STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2013AP002127 CR

PAUL J. WILLIQUETTE,

Defendant-Appellant.

Appeal from the Circuit Court for Wood County
The Honorable Todd P. Wolf, Presiding
Circuit Court Case No. 12CF000262

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

(1) Did the new evidence of the actual car repair costs constitute a new factor to justify modification of the restitution?

The trial court answered no.

(2) Did Appellant's failure to object to the amount of restitution at sentencing waive his right to contest the amount after discovering the true amount of the repair costs?

The trial court answered yes.

(3) Did Appellant waive the right to contest the amount of restitution by filing a post-conviction motion pursuant to Wis. Stat. 809.30 that was not heard until about a year after the trial court ordered restitution?

The trial court answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Appellant believes that the Court can decide the issues based on the briefs, but welcomes the opportunity for oral argument if the Court has questions not resolved by the briefs. Publication most likely is not warranted pursuant to Wis. Stat. § 809.23.

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction entered on October 9, 2012 in Wood County, The Honorable Todd P. Wolf presiding (R. 12; A-App. 104) and from the Order Denying Defendant's Post-Conviction Motion entered on September 9, 2013 (R. 18; A-App. 106). The Court entered judgment based on Mr. Williquette's no contest pleas

to felony criminal damage to property and disorderly conduct. (R. 12; A-App. 104.) Mr. Williquette timely filed a Notice of Intent to Pursue Post-Conviction Relief on September 20, 2012. (R. 11.)

On August 1, 2013,[1] Appellant filed a post-conviction motion to modify his sentence to reduce the restitution. (R. 14.) The Court held a hearing on August 30, 2013, at which time it orally denied Appellant's motion. (R. 24; A-App. 123.) The Court entered a written order denying the motion on September 9, 2013. (R. 18; A-App. 106.) Appellant then timely filed a Notice of Appeal on September 20, 2013. (R. 19.) The only issue for appeal is whether the trial court should have modified the restitution award.

STATEMENT OF FACTS

The State charged Paul Williquette with felony criminal damage to property and disorderly conduct arising out of allegations that on June 23, 2102 he broke several windows and slashed the tires of Christopher Opsal's car, alleging that the damages were more than $2500. (R. 3; A-App. 101.) This allegation was based on Christopher Opsal providing the police with an estimate to repair the car of $2576.27. (R. 3; A-App. 102.) The estimates were included in the police reports produced in discovery. (R. 16, Ex. 3; A-

[1] This Court issued an Order on October 28, 2013 retroactively extending the time for Appellant to file his post-conviction motion until August 1, 2013 on the grounds that the previously extended time to file said motion was July 8, 2013. Although this therefore made Appellant's post-conviction motion timely, Appellant is unsure of the reason for the order. On May 22, 2013, this Court granted Appellant's motion for an extension because the State Public Defender needed to appoint new counsel. In that order, this Court stated that "the time to file a postconviction motion or notice of appeal is extended to seventy-five days from the date of this order." Appellant therefore believed that the deadline was August 5, 2013—seventy-five days from May 22nd.

App. 138-143.) The estimates included $963.38 for tires from Schierl Tire in Marshfield, $250 for cleaning the car based on a print out from V&H Automotive in Marshfield with a handwritten amount for cleaning the glass out, and $1362.89 for window repair by Safelite AutoGlass in Milwaukee. (Id.) This added up to $2576.27,[2] putting it just over the $2500 cut-off between misdemeanor criminal damage to property and felony criminal damage to property in Wis. Stat. § 943.01.

On September 20, 2012, Paul Williquette pled no contest to both charges in this case. (R. 23: 2-3; A-App. 113-114.) The State's recommendation was for restitution in the amount of $2,581.22 in this matter and $179.99 in 12CM451. As part of the sentence, this Court ordered that Mr. Williquette pay $2,581.22 restitution in this matter and $79.99 in 12CM451 for a total of $2,661.21. (R. 23: 9-10; A-App. 120-121; R. 12; A-App. 104.) Based on the evidence before the Court at sentencing, the Court, the State, and Appellant believed that was the correct amount of restitution. Subsequently, however, Mr. Williquette discovered that the restitution amount for the damage to Christopher Opsal's car far exceeded the actual repair costs and therefore sought to modify the judgment regarding the restitution. The basis for the motion was the testimony of Carol Laru, which was uncontroverted at the motion hearing.

Carol Laru was present at the time of the underlying actions. (R. 17, ¶ 2; A-App. 107.) At the time that Paul Williquette broke Christopher Opsal's windows and slashed his tires, the car was parked at Ms. Laru's house. (Id.) The disturbance that formed the basis for the disorderly conduct charge involved Ms. Laru. (R. 3:2; A-App. 102.) Thus a condition of Mr. Williquette's bond was that he not have any

[2] It is not clear where the discrepancy arose between this number and the final restitution number of $2581.22. At the post-conviction motion hearing, the State explained that it might have been due to the claimant having different estimates for tires. (R. 24:4; A-App. 126.)

contact with Ms. Laru and she could not inform him of the actual cost for the repairs to Mr. Opsal's car. (R. 17, ¶ 3; A-App. 107-108.) Mr. Williquette therefore had no information that the costs of repair were anything other than the information that Mr. Opsal provided to the police.

Carol Laru paid for the repair of the windows in Mr. Opsal's car and therefore has personal knowledge of the cost of repairs. (R. 17, ¶ 4; A-App. 108.) The repairs were done by Central Wisconsin Glass Company in Marshfield, not Safelite AutoGlass in Milwaukee; the total repair cost was $975—almost $400 less than the estimate that Mr. Opsal provided to the police. (Id.) In addition, Chrisopher Opsal did not incur a cleaning charge of $250. Instead, Christopher Opsal cleaned the car himself using Carol Laru's shop vac and the remainder of the glass was cleaned out by Central Wisconsin Glass at no additional charge. (R. 17, ¶ 5; A-App. 108.) Therefore, the total cost to repair all of the broken windows and clean out the glass was $975, not $1612.89; a difference of $637.89.

Furthermore, the tires only cost Christopher Opsal $60. (R. 17, ¶¶ 6-7; A-App. 108-109.) Prior to the incident in question, the four tires on Christopher Opsal's car were in bad condition and he previously told Ms. Laru that he needed new tires. (Id., ¶ 6; A-App. 108.) To help him out, Ms. Laru's neighbor gave Mr. Opsal four tires for his car. (Id.) Ms. Laru has personal knowledge of this, because she helped roll the four tires from her neighbor's shed to Dave's Expert Auto in Marshfield which was next door to the shed. (Id.) Dave's Expert Auto then installed the tires for $15 per tire for a total of $60. (Id., ¶ 7; A-App. 108.)

Thus, the total damage to Christopher Opsal's car as a result of the underlying incident for which Paul Williquette was charged was $1035. (R. 17, ¶ 8; A-App. 109.) This is less than half of the restitution amount that the Court ordered. The State did not contest these new facts at the post-conviction motion hearing.

ARGUMENT

I. THE ACTUAL AMOUNTS THAT THE CLAIMANT PAID TO REPAIR HIS VEHICLE WERE A NEW FACTOR THAT JUSTIFIED MODIFICATION OF THE RESTITUTION AMOUNT.

A. Standard of Review and Introduction.

Assessing whether a set of facts constitutes a new factor is a question of law that the appellate courts decide *de novo*. *State v. Hegwood*, 113 Wis. 2d 544, 546-47, 335 N.W.2d 399 (1983). On the other hand, whether the new factor justifies modification of the sentence is within the trial court's discretion and the appellate courts review that determination under an erroneous exercise of discretion standard. *State v. Harbor*, 2011 WI 28, ¶ 33, 333 Wis. 2d 53, 797 N.W.2d 828.

At the time of sentencing and the imposition of restitution, everyone believed that the correct amount of the damages were what Christopher Opsal submitted to the police. Yet, the uncontroverted evidence is that amount was substantially more than the actual damages and therefore Mr. Williquette should not be required to pay the exaggerated amount. Mr. Williquette does not argue that he should be free from paying any restitution. He only argued in the trial court and continues to argue in this appeal that he should only be required to pay Mr. Opsal's actual damages. Anything more is a windfall to Mr. Opsal and an additional penalty on Mr. Williquette.

As a matter of law, the evidence of the actual damages was a new factor and the trial court erred by holding otherwise. In addition, the trial court's determination that this new factor did not justify modification of the restitution was an erroneous exercise of discretion.

B. The Actual Amounts Incurred by the Claimant Constituted a New Factor.

To prevail on a motion to modify a sentence based on a claim of a new factor, a defendant must prove both that there is a new factor and that the new factor does indeed justify a modification of the sentence. *Harbor*, at ¶ 38. The Court set forth the definition of a new factor in *Rosado v. State*:

> …a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

Rosado v. State, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975).

The actual costs incurred by Mr. Opsal to repair his vehicle were unknown by the trial judge at the time of sentencing. The Court, District Attorney, and Appellant proceeded on the mistaken assumption that the repair costs were what Mr. Opsal submitted to the police. At sentencing, the State affirmed that it had complied with the victim's rights law, but no victim was present. (R. 23: 5-6; A-App. 116-117.) Thus, the only information on damages was what Mr. Opsal previously provided to the police. In addition, because Mr. Williquette was prohibited from contacting Ms. Laru, he had no way of knowing that the actual repair costs were less than the information that Mr. Opsal supplied to the police.

Based on the above, the actual repair costs are a "set of facts highly relevant to the imposition of sentence." *Rosado*, 70 Wis. 2d at 288. If the trial court knew the actual repair costs at the time of sentencing, it should have led to a

different restitution award. Therefore, as a matter of law, these facts constitute a new factor. As will be shown in the next section, according to Wisconsin law, the amount of restitution in this case should be determined by the costs to repair the damage to the vehicle.

C. The New Factor of the Actual Amounts Paid Justified Modification of the Restitution.

Restitution is governed by Wis. Stat. § 973.20. If the crime at issue at sentencing caused property damage, then the Court may require the defendant to pay the owner the reasonable repair or replacement cost. Wis. Stat. § 973.20(2)(b). The Court in ordering restitution is to look at restoring the victim to the position that he or she was in before the criminal incident. "[T]he purpose of restitution is to return the victims to the position that they were in before the defendant injured them." *State v. Holmgrem*, 229 Wis. 2d 358, 366, 599 N.W.2d 876 (Ct. App. 1999). In this case, that would mean restoring Mr. Opsal's car to the condition it was in before Mr. Williquette damaged it.

The statute further provides that the restitution order may require the Defendant to pay special damages that a plaintiff could recover in a civil suit, but not general damages. Wis. Stat. § 973.20(5)(a). General damages are compensation for such things as pain and suffering. They are not allowed as restitution. *Holmgrem*, 229 Wis. 2d at 365. In contrast, special damages are the actual pecuniary injury. "Any readily ascertainable pecuniary expenditure paid out because of the crime is appropriate as special damages." *Id.* In a civil case for damage to property, the correct measure of damages is the lesser of the cost of repair or diminution of value. *See Engel v. Dunn County*, 273 Wis. 2d 218, 222, 77 N.W.2d 408 (1956); *Mueller Real Estate Inv. Co. v. Cohen*, 158 Wis. 461, 465, 149 N.W. 154 (1914); *see also* WIS JI-Civil 1804. There is no evidence of any diminution of value of Mr. Opsal's car. The only evidence is the cost of repairs.

The actual pecuniary loss by Christopher Opsal is $1035. Following the repairs, Mr. Opsal was not only put in the position he was in before the underlying criminal incident, but he was actually in a better position. Mr. Opsal needed new tires. His tires were in bad condition and although the value of the old tires is not known, it was probably little or nothing. He then got new tires for free and only had to pay $60 to have them installed.

Leaving the tire issue aside, the major amount of damages was for the broken windows. Restitution is appropriate to cover the repair cost to the windows and Mr. Opsal is entitled to recover the cost of repair. The amount to repair those windows, however, was not the inflated amount off of the internet for a shop in Milwaukee, but the $975 that it cost at Central Wisconsin Glass Company to replace every broken window and to vacuum up the remaining glass.

The trial court found this not to be a new factor stating that a victim always gets an estimate and does the best he can to make the repairs. (R. 24:12-13; A-App. 134-135.) The court further expressed concern about opening a Pandora's box by allowing someone to come in later and contest restitution because the victim "cut corners" and did the work himself or that it was cheaper than the estimates. (Id.: 13; A-App. 135.) The trial court analogized it to someone who takes an insurance check for hail damage, but then decides not to fix the hail damage. (Id.: 14; A-App. 136.) Yet, this is not a case of someone's car hood or door being dented, receiving a check for the estimate to repair the damage, and then deciding not to repair it. In that case, the estimate is the correct amount of restitution. Instead, here the actual cost to repair and clean up the broken windows turned out to be about 60% of what Mr. Opsal submitted as an estimate and upon which the trial court based restitution. Therefore, it was an erroneous exercise of discretion by the trial court to find that the actual costs were not a new factor requiring modification of the restitution.

II. *SZARKOWITZ*, ET AL., DOES NOT OVERCOME THE NEW FACTOR ANALYSIS.

In response to Appellant's motion at the hearing, the only opposition that the State raised is that defendant's motion should be denied because he did not object to restitution, citing *State v. Szarkowitz*, 157 Wis. 2d 740, 460 N.W.2d 819 (Ct. App. 1990). (R. 24:2-3; A-App. 124-125.) Neither *Szarkowitz* nor the cases following it, however, addressed a new factor issue. Therefore, those cases do not apply to the situation here.

In *Szarkowitz*, the defendant claimed that restitution was improper in part[3] because he did not stipulate to the restitution and therefore claimed it violated Wis. Stat. § 973.20. The Court of Appeals disagreed and held that where the defendant had notice of the claimed amount of restitution and did not object, then the trial court was entitled to proceed on the understanding that the amount was not in dispute and order it as restitution. 157 Wis. 2d at 749. Unlike Szarkowitz, Mr. Williquette does not seek to overturn the award of restitution, but rather merely to modify it. Szarkowitz did not raise any new factors and the Court of Appeals did not address the issue of modification for a new factor. Therefore, the case is not directly on point.

The Court of Appeals has applied the rationale of *Szarkowitz* in other cases, including *State v. Hopkins*, 196 Wis. 2d 36, 538 N.W.2d 543 (Ct. App. 1995) and *State v. Leighton*, 2000 WI App 156, 237 Wis. 2d 709, 616 N.W.2d 126. Like *Szarkowitz*, however, these courts did not address the issue of a new factor and Appellant is unaware of any

[3] Szarkowitz raised two other objections that are not relevant to this case: that the trial court failed to solicit any information regarding his ability to pay and ordering restitution to non-victims. 157 Wis. 2d at 749, 750-51.

case holding that new factor analysis cannot be applied to a restitution order to which the defendant did not object. Instead, in *Hopkins*, like *Szarkowitz*, the defendant sought to vacate the the restitution order. 196 Wis. 2d at 41. The Court, following *Szarkowitz*, held that Hopkins constructively stipulated to the restitution by failing to object. *Id.* at 39. *Leighton* followed *Hopkins* finding that the defendant constructively stipulated to the restitution because he did not object until the post-conviction motion when he argued that it should be vacated because no proof was offered at sentencing or in the pre-sentencing investigation report as to the amount. 2000 WI App 156, at ¶¶ 54-56.

The conclusion that Mr. Williquette constructively stipulated to the amount of restitution because he did not object at the time of sentencing does not then preclude him from bringing a post-conviction motion to modify the sentence based on a new factor. If it did, many other types of motions to modify a sentence based on a new factor could be barred. As the Wisconsin Supreme Court noted in *Harbor*, the requirements that the Court imposed for sentence modifications are meant to balance the need for finality of judgments and the need to correct unjust sentences. 2011 WI App at ¶ 51. The current judgment of conviction requiring Mr. Williquette to pay in restitution more than double what it cost to repair Mr. Opsal's car is an unjust sentence and therefore outweighs the need for finality of judgments.

Furthermore, a stipulation is simply a form of "contract made in the course of judicial proceedings." *See State v. Craft*, 99 Wis. 2d 128, 133, 298 N.W.2d 530 (1980). Courts can rescind a contract based on a mistake of fact. *See, e.g., Moehlenpah v. Mayhew*, 138 Wis. 2d 561, 119 N.W.2d 826, 830-831 (1909)(discussing cases and theories). In a civil case, a party can file a motion under Wis. Stat. 806.07 to re-open a judgment for mistake within one year from entry of judgment. Similarly, a party can file for new trial under Wis. Stat. 805.15 for newly discovered evidence. Restitution is similar to a civil judgment for damages and indeed under

Wis. Stat. 973.20(1r) can be converted to a civil judgment. Thus, there is no reason why the initial stipulation to restitution and judgment at sentencing should now preclude correcting the amount of restitution to reflect Mr. Opsal's actual damage. Mr. Williquette, the Court, and the State were mistaken about the facts of the costs of repairs. Therefore, the amount should be modified to reflect the true amount of the damages.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT APPELLANT WAIVED HIS RIGHT TO FILE A POST-CONVICTION MOTION.

The trial court seemed to hold, in addition to finding that there was no new factor, that because the hearing was almost a year after the original sentence that Appellant waived any right to contest the restitution. At the post-conviction motion hearing, the trial court stressed a couple of times that the hearing was a year after the sentencing. (R. 24: 11, 13; A-App. 133, 135.) The trial court also added to the proposed written order denying the motion: "Waived time in bringing request." (R. 106; A-App. 106.)

To the extent that the trial court denied Appellant's motion because it felt that he waived it by not filing a post-conviction motion until almost a year after the sentencing, the trial court is in error. Wis. Stat. § 809.30 governs the time line for a defendant to file a post-conviction motion. Furthermore, Wis. Stat. § 809.82(a) gives the authority to this Court to extend the time for filing post-conviction motions. Appellant timely filed his notice of seeking post-conviction relief, this Court granted him extensions in which to file his post-conviction motion, and he subsequently timely filed his post-conviction motion. This procedure brought the hearing until almost a year since the sentencing, but is not at all unusual in a criminal post-conviction proceeding. It would be an abuse of discretion by a trial court to deny a motion

holding that a defendant waived his or her rights by following the procedures under § 809.30.

CONCLUSION

For the above reasons, Defendant Paul Williquette respectfully requests that this Court reverse the trial court and remand this matter to the Circuit Court to modify the restitution order to reflect the actual costs of the damages being $1035.

Dated this 27th day of November, 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 3237 words.

Dated this 27th day of November, 2013.

Signed:

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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 27th day of November, 2013.

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APPENDIX

INDEX TO APPENDIX

CERTIFICATION AS TO APPENDIX

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 § 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 of 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.

Dated this 27th day of November, 2013.

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