STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP883-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JAMAL L. WILLIAMS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Order Denying Postconviction Relief, Both Entered in the Milwaukee County Circuit Court, the Honorable Timothy G. Dugan and the Honorable Ellen R. Brostrom Presiding

---

REPLY BRIEF OF DEFENDANT-APPELLANT

LEON W. TODD
Assistant State Public Defender
State Bar No. 1050407

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202
(414) 227-4805
toddl@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

ARGUMENT

I. Williams' Refusal to Stipulate to Restitution was an Improper and Irrelevant Sentencing Factor; He is Therefore Entitled to Resentencing.

A. In sentencing Williams, the circuit court actually relied on an improper factor – Williams' refusal to stipulate to restitution.

The State claims that Williams' refusal to stipulate to restitution was not an improper sentencing factor. Its argument in this regard hinges on the premise that the circuit court was wrong about restitution. That is, the State insists that Williams was, in fact, legally responsible for restitution for R.W.'s funeral expenses. (State's Resp. Br. at 4-5).

The State is precluded from making this argument, however. At sentencing, the circuit court agreed with Williams that he was not liable for restitution. (74:26; App. 109). It therefore entered a judgment of conviction stating that Williams did not owe any restitution. (35; App. 113-14). The State could have appealed (or cross-appealed) from the order denying its restitution claim. *See* WIS. STAT. § 809.10(2). It chose not to do so. As a result, the State cannot now claim that Williams is legally responsible for restitution. It has waived appellate review of this issue. The circuit court's restitution order is therefore final and conclusive for purposes of this appeal.[1] *See* ***Washington v.***

[1] In any event, the State is wrong in its assertion that Williams should have been liable for restitution. There are two components to the question of whether restitution can be ordered. First, the claimant must be a "direct victim" of the crime. Second, there must be a causal (continued)

Hicks, 109 Wis. 2d 10, 13, 325 N.W.2d 68 (Ct. App. 1982) (respondent waived appellate review of adverse issue by failing to cross-appeal); ***Campbell v. Sutliff***, 193 Wis. 370, 378, 214 N.W. 374 (1927) (errors claimed to be prejudicial to appellee or respondent cannot be considered in the absence of separate or cross appeal), *overruled in part on other grounds in* ***Powers v. Allstate Ins. Co.***, 10 Wis. 2d 78, 102 N.W.2d 393 (1960).

The State further argues that it was proper for the circuit court to consideration Williams' opposition to restitution as an indication that Williams lacked remorse for his actions. (State's Resp. Br. at 5-7). However, there was no logical connection in this case between Williams' refusal to stipulate to a legally deficient restitution claim and his level of remorse. It would be patently unreasonable to conclude that Williams' refusal to stipulate to what would have been an erroneous restitution order reflected any sort of lack of remorse.

---

connection between the defendant's conduct and the harm suffered by the claimant. *See* ***State v. Hoseman***, 2011 WI App 88, ¶ 16, 334 Wis. 2d 415, 799 N.W.2d 479. The State completely overlooks the fact that the first component – that the claimant be a direct victim of the crime – is missing here. Williams pled guilty to attempted armed robbery of B.P., not of R.W. (27; 73:7; *see also* 2). Also, Williams did not plead guilty to any crime related to the shooting of R.W., such as felony murder or recklessly endangering safety. As such, R.W. was not a direct victim of the crime considered at sentencing in this case. B.P. was only direct victim. *See* ***State v. Lee***, 2008 WI App 185, ¶ 11, 314 Wis. 2d 764, 762 N.W.2d 431 (officer, who was injured while attempting to apprehend defendant immediately after armed robbery and burglary, was not a victim of the crimes considered at sentencing, where the only crimes considered at sentencing were armed robbery and burglary, and not any crime related to defendant's flight from the officer).

Williams' refusal to stipulate to the State's restitution claim was therefore an improper sentencing factor – one that was totally irrelevant and immaterial to the question of what sentence he should receive. The State concedes that the circuit court "actually relied" on Williams' opposition to paying restitution. (State's Resp. Br. at 8-10). Thus, Williams is entitled to resentencing unless the State proves that the error was harmless, i.e., that there is no reasonable probability that it contributed to the sentence. *See* ***State v. Travis***, 2013 WI 38, ¶ 49, 66, 347 Wis. 2d 142, 832 N.W.2d 491; ***State v. Dyess***, 124 Wis. 2d 525, 541-43, 370 N.W.2d 222 (1985).

B. The circuit court's reliance on Williams's refusal to stipulate to restitution was not harmless.

The State argues that the circuit court's consideration of Williams' objection to restitution was harmless because the circuit court considered many other factors in imposing sentence. (State's Resp. Br. at 10-14). However, "the fact that other information might have justified the sentence . . . is irrelevant when the court has relied on [an improper sentencing factor] as part of the basis of the sentence." *See* ***Travis***, 347 Wis. 2d 142, ¶ 47 (quoting ***United States ex rel. Welch v. Lane***, 738 F.2d 836, 866 (7th Cir. 1984)).

Furthermore, the record of the sentencing hearing indicates that the circuit court's reliance on this improper factor contributed to the sentence in this case. The circuit court stated that it was "certainly considering" Williams' refusal to "join in on" the restitution claim, which it believed reflected his "lack of remorse under the circumstances." (74:26; App. 109). This statement shows that the court treated Williams' refusal to stipulate to the State's restitution

claim as an aggravating factor in deciding what sentence to impose. As a result, this improper factor appears to have negatively impacted the sentence that Williams ultimately received.

The State points out that the PSI writer also believed that Williams was not remorseful. It therefore insists that the circuit court "had information other than [Williams'] opposition to paying restitution that indicated Williams' lack of remorse." (State's Resp. Br. at 14). However, although the circuit court had previously noted that the PSI writer believed Williams was not remorseful, the court never stated that it also believed Williams was not remorseful until it considered his refusal to stipulate to restitution. As such, Williams' refusal to stipulate to restitution appears to have been the determinative factor the court relied on to infer he lacked remorse.

Moreover, even if the circuit court did believe that other actions by Williams demonstrated some degree of remorselessness on his part, the court's consideration of his opposition to the restitution claim would still likely have impacted the sentence Williams ultimately received. After all, this improper sentencing factor would have led the court to believe that Williams was even less remorseful than the record would otherwise suggest. Thus, even if the court believed that others factors demonstrated some level of remorselessness in Williams, there is a reasonable probability that his decision to challenge the restitution claim negatively affected the sentence he received. His sentence should therefore be vacated and the case remanded for a resentencing hearing.

II. The Retroactive Application of the Mandatory DNA Surcharge Statute Violates *Ex Post Facto* Law in this Case Because Williams Had Previously Been Ordered to Provide a DNA Sample and Pay the Surcharge in a Prior Case.

As noted in his brief-in-chief, Williams had previously been ordered to provide a DNA sample and pay the DNA surcharge in a prior case. (Williams' Initial Br. at 21; *see also* 47:21-23). He therefore would not have needed to provide a DNA sample after his conviction in this case. The mandatory surcharge was therefore not used to cover the costs of taking a sample from Williams or entering it into the database. Instead, the additional $250 DNA surcharged was simply punitive.

State argues that this court should nonetheless reject Williams' *ex post facto* challenge because, it claims, he failed to show that there is no rational connection between the method of calculating the surcharge and the other costs the surcharge is intended to fund. (State's Resp. Br. at 16). In this regard, the State notes that funds collected from DNA surcharges may be used for purposes other than the collection of DNA samples from convicted criminal defendants and the entry of the resulting profiles into the DNA database. (*Id*.) DNA surcharge funds may also be used for analyzing DNA samples collected as part of law enforcement investigations; when requested by a defense attorney, pursuant to a court order, regarding his or her client's specimen; and, subject to DOJ rules, at the request of an individual regarding his or her own specimen. *See* WIS. STAT. § 165.77(2)(a)1. In addition, DNA surcharge funds may be used for comparing the DNA profiles from such samples as permitted by WIS. STAT. § 165.77.

In ***State v. Radaj***, 2015 WI App 50, 353 Wis. 2d 633, 866 N.W.2d 758, however, this court acknowledged that DNA surcharges fund these other DNA-analysis-related activities. ***Id.***, ¶ 10. Nevertheless, the court held that there was no conceivable reason why the costs of any other DNA-analysis-related activities permitted under WIS. STAT. § 165.77 would generally increase in proportion to the number of convictions, let alone in direct proportion to the number of convictions. ***Id.***, ¶ 32. Similarly, there is also no reason why the costs of other DNA-analysis-related activities permitted under WIS. STAT. § 165.77 would generally increase in proportion (let alone in direct proportion) to the number of additional convictions entered after a defendant has already provided a sample and been assessed a surcharge in a prior case.

There is nothing inherent with multiple convictions that requires multiple surcharges. This is true even if an additional surcharge (or surcharges) is imposed in a subsequent case, rather than in the same action. In such subsequent cases, the mandatory DNA surcharge statute simply requires as many additional surcharges as there are convictions, without any regard for whether any DNA testing was involved in the case. Thus, in such cases, the surcharge is simply a mandatory punitive measure that bears no relation to actual DNA costs created by a defendant. It simply enhances the penalty for each subsequent conviction as a matter of course.

If the DNA surcharge were simply a cost-recovery measure, then it would match (at least roughly) DNA costs. It is not difficult to imagine a DNA surcharge that would be non-punitive in this respect. Requiring a person to pay a surcharge only if his or her DNA sample is taken or if a case involves DNA testing would make sense as a cost-recovery

method. But requiring a defendant to pay an additional mandatory surcharge for another conviction in a subsequent case, without any consideration of whether he or she created a DNA costs, is simply punitive. *See* ***Radaj***, 353 Wis. 2d 633, ¶¶ 30-32.

Accordingly, the mandatory $250 DNA surcharge imposed in this case should be vacated as an unconstitutional *ex post facto* penalty as applied to Williams.

CONCLUSION

For the foregoing reasons, Jamal Williams respectfully requests that this court reverse the circuit court's order denying his postconviction motion for resentencing, vacate his sentence, and remand the case to the circuit court for a new sentencing hearing. Williams also requests that this court vacate the portion of the judgment of conviction that requires him to pay a $250 DNA surcharge.

Dated this 11th day of January, 2017.

Respectfully submitted,

LEON W. TODD
Assistant State Public Defender
State Bar No. 1050407

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202
(414) 227-4805
Email: toddl@opd.wi.gov

Attorney for Defendant-Appellant

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 1,832 words.

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 11th day of January, 2017.

Signed:

LEON W. TODD
Assistant State Public Defender
State Bar No. 1050407

Office of State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202
(414) 227-4805
Email: toddl@opd.wi.gov
Attorney for Defendant-Appellant