

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 REPLY BRIEF

CHRISTOPHER DONOVAN
State Bar No. 1055112
Pruhs & Donovan, S.C.
757 N. Broadway, 4th Floor
Milwaukee, Wisconsin 53202
Phone (414) 221-1950
Fax (414) 221-1959

Attorney for Defendant-Appellant

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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.

The state, without citation to authority, argues that Wisconsin case law “does not impose a requirement that the [trial] court explicitly or specifically explain its [restitution] order in an in[-]depth manner, but rather there must be some basis for the decision.” Resp. Br. at 1. The state further argues that Mr. Napiwocki’s “primary concern” on appeal is that “the restitution order does not explain its reasoning to his satisfaction.” *Id.* at 2. Both of these arguments are incorrect. First, Wisconsin case law does require a trial court to provide explicit explanation of its discretionary decisions because those “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.” *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981) (emphasis added). Second, Mr. Napiwocki’s primary concern is that the trial court’s explanation here does not meet the *Hartung* standard, not that the court’s reasoning was not explained to his own “satisfaction.”

The trial court here never considered several substantial and disputed issues related to restitution raised by Mr. Napiwocki, nor has it ever stated how these issues did or did not impact its ultimate restitution determination. The court’s failure to consider and discuss these issues violates *Hartung*’s mandate and requires reversal. As noted in Mr. Napiwocki’s opening brief, the trial court failed to consider or discuss all of the following: (1) what amount should be offset

for the monetary value of the labor performed by Mr. Napiwocki and Mr. Lochinger¹; (2) that Mr. Napiwocki incurred expenses for the project beyond Feltz Lumber that he was not credited for²; and (3) why Mr. Napiwocki's objection to the Cooper Contracting work that he asserts was unrelated to the contract at issue and his criminal conduct was overruled and that amount included in the restitution order.³ See Def. Br. at 9-11.

To sustain a trial court's discretionary determination, *Hartung* requires it do more than exercise "unfettered decision-making"- it must consider and then state or discuss the facts and law it is relying upon to reach its decision. See *Hartung* at 66, 306 N.W.2d 20-21. It is not enough that the relevant facts and law may be "found obscurely in the record" because the court must demonstrate "on the record that those factors were considered in making" its ultimate determination. See *id.* at 67, 306 N.W.2d at 21. The trial court did not engage in that process here, and Mr. Napiwocki is entitled to a new restitution hearing as a result.

¹ The state does not dispute Mr. Napiwocki's assertion that he and Mr. Lochinger performed a substantial amount of work remodeling the victim's home, see Def. Br. at 7, and thus the state concedes this fact. See *Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Wis. Ct. App. 1979).

² This is also not disputed by the state as it concedes "these amounts could potentially be subject to offset." Resp. Br. at 3. But the state argues these expenses were not improperly ignored by the court because they were not presented to it at the restitution hearing. They were raised and presented in Mr. Napiwocki's post-conviction motion, however, and were nonetheless still ignored and not accounted for.

³ The state argues the victim had to hire Cooper Contracting to "undo the damage to his residence caused by the defendant, and is clearly permissible restitution under Wis. Stat. § 973.20(2)(b) as the costs of repair." Resp. Br. at 3. But the trial court never made any finding that the Cooper Contracting amount (1) was related to the work covered by Mr. Napiwocki's criminal conduct or (2) was reasonably necessary to repair any damage caused by Mr. Napiwocki.

Lastly, the state criticizes Mr. Napiwocki's reliance on *State v. Longmire*, 272 Wis.2d 759, 777, 681 N.W.2d 534, 543 (Ct. App. 2004) to argue that it is an erroneous exercise of discretion when a trial court does not adequately consider potential offset amounts when ordering restitution. It attempts to distinguish *Longmire* because it dealt with "actual expenses" incurred by the defendant whereas Mr. Napiwocki is not only asking for an offset for expenses incurred beyond Feltz Lumber, but also for his and Mr. Lochinger's labor. *See* Resp. Br. at 3. The state, again without citation to any authority, argues "labor is different" from expenses and that the restitution owed "could be offset entirely" based on the number of hours claimed. But this is a determination for the trial court to make after considering all relevant evidence, arguments, and applicable law. That any offset could potentially meet or exceed the restitution claimed (whether it be for labor or expenses) is always a possibility and is entrusted to the sound discretion of the trial court to consider and resolve. The state offers no reasoned or principled argument for why "labor is different" for offset analysis, and this Court should not try to find one. This Court should only be concerned that the trial court here did not even consider Mr. Napiwocki's offset arguments and therefore abused its discretion.

The trial court in this case thrice failed to consider or discuss key contested issues relating to restitution- once by the commissioner who presided over the restitution hearing, once by Judge Finn who adopted the commissioner's recommendation without comment or question, and once by Judge Shannon who denied Mr. Napiwocki's post-conviction motion that contained all the arguments

(and authorities) now raised on this appeal. To this day, Mr. Napiwocki still has not had his principal arguments in favor of a lower restitution amount considered by a court, nor any rejection of them explained. He does not ask nor expect this Court to consider the merits of his offset arguments. But he does ask that this Court find he be afforded the opportunity under *Hartung* to have his claims fully considered and accounted for at a new restitution hearing. He therefore asks that this Court vacate the current restitution order, order that a new hearing be held, and stay any restitution payments in the meantime.

Respectfully submitted this 3rd day of February, 2017 at Milwaukee, Wisconsin.

CHRISTOPHER DONOVAN
State Bar No. 1055112
Pruhs & Donovan, S.C.
757 N. Broadway, 4th Floor
Milwaukee, Wisconsin 53202
Phone (414) 221-1950
Fax (414) 221-1959

Attorney for Defendant-Appellant

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 1,094 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 3rd day of February, 2017. 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 3rd day of February, 2017 at Milwaukee, Wisconsin.

CHRISTOPHER DONOVAN

State Bar No. 1055112

Pruhs & Donovan, S.C.

757 N. Broadway, 4th Floor

Milwaukee, Wisconsin 53202

Phone (414) 221-1950

Fax (414) 221-1959

Attorney for Defendant-Appellant