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STATE OF WISCONSIN **08-13-2015**

COURT OF APPEALS **CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT IV

Case No. 15AP863-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BARBARA THIRY,

Defendant-Appellant.

On Appeal from Judgment of Conviction and Order for Restitution Entered in
Waupaca County, the Honorable Raymond Huber, Presiding

BRIEF AND APPENDIX OF
PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Is the defendant herein responsible for reimbursing the County for the care of animals which correspond to counts for which the defendant was acquitted by the jury? The Circuit Court answered this question in the affirmative.

STATEMENT ON ORAL ARGUMENT

The State is not requesting oral argument in this case. It presents an issue of statutory interpretation which does not necessarily lend itself to oral argument. Rather, the State believes that the issue can be presented and addressed adequately in written argument.

STATEMENT ON PUBLICATION

This case presents an issue for which no precedent directly on point could be found. A decision in this case could present a substantial and important addition to the *corpus juris* of this state and provide guidance to the circuit courts below.

STATEMENT ON THE CASE AND FACTS

The State has no disagreement with the factual and procedural history of this case relevant to this appeal presented by the Defendant-Appellant; and therefore declines to make any further statement on the case. Any additional facts from the record below will be referenced (TR: X, p-pp).

ARGUMENT

I. REFERENCING §973.20, WIS. STATS., FOR GUIDANCE IS INAPPROPRIATE, AS THAT SECTION DOES NOT APPLY TO THE ORDER AT ISSUE HERE.

In her brief in chief, the Defendant/Appellant makes reference, somewhat in passing, to §973.20, Wis. Stats., which relates to requiring restitution as a condition of sentence. However, it is clear, based upon both the plain language of that statute, and case law from the State Supreme Court, that restitution can only be ordered on counts for which there is a conviction, which are read-in or for which the defendant was willing to stipulate that restitution could be ordered. State v. Frey, 343 Wis.2d 358, 817 N.W.2d 436 (2012). While the sentencing court can consider the facts supporting those counts for other aspects of sentence, restitution relating to those counts cannot be ordered.

However, there is another reason why any reference made to that section is inappropriate. While the Court repeatedly made reference to the figures as representing restitution, that is not an accurate statement or assessment. Rather, the costs involved really represent something more akin to investigatory expenses and other routine expenses relating to law enforcement or investigation. As such, those costs cannot be ordered as restitution. State v. Storke, 256 Wis.2d 500, 647 N.W.2d 926 (Ct.App. 2002). Rather, such costs, in most cases, represent collateral expenses. *See also*: State v. Vanbeek, 316 Wis.2d 527, 765 N.W.2d 834 (Ct.App.

2009) and cases cited therein; State v. Evans, 181 Wis.2d 978, 512 N.W.2d 259 (Ct.App. 1994). As such, they cannot be ordered as restitution, as the law enforcement agency in question would not be considered a victim for the purposes of restitution. State v. Vanbeek.

**II. IMPOSITION OF THE COSTS IN THIS CASE
FOR THE CARE OF ALL OF THE ANIMALS
INVOLVED WOULD BE APPROPRIATE
UNDER THE APPLICABLE STATUTES.**

There are two applicable statute sections or provisions which would relate to costs or restitution imposed in this case. §951.18(4)(a)2, Wis. Stats., states:

“A sentencing court **shall** require a criminal violator to pay restitution to a person, including any local humane officer or society or county or municipal pound or a law enforcement officer or conservation warden, for any pecuniary loss suffered by the person **as a result of the crime.**” (emphasis added)

Further, §173.24(1), Wis. Stats., states:

“A court shall assess expenses under this section in any case in which there has been a search authorized under §173.10 or in which an animal has been seized because it is alleged that **the animal has been used in or constitute evidence** of any crime under Chapter 951.” (emphasis added)

These sections clearly address the problem described in the first section of this brief, wherein the investigating law enforcement agency would normally be

precluded from recovering those costs. These sections specifically allow the agency to recoup those costs, to the extent, of course, that the offender can pay them.

Applying these provisions to the case at hand represents an issue of statutory construction or interpretation. As such, this court makes its own determination as to the application of the law with little or no difference to the court below. Wombolt v. West Bend Mutual Insurance Company, 299 Wis.2d 723, 728 N.W.2d 670 (2007), State v. Berndt, 161 Wis.2d 116, 467 N.W.2d (Ct.App. 1995). In interpreting the statutes the court looks to the plain meaning of the statute when it is not ambiguous. State v. Berndt. If the statute is found to be ambiguous, the court should endeavor to interpret the statute within context, looking to related statutes. State v. Kuenzi, 332 Wis.2d 297, 796 N.W.2d 222 (Ct.App. 2011). The Courts are also to look to the spirit of the law and what goal it was intended to accomplish. State v. Berndt.

First of all, it should be noted that this case was, essentially, commenced as a result of a search warrant that was obtained under §173.10, Wis. Stats. (TR 3: 1-18) (TR 55: p 133) Further, there was also an ancillary or parallel proceeding that was commenced wherein Circuit Judge John Hoffman ordered that the defendant herein be responsible for the payment of costs of maintaining the animals, that that three of the animals be disposed of at that time. (Appx p. 103)

The Court in this case accepted those actions by the other Court as reasonable and appropriate. (Appx 116) Therefore, §173.24(1), Wis. Stats. would directly apply.

The question then becomes the significance of the jury's conviction of the defendant relating to one count for one of the five animals that were seized. The apparent lynch pin of the argument of the Defendant/Appellant is the significance of the phrase... "found guilty of the violation,..." (emphasis added). In §173.24(3), Wis. Stats.

As stated above these animals were seized as a result of a search warrant issued under §173.10, Wis. Stats. The seizure of those animals was accepted as justifiable in another proceeding. In this case, there is very limited case law. However, in State v. Berndt this court was faced with a situation in which there were in excess of thirty animals seized from the possession of the defendant. The defendant was ultimately convicted of three counts and assessed the costs of all of the animals as opposed to the three for which she was convicted. Unfortunately, that case is unclear as to whether that came about as a result of a plea agreement. Hence, resort to that case presents very little utility or value.

The State asserts that the argument of the Defendant/Appellant is far too simplistic. It assumes that there is automatically one count for each animal in a particular prosecution. In this particular case, that was, indeed, the case. However, the State asserts that there can be situations where you have a large

number of small animals such as gerbils, hamsters and the like, as well as small birds such as parakeets, where the State would have the ability to charge one count collectively for all of the various animals. Further, the State further would submit that such charging discretion does not necessarily have to be relegated to areas where there are such small animals.

Where the defendant is charged with neglect of upwards of twenty or twenty-five such animals, such as the Berndt case, the State would have the option of charging the matter collectively. (Again, it is not clear from the opinion as to whether that is not what, indeed, was done there.) Therein, the jury could simply find that if any such animal were neglected, conviction would be appropriate. In that case, the costs of seizing of all of the animals would most certainly be appropriate. In such cases, it probably would not be possible to isolate which animals represents “the” animal unless a specific question were submitted to the jury.

It also ignores the language in §951.18(4)(a)2, Wis. Stats., which requires that “a sentencing court shall require a criminal violator to pay restitution...” (emphasis added) There is no reference to a particular animal. Rather, it calls for restitution to be paid where the losses in question are incurred as a reasonable part of the investigation. As also stated above, that is one of the factors that makes these proceedings unique. Under §973.20, Wis. Stats., such costs would not be recoverable, at least as restitution. In this case, there were five horses seized as a

result of the investigation and that, as noted by the sentencing court, another court determined that the forfeiture of the horses was appropriate. (Appx. P. 117) In a case such as that, it would hardly seem reasonable or appropriate to limit the reimbursement for the cost to a particular animal. Rather, all of these horses represented evidence of the crime when they were seized. Another court had previously ordered that three of the horses be forfeited. As a result, payment for the costs incurred for all of the animals would be appropriate.

CONCLUSION

For the reasons stated herein, the State prays that this Court enter an order affirming the judgment of the circuit court below.

DATED this 13th day of August, 2015

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CERTIFICATION OF MAILING

I hereby certify that:

This brief was, on August 13, 2015, deposited in the United States mail for delivery to the clerk by first-class mail, or other class of mail that is at least as expeditious, postage pre-paid.

DATED this 13 day of August, 2015

Signed:

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CERTIFICATION AS FO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and 3b in that it is a monospaced font, 10 characters per inch, double spaced, a 1.5 inch margin on the left side and a one-inch margin on all other sides. The length of this brief is 1,542 words.

DATED this 13 day of August, 2015.

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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 13th day of August, 2015.

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