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STATE OF WISCONSIN
COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT IV

Case No. 2013AP2127-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PAUL J. WILLIQUETTE,

Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT FOR
WOOD COUNTY THE HONORABLE TODD P.
WOLF, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT

This case can be resolved on the briefs by applying well-established legal principles to the facts; accordingly, the State requests neither oral argument nor publication.

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

In July 2012, Williquette was charged with felony criminal damage to property and disorderly conduct-domestic abuse (3). The charge stemmed from Williquette breaking the windshield and exterior and flattening the tires of Christopher Opsal's car, without his permission, on June 23, 2013. (3: 1-2). In September 2012, Williquette pleaded contest to the reduced charge of misdemeanor criminal damage to property and disorderly conduct-domestic abuse (12). The circuit court sentenced Williquette to four months jail and 90 days of jail to be served concurrently, which was imposed and stayed and Williquette was placed on probation for a period of two years (12). The court granted the State's request for a restitution order in the amount of \$2581.22 to compensate Mr. Opsal (12). The judgment of conviction was entered September 20, 2012. (12) Williquette did not appeal.

On August 30, 2013, Williquette, through counsel, moved the court for sentence modification, arguing that the amount Mr. Opsal has paid to repair his vehicle was a new factor warranting a new sentence in this case (14). The court denied the motion (24).

Williquette appeals the trial court's decision.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DENIED WILLIQUETTE'S MOTION FOR SENTENCE MODIFICATION.

A. Standard of Review.

Whether a new factor exists presents a question of law that this court reviews independently. *State v. Scaccio*, 2000 WI App 265, ¶13, 240 Wis. 2d 95, 622 N.W.2d 449. Whether the existence of a new factor justifies sentence modification is a discretionary determination that will be overturned by this court only when that discretion is erroneously exercised. *See State v. Harbor*, 2011 WI 28, ¶33, 333 Wis. 2d 53, 797 N.W.2d 828.

B. Relevant Law.

A sentence may be modified if a defendant shows the existence of a “new factor.” *Staccio*, 240 Wis. 2d 95, ¶13. A new factor is:

[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 defendant bears the burden of establishing the existence of a new factor by clear and convincing evidence. *Harbor*, 333 Wis. 2d 53, ¶36.

“The existence of a new factor does not automatically entitle the defendant to sentence modification.” *Id.* ¶37. “Rather, if a new factor is present, the circuit court determines whether that new factor justifies modification of the sentence.” *Id.* “In making that determination, the circuit court exercises its discretion.” *Id.*

C. Williquette has failed to show a new factor that warrants sentence modification.

Williquette argues that the actual amount Mr. Opsal paid to repair his vehicle is a new factor. Williquette’s Br. at 5. Volpendesto argues, “The actual costs incurred by Mr. Opsal to repair his vehicle were unknown by the trial judge at the time of sentencing.” Williquette’s Br. at 6. He argues further that the actual repair costs are highly relevant to the sentence. Williquette is incorrect.

Williquette has failed to demonstrate how the amount of money the victim has paid toward the damage perpetrated by the defendant is a factor *highly relevant* to Williquette’s original sentence. The methods undertaken by the victim to make his vehicle operable cannot be relevant to the Wood County court’s sentence for restitution, as the amount ordered is based on the loss

suffered by Mr. Opsal through Williquette's criminal conduct.

In addition, Williquette's argument that "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" is a misinterpretation of the restitution statute. "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." Wis. Stats. §973.20(13)(a)1. Williquette did not object to the restitution request at the time of sentencing. To argue that the amount the victim has paid toward repairing his vehicle is the amount of the loss is a misinterpretation of the purpose of restitution.

The defendant was aware that the restitution request was based on estimates and agreed to the amount of restitution requested as the amount of loss sustained by Mr. Opsal. The restitution statute is to be construed broadly to compensate *victims* for their losses. *State v. Longmire*, 2004 WI App 90, ¶11, 272 Wis. 2d 759, 681 N.W.2d 534. It is not to be construed broadly to allow a defendant to sit on his rights and challenge the award a year later, when the victim has merely attempted to make his vehicle operable while awaiting compensation for the damage from the defendant's crime.

In sum, the amount of money Mr. Opsal has paid to make his vehicle operable is not relevant to Williquette's sentence, so Williquette has failed to set forth a new factor. Thus, the circuit court was

correct to deny Williquette relief. *See Harbor*, 333 Wis. 2d 53, ¶38.

II. THE CIRCUIT COURT PROPERLY ESTABLISHED THE AMOUNT OF RESTITUTION

A. Standard of Review.

“The determination of the *amount* of restitution to be ordered (and thus whether a victim’s claim should be offset or reduced for any reason) is reviewed under the erroneous exercise of discretion standard.” *Longmire*, 272 Wis. 2d 759, ¶16 (emphasis in original). In reviewing an exercise of discretion, this court “examine[s] the record to determine whether the circuit court logically interpreted the facts, applied the proper legal standard and used a demonstrated, rational process to reach a conclusion that a reasonable judge could reach.” *Id.*

B. Relevant Law.

In the absence of an objection, where the defendant has been given notice of the requested restitution, the trial court can proceed with an understanding that the amount claimed is not in dispute. *State v. Szarkowitz*, 157 Wis.2d 740, 749, 406 N.W.2d 719. Where the defendant has been given notice of restitution and does not dispute that he failed to contest the restitution amount at

sentencing, the court can find that the defendant constructively stipulated to the restitution order. *State v. Leighton*, 237 Wis.2d 709, ¶57, 616 N.W.2d 126.

C. Williquette constructively stipulated to the amount of restitution.

Williquette does not dispute that his conduct caused damage to Mr. Opsal's vehicle. He was first given notice of the estimated amount of the damage in the amended criminal complaint. (3: 2). The amount of the damage was also discussed extensively during the preliminary hearing. (22: 12-14). The defendant did not dispute restitution at the time of sentencing. (R.23: 6-9). The defendant did not request a hearing on the issue of restitution. (Id.). Given those circumstances, the circuit court properly ordered restitution and exercised little, if any, discretion in determining the restitution amount.

CONCLUSION

For the foregoing reasons, the State respectfully requests this court affirm the decision of the circuit court. If the Court determines that the defendant has established a new factor, the State respectfully requests that this matter be remanded to the circuit court for a determination of whether this justifies sentence modification.

Dated this 29th day of January, 2014.

Respectfully submitted,

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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 1,334 words.

Dated this 29th day of January, 2014.

Elizabeth R. Constable
Assistant District Attorney

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 29th day of January, 2014.

Elizabeth R. Constable
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