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

REPLY BRIEF OF DEFENDANT-APPELLANT

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INTRODUCTION

The issue before this Court is whether a defendant on a post-conviction motion brought under Wis. Stat. § 809.30 is entitled to have the trial court modify the amount of restitution based on a new factor when the defendant discovers that the amount of restitution was based on an error. Here Mr. Opsal, the claimant, paid far less to repair the damage to his car than what the trial court awarded as restitution at sentencing. At that time, everyone involved thought that the amount of the award was the correct amount of restitution based on earlier estimates. After sentencing, however, Mr. Williquette learned that the actual repair costs were significantly less than the restitution award.

Wisconsin precedent and justice require that the sentence concerning restitution be modified to reflect the actual repair costs. The State failed to cite to any case law that would compel a different result. The State goes so far as to assert that the amount of money that Mr. Opsal paid to repair his car is not a "highly relevant" factor to be considered in awarding restitution. (State's Br. at 4.) The State is incorrect. The actual repair costs are extremely relevant to the sentence and the trial court erred in denying Mr. Williquette's motion to modify the sentence to correct the restitution amount.

ARGUMENT

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

There is no dispute between the parties about the appropriate legal standards for determining whether a new factor exists for modification of a sentence. The Wisconsin Supreme Court has stated the definition as:

> …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). Nor is there any dispute about the amount that Mr. Opsal actually paid to repair his car.

Instead, the dispute here is whether what Mr. Opsal actually paid to repair his car from the damage caused by Mr. Williquette is "highly relevant" to the issue of restitution. The State's sole argument is that the actual damages are not highly relevant, because what he did to make his car operable cannot be relevant for restitution; asserting that restitution is the amount suffered by Mr. Opsal due to Mr. Williquette's conduct. (Br. at 4-5.) Yet the State ignores the fact and the law that the amount of loss is the amount necessary to repair the car. Mr. Opsal suffered no other loss.

The State seems to want to put Mr. Opsal in a far better position than he was prior to Mr. Williquette's conduct damaging his car. This is not the purpose of restitution. "[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). Wis. Stat. § 973.20(5)(a) in addressing the amount of restitution refers to special damages that a plaintiff could recover in a civil suit. Special damages are the actual pecuniary injury. 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. Since there is no evidence that Mr.

Opsal suffered any diminution of value, the proper analysis of damages for restitution is the cost of repair.

There is no dispute about the actual pecuniary loss suffered by Mr. Opsal. The State did not argue at the post-conviction motion and did not argue in its response brief that the evidence Mr. Williquette submitted as to the actual pecuniary damages was incorrect. The damage to Mr. Opsal's car consisted of the broken windows and the slashed tires. It is undisputed that the total amount to replace the broken windows and to clean up the broken glass was $975—not the $1612.89 estimate upon which the trial court based its restitution award. (R. 17, ¶ 4; A-App. 108.) The State's argument that Mr. Opsal merely made his car operable is without merit. Mr. Opsal did not tape plastic over the windows to make it merely operable. The $975 completely replaced the broken windows caused by Mr. Williquette's conduct and cleaned the car of the broken glass. Therefore, it was the total pecuniary loss suffered by Mr. Opsal for the broken windows and the total amount that should have been awarded for restitution.

Although the State does not divide its argument about Mr. Opsal making his car operable between the replacement of the windows (where he got brand new windows and a cleaned car) and the replacement of the tires (where he got used but better tires), there should not be any difference for the restitution award. The restitution award was based on new tires at a cost of $963.38 for brand new Goodyear tires (R. 16, Ex. 3; A-App. 138-139) that were far better than his tires before Mr. Williquette damaged them. (R. 17, ¶ 6; A-App. 108). After the incident, Mr. Opsal replaced the damaged tires with four newer tires in better condition for only $60. (Id., ¶ 7; A-App. 108.) Contrary to what the State and the trial court suggested, Mr. Opsal did not go out and make do for example by patching the tires while he waited to receive the restitution money. He was able to purchase tires in better condition than his old tires for $60. Therefore, his

total pecuniary loss was $1035 ($975 for the windows and $60 for the tires).

Thus, the correct amount of the repair costs were a new factor because it was highly relevant and did indeed justify a modification of the sentence. *See State v. Harbor*, 2011 WI 28, ¶ 38, 333 Wis. 2d 53, 797 N.W.2d 828 (defendant must show both a new factor and that it justifies sentence modification). This Court reviews the first factor as a question of law *de novo*, *State v. Hegwood*, 114 Wis. 2d 544, 546-47, 335 N.W.2d 399 (1983), and the second for an erroneous exercise of discretion standard, *Harbor*, 2011 WI 28, ¶ 33. As shown above, the evidence of the actual costs to repair the car are highly relevant to the appropriate sentence and therefore as a matter of law constitute a new factor.

In addressing the second factor of whether the new factor justified a modification of the restitution, the trial court committed an erroneous exercise of discretion. This Court will find an erroneous exercise of discretion by a trial court if it "'failed to exercise its discretion, the facts fail to support the trial court's decision, or this court finds that the trial court applied the wrong legal standard.'" *State v. Black*, 2001WI 31, ¶ 9, 242 Wis. 2d 126, 624 N.W.2d 363 (citation omitted). First, the facts as to the actual pecuniary loss fail to support the trial court's ruling. The actual loss was $1035, not the $2581.22 awarded by the trial court. Second, the trial court failed to apply the correct law in assessing the restitution, because it based it on something other than the actual pecuniary loss. Therefore, this Court should find that the trial court made an erroneous exercise of discretion in failing to find that the new factor of the actual costs for the replacement of the windows justified a modification of the sentence. It was an erroneous exercise of discretion for the trial court to ignore the facts, misapply the law of restitution, and fail to modify the sentence.

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

The State continues in its response brief to rely on *State v. Szarkowitz*, 157 Wis. 2d 740, 406 N.W.2d 819 (Ct. App. 1990), contrary to the holdings of the Wisconsin Appellate Courts on the application of a new factor analysis. The State does not cite to any case that holds that *Szarkowitz* somehow trumps the new factor analysis. There is no legal or rational reason that *Szarkowitz* should trump the new factor analysis.

The State further ignores defendant's arguments that there is nothing special about a stipulation regarding restitution that precludes rescission of the stipulation. As noted by defendant in his initial brief, a stipulation like any other contract can be rescinded for mistake of fact. For example, in a civil case that might be based on a contract, a judgment can be reopened for a mistake within one year under Wis. Stat. § 806.07. (App. Br. at 10-11.) There is no difference here.

The State is correct that all else being equal, if a defendant fails to object to a restitution amount at a sentencing hearing that he or she has constructively stipulated to that amount. If, however, there is a new factor that establishes under the proper analysis that the amount is wrong, then it should be subject to modification like any other sentence. To do otherwise would make the motion for sentence modification for a new factor obsolete in one category of sentences (restitution) and without any rational justification.

III. THE DEFENDANT FOLLOWED CORRECT PROCEDURE BY FILING A POST-CONVICTION MOTION.

Both the trial court and the State seek to negate the procedure of Wis. Stat. § 809.30. The trial court appears to

have done it more overtly by adding to the proposed written order: "Waived time in bringing request" (R. 106; A-App. 106) and in stating at the post-conviction motion hearing as a negative factor that it was a year after sentencing (R. 24: 11, 13; A-App. 133, 135). The State does such more subtly by asserting that a defendant should not be "allow[ed] to sit on his rights and challenge the [restitution] award a year later …." (Br. at 5.) The State also misleadingly states in its statement of facts that after the judgment of conviction was entered that Mr. Williquette did not appeal. (Br. at 2.) Mr. Williquette did indeed appeal, by following the proper procedure under Wis. Stat. § 809.30.

The positions of both the trial court and the State contradict the statutory procedure for sentence modification. Under Wis. Stat. § 973.19, a defendant seeking sentence modification may proceed under 973.19(1)(a) and not request preparation of the transcripts and thereby obtain a faster decision, but he also then waives the right to a full appeal. *State v. Scaccio III*, 2000 WI App. 265, ¶ 5, 240 Wis. 2d 95, 622 N.W.2d 449 (cited by the State). The second option under 973.19(1)(b) is to follow the procedure set forth in Wis. Stat. § 809.30, which involves the request for transcripts and the court record, and eventually can lead to an appeal. When raising a sentencing issue, a defendant is first required to file a post-conviction motion before filing a direct appeal. Wis. Stat. § 809.30(2)(h). This was the route chosen by Mr. Williquette here and the procedure which he followed. It is an error by the trial court and the State to penalize Mr. Williquette for following the correct statutory procedure.

CONCLUSION

For the above reasons and those stated in his initial brief, 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 12th day of February, 2014.

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 2256 words.

Dated this 12th day of February, 2014.

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 12th day of February, 2014.

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