STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2017AP1906-CR

Michael A. Nieman,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR CLARK COUNTY, THE HONORABLE JON M. COUNSELL PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

Kerra Stumbris
District Attorney
State Bar No. 1095694

Attorney for Plaintiff-Respondent

Clark County District Attorney's Office
517 Court Street, Room 404
Neillsville, Wisconsin 54456
(715)743-5167

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES CITED Page

STATUTES CITED Page

CONSTITUTIONAL PROVISIONS Page

ISSUES PRESENTED

I. Whether the defendant is entitled to modification of the restitution award ordered by the circuit court.

The circuit court answered no.

II. Whether the defendant is entitled to a modification of the probation term ordered by the circuit court.

Not raised in the circuit court.

II. Whether trial and/or appellate counsel's performance was deficient, so as to undermine confidence in the proceedings and the outcome.

Not raised in the circuit court.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State of Wisconsin does not request oral argument or publication. The parties present all the issues in their briefs, and the case can be resolved by applying well-established principles of law.

STANDARD OF REVIEW

Reviewing courts review a circuit court's sentence under an abuse of discretion standard. *State v. Tuttle*, 21 Wis.2d 147, 124 N.W.2d 9 (1963). The existence of a "new factor" is a question of law, which an appellate court decides de novo. See *State v. Franklin*, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989).

An ineffective assistance of counsel claim presents a mixed question of law and fact. *State v. Carter*, 2010 WI 40, ¶19, 324 Wis. 2d 640, N.W.2d 695. Appellate courts review the circuit court's findings of fact under the clearly erroneous standard. *State v. Knight*, 168 Wis. 2d 509, 514, 484 N.W.2d 540 (1992). Whether counsel's performance was

constitutionally ineffective is a question of law, which the appellate court reviews de novo. *Id*.

ARGUMENT

I. NIEMAN IS NOT ENTITLED TO MODIFICATION OF THE RESTITUTION AWARD OR THE PROBATION TERM ORDERED BY THE CIRCUIT COURT.

A. The circuit court's restitution order was lawful.

Restitution orders in criminal cases are governed by Wis. Stat. § 973.20. When placing a defendant on probation, a sentencing court "*shall* 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 substantial reason not to do so and states the reason on the record." Wis. Stat. § 973.20(1r) (emphasis added). *See also* Wis. Stat. § 973.09(1)(b). The word "shall" imposes a mandatory duty on the sentencing court, and sentences that fail to include a restitution order are considered illegal and incomplete. *State v. Borst*, 181 Wis. 2d 118, 122, 510 N.W.2d 739 (Ct. App. 1993).

The court is required to consider a number of factors when determining whether to order restitution and in what amount. Those factors include the amount of loss suffered by the victim, the financial resources of the defendant and his or her ability to pay, and other factors deemed appropriate by the court. See Wis. Stat. § 973.20(13)(a). At sentencing, the defendant can stipulate to restitution or "present evidence and argument" on the relevant factors. Wis. Stat. § 973.20(13)(c). Within the statutory parameters and relevant factors, the ultimate determination of the amount of restitution owed rests in the discretion of the trial court. *State v. Boffer*, 158 Wis. 2d 655, 462 N.W.2d 906 (Ct. App. 1990); *State v. Anderson*, 215 Wis. 2d 667, 573 N.W.2d 872 (Ct. App. 1997). Where a defendant is fully aware of the amount of restitution and makes no effort to contest it, such failure to contest constitutes a "constructive" stipulation to the restitution award. *State v.*

Hopkins, 196 Wis. 2d 36, 42-43, 538 N.W.2d 543 (Ct. App. 1995). Further, a defendant's failure to present evidence on his financial resources and ability to pay, when given the chance to do so, bars a challenge to the court's failure to address such factors. *State v. Dugan*, 193 Wis. 2d 610, 624–25, 534 N.W.2d 897 (Ct. App. 1995); *State v. Boffer*, 158 Wis. 2d 655, 663, 462 N.W.2d 906 (Ct. App. 1990).

Wis. Stat. § 973.20(8) indicates that crime victims are not limited to a restitution order and may also collect damages in a civil action against the defendant under the same set of facts. Under that scenario, restitution payments are to be set off against the civil judgment, the validity of which must be asserted by the defendant in a hearing in the civil action. *Id*. A civil settlement agreement can have no effect upon a criminal restitution order while the defendant remains on probation unless the circuit court finds that enforcement of the restitution order would result in double recovery for the victim. *Huml v. Vlazny*, 2006 WI 87, ¶ 50, 56, 293 Wis. 2d 169, 716 N.W.2d 807. The burden of demonstrating applicable setoff to restitution rests with the defendant. *State v. Walters*, 224 Wis. 2d 897, 591 N.W.2d 874 (Ct. App. 1999); *State v. Behnke*, 203 Wis. 2d 43, 553 N.W.2d 265 (Ct. App. 1996).

Michael A. Nieman was charged on August 3, 2015 with felony theft by false representation and unauthorized use of an entity's identifying information or documents (R1). At a preliminary hearing on September 11, 2015, Clark County Sheriff's Detective Jason Bourget testified that he received a letter from Phillip Haas of Haas Sons, Inc. complaining of issues related to a contract between the company and Nieman (R50 4:17-20). Through his investigation, Detective Bourget learned that Nieman had contacted Haas to place a bid for the removal of manganese (R50 5:14-17). Nieman had represented that he worked for Demolitions Plus and had submitted his bid on the company's letterhead (R50 5:20-6:3). Detective Bourget testified that Dan Nieman, the owner of Demolitions Plus, said the last time Nieman worked for him was 2007 and that Nieman did not have permission to submit bids for the company (R50 6:20-7:6). Ultimately, Nieman

hauled the manganese per the agreement with Haas, but Haas never received payment from Nieman (R50 6:4-10, 8:3-6).

On February 22, 2016, Nieman entered guilty pleas to two amended counts of misdemeanor theft (R54 13:25-14:7). The joint sentencing recommendation from the parties involved the court withholding sentence and placing Nieman on probation for two years, with one condition being that he be ordered to make payments against a civil judgment ordered in Clark County Case 14CV142, a civil case stemming from Nieman's behavior in the present case (R54 2:12-25). Before the court would accept the plea agreement, the parties were asked to provide the legal authority for the court to order payments to the civil judgment rather than restitution, expressing its believe that Wis. Stat. § 973.20 required it to order restitution (R54 7:4-15). The State pointed to the civil judgment offset potential, but the court remained of the opinion that the statutes require restitution to be ordered, with the defendant required to assert the offset in the civil action (R54 8:12-9:10). Nieman made no objection to the restitution amount requested, but wanted to confirm that he would not be paying twice (R54 10:8-15, 9:11-15), and the court again explained the offset (R54 9:20-10:7). The court then conducted its full plea colloquy after this exchange. The court further agreed to allow Nieman to request early termination of his probation term if he had satisfied the restitution requirement after one (1) year of being on probation (R54 27:2-4).

Nieman then filed a motion for postconviction relief (R26), and a hearing was held on April 3, 2017 on the issue of restitution. Appellate counsel claimed the court was not required to order restitution, so the circuit court reviewed the restitution order under the discretionary portion of Wis. Stat. § 973.20(1r) instead (R55 3:5-15). The court reached the conclusion that the existing civil judgment did not create a substantial reason for the court to avoid the restitution order due to the more effective means of collection behind restitution through probation as opposed to a civil judgment (R55 3:16-4:23, 8:24-9:3, 9:12-14, 12:1-14).

Nieman now argues that this Court should remove the restitution award from his judgment of conviction and reduce his probation term to one (1) year based on the circuit condition that Nieman could apply for early discharge if the restitution was paid in full. Nieman's lack of an objection to the restitution order at the time of sentencing can be considered a stipulation to the amount of restitution under Wis. Stat. § 973.20(13)(c) and *Hopkins*. Nieman was told before he entered his guilty pleas that the court believed it was required to order restitution; he entered his pleas anyway. He has effectively waived the right to argue this issue in his appeal by failing to object to the original order. Further, Nieman admits repeatedly that he knows he owes the money and intends to repay it. He is still not contesting the fact that restitution is owed.

Instead, Nieman argues that the court's restitution order results in Nieman paying double what he should be, due to the existing civil judgment for the same offense. Nieman has been told by the circuit court and his attorney at sentencing that he would be able to offset the amounts (R54 9:20-10:17), and again by the court and appellate counsel at the hearing on his postconviction motion (R55 6:11-15, 10:22-11:25) Repeatedly raising the issue despite being informed of the law still does not make Nieman entitled to relief.

Additionally, Nieman contends that the court overlooked Nieman's medical condition in determining the amount of restitution. The court was informed at sentencing of the severity of Nieman's medical condition by trial counsel (R54 4:14-20). The court was also informed by trial counsel and by Nieman himself that Nieman has every intention of repaying what is owed (R54 4:9-13, 5:18-21, 20:23-21:8). When Nieman makes those representations to the court, it would be counterintuitive for the court to somehow find that Nieman does not have the financial resources or the future ability to pay or that his medical issue would bar him from be able to make the payments in the future.

The circuit court properly determined that Wis. Stat. § 973.20(1r) required it to order restitution. The court properly

determined that no substantial reason exists not to order restitution. Further, Nieman has failed in this appeal to present evidence or explain how his situation makes it impossible for him to be able to pay in the future such that this court should remove the restitution order. Instead, Nieman has consistently admitted his intention to repay what is owed, making it clear that he believes he will have future ability to pay.

B. Nieman has failed to establish that he is entitled to sentence modification.

A strong public policy exists against interfering with a sentencing court's discretion, with a presumption that the court acted reasonably. *State v. Perez*, 170 Wis.2d 130, 142, 487 N.W.2d 630 (Ct.App.1992). The defendant bears the burden of showing of an unreasonable or unjustified basis for the sentence. *Id*.

Wisconsin courts have inherent authority to modify criminal sentences. *State v. Hegwood*, 113 Wis.2d at 546, 335 N.W.2d 399. Sentence modification cannot be based solely on a court's later reflection or second thoughts. *State v. Wuensch*, 69 Wis.2d 467, 474, 480, 230 N.W.2d 665 (1975). A court can, however, modify a sentence based on the presentation of a "new factor." *Hegwood*, 113 Wis.2d at 546, 335 N.W.2d 399.

Deciding a motion for sentence modification based on a new factor involves a two-step inquiry. First, the defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor. *State v. Franklin*, 148 Wis.2d 1, 8–9, 434 N.W.2d 609 (1989). See also *State v. Harbor*, 2011 WI 28, ¶ 36, 333 Wis.2d 53, 72. "Whether the fact or set of facts put forth by the defendant constitutes a "new factor" is a question of law." *Harbor*, at ¶ 36 (citing *Hegwood*, 113 Wis.2d at 547, 335 N.W.2d 399). *Rosado v. State*, 70 Wis.2d 280, 288, 234 N.W.2d 69 (1975) defines "new factor" as "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties."

A new factor does not automatically entitle the defendant to sentence modification. *Hegwood*, 113 Wis.2d at 546, 335 N.W.2d 399; *State v. Verstoppen*, 185 Wis.2d 728, 740–42, 519 N.W.2d 653 (Ct. App. 1994). Instead, the court must then decide whether the new factor justifies sentence modification. *Franklin*, 148 Wis.2d at 8, 434 N.W.2d 609. To prevail on a motion for sentence modification, the defendant must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence. *Harbor*, 2011 WI 28, ¶ 38 (citing *State v. Crochiere*, 2004 WI 78, ¶ 24, 273 Wis.2d 57, 681 N.W.2d 524). Accordingly, if a court determines that the facts do not constitute a new factor as a matter of law, "it need go no further in its analysis" to decide the defendant's motion. *Crochiere*, at ¶ 24.

Nieman attempts to argue several new factors that would favor sentence modification but fails to fully develop that (1) they are proper new factors and (2) a new sentence is justified. Nieman's first argument discusses what he calls "exculpatory evidence" from a Wood County case, seemingly suggesting that the fact that an error in that case impacted the court's determination in the present case in the form of a false criminal record. Even if a Wood County case had any relevance, the circuit court made very limited reference to Nieman's criminal record, except for noting that Nieman had clearly been in prison (R54 22:21-24). Despite that, the court still agreed to place Nieman on probation. Further, Nieman's record and the supposed false criminal record he references has nothing to do with the court ordering restitution. This is not a relevant issue or a proper new factor, and even if it was, it does not justify removing the restitution requirement and subsequently reducing the circuit court's ordered probation term.

Nieman also attempts to argue that his medical issues were a factor that the court overlooked and were never argued by either trial or appellate counsel. First, as stated previously, trial counsel did mention the medical issues at sentencing. Since it was on record and the court was aware of it, appellate counsel did not need to repeat it. Second, Nieman has

consistently represented to the circuit court and in his appeal that he intends to repay Haas for the civil judgment and/or restitution amount. Even if the court overlooked his injuries and failed to consider them in the restitution order, Nieman's representations satisfied the court that Nieman would have the intention and ability to pay at a later time. Even if this was considered a new factor, it does not justify modifying Nieman's sentence.

Nieman next references a Wood County case and his providing of substantial assistance to authorities as a new factor for the court to consider. While providing assistance to law enforcement may be a proper new factor under certain circumstances, Nieman fails to fully articulate the substance of his assistance and its relevance to this matter, and provides no detail as to the timing of the assistance and whether any of it occurred prior to his sentencing on February 22, 2016. The only documentation provided include cooperation agreements with the Portage and Waupaca County Sheriff's Departments from 1994 and 1995. Even if Nieman's assistance to law enforcement was considered a new factor for the court to consider, Nieman has failed to establish that it would justify modification of the restitution order or probation term in his Clark County case.

Nieman has raised multiple issues that could be considered new factors under the law. However, he has failed to establish that they are, in fact, proper new factors under the facts of this case. Even if he had, none of them justify upsetting the circuit court's discretion and modifying the sentence.

II. COUNSEL'S PERFORMANCE WAS NOT DEFICIENT, SO AS TO PREJUDICE NIEMAN AND DENY HIM OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT.

The United States Constitution preserves every individual's right to counsel in criminal proceedings. U.S. Const. amend. VI. The Supreme Court "has recognized that

'the right to counsel is the right to the effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970). To succeed on a claim of ineffective assistance of counsel, the defendant is require to prove that (1) counsel's performance was deficient and (2) that deficiency prejudiced the defendant. *Id.* at 687. Nieman has failed to meet the requirements under either prong of this test.

The performance prong of the *Strickland* standard requires the defendant to show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, at 687. This claim involves a showing that counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688. The prejudice prong requires a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Nieman claims counsel was ineffective for failing to raise his health issues as a reason for reducing the restitution order. However, that issue was raised by trial counsel at sentencing, and the circuit court was aware of it when it ordered restitution. Additionally, Nieman entered a plea after knowing the circuit court intended to order restitution and after being told of his ability to offset the civil judgment with any restitution payments made. Further, while Nieman may have health issues, he has failed to establish that he would never be able to make restitution payments in the future, and has repeatedly expressed his intention of paying what is owed to the victim.

Nieman cites appellate counsel's failure to investigate his substantial assistance to law enforcement as further evidence that counsel was ineffective. He defeats his own argument with documents contained in his index: an email from appellate counsel shows this issue was researched and a transcript shows it was raised at a hearing before a separate court in another county. Nieman has failed to show the

relevance of this assistance to the proceedings in the present case or how it would impact the sentence in Clark County.

Nieman further claims that both trial and appellate counsel failed to properly investigate his prior criminal record and present it to the circuit court at sentencing and postconviction hearings. Nieman has included in his appendix a number of documents related to 2007 cases in Wood and Portage counties as evidence he was sentenced based on dismissed charges. As reflected in the sentencing and postconviction hearing transcripts (R54, R55), the circuit court made little reference to Nieman's criminal history in pronouncing sentence. It ordered a probation term despite Nieman's status as a prison inmate at the time of sentencing and affirmed its restitution order in a postconviction proceeding. Nieman's prior record had no bearing on the circuit court's restitution order, as the court very clearly indicated both at sentencing and at the hearing on Nieman's postconviction motion that the Wisconsin statutes required it to order restitution.

Finally, Nieman asserts that appellate counsel was ineffective because counsel withdrew without a hearing when potential appellate issues remained. However, appellate counsel requested a hearing on counsel's motion to withdraw, which indicated that Nieman requested counsel withdraw on more than one occasion, and despite being informed of the disadvantages of proceeding pro se (R34). The circuit court signed an order allowing appellate counsel to withdraw without a hearing, based on counsel's motion, and because Nieman's intent was made clear with pro se filings (R38). Nieman cannot now claim counsel was ineffective for withdrawing at his request.

Ultimately, Nieman got what he bargained for: a two (2) year probation term. The circuit court, for the reasons already explained, ordered that Nieman pay restitution rather than ordering him to make payments toward the associated civil judgment. Nieman still has the ability to apply for early discharge of his probation term if he satisfies the restitution award early. The circuit court followed the law in ordering

restitution, and no basis exists to shorten the probation term ordered. Nieman has failed to show that the circuit court's sentence would have been any different had trial or appellate counsel functioned any differently in his case.

CONCLUSION

Based on the foregoing reasons, the State of Wisconsin respectfully requests that this Court affirm the circuit court's judgment.

Dated this 22nd day of July, 2019.

Respectfully submitted,

Kerra Stumbris
District Attorney
State Bar #1095694

Attorney for Plaintiff-Respondent

Clark County District Attorney's Office
517 Court Street, Room 404
Neillsville, Wisconsin 54456
(715)743-5167

CERTIFICATION

I certify 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 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is 3,390 words.

Dated this 22nd day of July, 2019.

Kerra Stumbris
District Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 22nd day of July, 2019

Kerra Stumbris
District Attorney