STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2018AP000870-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

DESHAWN J. DRIVER,
Defendant-Appellant.

On appeal from a judgment of conviction entered in the circuit court for Milwaukee County, the Honorable Dennis R. Cimpl presiding, and from an order denying postconviction relief, the Honorable Dennis P. Moroney presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ISSUES PRESENTED

1. Was Mr. Driver denied his statutory and due process right to be heard and to present evidence at his restitution hearing?

2. Was Mr. Driver denied due process at the restitution hearing due to bias exhibited by the judge such that he is entitled to a new hearing before a different judge?

POSITION ON ORAL ARGUMENT AND PUBLICATION

Publication is not warranted as this case, which involves the application of well-settled law to a unique set of facts.

While undersigned counsel anticipates the parties' briefs will sufficiently address the issues raised, the opportunity to present oral argument is welcomed if this court would find it helpful.

STATEMENT OF THE CASE

As set forth in the judgment of conviction, Mr. Driver entered a plea of guilty to one count of armed robbery. (14). The criminal complaint that formed the factual basis for the plea alleged that Mr. Driver and a co-actor, Kenyacies Phipps, had taken P.B.'s purse and vehicle from her at gunpoint. Mr. Phipps was charged under a separate case number. (1).

Mr. Driver was sentenced to five years of initial confinement in prison and five years of extended supervision. (14). Mr. Driver timely filed a Notice of Intent to Pursue Postconviction Relief. (16).

Subsequently, Judge Dennis R. Cimple conducted a restitution hearing and ordered restitution in the amount of $5,175.34. (37: 23). Mr. Driver filed a motion for postconviction relief seeking a new restitution hearing. (25). The circuit court, by Judge Dennis P. Moroney, denied the motion. (26). Mr. Driver appealed.

STATEMENT OF FACTS

A single restitution hearing was held for Mr. Driver and Mr. Phipps. The court received a list of items that the victim, P.B., claimed were in the vehicle when it was taken and their claimed value. It included a stroller worth $350, a car seat, and multiple miscellaneous items worth a claimed total of $2,105. (37: 7). P.B. also claimed lost wages, reimbursement for the loss of an insurance discount, a medical co-pay, and the cost of a new door for her home, which she asserted was necessary because her keys had been taken, and she was fearful of a break-in. At the restitution hearing, the court preliminarily asked counsel for Mr. Driver what he was contesting:

> The Court: Before we get Ms. [B.] on the phone, is the defense challenging the $350 for the stroller that was in the car? Ms. Firer?

Ms Firer: We do have a question about this stroller because this stroller –

The Court: All right. I just want to know if I want –

Ms. Firer: Yes. I guess so.

The Court: All right. So what about the car seat?

Ms. Firer: Well, yes.

The Court: Okay. And the Quebo International purse?

Ms. Firer: No, we're not challenging that.

The Court: And the Motorola phone?

Ms. Firer: We're not challenging that.

(37: 3). After making similar inquiries of Mr. Phipps' attorney, the court continued with counsel for Mr. Driver:

The Court: . . . And then there's a whole itemization list on the other side. Any of those things you're challenging, Ms. Firer?

Ms. Firer: There are items we are challenging, yes.

The Court: And the reason?

Ms. Firer: Some of the items were not in the car.

The Court: Well, no. If she testifies that they were in the car, it's going to go down.

Ms. Firer: I was just stating what my client says.

The Court: And is that what you're challenging on the stroller and the car seat too?

Ms. Firer: Yes.

The Court: All right. So we'll – The first question will be if they were in the car, that's fine. You know, her words are more credible than your client's words.

(37: 4). P.B. then testified by telephone. She testified that the items on the list were in the car when the crime occurred. (37: 7). She said that she and her husband went to the tow lot after the crime, and that her husband looked in the car. However, she said he did not recover any of the items on the list. (37: 7).

On cross examination, counsel for Mr. Phipps asked P.B. whether it was possible that a number of the items she was claiming were still in the car when she went to the tow lot. She conceded that it was possible but that the items were "still gone," and "the perpetrators are to blame." (37: 18).

After P.B.'s testimony concluded, counsel for Mr. Driver said "My client does dispute several of the items listed in Ms. [B.]'s list of items. I understand what the Court's position is. (37: 20). Counsel for Mr. Phipps offered that his client "would testify that – that he did not see a lot of these items." The Court responded:

> Well, I'll take that without their testimony that they didn't see all these items. That's why I didn't give them a chance to say it. They simply deny these items were there, and frankly, their credibility is not -- is not good with the Court. Her credibility is better. She's the one that's the victim. All right.

(37: 21). The Court ordered a total of $5, 175.34 in restitution, including all of the items P.B. claimed were in the vehicle. (37: 23).

ARGUMENT

I. Mr. Driver was denied his statutory and due process right to be heard and to present evidence at the restitution hearing.

Restitution in criminal cases is governed by Wis. Stat. § 973.20. This Court has explained:

> [T]he nature of the hearing is informal. A restitution hearing is not a full-blown civil trial as evidenced by the dispensing of the normal rules of evidence.

State v. Madlock, 230 Wis. 2d 324, 335-36, 602 N.W.2d 104, 110 (Ct. App. 1999), citing *State v. Pope*, 107 Wis.2d 726, 729, 321 N.W.2d 359, 361 (Ct.App.1982); Wis. Stat. § 973.20(14)(d). By statute, the victim carries the burden of proving the amount of loss sustained as a result of the crime by a preponderance of the evidence. *See* Wis. Stat.§ 973.20(14)(a).

At a restitution hearing, "[a]ll parties interested in the matter shall have an opportunity to be heard, personally, or through counsel, to present evidence and to cross examine witnesses called by other parties." Wis. Stat. § 973.20(14)(d). The statute protects the defendant's right to due process. *See*, *State v. Fernandez*, 2009 WI 29, ¶ 59, 316 Wis. 2d 598, 764 N.W.2d 509. Federal constitutional due process[1] requires that a defendant facing a claim for restitution must be given notice and a hearing at which he has the opportunity to "confront the victim's claim for pecuniary loss" and to be heard. *Pope*, 107 Wis. 2d at 730, 321 N.W.2d at, 361.

A request for restitution, including the calculation as to the appropriate amount of restitution, is addressed to the circuit court's discretion and its decision will only be disturbed when there has been an erroneous exercise of that discretion. *Madlock,* 230 Wis.2d at 329. However, the interpretation of the requirements of the restitution statute, Wis. Stat. § 973.20, presents a question of

[1] U.S. Const. amend V, XIV.

law that this Court reviews *de novo*. *State v. Lee*, 2008 WI App 185, ¶ 7, 314 Wis. 2d 764, 768, 762 N.W.2d 431, 433. Further, whether a party has been denied due process is a question of law that this Court reviews independently. *State v. Weissinger,* 2014 WI App 73, ¶ 7, 355 Wis.2d 546, 851 N.W.2d 780.

What passed for a restitution hearing in this case was contrary to the requirements of the statute and offensive to even the loosest conception of due process. The Court did not permit Mr. Driver to testify at all. The judge acknowledged that he "didn't give them a chance to say it." (37: 21). Even if Mr. Driver's attorney had demanded that the Court hear Mr. Driver, that would have been pointless under the circumstances. The Court had preemptively found that any testimony Mr. Driver might give would be incredible as weighed against any contrary testimony by the victim. The court judged Mr. Driver's credibility to be "not good" without hearing his testimony and judged the victim's credibility to be "better" because "she's the one that's the victim." (37: 21).[2] This was not the restitution hearing contemplated by Wis. Stat. § 973.20 and demanded by due process.

[2] It is worth noting that Mr. Driver waived his preliminary hearing and pled guilty. (32, 35). The judge had never heard any testimony from Mr. Driver from which to assess his credibility except at the plea hearing. Presumably the judge found Mr. Driver's statements at that hearing to be credible or he would have rejected the plea.

In denying Mr. Driver's motion, the circuit court declared that the requirements of Wis. Stat.§ 973.20 and due process were satisfied because Mr. Driver was allowed to cross examine the victim and to be heard "through counsel." (26: 2). In other words to satisfy Mr. Driver's right to be heard, it was enough that the judge preliminarily asked Mr. Driver's lawyer what aspects of the restitution claim were being challenged and allowed her to speak in response before summarily rejecting her challenges. The circuit court specifically rejected the idea that Mr. Driver had any right at all to testify at the restitution hearing if he wished to do so. (26: 2). Even assuming that the statutory right to be heard could be satisfied in this perfunctory way, the court did not even try to explain how its conclusion squared with the right of the defendant to "present evidence." Wis. Stat. § 973.20(14)(d). The only evidence Mr. Driver could present was his testimony and that of his co-actor, and he was prevented from doing that.

The circuit court erred as a matter of law. Just as the restitution statute provides the right to be heard and to present evidence, the due process guarantee of an opportunity to be heard includes the "right to offer the testimony of witnesses." *Estate of Derzon*, 2018 WI App 10, ¶ 42, 380 Wis. 2d 108, 132, quoting *Brown Cty. v. Shannon R.*, 2005 WI 160, ¶ 65, 286 Wis. 2d 278, 706 N.W.2d 269. It was not enough that the court allowed Mr. Driver's lawyer to state which aspects of the restitution claim were contested. The court never heard anything about what observations Mr. Driver and his co-actor made

of the contents of the car and never had an opportunity to judge the plausibility and credibility of their claims that some of the items enumerated by the victim were not there. Further, Mr. Driver's opportunity to cross-examine the victim was meaningless, since the judge had decided her testimony would be credible before he heard it.

A new restitution hearing is required.

II. Mr. Driver is entitled to a restitution hearing before another judge.

The circuit court's refusal to hear Mr. Driver and his co-actor's evidence was not the only, or even the worst, due process violation at the restitution hearing. The essential ill was that the judge prejudged the hearing, announcing at the outset that he would believe any testimony from the victim regarding the items that were in the car and would disbelieve any contrary testimony by Mr. Driver or his co-actor.

There is a presumption that a judge acted fairly, impartially, and without prejudice. *State v. Goodson,* 2009 WI App 107, ¶ 8, 320 Wis.2d 166, 771 N.W.2d 385. A defendant may rebut the presumption by showing that there is an appearance of bias on the judge's part that reveals a great risk of actual bias. *Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868, 885, 129 S.Ct. 2252 (2009); *Goodson,* 320 Wis.2d 166, ¶ 14; *State v. Gudgeon,* 295 Wis. 2d 189, ¶ 23, 295 Wis.2d 189, 720 N.W.2d 114. Such a showing

constitutes a due process violation. *Gudgeon,* 295 Wis.2d 189, ¶ 23, 720 N.W.2d 114.

A judge who has prejudged the facts or the law cannot decide a case consistent with due process. *Gudgeon*, 295 Wis. 2d 189, ¶ 25. Here, the judge did that. He said so. Before hearing any testimony, he rejected Mr. Driver's proposed testimony that some of the items claimed were not in the car and declared "if she testifies that they were in the car, it's going to go down." (37: 4). In case the judge's position was not clear, he added, "her words are more credible than your client's words." (37: 4). At the very least, the judge's comments "revealed a great risk of actual bias," such that the judge was disqualified from hearing the matter. ***Id***., at ¶23.

In its decision denying the motion for postconviction relief, the circuit court simply declared, "the court rejects any claim that it exhibited bias when it found the victim's testimony to be more credible than the defendant's proffered testimony."[3] (26: 2). Troubling as that statement is on its face, it does not even account for the fact that the judge found the victim's testimony to be more credible *before he even heard it*. The judge displayed bias when he found a defendant incredible because he was a defendant and a victim credible because she was a victim before hearing testimony from either. Due

[3] Judge Dennis R. Cimpl presided over the restitution hearing, but Judge Dennis P. Moroney denied the postconviction motion. (37; 26).

process demands that Mr. Driver be given a restitution hearing before an impartial judge.

CONCLUSION

Mr. Driver respectfully requests that this Court reverse the order of the circuit court denying his postconviction motion and order that the case be remanded for a restitution hearing before a different judge.

Dated this 17th day of August, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,074 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 August, 2018.

Signed:

PAMELA MOORSHEAD
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 one or more initials or other appropriate pseudonym or designation 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.

Dated this 17th day of August, 2018.

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APPENDIX

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