STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP001541-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHAWN T. WISKERCHEN,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District II, Affirming a Restitution Order and Amended Judgment of Conviction Entered in the Racine County Circuit Court, the Honorable Faye M. Flancher, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

JEREMY A. NEWMAN
Assistant State Public Defender
State Bar No. 1084404

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 264-8566
newmanj@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

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ARGUMENT

The dispositive issue in this case is whether a circuit court may, pursuant to the authority granted in Wis. Stat. § 973.20, order a defendant to pay restitution for a victim's claimed losses not caused by a "crime considered at sentencing." Below, the state argued, and the court of appeals agreed, that the restitution order was authorized, under ***State v. Queever***, 2016, WI App 87, 372 Wis. 2d 388, 887 N.W.2d 912, because the alleged prior burglaries were "part of a single course of criminal conduct" related to Wiskerchen's May 8 burglary. (App. 113-14, 119-20; State's court of appeals br. at 8-17).

The state now concedes that the victim's alleged losses were not caused by a Wiskerchen's conduct related to a "crime considered at sentencing." (State's br. at 3, 21, 33).

Rather, in this Court the state sets forth a brand new argument, unsupported by the statutory text, history, or precedent, that courts may, within their "broad discretion," order a defendant to pay restitution "beyond losses directly flowing from the offense of conviction" pursuant to Wis. Stat. § 973.20(13)(a)5. (State's br. at 2, 20, 41-42). The state's new argument fails because the discretionary catch-all provision, which permits to consider any other appropriate factor when considering a defendant's ability to pay restitution, does not expand the legal scope of the statute, which repeatedly limits restitution to losses caused by a "crime considered at sentencing."

As argued below, and in addition to the arguments set forth in Wiskerchen's brief-in-chief, this Court should reject the state's new argument for the following reasons.

First, the restitution statute as a whole, and subsections 973.20(1g)(a), (1r), (2), (5)(a), (13)(a)1.-5., and (14)(a) specifically, conclusively demonstrates that a prerequisite to a circuit court's exercise of discretion, "in determining whether to order restitution and the amount thereof," is that a victim's losses must have been caused by a "crime considered at sentencing." *See* Wis. Stat. § 973.20(13)(a).

Second, in its effort to defend its expansive interpretation of the scope of the restitution statute, the state either misreads or misstates the reasoning and rule set forth in ***State v. Rodriguez***, 205 Wis. 2d 620, 556 N.W.2d 140 (Ct. App. 1996); ***State v. Madlock***, 230 Wis. 2d 324, 602 N.W.2d 104 (Ct. App. 1999); and ***State v. Canady***, 2000 WI App 87, 234 Wis. 2d 261, 610 N.W.2d 147, concerning the meaning and import of the statutorily defined phrase "crime considered at sentencing" and the requirement that restitution must reflect a causal connection between the defendant's course of conduct related to a crime considered at sentencing and the victim's claimed losses.

Third, the state's request for a second contested restitution hearing is meritless. In the circuit court, the state and the victim had a full and fair opportunity to prove whether any of the victim's claimed losses were caused by Wiskerchen's May 8 burglary. Because the record demonstrates, and the state now concedes, that the victim's losses were not caused by Wiskerchen's conduct related to a "crime considered at sentencing," remand for a second contested restitution hearing is unnecessary and inappropriate.

I. The Restitution Statute, By Its Clear And Plain Statutory Text, Authorizes Circuit Courts To Order Restitution For A Victim's Losses Caused By A "Crime Considered At Sentencing."

In addition to principles of statutory interpretation set forth by the state (state's br. at 22-23), the following key principles are also worth noting and relevant to the interpretation of Wis. Stat. § 973.20:

- "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially defined words or phrases are given their technical or special definitional meaning." ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

- Statutory history, as opposed to legislative history, consists of previously enacted and repealed or amended provisions of a statute and is part of a plain meaning analysis. ***County of Dane v. Labor and Industry Review Com'n.***, 2009 WI 9, ¶27, 315 Wis. 2d 293, 759 N.W.2d 571. By analyzing the changes the legislature has made over the course of the statute's existence, the court "may be assisted in arriving at the meaning of the statute." ***Id.***

- This Court is "assisted by prior decisions that have examined similar statutory questions." ***Bostco LLC v. Milwaukee Metro. Sewerage Dist.***, 2013 WI 78, ¶46, 350 Wis. 2d 554, 835 N.W.2d 160.

The plain text of the restitution statute, read as a whole, and Wis. Stat. §§ 973.20(1g)(a), (1r), (2), (5)(a), (13)(a)1.-5., and (14)(a) specifically, limits the scope of criminal restitution to a victim's losses caused by a "crime considered at sentencing." Further, the plain meaning of §§ 973.20(13)(a)1.-5. is that, in exercising discretion to determine "whether to order restitution and the amount thereof," courts are required to consider the defendant's ability to pay restitution. In doing so, courts have a duty to consider any appropriate factor. The meaning and application of § 973.20(13)(a)5. does not alter or expand the scope of a court's legal authority to order restitution. Rather, the only reasonable interpretation of this catch-all provision is that the legislature simply granted courts broad discretion to consider any appropriate factor in determining "*whether* to order restitution and the amount thereof." *See* Wis. Stat. § 973.20(13)(a).

First, § 973.20(1g)(a) defines a "[c]rime considered at sentencing" as "any crime for which the defendant was convicted and any read-in crime." Therefore, as used in § 973.20, a "crime considered at sentencing" explicitly includes only crimes of which the defendant was convicted and "read-in crimes," as defined by § 973.20(1g)(b), and excludes alleged crimes that were not read-in at sentencing as part of a plea agreement.

Whereas the state asserts that § 973.20(1g) "merely defines what "[c]rime considered at sentencing" means when used elsewhere in the statute" (state's br. at 21), no court is "at liberty to disregard the plain, clear words of the statute." ***Id.***,¶46. Rather, these definitional subsections must be read "where possible to give reasonable effect to every word, in order to avoid surplusage." ***Id.*** When the issue presented in

this case is essentially what the term "crime considered at sentencing" means, the state errs in its attempt to ignore the significance of the legislature's "special definitional meaning" of a "crime considered at sentencing." As is clear from a complete and plain reading of the restitution statute, the statutory definition of a "crime considered at sentencing" is key to determining the lawful scope of a circuit court's authority to order restitution.

Second, § 973.20(1r) requires courts, "[w]hen imposing sentence or ordering probation for any crime…for which the defendant was convicted," to order the defendant to make "full or partial restitution under this section to any victim of a crime considered at sentencing…unless the court finds a substantial reason not to do so and states the reason on the record."

As relevant here, Wiskerchen does not contest the fact N.E.D. is a "victim of a crime considered at sentencing," specifically the May 8, 2015, burglary to which he pled. However, the statutory text reveals that it is not enough that N.E.D. is a victim of *a* crime considered at sentencing *if* the losses she claimed restitution for were not caused by *that* crime. The state's assertion to the contrary is based on a flawed and strained reading of the statute and hinges entirely on § 973.20(13)(a)5.

Third, §§ 973.20(2)-(5) set forth the circuit court's statutory authority to order restitution in a wide range of factual circumstances. Subsection 973.20(2), applies to circumstances where "a crime considered at sentencing resulted in damage to or loss or destruction of property." Under this subsection, the court may order the defendant to return property to the owner or pay the owner the value of the property. Wis. Stat. § 973.20(2)(a) & (b). However, the

court's authority to proceed under this section is contingent on the damaged, lost, or destroyed property being a result of a "crime considered at sentencing." Wis. Stat. § 973.20(2). Plainly, if the victim's losses were not the result of a "crime considered at sentencing," the court may not proceed under § 973.20(2).

Subsection 973.20(5)(a) sets forth a similar, if not substantively identical, limitation on the circuit court's discretionary authority: "In any case, the restitution order may require that the defendant…[p]ay all special damages, but not general damages, substantiated from the record, which could be recovered in a civil action against the defendant *for his or her conduct in the commission of a crime considered at sentencing*." (Emphasis added). By limiting restitution to special damages recoverable in a civil action against the defendant for his conduct "in the commission of a crime considered at sentencing," the legislature plainly excluded, "in any case," otherwise recoverable civil damages that were not caused by conduct related to a "crime considered at sentencing." Again, if the victim's claimed losses were not caused by a "crime considered at sentencing," the court may not proceed under § 973.20(5)(a).

Fourth, § 973.20(13)(a)5., the discretionary catch-all provision upon which the state rests its entire argument in this Court, is part of a paragraph of the statute that consists of four other enumerated discretionary factors circuit courts are required to consider "in determining whether to order restitution and the amount thereof." Wis. Stat. § 973.20(13)(a). The enumerated factors all relate to the defendant's ability to pay restitution: the *amount of loss* suffered by any victim *as a result of a crime considered at sentencing*, the financial resources of the defendant, the present and future earning ability of the defendant, and the needs and earning ability of the defendant's dependents.

Wis. Stat. § 973.20(13)(a)1.-4. (Emphasis added). The catch-all factor provides that the circuit court is to consider "[a]ny other factors which the court deems appropriate." Wis. Stat. § 973.20(13)(a)5. This subdivision must be interpreted in context and, as the state concedes, as "bringing within a statute categories similar in type to those specifically enumerated." (State's br. at 25) (citing ***Fed. Mar. Comm'n v. Seatrain Lines, Inc.***, 411 U.S.726, 734 (1973)).

Finally, § 973.20(14)(a) places the "burden of demonstrating by the preponderance of the evidence the amount of loss sustained by a victim as a result of a crime considered at sentencing" on the victim. In line with every substantive provision of the restitution statute, § 973.20(14)(a), means that if a victim cannot prove, by a preponderance of the evidence, that the victim's claimed losses are the result of a crime considered at sentencing, a court may not order the defendant to pay restitution under § 973.20(14)(a).

Based on the above statutory provisions, the plain meaning of this statutory text is clear: courts may, within their discretion, order restitution for a victim's losses caused by a "crime considered at sentencing," and, as part of that exercise of discretion, courts must consider a defendant's ability to pay when "determining whether to order restitution and the amount thereof."

In addition to the plain statutory text, Wiskerchen's plain meaning analysis is supported by the context and history of the restitution statute, as previously recognized by this Court. Specifically, the history of the statute confirms that restitution must reflect a victim's losses caused by a "crime considered at sentencing" and in exercising discretion to

determine whether to order full or partial restitution, courts are required to consider a defendant's ability to pay.

The statutory requirement that convicted criminals pay restitution was first mandated by Wis. Stat. § 973.09 (1979-80). *See* ***State v. Sweat***, 208 Wis. 2d 409, 418, 561 N.W.2d 695 (1997). In 1987, the legislature enacted Wis. Stat. § 973.20 to "set restitution requirements" and amended § 973.09 to require conformance with § 973.20.

With regard to § 973.20(13)(a), the Judicial Council Note indicates that § 973.20(13)(a) was "patterned on 18 USC 3664(a). Prior s. 973.09(1m)(a), stats., *similarly required the court to consider the defendant's ability to pay when determining the amount of restitution*." (Emphasis added). Wisconsin Stat. § 973.09(1m)(a) (1985-86) provided, in relevant part: "In determining the amount and method of payment of restitution, the court shall consider the financial resources and future ability of the probationer to pay. The court may provide for payment of restitution to the victim up to but not in excess of the pecuniary loss caused by the offense." *See also* ***State v. Sweat***, 208 Wis. 2d at 418-19 (describing Wis. Stat. § 973.20(13)(a)1.-4. as "ability to pay factors."); ***State v. Fernandez***, 2009 WI 29, ¶22-26, 316 Wis. 2d 598, 764 N.W.2d 509 ("Our case law has repeatedly stressed the necessity of considering a defendant's ability to pay when ordering restitution.").

Subdivision (13)(a)5., upon which the state's argument in this Court hinges, must be read and understood within this context. Paragraph (13)(a) is the statutory enactment of the requirement that before ordering a defendant to pay criminal restitution, the court *must* consider the defendant's ability to pay restitution. ***State v. Fernandez***, 316 Wis. 2d 598, ¶¶22-26 Moreover this Court, appears to have implicitly relied upon

§ 973.20(13)(a)5. when it recognized that "[i]n considering the defendant's ability to pay, courts may consider external legal realities as well, such as the fact that a restitution order is not dischargeable in bankruptcy." ***Fernandez***, 316 Wis. 2d 598, ¶26. In doing so, the Court appears to have recognized § 973.20(13)(a)5. for what it plainly is: a catch-all discretionary factor related to the requirement that courts consider a defendant's ability to pay before ordering restitution. There is simply no support for the state's argument that this discretionary catch-all provision authorizes courts to order restitution for losses not caused by a crime considered at sentencing, which are otherwise not authorized by the statutory text.

II. The State Misinterprets Relevant Precedent Related To The Meaning And Import Of The Statutory Phrase "Crime Considered At Sentencing."

As previously argued (brief-in-chief at 14-24), longstanding precedent has repeatedly held that pursuant to Wis. Stat. § 973.20, before restitution can be ordered, a causal nexus must be established between the "crime considered at sentencing" and the victim's claimed losses. *See e.g.*, ***State v. Canady***, 2000 WI App 87, ¶9, 234 Wis. 2d 261, 610 N.W.2d 147. Further, courts have defined a "crime considered at sentencing" in broad terms to include all facts and reasonable inferences concerning the defendant's activity related to the crime for which the defendant was convicted.[1]

[1] As previously argued, the court of appeals erred in ***State v. Queever***, 372 Wis. 2d 388, by extending the scope of criminal restitution beyond the statutory text: specifically to include losses not caused by a crime considered at sentencing or the defendant's course of conduct related to that crime. (Brief-in-chief at 18-24). For those reasons, this Court should overturn ***Queever*** and reaffirm the lawful scope of Wisconsin's restitution statute.

In response, the state presents and then attempts to refute a straw-man argument: that courts may order restitution even if a defendant's conduct "could have been charged as a separate crime." (State's br. at 19-21, 27-29, 39-40). The state's straw-man argument and rebuttal is flawed because the issue is not whether a defendant's conduct "could have been charged as a separate crime," but rather whether the defendant's alleged conduct, related to the "crime considered at sentencing," caused the victim's losses. (Brief-in-chief at 14-24),

Neither Wiskerchen nor the dissent below (App. 121-134) argues that the problem with the restitution order in this case is that the court ordered restitution for conduct that could have been charged as a separate crime. Rather, according to the plain meaning of the statutory text and established precedent, the restitution order here is unlawful because the victim's claimed losses were not caused by the defendant's course of conduct related to the "crime considered at sentencing."

III. Remand For A Second Contested Restitution Hearing Is Unnecessary And Inappropriate.

It is unnecessary and it would be inappropriate for this Court to remand Wiskerchen's case to the circuit court for a second contested evidentiary hearing on the issue of restitution. (*See* brief-in-chief at 28-30). The state mistakenly relies on ***Madlock*** to support its request for a do-over. (State's br. at 42-43). However, the key distinction between this case and ***Madlock***, is that the circuit court there denied the defendant's request for a contested restitution hearing and therefore remand was appropriate because the existing record was insufficient to determine the "fact or nature of the damage" or the "nexus between such possible damage and

Madlock's conduct." 230 Wis. 2d at 337. Thus, Madlock was entitled to the contested restitution hearing he sought. ***Id.***

In this case, the court held a contested restitution hearing at which the state solicited the testimony of the victim. (35; Supp. App. 41-46). The victim testified fully, on direct and cross-examination, and had a fair opportunity to set forth any evidence linking Wiskerchen's course of conduct related to his May 8 burglary with her claimed losses. Nevertheless, the record is clear that, while the victim testified that she believes Wiskerchen burglarized her home on prior occasions, none of the claimed losses for which restitution was ordered were the result of the May 8 burglary for which Wiskerchen was convicted. (35:5-11).

Thus, the only remaining dispute is whether the court was statutorily authorized to order Wiskerchen to pay restitution for the victim's claimed losses caused by alleged prior burglaries, none of which were "crime[s] considered at sentencing." Accordingly, there is no need and no basis for a second contested restitution hearing.

CONCLUSION

As argued above, this Court should reject the state's new argument that Wis. Stat. § 973.20(13)(a)5. authorizes the restitution order in this case. For this reason and the reasons argued in his brief-in-chief, Shawn T. Wiskerchen respectfully requests that this Court reverse the decision of the court of appeals and to remand this case to the circuit court with directions to vacate the restitution order without further proceedings.

Dated this 17th day of July, 2018.

Respectfully submitted,

JEREMY A. NEWMAN
Assistant State Public Defender
State Bar No. 1084404

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 264-8566
newmanj@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

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 2,956 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 17th day of July, 2018.

Signed:

JEREMY A. NEWMAN
Assistant State Public Defender
State Bar No. 1084404

Office of State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 264-8566
newmanj@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner