

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2015AP1855 – CR

STATE OF WISCONSIN,

Plaintiff- Respondent,

v.

ZACHERY J. PAGENKOPF,

Defendant-Appellant.

ON APPEAL FROM AN AMENDED JUDGMENT OF
CONVICTION ENTERED BY THE CIRCUIT COURT FOR
PORTAGE COUNTY, THE HONORABLE THOMAS P.
EAGON PRESIDING

**BRIEF OF PLAINTIFF-RESPONDENT STATE OF
WISCONSIN**

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin does not request oral argument of this court's opinion. It is not warranted as the issue on appeal can be resolved on the basis of well-established authority and argument fully presented in the parties' briefs.

ARGUMENT

I. The Circuit Court appropriately denied Mr. Pagenkopf's motion for de novo review.

A. Standard of Review.

The State agrees with Mr. Pagenkopf that the applicability of de novo review by the circuit court is a question of law reviewed de novo.

B. Restitution was determined and ordered by the sentencing court.

When imposing a sentence or probation for a crime, a court may order full or partial restitution. WIS. STAT. § 973.20(1r). When the restitution amount is under dispute, the sentencing court has several options, one of which is to refer the matter to a court commissioner or other referee for a hearing. WIS. STAT. § 973.20(13)(c)4. Following the hearing, the sentencing court "shall determine the amount of restitution on the basis of the record submitted by the referee and incorporate it into the sentence or probation order imposed." *Id.*

In this matter, Mr. Pagenkopf disputed the restitution requested by the State in its restitution summary. The sentencing judge referred the dispute to a court commissioner, who conducted the hearing, hearing testimony and viewing exhibits. Subsequently, the court commissioner prepared a proposed findings of fact and conclusions of law, dated December 14, 2014. (41:1-2). This was reviewed by the sentencing court, and on January 5, 2015, the court issued a restitution order and incorporated that amount into the probation order. (41:3).

Mr. Pagenkopf's reliance on the provision for de novo review of a court commissioner decision in WIS. STAT. § 757.69(8) is misplaced. Despite the characterization of the court commissioner's involvement in this matter as making a "decision," the order incorporating the restitution in the probation is made by the circuit court judge that presided over sentencing. The proposed findings of fact and conclusions of law of the court commissioner, standing alone, have zero legal effect. This distinguishes the issue before the court from other matters involving a court commissioner, such as an order to bind over for trial, or a mental commitment. Instead, restitution is set only at the moment that the circuit court judge, having reviewed the record, orders that restitution be incorporated into the sentence or probation. It is important to note that the court is free to reject or modify the findings.

Moreover, WIS. STAT. § 973.20(13)(c)4 allows the hearing to be conducted by a court commissioner or an "other appropriate referee." Nothing else in WIS. STAT. § 973.20 allows "de novo" review of the finding of facts and conclusions of law prepared by an appropriate referee other than a court commissioner. Accepting Mr. Pagenkopf's argument would create a peculiar procedure in which a court commissioner's findings would be subject to de novo review, while those of a non-commissioner referee would not. This is an absurd result, and should serve to emphasize the point that restitution order and its incorporation into a sentence is an order of the sentencing court, not the court commissioner.

C. Mr. Pagenkopf has no right to de novo review of the circuit court's restitution order.

Given this fact, the defendant is not entitled to de novo review of the restitution order, as that would be tantamount to a right to de novo review of a circuit court order to that same circuit court. The State is unaware of, and Mr. Pagenkopf has presented no authority, on the existence of such a right.

II. The restitution order and attribution of the injury is based on a reasonable interpretation of the facts presented at the restitution hearing.

A. Standard of Review.

Mr. Pagenkopf's challenge to the sufficiency of the evidence supporting the restitution order is reviewed under the erroneous exercise of discretion standard. *State v. Haase*, 206 WI App 86, ¶ 5, 293 Wis. 2d 322. An order should be reversed "only if the [trial] court applied the wrong legal standard or did not ground its decision on a logical interpretation of the facts." *State v. Canady*, 2000 WI App 87, ¶ 6, 234 Wis.2d 261, 610 N.W.2d 147.

B. The restitution order is grounded on a logical interpretation of the facts.

At the restitution hearing, the evidence must establish a causal link between a victim's injuries and the actions of the defendant. WIS. STAT. § 973.20(14)(a). Counsel is correct that Mr. Pagenkopf's actions must be "the precipitating cause of the injury and the harm must have natural resulted from the natural consequences of the actions." *State v. Canady*, 2000 WI App 87, ¶ 9, 234. Wis. 2d 261. However, 'precipitating cause' does not mean "that the defendant must have caused directly or even intended or expected the damage encompassed by the restitution order." *State v. Rash*, 2003 WI App 32, ¶ 7, 260 Wis. 2d 369 (quotes omitted). Instead, "it is sufficient if the defendant's actions were a substantial factor in causing the damage in a 'but for' sense." *Id.* Thus, "precipitating cause" merely means that the defendant's criminal act set into motion events that resulted in the injury. *Id.*

Furthermore, "in ordering restitution, the sentencing court must take a defendant's entire course of conduct into consideration and not 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. Additionally, a criminal cannot escape responsibility for restitution simply because he or she was not aware of the damage." *Id.*, ¶ 8 (quotes omitted).

At the restitution hearing, S.D. testified that he suffered a tear in his left quadriceps tendon when assaulted by Mr. Pagenkopf. (58:9-12). In extended cross examination,

trial counsel questioned S.D. about delayed reporting of the knee injury, attribution of the injury to slipping on ice, and medical records relating to the injury. (58:28-29; 58:34; 58:41-42). S.D. responded to questions on these issues, and ultimately, the court commissioner stated, "...testimony at the hearing by [S.D.] and Dr. Mitchell's note (Exhibit 8) sufficiently rehabilitated the previous confusion and this court specifically finds that Mr. Pagenkopf's actions were the cause of [S.D.]'s knee injury." (41:2). The court commissioner explicitly addressed the issues raised by Mr. Pagenkopf that tended to call in to question the origin of his injury. Nonetheless, the court commissioner's proposed findings of fact were that Mr. Pagenkopf's actions caused the knee injury. (41:2). While Mr. Pagenkopf may contest this conclusion, under a full review of the transcript from the restitution hearing, this conclusion is nonetheless grounded upon a reasonable interpretation of the facts.

III. The restitution ordered for medical costs either uncontested or based on a logical interpretation of the evidence.

In his brief, Mr. Pagenkopf questions the restitution ordered to ACS in the amount of \$9,594.75. This amount was derived from a restitution summary submitted to the court commissioner at the restitution hearing. (36:1). This summary also included a value for S.D.'s financial loss from his deductible and contribution to medical bills.

The State takes the position that the amount or basis ACS claim \$9,594.75 was not contested and the court appropriately relied upon the restitution summary submitted at the hearing. *State v. Szarkowitz*, 157 Wis. 2d 740, 749, 460 N.W.2d 819 (Ct. App. 1990). Instead, the focus of the controversy was existence of a causal link between the restitution request and the actions of Mr. Pagenkopf. Therefore, the restitution summary provides a basis upon which the court commissioner reasonably relied to set the restitution obligation to ACS.

Regarding S.D.'s restitution request of the medical bills beyond the \$2,500 deductible, he testified to the basis of these amounts on direct and cross examination. (58:14-15;

58:21-22). While not extensively detailed, S.D. provided a sufficient explanation underlying the restitution figure presented in the summary. Further, the heart of the controversy is not the restitution amount – similar to the ACS bill, the issue underlying the entire restitution hearing is the causal link between the crime and S.D.’s knee injury.

IV. Mr. Pagenkopf presented no evidence on ability to pay to the circuit court, waiving the issue for sentencing purposes.

A sentencing court must consider a defendant’s earning ability and financial resources when imposing restitution. WIS. STAT. § 973.20(13)(a). The burden of proof for presenting evidence on these issues falls on the defendant. WIS. STAT. § 973.20(14). When the defendant fails to offer evidence the considerations outlined in WIS. STAT. § 973.20(13)(a), the trial court may order restitution without making detailed findings. *State v. Szarkowitz*, 157 Wis. 2d 740, 460 N.W.2d 819 (Ct. App. 1990). Mr. Pagenkopf did not avail himself of the opportunity to present such evidence at the restitution hearing. Nowhere does *Szarkowitz* support the assertion that public defender representation alone satisfies a defendant’s burden, and further requires detailed findings regarding financial resources and ability to pay. Under this longstanding precedent, the sentencing court was exempted from making detailed findings on Mr. Pagenkopf’s ability to pay. With regards to Mr. Pagenkopf’s observation that the restitution order should accomplish “substantial justice between the parties,” in the State’s estimation, substantial justice is served by a restitution order that aims to make financially whole S.D. and the other victims of Mr. Pagenkopf’s crimes.

V. The court’s order of restitution to losses suffered by insurance companies was an appropriate use of discretion.

Mr. Pagenkopf’s final alternative argument is that the court abused its discretion when it ordered that he pay restitution to various insurance companies for expenses incurred in S.D.’s medical treatment and for lost income. The state is unaware of any law or precedent establishing that

certain classes of victims are undeserving of restitution when they have suffered a financial loss as a result of a crime. Moreover, Mr. Pagenkopf's argument rests on the premise that the circuit court abused its discretion elsewhere in ordering restitution in the first place – as such, this separate assertion is redundant and similarly without merit.

CONCLUSION

The sentencing court appropriately denied Mr. Pagenkopf's request for de novo review of its own order, and in all other ways properly exercised its discretion in ordering restitution in this matter.

Dated this 3rd day of February, 2016.

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 1,729 words.

Dated this 3rd day of February, 2016.

Cass Cousins
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 3rd day of February, 2016.

Cass Cousins
Assistant District Attorney