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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4

Case No. 2017AP2206

STATE OF WISCONSIN
ex rel. DRAZEN MARKOVIC,

Petitioner-Respondent,

v.

JON E. LITSCHER,

Respondent-Appellant.

APPEAL FROM AN ORDER GRANTING A WRIT OF CERTIORARI ENTERED BY THE HONORABLE FRANK D. REMINGTON, DANE COUNTY CIRCUIT COURT

RESPONDENT-APPELLANT'S REPLY BRIEF

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INTRODUCTION

Markovic offers two flawed responses to DOC's position that it can collect unpaid restitution from inmates in its custody who have completed their sentences on crimes associated with unpaid restitution. First, he contends that Wis. Stat. § 973.20(1r) provides the sole way to collect his unpaid restitution—an action by his crime victim on a civil judgment. But other methods co-exist, including the one DOC chose here.

Second, Markovic argues that DOC did not have authority under Wis. Stat. §§ 303.01(8)(b) and 301.32(1) to collect his unpaid restitution. But he largely relies on arguments DOC rebutted in its opening brief, and his other ones enjoy no support.

Markovic also contends that the certiorari court could properly order DOC to pay him money, but Wisconsin courts hold that certiorari courts may only affirm or reverse the agency's decision. Markovic provides no authority for departing from that rule here.

ARGUMENT

I. Wisconsin Stat. § 973.20(1r) did not provide the exclusive means to collect Markovic's unpaid restitution.

Markovic relies on both a plain meaning and a contextual analysis of Wis. Stat. § 973.20(1r) to conclude that only his crime victim, not also DOC, could collect his unpaid restitution. Neither analysis supports his position.

A. Wisconsin Stat. § 973.20(1r)'s plain language does not create an exclusive collections method.

Markovic's position that DOC could not collect his unpaid restitution misreads Wis. Stat. § 973.20(1r):

> After the termination of probation, extended supervision, or parole, or if the defendant is not placed on probation, extended supervision, or parole, restitution ordered under this section is enforceable in the same manner as a judgment in a civil action by the victim named in the order to receive restitution or enforced under ch. 785.

This provision does not state that unpaid restitution "is *only* enforceable in the same manner as a judgment in a civil action by the victim." Instead, it provides that unpaid restitution "*is enforceable*" in that manner. This is a critical distinction, because only that hypothetical wording would support Markovic's position that "any restitution for a crime of which Markovic has completed [his sentence] should be transformed into a civil judgment the victim may enforce, not the DOC." (Resp't's Br. 6.)

It is true that DOC may not use Wis. Stat. § 973.20(1r) to collect, but that provision says nothing about whether DOC may *also* collect unpaid restitution using its statutory authority under Wis. Stat. §§ 303.01(8)(b) and 301.32(1). Multiple parties have overlapping authority to collect unpaid restitution, a scheme that preserves crime victims' constitutional right to recover unpaid restitution they are owed. (Appellant's Br. 9–10.) This does not mean that a victim can double-recover, but multiple methods exist to collect unpaid restitution.

B. The structure of Wis. Stat. § 973.20(1r) and related statutes does not show that only the crime victim could pursue Markovic's unpaid restitution.

Markovic also contends that the structure of Wis. Stat. § 973.20 shows that his unpaid restitution was only collectible by the crime victim as a civil judgment. (Resp't's Br. 7–9.) He misplaces his reliance on Wis. Stat.

§ 806.10, which directs that civil judgments shall be placed on the judgment and lien docket.

First, even if crime victim collections under Wis. Stat. § 973.20(1r) did need to follow Wis. Stat. § 806.10, that would have nothing to do with DOC's independent authority. DOC did not purport to enforce a judgment when collecting Markovic's unpaid restitution. Instead, the enforceable judgment's existence allowed DOC to collect money directly from his prison account under Wis. Stat. §§ 303.01(8)(b) and 301.32(1). Since this is a different mechanism than enforcing a judgment, there is no reason to reference Wis. Stat. § 806.10 when considering DOC's authority.

Markovic responds that there is no difference between Wis. Stat. § 973.20(1r)'s actual language—"is enforceable in the same manner"—and a hypothetical statute providing that unpaid restitution "becomes" or "is converted" to a civil judgment. (Resp't's Br. 6.) That is not the language the Legislature chose. Even Markovic's preferred, hypothetical wording would not support his position, because it still would not establish that *only* his crime victim could collect his unpaid restitution.[1] DOC's independent statutory authority does not rest on enforcing a civil judgment for restitution, but on the existence of that judgment coupled with DOC's authority over inmates' prison accounts.

Second, contrary to Markovic's assertion, Wis. Stat. § 973.20 does *not* cross-reference Wis. Stat. § 806.10, let alone always require compliance with the latter provision in order to collect unpaid restitution. No basis exists to

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[1] Markovic similarly notes that Wis. Stat. § 973.20(1r) does not expressly render unpaid restitution "non-dischargeable or non-negotiable." (Resp't's Br. 6.) This is irrelevant to DOC's independent authority to collect restitution under other statutes.

conclude that Wis. Stat. § 806.10 limits DOC's independent authority.

Markovic also suggests that Wis. Stat. § 973.20(1r) would be superfluous, if DOC can also collect his unpaid restitution. (Resp't's Br. 8.) Not so. Most importantly, section 973.20(1r) enables crime victims to collect from offenders who leave DOC custody. When that happens, DOC loses its power to collect unpaid restitution under Wis. Stat. §§ 303.01(8)(b) and 301.32(1). Wisconsin Stat. § 973.20(1r) thus ensures that crime victims can still collect unpaid restitution from released offenders.

As for offenders like Markovic who owe restitution and remain in DOC custody, Wis. Stat. § 973.20(1r) is one piece of a scheme that creates overlapping authority to collect unpaid restitution. Other options include DOC's collection power under Wis. Stat. §§ 303.01(8)(b) and 301.32(1), certification to DOR under Wis. Stat. § 973.20(10)b), and contempt proceedings under Wis. Stat. § 973.20(1r). None of these collection methods are "superfluous" just because others exist—instead, they each offer different approaches to collecting unpaid restitution that may be more or less effective and appropriate, depending on the circumstances.

Markovic dismisses DOC's consideration of these other statutes as irrelevant "rambling" (Resp't's Br. 14), but he misses the point of DOC's argument. These other collection methods are relevant because they undermine Markovic's central premise: that Wis. Stat. § 973.20(1r) provided the sole method for collecting his unpaid restitution once his sentence ended, and that only his victim can collect his unpaid restitution. These other statutes show that no single, exclusive method exists for collecting unpaid restitution.

Markovic also cites *Huml v. Vlazny*, but *Huml* presented an entirely different issue than the one here—whether a victim's right to collect unpaid restitution under

Wis. Stat. § 973.20(1r) can be extinguished by a civil settlement agreement with the criminal defendant. 2006 WI 87, ¶ 33, 293 Wis. 2d 169, 716 N.W.2d 807. (Resp't's Br. 9–11.) The *Huml* court held that, when a *victim* seeks to collect unpaid restitution, a settlement agreement may preclude the victim from enforcing the unpaid restitution as a civil judgment. *Id.* ¶ 5. Nothing in *Huml* addresses DOC's power.

Huml also notes that the State's penal and rehabilitative interests in restitution cease when probation ends, leaving only a civil debt. 293 Wis. 2d 169, ¶ 38, 43–44. But DOC's collection here does not rest on penal and rehabilitative interests; collection rests on the fact that an inmate remaining in DOC's custody still owes restitution to his crime victim.

Lastly, Markovic mistakenly argues that the rule of lenity requires interpreting Wis. Stat. § 973.20(1r) in his favor. (Resp't's Br. 8–9.) The rule of lenity does not apply here because it is meant to "ensur[e] fair warning by applying criminal statutes to conduct clearly covered." *State v. Guarnero*, 2015 WI 72, ¶ 26, 363 Wis. 2d 857, 867 N.W.2d 400 (citation omitted). This case does not concern whether Markovic's *conduct* that led to his restitution obligation was criminal—it indisputably was. Nor does it concern the scope of possible *consequences* for his conduct—the amount of restitution he owes is also undisputed. Instead, this case concerns only how to *enforce* one consequence of his criminal conduct—how to collect his unpaid restitution—and that issue is far removed from the rule of lenity's focus.

Moreover, the rule of lenity applies only when "grievous ambiguity" exists such that a court can only "simply guess" at what a statute means. *Guarnero*, 363 Wis. 2d 857, ¶ 27 (citation omitted). No such ambiguity exists here.

Since Markovic fails to show that only his crime victim could collect his unpaid restitution under Wis. Stat. § 973.20(1r), DOC could collect that restitution using its own statutory authority.

II. Wisconsin Stat. §§ 303.01(8)(b) and 301.32(1) allowed DOC to collect Markovic's unpaid restitution.

Markovic's position that DOC had no authority to collect his unpaid restitution under Wis. Stat. §§ 303.01(8)(b) and 301.32(1) should be rejected because it conflicts with the plain language of these statutes and case law applying them.

A. Wisconsin Stat. § 303.01(8)(b) permitted DOC's collection.

Wisconsin Stat. § 303.01(8)(b) allows DOC to "distribute earnings of an inmate or resident for . . . obligations . . . which have been reduced to judgment that may be satisfied according to law." Markovic does not dispute that, under *State v. Baker*, this provision allows DOC to collect unpaid restitution. 2001 WI App 100, ¶ 17, 243 Wis. 2d 77, 626 N.W.2d 862.

Baker cannot be distinguished just because the inmate there was incarcerated on the same judgment of conviction that also imposed restitution. (Resp't's Br. 11.) Under *Baker*, it does not matter whether the restitution order resides in the judgment of conviction that imposes the inmate's current prison term. Even if Markovic's prison term had expired and his unpaid restitution is collectable "in the same manner as a civil judgment" under Wis. Stat. § 973.20(1r), that debt still constitutes an "obligation[] . . . reduced to judgment that may be satisfied according to law" under Wis. Stat. § 303.01(8)(b).

Markovic also argues that permitting DOC to rely on Wis. Stat. § 303.01(8)(b) here would be somehow absurd,

because it would always enable DOC to collect any unpaid restitution, no matter how old. (Resp't's Br. 9.) But imagine an inmate who is incarcerated for life for a single crime—there is no doubt that DOC could keep collecting unpaid restitution, no matter how long ago the crime was committed. Nothing in Wis. Stat. § 303.01(8)(b) or *Baker* demands a different result, just because Markovic remains incarcerated on a different sentence.

B. Wisconsin Stat. § 301.32(1) permitted DOC's collection.

DOC also enjoys authority under Wis. Stat. § 301.32(1) to use money in Markovic's prison account for "the benefit of the prisoner." Markovic reiterates the certiorari court's flawed decision—that this provision does not mention restitution and does not apply to uncollectible civil debts—issues that DOC addressed in its opening brief. (Resp't's Br. 12–15; Appellant's Br. 11–13.)

C. Markovic's other reasons for not applying Wis. Stat. §§ 303.01(8)(b) and 301.32(1) here fail.

Markovic's other arguments all fail because they are not grounded in the text or structure of Wis. Stat. §§ 303.01(8)(b) and 301.32(1).

He asks rhetorically how DOC can maintain criminal jurisdiction in order to collect his unpaid restitution, given that his sentence had ended. (Resp't's Br. 6.) But that rests on a false premise. DOC is not a court that must have jurisdiction over Markovic in order to render and enforce a judgment against him. Instead, DOC is an agency that is using its power under Wis. Stat. §§ 303.01(8)(b) and 301.32(1) to collect unpaid restitution from an inmate who remains in its custody. Criminal jurisdiction has nothing to do with DOC's power here.

Markovic also says that allowing DOC to collect his unpaid restitution would improperly render it a "collections agency" (Resp't's Br. 10), but the cases he cites confronted an issue not presented here—whether probation may be extended solely to collect unpaid restitution. *State v. Davis*, 127 Wis. 2d 486, 499, 381 N.W.2d 333 (1986); *Huggett v. State*, 83 Wis. 2d 790, 802–03, 266 N.W.2d 403 (1978). DOC did not threaten Markovic with further criminal sanctions. Markovic's prison term remained the same, as did the amount of his unpaid restitution. DOC instead used its existing authority over Markovic to collect his unpaid restitution. And none of this creates a system of "debtor's prisons"—Markovic remains incarcerated only because he has not finished his sentence for another crime.

Next, Markovic argues that DOC is imposing retroactive punishment in violation of due process and double jeopardy principles. (Resp't's Br. 13.) But DOC did not use Wis. Stat. §§ 303.01(8)(b) and 301.32(1) to require Markovic to pay more restitution than the sentencing court originally imposed, nor to modify his 1995 conviction in any way. DOC only collected restitution that Markovic already owed.

Since both Wis. Stat. §§ 303.01(8)(b) and 301.32(1) permit DOC to collect unpaid restitution from incarcerated inmates, DOC's decision to do so here should be affirmed.

III. Markovic fails to show that the circuit court could order DOC to pay money in this certiorari action.

Even if DOC could not collect Markovic's unpaid restitution, he fails to show that he could recover that money through this certiorari action. Markovic acknowledges that the relief available in certiorari proceedings is very narrow. (Resp't's Br. 15–16.) Again, "[a]s a general rule, a certiorari court may affirm or reverse the action of the agency, and

therefore cannot order the agency to perform a certain act." *State ex rel. Richards v. Leik*, 175 Wis. 2d 446, 455, 499 N.W.2d 276 (Ct. App. 1993) (citation omitted).

Markovic responds that DOC can be ordered to pay him money, since such a payment would represent only the amount DOC collected from his prison account, and not additional money for "damages." (Resp't's Br. 15–16.) But that distinction is without a difference. Whatever the nature of the payment Markovic seeks, it still represents a monetary payment that a certiorari court cannot order DOC to make. Markovic does not cite any case in which a state agency has been ordered to pay money in a certiorari proceeding. That is unsurprising, since such a decision would violate the well-established principle that certiorari courts can only affirm or reverse an agency's decision and not order specific actions.

Markovic tries to distinguish *State ex rel. Richards*, *Coleman v. Percy*, and *Guerrero v. City of Kenosha Housing Authority* on similar grounds, arguing that the certiorari courts there were reversed for ordering different relief than he seeks here. (Resp't's Br. 15–16.) The distinctions he identifies are insignificant.

Guerrero is not materially different from this case. 2011 WI App 138, ¶ 10, 337 Wis. 2d 484, 805 N.W.2d 127. There, the petitioner challenged a housing authority's decision to terminate her rent assistance benefits.[2] The certiorari court reversed that decision, and the petitioner asked for an order directing the housing authority to pay her

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[2] *Guerrero* considered a certiorari review under Wis. Stat. § 68.13, rather than a common law certiorari petition as here. 337 Wis. 2d 484, ¶ 7. But that does not lessen *Guerrero*'s applicability, since the same prohibition on awarding money exists in both kinds of certiorari proceedings.

the past benefits she had been improperly denied. But the certiorari court declined to grant this equitable relief and this Court affirmed, reasoning that the petitioner effectively sought damages, which are not available in a certiorari review. *Guerrero*, 337 Wis. 2d 484, ¶¶ 7–11. Markovic argues that certiorari courts can "give you what you would have had if the incident giving rise to the complaint had never happened." (Resp't's Br. 16.) But if that were true, then the petitioner in *Guerrero* would have been entitled to recover her past benefits through the certiorari proceeding. She was not.

The fact pattern here is essentially the same, assuming DOC improperly collected Markovic's unpaid restitution. DOC, like the housing authority in *Guerrero*, would have collected money the petitioner should instead have, if not for the mistaken decision. An order directing DOC to pay that money to Markovic would be no different from an order in *Guerrero* directing the housing authority to pay past housing benefits to the petitioner. In both cases, the certiorari court lacked power to order the payment of money. *State ex rel. Richards*, 175 Wis. 2d at 455, and *Coleman v. Percy*, 86 Wis. 2d 336, 341, 272 N.W.2d 118 (Ct. App. 1978), *aff'd*, 96 Wis. 2d 578, 292 N.W.2d 615 (1980), further support this result, since they also involved requests for DOC to perform specific acts beyond simply affirming or reversing DOC's decisions.

To recover the money DOC collected, Markovic instead needs to go to the state claims board, as discussed in *State v. Minniecheske*, 223 Wis. 2d 493, 502, 590 N.W.2d 17 (Ct. App. 1998). Markovic responds that *Minniecheske* involved post-conviction motions for relief rather than a certiorari proceeding. (Resp't's Br. 18–19.) But that case presented a similar issue—the proper procedure to recover restitution improperly collected by DOC. In *Minniecheske*, the inmate's post-conviction motions entitled him only to narrow relief—

correcting a sentencing order—and not also the payment of money. So, the court held that, even though DOC had "improperly seized assets pursuant to [a] restitution order," the criminal defendant had to seek payment from the state claims board. 223 Wis. 2d at 502. The same result is required here, since certiorari proceedings also entitle petitioners to narrow relief.

Markovic also contends that it would be unfair to require him to seek relief from the state claims board, because other inmates may not have the resources or knowhow to pursue certiorari claims. (Resp't's Br. 19–20.) But other inmates' possible trouble in pursuing certiorari claims has no relation to whether Markovic must go to the state claims board to receive the money he seeks.

The rest of Markovic's response impugns DOC's motives for collecting his unpaid restitution. (Resp't's Br. 16–20.) This has no relation to DOC's statutory authority and enjoys no support in the record. (*See* R. 10:42, 44, 50–54, 57–63.)

CONCLUSION

DOC's decision to withhold Markovic's unpaid restitution should be affirmed. If that decision is reversed, DOC should not be ordered to pay to Markovic the restitution it collected.

Dated this 21st day of February, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2998 words.

Dated this 21st day of February, 2018.

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

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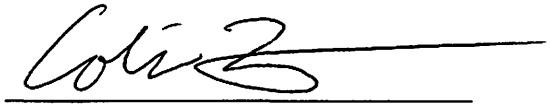

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