STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Appeal No. 2015AP001855 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ZACHERY J. PAGENKOPF,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

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

Respectfully submitted,
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Wisconsin Cases

WISCONSIN STATUTES AND SUPREME COURT RULES

OTHER SOURCES

ARGUMENT

I. The State's arguments regarding the availability of de novo review add little substance to the legal dispute at issue.

The State puts forth two arguments in support of its proposition that de novo review of the restitution decision should not have been available to Mr. Pagenkopf. First, the State asserts that de novo review should not have been available because the conclusions drawn by the commissioner in this case cannot be construed as a "decision" for the purposes of the de novo statute. (State's Br. at 2). This line of argument was articulated by the lower court in an oral ruling on the matter. (59:3).

However, this line of argument has been fully anticipated and addressed in the opening brief. (Opening Br. at 8). As Mr. Pagenkopf has already asserted, the statute is clear and unambiguous. (Opening Br. 8-9). The statute in question uses broad terminology and guarantees litigants a comparatively broad right of review with respect to any "decision" made by a court commissioner. WIS. STAT. § 757.69(8).

The State does not apply tools of statutory construction to support its proffered reading. Essentially, the State argues that the broadly applicable de novo statute should not apply to restitution hearings because they are restitution hearings. This is circular and unsatisfying reasoning. Moreover, the State's assertion that the findings of fact and conclusions of law "have zero legal effect" is inaccurate. (State's Br. at 2).

As articulated in the opening brief, it is the court commissioner who is broadly tasked with making many legally dispositive determinations. (Opening Br. at 8). In asserting that causation, for example, has been sufficiently proven, the commissioner must first make implicit credibility and plausibility findings and then faithfully apply the *Canady* standard to the controverted testimony. How this is anything other than a "decision" subject to de novo review escapes undersigned counsel. And, contrary to the State's position, the statute does not require that the "decision" be an independently-existing legal order with free-standing legal significance. (State's Br. at 2). The choice of broad language in the statute disfavors such a reading, which attempts to graft extraneous qualifications onto an otherwise broad statutory mandate.

The State's second argument is that the commissioner's "determination" should also be isolated from de novo review due to the unique structure of the of restitution statute. (State's Br. at 2). In brief, the State appears to put forth a claim that other statutory authority forecloses the application of de novo review in this instance. (State's Br. at 2). Specifically, the State claims the existence of alternative referees—not covered by the de novo statute—in the restitution referral statute defeats Mr. Pagenkopf's argument. (State's Br. at 2).

Importantly, the statute does not specifically preclude the applicability of de novo review, which appears to be a legally dispositive requirement. *See In the Matter of the Mental Commitment of T.B.*, No. 2015AP799, unpublished slip op. (Wis. Ct. App. October 1, 2015). This is also not a situation where the legislature has elsewhere addressed the ability to

obtain circuit court review of a commissioner's decision—unlike in *Gillespie*, which concerned the availability of a second preliminary hearing. *State v. Gillespie*, 2005 WI App 25, ¶8, 278 Wis.2d 630, 693 N.W.2d 320.

Admittedly, the State has correctly identified a legal quirk that results when the two statutes are read together. That quirk, however, does not entitle the State to prevail. That is, Mr. Pagenkopf concedes that there is no statute allowing de novo review of a referee's findings. However, there clearly is a statute allowing for the review of a commissioner's findings. Whatever rules govern "referees," there are clearly rules governing the exercise of quasi-judicial power by court commissioners. *See* WIS. STAT. § 757.69. This is the legislative mandate that matters in this appeal.

The State is also correct when it points out the practical consequence: a statute that creates a right of review applicable in some restitution hearings but not in others. However, this Court should not ignore a legislative mandate governing the review of commissioners simply because there is no such statute for referees. The statute empowering court commissioners and referees to conduct restitution hearings was created as § 43 of 1987 Wisconsin Act 398.[1] The broad de novo review language was added to the statute regulating court commissioners as § 109 of 2001 Wisconsin Act 61.[2] Both statutes have been revised numerous times in the interim. The legislature has never acted to address the alleged problem pointed to by the State despite having numerous opportunities to do so. Rather than assuming sloppy draftsmanship in need

[1] https://docs.legis.wisconsin.gov/1987/related/acts/398
[2] https://docs.legis.wisconsin.gov/2001/related/acts/61

of correction, this Court is duty-bound to assume the legislature knew what it was doing when it created the statutes in question. *See State v. Hemp*, 2014 WI 129, ¶31, 359 Wis.2d 320 856 N.W.2d 811; *State v. Steffes*, 2013 WI 53, ¶21, 347 Wis.2d 683, 832 N.W.2d 101; *Ball v. District No. 4, Area Board of Vocational, Technical & Adult Education*, 117 Wis.2d 529, 539, 345 N.W.2d 389 (1984) *Glinski v. Sheldon*, 88 Wis.2d 509, 519-520, 276 N.W.2d 815 (1979).

The Court should not rewrite WIS. STAT. § 757.69 ("powers and duties" of commissioners) to fit the restitution statute. Rather than meddling with the legislature's apparent construction, the Court should accept their wisdom and therefore endorse Mr. Pagenkopf's proffered reading.

Above all, the State's brief response on this point largely parrots the oral ruling of the lower court and does not meaningfully engage with Mr. Pagenkopf's arguments. Mr. Pagenkopf therefore redirects this Court's attention to the relevant sections of the opening brief, which is fully responsive to the State's briefly-stated line of argument.

II. The restitution order is not based on a reasonable interpretation of the causation issue.

Both parties agree that there must be a finding of causation before restitution can be ordered. (State's Br. at 3). Mr. Pagenkopf agrees that issues of causation can be complex. They can also create difficult epistemic quandaries for reviewing bodies. This case, however, offers a straightforward set of facts. When viewed objectively, there is ample evidence in the record not only calling into question, but also actively disproving, the claimed causal link. At the same time, there is

precious little evidence in support of the State's position. On the basis of this record, the State is therefore incorrect to assert that there was a logical path toward a finding that Mr. Pagenkopf caused the injury at issue.

For starters, the medical documentation actually offered at least two competing, independent, sources of causation. In the earliest medical report, S.D. described a preexisting injury that had been worsening over time. (36:1). The report itself omits any mention of the incident for which Mr. Pagenkopf was convicted. (36:1). The State never attempted to tie this evidence into their theory of causation and never claimed that Mr. Pagenkopf's actions worsened a preexisting injury. Rather, the State effectively ignored the evidence regarding a preexisting injury and their witness, S.D., went so far as to effectively disavow the report. (58:45-47).

There was also evidence that the injury may have been caused by accidental means totally unrelated to the fight. (36:1). Namely, medical records again showed that when the knee injury was initially diagnosed, a totally different source of the injury was disclosed by S.D. (36:1). While a conclusory doctor's note was introduced into evidence to try and salvage the State's case, the treating physician was never called as a witness. The only evidence to explain the discrepancy comes from S.D.—a surrogate, self-interested party.

These are not minor points. They should not be glossed over, as they apparently were at the restitution hearing. In effect, the court was given three different, genuinely independent, explanations of the injury. As argued in the opening brief, there were many inconsistencies and other issues with respect to S.D.'s claim that Mr. Pagenkopf caused

the injury. There was no compelling, logically defensible, reason to privilege this explanation over all others. Accordingly, this judgment should be overturned on appeal.

III. The State has not meaningfully responded to Mr. Pagenkopf's criticism of the restitution figure as it relates to alleged medical costs.

First and foremost, contrary to the State's assertion, the restitution figures were contested at the lively evidentiary hearing. In fact, the transcript on this point spans several pages. As it relates to S.D.'s costs, the record is sufficient to demonstrate the confusing nature of his testimony. S.D. did not give a single unambiguous, unqualified answer on cross-examination when asked to explain what exactly he paid and how the medical costs were distributed. Given the issues raised by the testimony, the lower court was incorrect to blithely rely on the static numbers contained in the restitution summary. (See State's Br. at 4).

As to the apparent glitch relating to the apportionment of the medical costs by the commissioner, it is clear that some mathematical or other logical error has been committed. It makes little sense to hold Mr. Pagenkopf accountable for both a "total" amount and S.D.'s portion thereof (which, when the two are added together, results in an amount in excess of the total). The record is unambiguous on this point and the commissioner's resulting findings are therefore plainly erroneous. Importantly, this point is ignored by the State and not meaningfully addressed in the response brief. Accordingly, Mr. Pagenkopf avers that it should be conceded in his favor without further debate.

IV. The remaining brief arguments are fully anticipated and addressed in the opening brief.

The State's brief response to points four (proof of indigency) and five (an award of restitution to an insurance company) take up little more than a page of total space. The briefly stated arguments do not require a formal reply and can be fully addressed with reference to Mr. Pagenkopf's arguments and authorities contained in the opening brief.

CONCLUSION

Mr. Pagenkopf should have received a de novo review upon request. Because he did not, the Court should reverse and remand the matter for such a hearing. In the alternative, Mr. Pagenkopf asks that the award be vacated in light of the numerous instances of erroneously exercised discretion identified herein.

Dated this 17th day of February 2016.

Respectfully submitted,

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CERTIFICATION OF BRIEF

I certify that this brief conforms to the rules contained in WIS. STAT. sections 809.19(8)(b) and (c) for a brief produced using the following font: Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 1,690 words.

I hereby certify that the text of the electronic copy of the brief, which was filed pursuant to WIS. STAT. § 809.19(12)(13), is identical to the text of the paper copy of the brief.

I further certify that I have complied with WIS. STAT. § 809.86 requiring the usage of pseudonyms for crime victims.

Dated this 17th day of February 2016.

Christopher P. August
State Bar No. 1087502

CERTIFICATION OF SERVICE

I hereby certify that on this 17th day of February, 2016, pursuant to § 809.80(3) and (4), ten (10) copies of the Appellant's Brief were served upon the Wisconsin Court of Appeals by hand delivery. Three (3) copies of the same were served upon counsel of record via first class mail.

Dated this 17th day of February, 2016.

Christopher P. August
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APPENDIX TABLE OF CONTENTS