STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2020AP1394

STATE OF WISCONSIN
ex rel. VICTOR ORTIZ, JR.,

Petitioner-Respondent,

v.

CATHY JESS,

Respondent-Appellant.

APPEAL FROM A FINAL ORDER OF
THE DANE COUNTY CIRCUIT COURT,
THE HONORABLE PETER C. ANDERSON, PRESIDING

REPLY BRIEF OF RESPONDENT-APPELLANT

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ARGUMENT

I. The Department's deduction of Ortiz's funds from his trust account at a 50 percent rate to pay his restitution obligation is lawful because a criminal sentencing court has no authority to limit the Department's exclusive statutory authority.

As he must, Ortiz acknowledges that the Department of Corrections "has substantial authority over inmate trust accounts" and "the power to set the rates at which prison trust accounts are dispersed for [statutorily] mandated surcharges or other prisoner obligations, including restitution." (Ortiz's Br. 4; *see also* Department's Opening Br. 7–11.) He contends, however, like the circuit court below, that the Department's authority is not exclusive. (Ortiz's Br. 4.) Like the circuit court, he is incorrect.

Ortiz points to the unremarkable proposition that a criminal sentencing court has exclusive authority to impose restitution. (Ortiz's Br. 4.) This authority to impose restitution upon all criminal defendants, however, is not the same as the authority to impose upon the Department *the rate* at which it must collect funds from a defendant *prisoner's* trust account to pay the restitution obligation.

This Court's holding in *State v. Baker*, 2001 WI App 100, 243 Wis. 2d 77, 626 N.W.2d 862, Ortiz says, supports his position. It does not. In *Baker*, this Court held that Wis. Stat. § 303.01(8)(b) gives a sentencing court authority to order that restitution be disbursed from prison wages, despite no express reference to restitution. The Court explained that restitution is an "other obligation[ ] . . . reduced to judgment that may be satisfied according to law." *Id.* ¶ 17 (quoting Wis. Stat. § 303.01(8)(b)). And *Baker* went no further; the decision does not hold that a sentencing court has authority to order at what rate the Department must deduct an inmate's wages to

pay the restitution obligation ordered. Ortiz asserts that, "[a]bsent a clear limitation by the legislature concerning sentencing courts [sic] authority on this topic, this Court should not assume there is such a limitation." (Ortiz's Br. 5.) Ortiz's argument fails because it relies on the erroneous assumption that there is circuit court authority to limit it in the first place.

Ortiz points to language in Wis. Stat. § 973.20(a)(10) permitting a sentencing court to order that restitution be "paid immediately, within a specified period or in specified installments." He opines that if courts have the authority to direct that restitution be paid in specified installments, "it would seem that the court necessarily has the authority to specify the amount and timing of each installment." (Ortiz's Br. 5–6.)

As explained in the Department's opening brief, however, the sentencing court's general authority to order restitution payments in specified installments applies to all criminal defendants, while only the Department has specific statutory authority "to take restitution from an *inmate's* account at 'an amount *or a percentage the department determines is reasonable* for payment to victims.'" *State v. Williams*, 2018 WI App 20, ¶ 2, 380 Wis. 2d 440, 909 N.W.2d 177. (Department's Opening Br. 8 n.3, 10, 15.) The *Williams* decision explicitly references the Department's specific power to set reasonable percentage rates in restitution collection for defendant *prisoners*. That specific power applies here—what is at issue are percentage rates from prisoner accounts—not a circuit court's general power to order "specified installments" for criminal defendants. There is no conflict between the two: the rate set by the Department is not an "installment" (in the sense that a set dollar amount is paid at set intervals), but rather is a *percentage* applied to a given pool of inmate funds, whatever that pool of funds happens to

be. That is not an "installment" payment.[1] Further, even if these statutes were in tension, the more specific (regarding percentages deducted from an inmate account) would apply instead of the general (generally regarding criminal defendant installments). *See Clean Wis., Inc. v. Pub. Serv. Comm'n of Wis.*, 2005 WI 93, ¶ 175, 282 Wis. 2d 250, 700 N.W.2d 768 ("Where two statutes apply to the same subject, the more specific controls . . . .").

Ortiz also quotes the next sentence from Wis. Stat. § 973.20(a)(10): "If the defendant is placed on probation or sentenced to imprisonment, the end of a specified period shall not be later than the end of any period of probation, extended supervision or parole." He claims that if the Legislature had "intended to further limit the manner in which sentencing courts order restitution be paid, it could have done so." (Ortiz's Br. 6.) But this argument assumes that the sentencing court has the authority to set the deduction rate from an inmate's trust account in the first instance, which it does not. So, this statutory language is not a lone limitation on a sentencing court's unlimited authority over restitution, but rather is nothing more than a temporal limitation on its authority to order that criminal defendants pay restitution within a "specified period."

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Contrary to the circuit court's and Ortiz's position, a criminal sentencing court has no authority to limit the Department's exclusive statutory authority to deduct Ortiz's trust account funds at a reasonable rate of 50 percent to pay his restitution obligation.

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[1] *See Installment*, Merriam-Webster, https://www.merriam-webster.com/dictionary/installment (last visited Feb. 12, 2021) ("one of the parts into which a debt is divided when payment is made at intervals").

II. The Department does not void, modify, or ignore Ortiz's amended judgment of conviction by deducting his inmate trust account funds at a rate of 50 percent.

Ortiz next asserts that the Department cannot modify, void, or ignore the sentencing court's order (i.e., amended judgment of conviction). He contends that the Department would need to take some affirmative action before not complying with its terms. (Ortiz's Br. 6–7.) Ortiz addresses a problem that does not exist.

As explained in its opening brief, the Department is complying with, not modifying, voiding, or ignoring, the sentencing court's amended judgment of conviction. The amended judgment of conviction places a floor, not a ceiling, on the Department's ability to set the deduction rate from his inmate trust account to pay restitution.[2] By deducting at a rate of 50 percent, the Department complies with the amended judgment of conviction's directive to deduct 25 percent; it simply chooses to deduct *more*. Again, the language of the amended judgment of conviction referencing 25 percent does not include limiting phrases, such as "no more than" or "up to." (Department's Opening Br. 12–13.) Ortiz criticizes the Department's argument, but he says nothing more than the Department is twisting the meaning of the language. He does not explain *why* the Department's argument is wrong. Ortiz then purportedly cites language from his sentencing hearing stating that "25% of his prison wages . . . go towards Restitution." (Ortiz's Br. 7.) Even assuming this language is correct—because the transcript is not in the record

[2] The Department need not take a position in this appeal, and the Court need not decide, whether the sentencing court may properly set that floor (i.e., directing the Department to deduct a *minimum* amount of inmate trust account funds to pay a restitution obligation). That is because, here, the Department's deduction exceeded the floor set by the circuit court's judgment.

(*see* R. 9:5)—it does not refute the Department's argument, as it is just more of the same language that does not place a cap at 25 percent.

Moving on to a separate issue, Ortiz complains that the language of the amended judgment of conviction also "limits the source of the funds that can be taken to 'prison wages.'" (Ortiz's Br. 8.) But, again, this language merely directs that the Department deduct from, at a minimum, Ortiz's prison wages. This language does not expressly prohibit the Department from exercising its authority to deduct from *other* sources of funds, such as gifts Ortiz receives. Ortiz puts forth no persuasive reason why the sentencing court would place a limit on the source of Ortiz's funds from which his victim could be made whole when case law and statutes applicable to DOC squarely permit it. (*See* Department's Opening Br. 9–11, 13.)

Ortiz also addresses this Court's decision in *Markovic*, claiming that it does not support the Department's position about the breadth of its authority to deduct inmate funds to pay an inmate's restitution obligation. He asserts that *Markovic* did not address the issue of the Department's deduction rate running up against a rate set out in a judgment of conviction. (Ortiz's Br. 9–10.) That is correct, but also irrelevant. Ortiz acknowledges that, in *Markovic*, this Court confirmed that payment of a court-ordered obligation, such as restitution, is the "for the benefit of the prisoner" under Wis. Stat. § 301.32(1). Nonetheless, he criticizes the Department for deducting an inmate's funds at a 50 percent rate for each category in the statute, so that $100 can ultimately be reduced to $6.25. But Ortiz points to no evidence in the record that the Department does what he claims to be "gross over reach [sic]." (Ortiz's Br. 9–10.) And he argues that such a purported deduction system violates Wis. Admin. Code DOC § 309.466, which requires that the institution business office deduct 10 percent of all income earned or received by an inmate and placed it in a release account. (Ortiz's Br. 10.)

That argument is incorrect: it is mathematically possible to make a deduction at 50 percent and another at 10 percent simultaneously. There is no conflict between the release account procedure and simultaneously deducting for amounts owed.

Ortiz raises the issue of 2015 Wisconsin Act 355.[3] He correctly states that the circuit court held that Act 355 did not apply to him. (Ortiz's Br. 2; R. 27:3, A.-App. 103.) Nonetheless, he claims that the Department applied Act 355 to him, quoting language from the Secretary designee's decision that tracks Wis. Stat. § 973.20(11)(c), which Act 355 created.[4] (Ortiz's Br. 10–11.) This argument fails for two reasons. First, as Ortiz acknowledges, the Secretary's designee was merely quoting his amended judgment of conviction, not Act 355 directly. (Respondent's Br. 11; R. 9:80, A.-App. 110; 9:14, A.-App. 109.) So, Ortiz's complaint is with the sentencing

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[3] Ortiz argues that because the Department was deducting inmates' funds at a rate of 25 percent before Act 355 and it began to deduct the same funds at a rate of 50 percent after its enactment, the cause of the Department's rate increase had to be Act 355. (Ortiz's Br. 2–3, 12.) But the question in this case does not turn on subjective intent; it is whether, as a matter of law, the Department has the legal authority to do what it did (from any source). There is no causation component to that inquiry. In any event, this is not a colorable causation argument. Timing alone rarely supplies enough evidence of causation. *See*, *e.g.*, *Milligan v. Bd. of Trs. of S. Illinois Univ.*, 686 F.3d 378, 389 (7th Cir. 2012) (employment retaliation case).

[4] This subparagraph reads: "If a defendant who is in a state prison or who is sentenced to a state prison is ordered to pay restitution, the court order shall require the defendant to authorize the department to collect, from the defendant's wages and from other moneys held in the defendant's prisoner's account, an amount or a percentage the department determines is reasonable for payment to victims." Wis. Stat. § 973.20(11)(c).

court, not the Department.[5] Second, this language in the amended judgment of conviction did nothing to authorize the Department to act because it already had authority without it. Indeed, irrespective of this language, the Department could already "collect, from the defendant's wages and from other monies held in the defendant's inmate account, an amount or a percentage which the department determines is reasonable for restitution of victims." (R. 9:14, A.-App. 109.) *See Williams*, 380 Wis. 2d 440, ¶ 2.

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Ortiz's assertion that the Department's deducting funds from his inmate trust account at a rate of 50 percent conflicts with his amended judgment of conviction is unavailing. The Department complies with the amended judgment of conviction's directive to deduct 25 percent of his prison wages; it simply chooses to deduct at a higher, yet reasonable, percentage rate and from all his funds. Wisconsin statutes and case law support the Department's action.

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[5] Ortiz criticizes the sentencing court's clerk for including language from Act 355 in his amended judgment of conviction and makes three points why the language's inclusion was improper. (Ortiz's Br. 11.) This argument is not proper in this appeal because Ortiz is not challenging the amended judgment of conviction. Further, Ortiz includes as part of his appendix what he claims to be a page from a transcript from his sentencing hearing. (Ortiz's Br. 11; Ortiz's App. 103.) The inclusion of this purported transcript page is improper because the transcript is not part of the agency record. (*See* R. 9:5 (certiorari return index).) For these reasons, the Department will not respond to Ortiz's argument.

III. This Court must reject Ortiz's argument that DAI Policy 309.45.02 is an unpromulgated rule because he did not commence a proper challenge against it.

Ortiz's final argument asserts that the Department could not have begun to deduct his funds at a rate of 50 percent because such policy is an unpromulgated rule under ch. 227. (Ortiz's Br. 12–15.) This Court must reject this argument for one basic reason: Ortiz did not prosecute a circuit court challenge to the Department's policy as required by statute.

Wisconsin Stat. § 227.40(1)—a declaratory judgment proceeding—is the standard vehicle to challenge an agency rule or an alleged unpromulgated rule. *See Mata v. DCF*, 2014 WI App 69, ¶ 13, 354 Wis. 2d 486, 849 N.W.2d 908 (requirements of Wis. Stat. § 227.40 apply to challenges that a policy is an unpromulgated rule). Apart from a declaratory judgment action under Wis. Stat. § 227.40(1) itself, the validity of a rule may be challenged in other limited "judicial proceedings when material therein." Wis. Stat. § 227.40(2). The Legislature provided a list of permissible judicial proceedings, but certiorari is not one of them. *See* Wis. Stat. § 227.40(2)(a)–(f). When the type of judicial proceeding is not listed in the statute, the validity of a rule still may be challenged, but only according to the statutory procedure in Wis. Stat. § 227.40(3).

To challenge the validity of a rule in any proceeding not listed in Wis. Stat. § 227.40(2), like this one, Wis. Stat. § 227.40(3) requires the challenger to seek "an order suspending the . . . proceeding until after a determination of the validity of the rule . . . in an action for declaratory judgment under sub. (1)." Wis. Stat. § 227.40(3). Then, if the circuit court is satisfied that the validity of the rule is material to the issues of the case, "an order shall be entered staying the . . . proceeding until the rendition of a final

declaratory judgment in proceedings to be instituted forthwith by the party asserting the invalidity." Wis. Stat. § 227.40(3)(a). Further, "[u]pon entry of a final order in the declaratory judgment action, it shall be the duty of the party who asserts the invalidity of the rule . . . to formally advise the court of the outcome of the declaratory judgment action." Wis. Stat. § 227.40(3)(b). "After the final disposition of the declaratory judgment action the court shall be bound by and apply the judgment so entered in the trial of the proceeding in which the invalidity of the rule is asserted." Wis. Stat. § 227.40(3)(b).

Importantly, "[f]ailure to . . . prosecute the declaratory judgment action without undue delay *shall preclude such party from asserting or maintaining that the rule . . . is invalid*." Wis. Stat. § 227.40(3)(c).

Here, the record is completely devoid of any showing that Ortiz prosecuted a Wis. Stat. § 227.40 rule challenge before the circuit court. As an initial matter, Ortiz's inmate complaint filed with the Department does not raise a challenge to Department policy.[6] (R. 9:24–25.) As a result, his argument can be rejected at the outset. *See Bunker v. LIRC*, 2002 WI App 216, ¶ 15, 257 Wis. 2d 255, 265, 650 N.W.2d 864 ("It is settled law that to preserve an issue for judicial review, a party must raise it before the administrative agency.") In addition, Ortiz's certiorari petition contains no allegation that the policy is invalid as an unpromulgated rule. (R. 7:1–7.) Unsurprisingly, then, there is nothing in the circuit court

[6] Although Ortiz does not explicitly reference what "policy" he attempts to challenge, the Department understands DAI Policy 309.45.02 (R. 9:30–46) to be his focus. Ortiz does reference and include in his appendix a "memo," which is a June 21, 2016, Memorandum from the administrator of the Department's Division of Adult Institutions that addresses DAI Policy 309.45.02. (Ortiz's Br. 12; Ortiz.'s App. 104). But that specific memo was not part of the certified return. (*See* R. 9:5(certiorari return index).)

record showing that Ortiz applied for an order suspending the certiorari action to allow him to commence a separate declaratory judgment challenge, that the circuit court suspended the certiorari action, or that any such judgment exists or was applied, as required under Wis. Stat. § 227.40(3)(a). Thus, since Ortiz failed to prosecute a challenge to Department policy at the circuit court level, he is statutorily "preclude[ed] . . . from asserting or maintaining" that the policy is an unpromulgated rule on appeal. Wis. Stat. § 227.40(3)(c). This Court should disregard his final appellate argument.

CONCLUSION

Respondent-Appellant asks this Court to reverse the final order of the circuit court and thereby affirm the Department Secretary's decision dismissing Petitioner-Respondent Ortiz's inmate complaint.

Dated this 16th day of February 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2942 words.

Dated this 16th day of February 2021.

STEVEN C. KILPATRICK
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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 16th day of February 2021.

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