WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIC J. JOLING,

Defendant-Appellant.

Appeal No. 23-AP-1023

Waukesha County
Case No. 18-CF-5

REPLY BRIEF OF DEFENDANT-APPELLANT ERIC J. JOLING

CIRCUIT COURT FOR WAUKESHA COUNTY
HONORABLE PAUL F. REILLY, PRESIDING
HONORABLE LAURA LAU, PRESIDING
HONORABLE FREDERICK J. STRAMPE, PRESIDING
Circuit Court Case No. 18-CF-5

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Before beginning, the State makes a fair point that the way the opening brief labeled and structured the arguments was confusing. Both issues allege an erroneous exercise of discretion, albeit on separate grounds. Accordingly, this brief continues to separate the issues but has reworded the headings and tweaked the structure to better fit the respective arguments.

ARGUMENT

I. THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS DISCRETION WHEN IT MISINTERPRETED AND VIOLATED 42 U.S.C. § 407(a).

The State takes a surprisingly narrow and uncompromising view of a statute protecting recipients of disability benefits. The Court should decline to join the Attorney General's Office on the wrong side of this issue.[1] Not only are its counterarguments unpersuasive, but more importantly, the purpose of the law at issue is to protect the financial welfare of disabled Americans. 42 U.S.C. § 407(a) should not be weakened or eroded. Rather, it should be construed to give its language its plain meaning and to further the purpose for which it was enacted: to safeguard disability rights nationwide.

Mr. Joling is a disabled veteran whose yearly earnings surpass the poverty line only because he receives SSDI benefits. The State's position, if accepted, would make that lifeline fair game to creditors with a court order. The law holds otherwise. And even if Mr. Joling's employment income was not volatile and unpredictable, his average

[1] Notably, the Wisconsin Department of Justice has jurisdiction over the enforcement of "laws affecting the health, safety, and welfare of public assistance program recipients[,]" Wis. Stat. § 49.846(2), including 42 U.S.C. § 407(a)'s state law companion statute, Wis. Stat. § 49.41 ("All . . . benefits under . . . federal Title XVI [e.g. SSDI], are exempt from every tax, and from execution, garnishment, attachment and every other process and shall be inalienable.").

monthly earnings are less than his average monthly expenses. Because the Circuit Court rejected his argument that it should not treat SSDI benefits as income in calculating restitution, Mr. Joling is now indebted $59,808.47 to claimants who were long ago made whole, with no choice but to rely on his SSDI payments to cover some or all of the $250 installments when his employment income inevitably dries up.

The State's position is untenable. Whether the order is viewed as a restitution determination or a sentence modification, the Circuit Court erroneously exercised its discretion when it determined restitution based on a misinterpretation of 42 U.S.C. § 407(a) and a miscalculation of present and future earnings and expenses.

A. The Circuit Court Improperly Treated Mr. Joling's SSDI Benefits as Income.

The State's primary argument is that Mr. Joling "rel[ies] on a flawed premise, namely that the circuit court ordered him to use his SSDI to satisfy his restitution obligation." (Resp. Br. at 14.) It insists that, because the Circuit Court stated at the motion hearing that "I'm making him pay the restitution out of earnings that he has from his process serving business[,]" the Court should conclude that the restitution order didn't require Mr. Joling to use his SSDI benefits to pay restitution. (Id. at 14-15.)[2]

[2] While the State attempts to draw the appellant into a war of who can find the most extra-jurisdictional cases supporting one's side—also known as the war of which attorney has the better Westlaw/Lexis subscription—Mr. Joling declines the invitation. Although out-of-state cases may cut every which way, there is more than enough law in Wisconsin to answer this question.

This argument is flawed for three reasons. First, the restitution order doesn't say that. It simply orders Mr. Joling to pay $250 each month, without any regard for the source of the funds. And this makes sense. A circuit court's authority under Wis. Stat. § 973.20 allows it to determine the claimants' losses, consider the defendant's ability to pay, and order a restitution amount, but nowhere does it authorize courts to micromanage a defendant's personal finances to escape the reach of federal preemption. If the Circuit Court did so, then its overreach constitutes an erroneous exercise of discretion.

Second, ordering Mr. Joling to use his benefits to pay expenses *still* runs afoul of 42 U.S.C. § 407(a). Its general exemption provision states that "none of the moneys paid or payable or rights existing under this title [42 U.S.C. §§ 401 *et seq.*] shall be subject to execution, levy, attachment, garnishment, or other legal process . . . ." A restitution order that directs an SSDI recipient to use his past or future SSDI payments in a certain way is, in fact, subjecting his benefits to the restitution legal process.

Similarly, 42 U.S.C. § 407(a)'s anti-assignment provision states that "[t]he right of any person to any future payment under this title [42 U.S.C. §§ 401 *et seq.*] shall not be transferable or assignable, at law or in equity . . . ." If the Circuit Court ordered Mr. Joling to use his SSDI benefits to pay fixed and variable expenses, then its restitution order was, effectively, transferring or assigning his future SSDI benefits to others, namely, the businesses providing these basic goods and services to Mr. Joling.

42 U.S.C. § 407(a) prohibits courts from alienating an SSDI recipient from his benefits. Judicial mechanisms cannot, in other words, be used to earmark, steer, or otherwise control SSDI benefits.

That is the plain meaning and purpose of 42 U.S.C. § 407(a). Because, otherwise, SSDI benefits would lose their character as replacement income—income that would ordinarily come from "substantial gainful employment." *See* 42 U.S.C. § 423(d).

An essential quality of income—whether from employment or a welfare income program—is that it is *not* earmarked. It can be freely used by its recipient as he sees fit and does not necessarily have to go towards fixed expenses. Disabled people might choose to spend their SSDI benefits on things like disability accommodations and rehabilitative treatment rather than on rent and utilities. It is the recipient's choice. By earmarking SSDI benefits, they lose this essential quality and become tantamount to government coupons, like food stamps. This is not what Congress intended.

Finally, Wisconsin case law doesn't support the State's reading of 42 U.S.C. § 407(a). Instructive are a trio of this Court's cases interpreting a closely-related state statute, Wis. Stat. § 49.96.[3] Mr. Joling will address them in chronological order before discussing their import.

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[3] Formerly Wis. Stat. § 49.41, now-renumbered Wis. Stat. § 49.96 reads:

> ASSISTANCE GRANTS EXEMPT FROM LEVY. All grants of aid to families with dependent children, payments made under ss. 48.57 (3m) or (3n), 49.148 (1) (b) 1. or (c) or (1m) or 49.149 to 49.159, payments made for social services, cash benefits paid by counties under s. 59.53 (21), **and benefits under** s. 49.77 or **federal Title XVI [e.g., SSDI]**, are exempt from every tax, and from execution, garnishment, attachment and every other process and shall be inalienable."

(Emphasis added); *see also* Wis. Stat. § 49.001(2) ("'Federal Title XVI' means Title XVI of the federal social security act."). Because this language has not undergone any material changes over the years, all of this brief's references to this statute will be to the renumbered § 49.96 (2024).

In the first case, the Court applied Wis. Stat. § 49.96 to conclude that a judgment creditor could not force the debtor to use her Aid to Families with Dependent Children (AFDC) grant to satisfy the debt, citing AFDC's purpose: "The purpose of the AFDC program is to provide recipients with the necessities of life, not to make public funds available to pay preexisting debts." *Northwest Engineering Credit Union v. Jahn*, 120 Wis. 2d 185, 187, 353 N.W.2d 67 (Ct. App. 1984) (citing 42 U.S.C. § 601 (1983)). And it didn't matter that the debtor had deposited the funds into her general checking account: "Depositing funds in a checking account is a common method of managing money, and we see no reason why a welfare recipient should be penalized for doing so." *Id.*

In a second case involving Wis. Stat. § 49.96, the Court reversed a circuit court order denying petitioner Richard Langlois's motion to modify his child support obligation because his sole financial resource was Supplemental Security Income (SSI), received pursuant to 42 U.S.C. §§ 1381-1383c. *Langlois v. Langlois*, 150 Wis. 2d 101, 103, 441 N.W.2d 286 (Ct. App. 1989). It explained that SSI is "a federally administered financial assistance program" whose "purpose is to assist those who cannot work because of age, blindness, or disability by setting a federal guaranteed minimum income level for those suffering under these handicaps." *Id.* at 105 (citing *Schweiker v. Wilson*, 450 U.S. 221, 223 n.1 (1981)).

"As such," the Court continued, "SSI constitutes a public assistance program" covered by Wis. Stat. § 49.96, **and SSI "is therefore excluded from the gross income calculation for purposes of establishing child support under the guidelines."** *Id.* (emphasis added). It further explained:

> There are no exceptions to the statutory rule that Title XVI benefits are exempt from every process and inalienable. *See id.* Therefore, the grant cannot be burdened by a child support order. The purpose of the program is to provide the recipient with minimum necessary financial resources. *Schweiker*, 450 U.S. at 223. That purpose is defeated if the resource is depleted.

Id. at 105-06.

In the third and final case involving Wis. Stat. § 49.96, the Court upheld a circuit court's decision to hold an AFDC grant recipient, Patricia Rose, in civil contempt for failing to pay child support. *In re B., L., T. & K.*, 171 Wis. 2d 617, 492 N.W.2d 350 (Ct. App. 1992). Ms. Rose received weekly employment earnings of $220 and an unspecified amount of AFDC grant money that, by law, was partially offset by those earnings. *Id.* at 620-21. However, because she had, for years, failed to pay $10 per week in child support, Racine County petitioned for a show-cause order as to why Ms. Rose shouldn't be held in contempt. *Id.* at 619-20. A few days later, in separate proceedings, a commissioner raised her weekly child support to $55. *Id.* at 620. This new amount was based *solely* on her employment earnings and did not consider her grant money in calculating income. *Id.* at 620 n.2.

At the petition hearing, Ms. Rose argued that Wis. Stat. § 49.96 rendered the commissioner's support order illegal and an improper basis for contempt. *Id.* at 621. She reasoned that, to the extent her grant money was offset by her employment earnings, those earnings should be treated as grant money, and AFDC grant money may not be considered when determining the ability to pay child support. *Id.* The circuit court disagreed. *Id.* In affirming, the Court of Appeals held that, **while "[t]he statutes, the administrative code and the case**

law eliminate from consideration as income" AFDC grant money, this was true of "only *actual* AFDC" grant money; Ms. Rose's earned income was *not* tantamount to grant money. *Id.* (quoted italicization in original, other emphases added); *see also id.* at 622.

The State's position cannot be reconciled with *Jahn*, *Langlois*, and *B., L., T. & K.* Under a state statute with similar wording to 42 U.S.C. § 407(a), this Court has made clear that, even though welfare benefits and employment earnings may be deposited into the same checking account, courts are prohibited from treating welfare benefits as income and must, instead, determine a debtor's court-ordered obligation based on other financial resources, such as employment earnings. Courts cannot, as the State believes, compel welfare recipients to expend their benefits in a certain way just to circumvent the statute's restrictions. Exercising this measure of control over welfare benefits runs contrary to their purpose—which, for SSDI, is to provide a certain level of income to make up for loss in gainful employment occasioned by a disability.

These principals are entirely consistent with the case law on 42 U.S.C. § 407(a), including *Washington State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003) and *Lakewood Credit Union v. Goodrich*, 2016 WI App 77, 372 Wis. 2d 84, 887 N.W.2d 342. Likewise, they align with the Court's treatment of other similarly-worded laws. *See State v. Kenyon*, 225 Wis. 2d 657, 593 N.W.2d 491 (Ct. App. 1999) (construing 26 CFR § 1.401(a)-13(b)(1)).

Here, the Circuit Court rejected Mr. Joling's argument that 42 U.S.C. § 407(a) should be interpreted to exclude SSDI benefits from its calculation of income in determining a restitution amount. Instead, it accepted the State's interpretation. Its decision should be reversed.

B. The Circuit Court Improperly Forced Mr. Joling to Use His SSDI Benefits to Pay Restitution.

The State's position is flawed for another reason. Even if the Circuit Court did not err by treating Mr. Joling's SSDI benefits as income, its restitution order still violates 42 U.S.C. § 407(a). Not even the State would dispute that, if the restitution order forces Mr. Joling to expend his SSDI benefits on restitution because he has no other source of funds available to cover it, then the order violates federal law. Indeed, if the State's position is to be believed, this is really the *only* way that a court-ordered obligation could contravene § 407(a). Regardless, a brief review of the facts shows why the restitution order is almost certain to leave Mr. Joling with no choice but to deplete his SSDI benefits when his employment income, predictably, dries up.

Having no meaningful assets, Mr. Joling lives paycheck to paycheck. However, he must now pay $250 each month in restitution. His monthly SSDI payment totals $1,153. His net earnings from employment are highly volatile and unpredictable and, in any event, average less than $1,000 per month. His fixed monthly expenses are $914.61. When variable expenses like groceries and clothing are considered—according to the IRS, food averages $458 each month while apparel averages $87[4]—it becomes clear that, at least most months, Mr. Joling's total expenses will exceed his employment income.

[4] This is according to the U.S. Internal Revenue Service's 2024 Allowable Living Expenses National Standards (eff. Apr. 22, 2024) for "food, clothing and other items," which is derived from data of the Bureau of Labor Statistics (BLS) Consumer Expenditure Survey (CES), available online at: https://www.irs.gov/businesses/small-businesses-self-employed/national-standards-food-clothing-and-other-items (last accessed May 9, 2024).

When Mr. Joling inevitably has a down month and receives little or nothing from his process service business, he will have few choices. He must either default on his restitution payment or choose to do without the things that most people take for granted. If the restitution order stands and 42 U.S.C. § 407(a) goes unenforced, then Mr. Joling will be put into this impossible position again and again and again.

II. THE CIRCUIT COURT'S EXERCISE OF DISCRETION WAS ILLOGICAL BECAUSE IT FRUSTRATED THE PURPOSE OF SSDI BENEFITS WITHOUT SO MUCH AS ADVANCING THE DUAL PURPOSES OF RESTITUTION.

The State argues that the Circuit Court's decision was reasonable because victim's rights are important. (Resp. Br. at 21-23.) That the restitution order grants the claimants a windfall doesn't make the decision reasonable. The restitution order was in no way reasonable, as the preceding section demonstrates. However, the point of Mr. Joling's second argument was that, by exercising its discretion in a way that did not further the purposes of either the SSDI benefits or restitution, the Circuit Court did not apply "a logical rationale,"[5] "a demonstrated rational process,"[6] or "an explained judicial reasoning process."[7]

In other words, the focus was more on the reasoning than on the resulting decision.

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[5] *State v. Gayton*, 2016 WI 58, ¶ 18, 370 Wis. 2d 264, 882 N.W.2d 459.

[6] *Dane Cnty. DHS v. Mable K.*, 2013 WI 28, ¶ 39, 346 Wis. 2d 396, 828 N.W.2d 198.

[7] *State v. Loomis*, 2016 WI 68, ¶ 30, 371 Wis. 2d 235, 881 N.W.2d 749.

On that front, the State argues that Mr. Joling incorrectly claimed that the Circuit Court "raid[ed]" or "[went] after" his SSDI benefits for purposes of restitution. (Id. at 23.) His argument, while maybe a bit heavy-handed with the verbiage, is not wrong. From Mr. Joling's perspective, he knows that SSDI benefits are supposed to be protected, but in reality, his finances are chaotic. His sporadic income means that he routinely taps into his benefits to make restitution. Yet, at the same time, Mr. Joling cannot get a steadier, better-paying job on account of his disability—not many jobs allow unlimited bathroom breaks, hence his self-employment.

Next, the State complains that Mr. Joling should not be allowed to argue that the Circuit Court's order allows the claimants a double recovery. (Id. at 23-24.) This argument doesn't make sense. Mr. Joling explained in his opening brief that the Court's exercise of discretion did not further the dual purposes of restitution partly because the claimants were already made whole. This isn't an argument that could have been made *beforehand*. Regardless, Mr. Joling *did* make that argument before the Circuit Court. In justifying his modification recommendation at the close of his supplemental brief, he reasoned that, "[a]fter all, the victims each received substantial compensation from his insurer[,]" meaning any restitution would be a double recovery. (R.160-19.)

Finally, the State protests Mr. Joling's assertion that the restitution order serves no rehabilitative purpose. (Resp. Br. at 24.) An unrealistic, unlawful restitution order that cripples the financial welfare of a disabled veteran is not rehabilitative, no matter how well it's spun.

CONCLUSION

For the foregoing reasons, Mr. Joling respectfully requests that the Court reverse the Circuit Court's order denying in part his motion for postconviction relief, vacate that portion of its restitution order, and order all other relief requested in the opening brief.

Dated this 10th day of May, 2024.

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 809.19(8g)(a)

I hereby certify that this brief meets the form and length requirements of Wis. Stat. § 809.19(8)(b), (bm), and (c) as modified by the Court's order. It is in proportional serif font, minimum printing resolution of 200 dots per inch, 13-point body text, 11-point quotes and footnotes, leading of minimum 2-point and maximum 60-character lines. The length of this brief is **2,926** words.

Dated this 10th day of May, 2024.

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