even begun.” (26:4, 14-19).

Judge Berz concluded that restitution cannot be ordered based on this crime because the criminal portion of the statute is the “running,” not the “hitting” (26:17, 1 – 26:18, 2). Judge Berz also mentioned that civil liability is available to the victim, and the requested restitution “is wholly unrelated to the crime itself” (26:17, 21 – 26:18, 2). Herein is the State’s appeal from that decision.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE CIRCUIT COURT'S ORDER BASED UPON THE WISCONSIN SUPREME COURT'S HOLDING IN *STATE V. RODRIGUEZ*, 205 WIS. 2D 620, 556 N.W.2D 140 (1996).

In *State v. Rodriguez*, 205 Wis. 2d 620, 556 N.W.2d 140 (1996), the Wisconsin Supreme Court addressed very nearly the same factual situation as in the case at hand. In that case, the defendant entered a plea of "no contest" to the charge of Hit and Run Causing Death, in violation of Wis. Stat. § 346.67(1) (*Rodriguez*, 205 Wis. 2d at 623). At sentencing, Rodriguez was ordered to pay restitution (*Id.*). Rodriguez then appealed this potion of the sentence, stating that his criminal act – that of fleeing the scene – was not the cause, or even a cause, of the victim's injuries (*Id.* at 624).

The Wisconsin Supreme Court upheld the requirement of restitution, stating that "Section 973.20(1), STATS., permits the sentencing court to order restitution upon a defendant's conviction for a crime without regard to whether there is a causal link between a specific element of the crime and the victim's damages." (*Rodriguez*, 205 Wis. 2d at 624). After holding that restitution may be

assigned in hit and run cases regardless of which party "caused" the crash, the Court then remanded the issue to the trial court for consideration of "other issues regarding the restitution order which were not raised in this appeal." (*Id.*).

Following the reasoning of the *Rodriguez* Court, a "crime" is defined in Wis. Stat. § 939.12 as "conduct which is prohibited by state law and punishable by fine or imprisonment or both." Wisconsin Stat. § 973.20(1r) states that "[w]hen imposing sentence for any crime . . . the court, in addition to any other penalty authorized by law, *shall* order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing . . . unless the court finds substantial reason not to do so and states the reason on the record (emphasis added)." Wisconsin Stat. §§ 973.20(3)(a), (b), and (c) allow a court to require restitution to a victim to cover medical services, physical and occupational therapy, and lost wages.

The defendant acknowledged in this case that there was no dispute over the existence of the injuries the victim received, nor over the amount of the restitution requested (26:4, 8-24; 26:5, 14-20). Judge Berz also noted that "the

victim's injuries were a result of the accident." (26:17, 21-22; *see also* 26:5, 4-20).

In *Rodriguez* the Supreme Court noted: "Under the restitution statute, the sentencing court takes a defendant's entire course of conduct into consideration. The restitution statute does not empower the court to break down the defendant's conduct into its constituent parts and ascertain whether one or more parts were a cause of the victim's damages." (*Rodriguez*, 205 Wis. 2d at 627).

The Court then went on to list the elements of the crime and noted that by pleading no contest, the defendant "admitted to all the elements of the crime, not just to 'leaving the scene of an accident.'" (*Id.* at 628). "Leaving the scene" is but one element of the crime, which must be viewed as a whole (*Id.* at 628-29).

> The fact that leaving the scene of the accident, in itself, may not "result" in [the injury or loss] is really not relevant to whether restitution is permissible. The prohibited conduct consisted of operating a vehicle which was involved in an accident and then leaving the scene of the accident before performing specific statutory duties. Although one element on its own may not constitute a crime, when all of those

> elements are proven or admitted, then a crime has been committed and restitution may be ordered.

Id. at 629.

Judge Berz also made essentially the same statement as the *Rodriguez* Court when she stated: "[U]nder the plain language of 346.67 as well as Jury Instruction 2670, what this crime entails is that the defendant operated a motor vehicle which was involved in an accident. It has no element regarding whose fault the accident was, but just that the person was involved in an accident. . . . Nowhere in the elements does it contain that the defendant has to have been the one at fault in the accident." (26:13, 14-21; 26:14, 3-5). She went on to say: "[t]he crime is not being at fault for an accident. The crime is being in an accident, whether you are at fault or the other person is at fault, and leaving the scene without giving the proper information." (26:17, 16-20). Yet Judge Berz reached the opposite decision from the Supreme Court.

In her Denial of the State's Motion for Reconsideration, Judge Berz essentially stated that there must be some proof as to how the defendant's actions caused the victim's injury before restitution could be ordered (24; *see* Order/Denial of Motion for Reconsideration,

Appendix 5). That reasoning goes directly contrary to established Wisconsin law, as explained by the Supreme Court in *Rodriguez*.

The State respectfully requests that this Court reverse Judge Berz's ruling to conform with established law.

II. WISCONSIN LAW REQUIRES COURTS TO ASSIGN RESTITUTION BASED ON A DEFENDANT'S CRIMINAL CONDUCT AND ALLOWS COURTS TO TAKE AN ENTIRE COURSE OF CONDUCT INTO ACCOUNT; BECAUSE RESTITUTION STATUTES ARE TO BE CONSTRUED LIBERALLY IN ORDER TO MAKE THE VICTIM WHOLE, THE COURT SHOULD ASSIGN RESTITUTION TO THE VICTIM IN THE CASE AT HAND.

Wisconsin courts have long held that the restitution statutes are to be construed "broadly and liberally in order to allow victims to recover their losses [that occur] *as a result of a defendant's criminal conduct*." (*State v. Longmire*, 2004 WI App 90, 272 Wis. 2d 759, 681 N.W.2d 534, *citing State v. Anderson*, 215 Wis. 2d 673, 682, 573 N.W.2d 872 (Ct. App. 1997) (emphasis added by the *Longmire* Court).

> [B]efore a trial court may order restitution "there must be a showing that the defendant's *criminal activity* was a substantial factor in causing" pecuniary injury to the victim. *State v. Johnson*, 2002 WI App 166, ¶ 16, 256 Wis. 2d 871, 649 N.W.2d 284 (emphasis added). In making its determination, however, a trial court may "take[] a defendant's entire course of conduct into consideration" including "all facts and reasonable inferences concerning the defendant's activity *related to the 'crime' for which [he] was convicted*, not just those facts necessary to support the elements of the specific charge." *State v. Madlock*, 230 Wis. 2d 324, 333, 602 N.W.2d 104 (1999) (emphasis added (citation omitted). Put another way, we have said that a causal link for restitution purposes is established when "the defendant's criminal act set into motion events that resulted in the damage or injury." *State v. Rash*, 2003 WI App 32, ¶ 7, 260 Wis. 2d 369, 659 N.W.2d 189.

Longmire, 2004 WI App 90 at ¶ 13.

Coupled with the analysis in *Rodriguez*, *supra*, the theory that restitution should be applied "broadly and liberally" applies directly to this case. Under *Rodriguez* restitution may clearly be assigned to a defendant convicted of Hit and Run, regardless of whether or not he

caused the initial crash because, in pleading to the crime, he is taking responsibility for all of the elements, not just one. According to *Longmire*, *supra*, and the other cases cited above, the criminal activity admitted to by the defendant need to be a "substantial factor" in producing the victim's monetary losses. That is precisely the situation here, therefore restitution should be assigned.

III. THE CASE AT HAND IS CLEARLY DISTINGUISHABLE FROM *STATE V. LEE*, 2008 WI APP 185, 314 WIS. 2D 764, 762 N.W.2D 431, WHICH WAS CITED BY DEFENSE IN HIS ARGUMENT.

The facts in *State v. Lee*, 2008 WI App 185, 314 Wis. 2d 764, 762 N.W.2d 431, are so dissimilar from the case at hand as to be completely inapplicable. In that case, the defendant was charged with Armed Robbery With Threat of Force and Armed Burglary as Party to a Crime (*Lee*, 2008 WI App 185 at ¶ 4). He subsequently pled guilty to the Armed Robbery; the Burglary charge was dismissed and read in (*Id.*). At sentencing the State sought restitution to an officer for injuries he sustained while chasing the

defendant (*Id.* at ¶ 5). The defendant objected to the restitution request, stating (1) that the officer was not a direct victim of the charged crime, and (2) that collateral law enforcement expenses could not be ordered as restitution (*Id.* at ¶ 6).

In the case at hand, there is no allegation that the victim of the crime of Hit and Run is not eligible to receive restitution (26:4, 12-19). Nor is there any allegation that she is not a direct victim of the crime; as a result that issue is not addressed here.

In his argument, the defendant directed the trial court to Paragraph 11 of the *Lee* decision. That paragraph states:

> As noted, WIS. STAT. § 973.20 authorizes a trial court to order restitution to victims of a "[c]rime considered at sentencing," which includes "any crime for which the defendant was convicted and any read-in crime." Sec. 973.20(1g)(a) & (1r). We conclude that this language is clear an unambiguous, and that it requires us to reverse the restitution order. Here, the two crimes that were considered at sentencing were armed robbery (to which Lee pled guilty) and armed burglary (which was read in). Lee was not charged with fleeing an officer, assaulting an officer o any crime related to his

> flight from officer Lindstrom. Accordingly, Lindstrom was not a victim of a crime considered at sentencing, and neither he nor the insurance company that paid expenses related to his injuries can receive restitution.

Lee, 2008 WI App 185 at ¶ 11.

The defendant cited *State v. Lee* to support his position that the restitution in this case is not tied to the crime; however, that argument has nothing to do with the facts of the *Lee* case, in which the defense alleged that the supposed victim was not in fact a victim of the crimes considered at sentencing.

Based on *State v. Rodriguez*, 205 Wis. 2d 620, 556 N.W.2d 140 (1996), which clearly mirrors both the facts and the arguments in the case at hand, it is clear that established Wisconsin law allows for the assignment of restitution in Hit and Run cases. Because of this, that case and the result reached in it by the Supreme Court should be controlling.

CONCLUSION

The State respectfully requests that this Court reverse the ruling of the trial court and allow restitution to be assigned to the victim of the crime of Hit and Run.

The State's argument can be summarized as follows: Courts are encouraged to broadly construe the restitution statutes to ensure that victims of crimes are made whole for monetary losses incurred as a result of those crimes. The restitution statutes allow for victims of crimes to request compensation for medical expenses and lost wages. *State v. Rodriguez*, 205 Wis. 2d 620, 556 N.W.2d 140 (1996), addresses that exact issue as it relates to a plea entered in a Hit and Run case. In *Rodriguez*, the Wisconsin Supreme Court held that restitution may be assigned in such a case because when a crime is proven or a plea is entered, the defendant assumes responsibility for all the elements of the crime, not just some of the elements. Because of this, the defendant in this case assumed responsibility for all the elements of the crime of Hit and Run of an Attended Vehicle when he entered a plea to that charge. As a result, he is liable for restitution as requested.

CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is _____ pages.

Dated: _____.

Signed,

_____
Attorney

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains:

(1) a table of contents;

(2) relevant trial court entries;

(3) the findings or opinion of the trial court; and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings of decisions showing the trial court's reasoning regarding these issues.

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 of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been reproduced to preserve confidentiality and with appropriate references to the record.

Dated: _____

_____

Emily L. Thompson

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 5th day of July, 2013.

_____

Emily L. Thompson
Assistant/Deputy District Attorney
Dane County, Wisconsin

APPENDIX

1. CRIMINAL COMPLAINT IN STATE V. DERIS D. HULEY, DANE COUNTY CASE NUMBER 2011 CF 2386, FILED DECEMBER 27, 2011; PAGES 1 – 3; cited as Document No. 2.

2. JUDGMENT OF CONVICTION IN STATE V. DERIS D. HULEY, DANE COUNTY CASE NUMBER 2011 CF 2386, COMPLETED ON JULY 23, 2012; PAGES 1 – 2; cited as Document No. 17.

3. TRANSCRIPT OF RESTITUTION HEARING, HELD ON DECEMBER 14, 2012; DATED MARCH 1, 2013; PAGES 1 – 19; cited as Document No. 26.

4. OBJECTION TO RESTITUTION ORDER, FILED BY DEFENSE ON OCTOBER 22, 2012; 1 PAGE; cited as Document No. 20.

5. ORDER OF THE DANE COUNTY CIRCUIT COURT, BRANCH 11, THE HONORABLE ELLEN K. BERZ PRESIDING, DENYING THE STATE'S MOTION TO RECONSIDER THE RULING OF THE DECEMBER 14, 2012, RESTITUTION HEARING; 1 PAGE; cited as Document No. 24.