

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

State of Wisconsin,

Plaintiff-Respondent,

vs.

Appeal No. 2016AP1264

Jason Napiwocki,

Portage County Circuit Court

Case No. 2014CF50

Defendant-Appellant.

ON NOTICE OF APPEAL TO REVIEW A RESTITUTION ORDER AND
POST-CONVICTION ORDER ENTERED IN THE CIRCUIT COURT FOR
PORTAGE COUNTY, THE HONORABLE ROBERT SHANNON PRESIDING

APPELLANT'S BRIEF

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ISSUES PRESENTED

- I. Whether the district court erred in denying Mr. Napiwocki's post-conviction motion to vacate the restitution order for \$51,184.54 and order a new restitution hearing be held?

The trial court denied Mr. Napiwocki's post-conviction motion, finding "no irregularity in the statutory process followed here" to determine the restitution amount. (45:13; App. 22).

STATEMENT ON ORAL ARGUMENT

Mr. Napiwocki would welcome the occasion to argue this case to the Court if given the opportunity. Oral argument may aid the Court in focusing on the contested issues and relevant facts and in deciding those issues in this appeal.

STATEMENT ON PUBLICATION

Mr. Napiwocki believes the Court's opinion in the instant case will not merit publication because it will apply established rules of law to a factual situation not significantly different from that in already published opinions.

STATEMENT OF THE CASE AND FACTS

This is a direct appeal of a criminal order of restitution.

Jason Napiwocki pled no contest to five misdemeanor counts related to work he did remodeling Jason Grezinski's home pursuant to a contract they signed in July 2012. Generally speaking, the crimes Mr. Napiwocki pled to constituted technical lapses in how he executed the contract, including failing to specify in writing when the project was to begin and end (Counts 1 and 2 of the amended information) and using funds received by Mr. Grezinski for other purposes prior to completion of the project (Count 5). (13). Mr. Napiwocki does not challenge any of his convictions nor the sentence imposed by the circuit court, except the amount it ordered for restitution of \$51,184.54 on May 28th, 2015. (22; App. 2). It re-affirmed this amount by denying Mr. Napiwocki's post-conviction motion to vacate it and hold a new restitution hearing in an order dated June 8th, 2016. (35; App. 18).

Court Commissioner David Worzalla originally held a restitution hearing in this matter on May 14th, 2015. He heard testimony from four individuals: Jason Grezinski (the victim whose house was substantially remodeled by Mr. Napiwocki despite the technical violations to which he pled guilty); Jeff Lochinger (Mr. Napiwocki's assistant who helped with the remodel work); Mr. Napiwocki; and his wife, Denise Napiwocki. Several key facts were not in dispute at the hearing, including the following:

1. Mr. Grezinski paid Mr. Napiwocki \$45,400 in relation to the work that was to be done. (43:9, 21, 53).

2. Mr. Napiwocki and Mr. Lochinger performed a substantial amount of work remodeling Mr. Grezinski's house. (43:10-11, 38, 41-43, 58, 64).

3. Mr. Napiwocki incurred expenses for the project that he paid for. (43:22, 51-52, 69-70).

4. The expenses where documentation could be provided by Mr. Napiwocki at the hearing added up to \$8,824.90. (43:51); *see also* Restitution Hearing Findings of Fact, Conclusions of Law and Judgment (22; App. 2); *see also* twelve Feltz Lumber receipts adding up to that amount (32:19-24; App. 12-17).

Two main issues were in dispute at the hearing:

1. Mr. Grezinski submitted four invoices from Cooper Contracting for a total of \$14,609.44 that he claimed were for work that was necessary to correct and/or finish what Mr. Napiwocki did. (43:25-26); *see also* Restitution Hearing Findings of Fact, Conclusions of Law and Judgment (22; App. 2); *see also* 5/14/15 Hearing Exhibits Nos. 1-4. Mr. Napiwocki objected to the admission of these exhibits and their consideration by the Court because he claimed they related to work that was not covered by the contract signed by him and Mr. Grezinski. (43:27). The objection was overruled and the exhibits were admitted into evidence. (43:27-28).

2. Mr. Napiwocki and Mr. Lochinger obviously worked on the project and therefore provided some amount of labor which has monetary value, but Mr. Grezinski dismissed that stating "the hours [claimed] are a joke." (43:22). Mr. Lochinger disagreed, stating he estimated he worked nearly 500 hours on the

project. (43:38). Mr. Napiwocki also disagreed with Mr. Grezinski, stating that he also put in a substantial amount of hours, although he did not have the calendar documenting those hours at the hearing. (43:53, 70, 79, 86). Mr. Napiwocki's 2012 calendar with the hours worked by him and Mr. Lochinger is in the court record as an attachment to Mr. Napiwocki's post-conviction motion. (32:10-13; App. 3-6)¹. Mr. Napiwocki also attached documentation for expenses he incurred and paid that were inexplicably not submitted at the restitution hearing of \$150 for two permits, \$206.84 for a dumpster rental, and \$2,200 for a lift rental, paid via check numbers 1123 and 1138. (32:14-18; App. 7-11).

After taking testimony and hearing closing arguments, Court Commissioner Worzalla stated that he was "basically... acting as a referee in this matter," and would draft proposed findings of fact and conclusions of law for review by Judge Finn, and the parties would get that proposed decision in writing. (43:99-100). No actual fact finding or application of any facts to applicable law was made on the record at the hearing, and no request was made for the parties to submit any further materials, evidence, or objections.

On May 18th, 2015- only two business days after the hearing was held- Court Commissioner Worzalla signed a "Restitution Hearing Findings of Fact, Conclusions of Law and Judgment" and found restitution due in the amount of \$51,184.54, consisting of the \$45,400 the parties agreed Mr. Grezinski paid to Mr.

¹ The days working on Mr. Grezinski's house are marked "Jason's house," or "Jason G's," or "J. Gre." or "J-G." The hours Mr. (Jason) Napiwocki and Mr. (Jeff) Lochinger worked are denoted at the bottom of each day, for example for July 9th, it is reported "11 hrs J/J," meaning they each worked 11 hours that day. The total hours worked between the two are approximately 990, substantiating Mr. Lochinger's claim of 500 hours.

Napiwocki, less the \$8,824.90 he paid to Feltz Lumber, plus the \$14,609.44 Mr. Grezinski paid to Cooper Contracting. (22; App. 2).

Significantly, Court Commissioner Worzalla did not address or discuss any of the following:

1. What amount should be offset for the monetary value of the labor performed by Mr. Napiwocki and Mr. Lochinger;
2. What amount should be offset for expenses other than the Feltz Lumber that Mr. Napiwocki paid for;
3. Why Mr. Napiwocki's objection to the Cooper Contracting work as unrelated to the contract at issue was overruled and that amount included in the restitution amount.

On May 28th, 2015, Judge Finn adopted Court Commissioner Worzalla's restitution determination with no further analysis or explanation. (22; App. 2).

On April 1st, 2016, Mr. Napiwocki filed a post-conviction motion to vacate the restitution order, hold a new restitution hearing, and to stay restitution payments pending final resolution of the issues raised in the meantime. Mr. Napiwocki noted all of the undisputed facts and two main disputed issues as recited above, and argued that inadequate reasoning and explanation was given by the Court when signing the order for \$51,184.54 in restitution. (32). Mr. Napiwocki specifically argued that the Court erred when not offsetting things of value he imparted to the victim as required by statute and case law, including costs and expenses he paid and the value of his and his assistant's time and labor. (32:5-6). He also noted the Court erred by not explaining why it found, despite

Mr. Napiwocki's timely objection at the restitution hearing, the Cooper Contracting invoices were related to the crimes of conviction and properly included in the restitution awarded. (32:6).

The Court, by Judge Robert Shannon, held a hearing on Mr. Napiwocki's post-conviction motion on May 26th, 2016. The Court first found that the parties received a restitution hearing before Court Commissioner Worzalla as provided by Wis. Stat. § 973.20(13)(c)(4). (45:10; App. 19). The Court then noted that nothing "requires" a court to make specific findings on "every claim or defense made at the restitution hearing." (45:11; App. 20). The Court described the timeline required by the statute in that the commissioner is to submit proposed findings of fact and conclusions of law to the circuit judge within 60 days, which is then to determine the amount of restitution due within 30 days and incorporate that amount into the sentence or probation ordered. *See id.* The Court found that neither party submitted any proposed findings of fact and conclusions of law to Commissioner Worzalla, but failed to note that this was not requested or ordered to be done, nor that his submission of same to Judge Finn occurred only two business days after the hearing. (45:12; App. 21). Ultimately, Judge Shannon found "no irregularity in the statutory process followed here," and denied Mr. Napiwocki's motion because the relief he sought of a "*de novo* hearing" was "not statutorily authorized." (45:13; App. 22).

Just as Court Commissioner Worzalla and Judge Finn before him, Judge Shannon never addressed the substantial and only issues raised in Mr. Napiwocki's post-conviction motion: (1) why the expenses from the Cooper

Contracting invoices were admitted over objection and why they were deemed related to the contract signed by Mr. Napiwocki and Mr. Grezinski, and (2) why the other expenses incurred by Mr. Napiwocki, including most significantly for his and his assistant's time and labor, were not deducted from the restitution amount. This appeal now follows.

ARGUMENT

I. The restitution order must be vacated and a new hearing held because inadequate reasoning and explanation was given by the Court when arriving at the \$51,184.54 restitution amount.

A. Standard of Review

This Court reviews a trial court's determination of restitution for an erroneous exercise of discretion. *See State v. Anderson*, 215 Wis.2d 673, 677, 573 N.W.2d 872, 873 (Ct. App. 1997).

B. Argument

When a trial court fails to consider legislatively mandated criteria when arriving at a discretionary decision on a subject governed by relevant statutes, it abuses its discretion. *See Hartung v. Hartung*, 102 Wis.2d 58, 69, 306 N.W.2d 16, 22 (1981). In *Hartung*, the trial court ordered a husband to pay his wife maintenance in the amount of \$200 per month for eighteen months. *See id.* at 60, 306 N.W.2d at 17-18. When doing so, the trial court failed to give any reason why \$200 was the appropriate monthly amount or why it should cease after eighteen months. *See id.* at 68, 306 N.W.2d at 21. The trial court also did not discuss several statutory factors that were required to be considered when

determining an appropriate amount to award for maintenance. *See id.* at 67, 306 N.W.2d at 21. Because the trial court’s order lacked any basis in the record, the Wisconsin Supreme Court held it “cannot be deemed to be a rational determination,” *see id.* at 68, 306 N.W.2d at 21, and found that the trial court’s order constituted an abuse of discretion, both as to the monthly amount and the eighteen-month time limitation imposed. *See id.* at 69, 306 N.W.2d at 22.

In *Hartung*, the Court reiterated its long-standing holding that “the exercise of discretion is not the equivalent of unfettered decision-making.” *Id.* at 66, 306 N.W.2d at 20. It further held that

A discretionary determination, to be sustained, must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law. Additionally, and *most importantly, a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon **are stated and are considered** together for the purpose of achieving a reasoned and reasonable determination.* It is recognized that a trial court in an exercise of its discretion may reasonably reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning.

Id., 306 N.W.2d at 20-21 (emphasis added). The *Hartung* Court concluded that “it is not enough that the relevant factors upon which discretion could have been based may be found obscurely in the record... to be upheld it must be demonstrated on the record that those factors were considered in making the discretionary determination. *See id.* at 67, 306 N.W.2d at 21.

Here, Wis. Stat. § 973.20 governs restitution in criminal cases. Subsection (2)(b)(2) requires that trial courts deduct any value imparted from the defendant to the victim from the amount of restitution that would otherwise be ordered. *See*

also State v. Longmire, 272 Wis.2d 759, 777, 681 N.W.2d 534, 543 (Ct. App. 2004) (holding it is an erroneous exercise of discretion when a trial court does not adequately consider potential offset amounts when ordering restitution). The record in this case is replete with several things that should have offset the restitution that may otherwise have been ordered that was not adequately considered nor discussed by Court Commissioner Worzalla, Judge Finn or Judge Shannon. Broadly speaking, these include the following: (1) the costs and expenses paid by Mr. Napiwocki besides for Feltz Lumber (which was credited), including \$150 for two permits, \$206.84 for a dumpster rental, and \$2,200 for a lift rental (32:14-18; App. 7-11); and (2) the monetary value of Mr. Napiwocki's and Mr. Lochinger's time and labor. (32:10-13; App. 3-6). Also, none of the three judges ever explained why, despite Mr. Napiwocki's timely objection, the Cooper Contracting invoices that were submitted and entered as exhibits at the original restitution hearing were related to the crimes of conviction in this case and therefore properly included in any restitution amount ordered.

The trial court in this case (by three different judges at various stages) utterly failed to abide by *Hartung's* requirement of adequately considering and discussing the facts of record as applied to the relevant law governing the discretionary decision of how much to award for restitution. The current restitution order of \$51,184.54 must therefore be vacated and a new hearing held where all the aforementioned arguments can be adequately considered, discussed and applied when determining what amount Mr. Napiwocki owes in restitution. The restitution payments Mr. Napiwocki is currently ordered to pay should be

stayed upon remand from this Court until restitution can be correctly and accurately calculated.

CONCLUSION

The trial court in this case was presented with various disputed issues pertaining to restitution, primarily the amount that should be deducted from restitution owed for Mr. Napiwocki and his assistant's time and labor, and for expenses he incurred other than for Feltz Lumber (which was deducted). The trial court was also presented with an objection to the Cooper Contracting invoices as not relating to the contract in question or Mr. Napiwocki's criminal actions. Despite three different judges taking action on various aspects of the restitution order, none ever considered and stated why or how these disputed issues called for \$51,184.54 in restitution, amounting to unfettered decision-making prohibited by *Hartung*. By not properly explaining its exercise of discretion, the trial court necessarily abused it. The restitution order in this case must be vacated, a new hearing held, and payments stayed in the meantime.

Respectfully submitted this 19th day of October, 2016 at Milwaukee, Wisconsin.

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,394 words.

CERTIFICATION FOR APPENDIX CONTENTS

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

CERTIFICATION OF ELECTRONIC COPY OF BRIEF BEING IDENTICAL TO PAPER COPY OF BRIEF

I hereby certify, pursuant to Wis. Stat. 809.19(12)(f), that the electronic copy of the brief, excluding the appendix, if any, filed in this case is identical to the text of the paper copy of the brief filed in this case.

CERTIFICATION OF FILING BY MAIL

I hereby certify, pursuant to Wis. Stat. 809.80(4)(a), that this Appellant's Brief and Appendix will be deposited in the United States mail for delivery to the Clerk of the Court of Appeals, P. O. Box 1688, Madison, WI 53701-1688, by first-class mail, or other class of mail that is at least as expeditious, on the 19th day of October, 2016. I further certify that the brief will be correctly addressed and postage pre-paid. Copies will be served on the parties by the same method.

Respectfully submitted this 19th day of October, 2016 at Milwaukee, Wisconsin.

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