

17AP1799

STATE OF WISCONSIN COURT OF APPEALS DISTRICT II

STATE OF WISCONSIN

Plaintiff - Respondent,

- vs -

Case No. APP-2017AP1799

SHAWN A. HODGKINS

Defendant - Appellate.

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APPELLANT'S BRIEF AND APPENDIX

CLERK OF COURT OF APPEALS
OF WISCONSIN

Submitted By

Shawn A. Hodgkins

PRO - SE

GREENBAY CORR. INST.

Po Box 19033

Greenbay, WISCONSIN.

54307

TABLE OF CONTENTS

<u>Cited</u>	<u>Pages</u>
Table of Contents Table of Contents	
Statement of the Issues	1-2.
Statement On Oral Arguments	
And Publication	2.
Statement Of The Case	2-4.
Statement Of The Facts	4.
Argument(s) Presented	
I. Did The Circuit Court Erroneously Exercised It's Discretion When It Denied Mr. Hodgkins Requesting That The Judgment Of Conviction Be Amended From To Pay Court Costs As A Condi- tion Of Probation To Impose And Stay The DNA Surcharge, Victim Witness Surcharge And Court Costs To Conform With The Court's Intent.	5-9.
II. Did The Circuit Court Erroneously Exercised It's Discretion When It Denied Mr. Hodgkins Request A Reduction Of Sentence Based Upon Ms. Polster Requesting Mr. Hodgkins To Be Released Early In Order To Help Support Their Child Financially.	-10-13.

Cont. Table Of Contents

<u>Cited</u>	<u>Pages</u>
Conclusion	13.
Length And Form Certification	14.
Certification Of Mailing	14.
Appendix	15.
Table Of Contents of Appendix	16.
Certification of Appendix	17.

TABLE OF AUTHORITIES

<u>Rosado v. State</u> , 70 Wis.2d 280, 281 234 N.W.2d 69 (1975)	12.
<u>State v. Harbor</u> , 2011 WI 28, 35; 333 Wis.2d 53, 797 N.W.2d 828	12.
<u>State v. Michels</u> , 150 Wis.2d 94, 99 (Ct.App. 1989)	11.
<u>State v. Johnson</u> , 210 Wis.2d 196, 565 N.W.2d 191 (Ct.App. 1997)	10.

Cont. Table Of Authorities

<u>Cited</u>	<u>Pages</u>
<u>State v. Mitchell</u> , 2015 WI App 68, 071 10.	12

Other Authorities Cited

Statutes

§ 301.01 (4), (8)	7
§ 30 B .01 (8)(b)	8
§ 303.06 (2)	7
§ 301.31	7
§ 809.19 (b) (12), (2) (a)	14, 17
§ 809.80 (4)(b)	14
§ 938.34 (8d) (c)	7
§ 973.045 (4)	5, 7, 8
§ 973.046 (4)	7
§ 973.20 (7), (10), (11), (a)(b)	5, 6

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT: II

APP. NO: 2017 AP1799

STATE OF WISCONSIN
Plaintiff-Respondence,

vs.

SHAWN A. HODGKINS,
Defendant-Appellate.

ON APPEAL FROM AN ORDER AND DECISION
DENYING DEFENDANT'S TO IMPOSE AND STAY
COURT COSTS AND SURCHARGES AND MOTION
TO REDUCE SENTENCE

BRIEF IN CHIEF OF DEFENDANT-APPELLANT'S

STATEMENT OF THE ISSUES

1. DID THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS DISCRETION WHEN IT DENIED MR. HODGKINS REQUESTING THAT THE JUDGMENT OF CONVICTION BE AMENDED FROM TO PAY COURT COSTS AS A CONDITION OF PROBATION TO IMPOSE AND STAY THE DNA SURCHARGE, VICTIM WITNESS SURCHARGE AND COURT COSTS TO CONFORM WITH THE COURT'S INTENT.

THE CIRCUIT COURT ANSWERED: NO.

- II. ~~_____~~
11. DID THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS DISCRETION WHEN IT DENIED MR. HODGKINS REQUESTING A REDUCTION OF SENTENCE BASED UPON MS. POLSTER REQUESTING MR. HODGKINS TO BE RELEASED EARLY IN ORDER TO HELP SUPPORT THEIR CHILD FINANCIALLY.

THE CIRCUIT COURT ANSWERED: NO.

III. STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Hodgkins seeks neither oral arguments or publication as the law is well settled in the areas relevant to this appeal.

STATEMENT OF THE CASE

1.) The defendant Shawn Hodgkins entered a plea of guilty on January 19, 2016, to three misdemeanors and received on court one eighteen months of initial confinement followed by six months of extended supervision. Mr. Hodgkins received one year of initial

Confinement followed by one year of extended supervision on the other two counts. These two counts were imposed and stayed for two years. These two counts were consecutive to each other and consecutive to the first count. The Court ordered court costs and DNA Surcharges as a total of \$ 929 dollars but ordered that this be paid as a condition of probation. (see: Sentc. Transcr. '2/8/16', Pg. 17, Hereinafter as **A-AP: 01**).

The Court reasoned:

Nonetheless, I'm satisfied that incarceration is appropriate until we can get you to the point where you can start dealing with and addressing the issues because you have not been able to do that. You also talked about maybe it will be your child that becomes the impetus for you to do that. Here's the other aspect, until you're able to address some of your issues, you're going to have a very difficult time being a parent. You may have courts that simply don't allow for that to occur, notwithstanding what maybe your desire or even that of the child's mother for you to be involved in the child's life. That may be precluded by other courts. It isn't just your wanting to be a parent. You also need to be an appropriate parent and children that grow up around violent and abusive adults themselves. ~~the~~

Id. A-AP: 01, Pg. 14.

The court also imposed a no contact order with the victim but also imposed a no violent contact order for the purposes of having contact with Mr. Hodgkins future child. See; A-AP: 01, Pg. 16.

In researching this case Mr. Hodgkins has indicated that the DOC is garnishing his commissary before he is serving his sentence. Not only is Mr. Hodgkins getting his commissary garnished, but his canteen money is getting garnished at 100 percent. See; A-AP: 03.

Mr. Hodgkins through the assistance of Counsel, Alex Cossi, filed the Motion to the Circuit Court, which is why this appeal follows.

STATEMENT OF THE FACTS

For ease and simplicity, Mr. Hodgkins will establish the relevant facts within the arguments section of this brief.

ARGUMENT'S PRESENTED

1. DID THE CIRCUIT COURT ERRONEOUSLY EXERCISED IT'S DISCRETION WHEN IT DENIED MR. HODGKINS REQUESTING THAT THE JUDGMENT OF CONVICTION BE AMENDED FROM TO PAY COURT COSTS AS A CONDITION OF PROBATION TO IMPOSE AND STAY THE DNA SURCHARGE, VICTIM WITNESS SURCHARGE AND COURT COSTS TO CONFORM WITH THE COURT'S INTENT.

A. Standards of Review.

The Wisconsin stats, § 973.20 [in conjunction with § 973.045, stats] contains several provisions that bestow authority on the trial court to fashion an order to achieve the goals of the restitution statute. Under § 973.20 (10), the trial court may require a defendant to pay restitution [Court costs, DNA And other Surcharges], "immediately", within a specified period or in specified instalments." Under § 973.20 (7), if the court orders restitution for more than one person, "the court may direct the sequence in which payments are to be transferred..." § 973.20 (11) (a) states that the "the restitution order shall require the defendant to

deliver the amount of money or property due as restitution to the [DOC] for transfer to the victim or ~~the~~ other person to be compensated "

In addition, Wis. Stat. § 973.20 (1)(b) requires the DOC to "establish a separate account for each person in its custody or under its supervision ordered to make restitution for the collection and disbursement of funds." Based on these provisions in § 973.20, the state may contend this, by ordering disbursement from prison wages, the trial court was merely implementing than the statutory scheme.

Mr. Hodykins attempted to present to his attorney to also request that the DOC's authority to disburse prison wages is strictly circumscribed by other statutes. He referred counsel and now to this court to Wis. Stat. § 301.31, which states:

Wages to prisoners. The [DOC] may provide for assistance of prisoners on their discharge; for the support of their families while the prisoners are in confinement; or for the payment, either in full or ratably, of their obligations acknowledged by them in writing or which have been reduced to judgment by the allowance of moderate wages. . . . Until the prisoner's final discharge, the funds ~~is~~

arising from the wages shall be under the control of the officer in charge of the institution and shall be used for the benefit of the prisoner, the prisoner's family and other obligations specified in this section. Earnings by inmates working in the prison industries and the retention and distribution thereof shall be governed by ss. 303.01(4) and (8), and 303.06(2).

So, the Wisconsin stat. § 303.01(4) pertains to wage standards and Wis. stat. § 303.06(2) pertains to sale of prison products. This Court had agreed that § 303.01(8) provides guidelines regarding the allowable prison wage distributions that concerns us here. § 303.01(8) enumerates specific purposes for which the DOC must distribute earnings of an inmate. That section reads in part:

(b) The [DOC] shall distribute earnings of an inmate or resident, other than an inmate or resident employed under sub. (3)(em), for the crime victim and witness assistance surcharge under § 973.045(4), for the delinquency victim and witness assistance surcharge under § 938.34(8d)(c), for the deoxyribonucleic ~~acid~~ acid analysis surcharge under § 973.046(4) and for compliance with s. 303.06(2) and may distribute earnings for the support of the inmate's or resident's dependents and for other obligations either acknowledged by the inmate or resident in writing or which have been reduced to judgment that may be satisfied according to law.

Mr. Hodgkins points out with all due respect, that a provision specifically allowing for distributions for restitution is absent. However, ~~the statute~~ this Court has concluded that a judgment of conviction including an order to pay restitution is an "other obligation [I]... reduced to judgment that may be satisfied according to law." Therefore, § 303.01(8)(b) gives the trial court the authority to order restitution be disbursed from prison wages.

So, in the case at bar, Mr. Hodgkins asserts that the circuit court erroneously exercised its discretion when it denied his motion. ~~because~~ It is apparent that the circuit court intended that Mr. Hodgkins pay the bulk of his court costs and surcharges while he had some means to pay during his probation and during his extended supervision. The Clerk stated, "DNA Surcharge and DNA sample?" The Court indicated, "On one only. He probably provided a DNA sample already, but one surcharge only in terms of costs." Clerk: "\$429." The Court ordered, "A total of \$949 and that can be paid as a condition of probation in this matter..." (see: A-AP:01, p. 17).

Mr. Hodgkins at this time is getting his canteen account garnished at 100 percent. The Department of Corrections was cited to Counsel § 973.045, stats., which states, "If a court imposes a sentence or places a person on probation, the court shall impose a crime victim and witness assistance surcharge. A surcharge imposed under this subsection may not be waived, reduced, or forgiven for any reason." § 973.045(4), stats., also states, "If an inmate

in a state prison or a person sentenced to state prison has not paid the crime victim and witness assistance surcharge under this section, the department shall assess and collect the amount owed from the inmate's wages or other moneys." This statute seems to suggest that someone can collect money's owed before the imposition of sentence. In this case, the defendant is serving a revoked sentence and his consecutive probationary term has not been implemented.

In the judgment of conviction it states that court costs are to be paid as a condition of probation. (See: A-AP: 02, P. 2). Also the judgment of conviction also states that court costs and DNA surcharge are to be paid as a condition of Extended Supervision and can be taken out of prison wages. (See: A-AP: 02, 01, P. 5).

The statutes are silent as to whether or not a surcharge or Court costs can be stayed until imposition of sentence. Hodykin's and his counsel believe that it the court's intent to not have the defendant have 100 percent of his canteen money be garnished until all of his obligations are paid in full. Counsel believes if the judgment of conviction reflected a stayed imposition of court costs and surcharges it would be consistent with the court's intent and cannot be misconstrued by the Department of Corrections.

Therefore, the defendant is requesting that this court of Appeals, send this case back to the circuit court to impose and stay any applicable surcharges, court costs until he serves his probation.

II. DID THE CIRCUIT COURT ERRONEOUSLY EXERCISED IT'S DISCRETION WHEN IT DENIED MR. HODGKINS REQUEST A REDUCTION OF SENTENCE BASED UPON MS. POLSTER REQUESTING MR. HODGKINS TO BE RELEASED EARLY IN ORDER TO HELP SUPPORT THEIR CHILD FINANCIALLY.

A. Standards of Review.

Under Wisconsin state law, a 'new factor' justifying sentence modification is a fact that is highly relevant but not known to the judge at the time of sentencing because it did not exist or was unknowingly overlooked. State v. Johnson, 210 Wis. 2d 196, 565 N.W. 2d 191 (Ct.

App. 1997).

In addition, a new factor must be "an event or development which frustrates the purpose of the original sentence. There must be some connection between the new factor and the sentencing - something which strikes at the very purpose for the sentence

selected by the trial court.⁴² State v. Michels, 150 Wis.2d 94, 99 (Ct.App. 1989).

In the case at bar, Ms. Polster elected not to make a statement at sentencing. See: A-AP: 01, P. 3. Now, Ms. Polster has articulated that she does want Mr. Hodgkins out early so he can help with his child to pay support. See: A-AP: 04, As Exhibit: D. This would be considered a new factor because this was never mentioned by the victim at the time of sentencing. In addition, this new factor is directly related to the purpose of the court's sentence because the court was aware that they had a child in common and wanted to accommodate this arrangement by allowing contact with the victim for the purposes of visitation. *id.* A-AP: 01. So, the defendant is asking for either a 25 percent reduction in his initial confinement or a sentence that is concurrent to his current revoked sentence in order for him to take care of his child. At sentencing, there was verification that Mr. Hodgkins did have a history of employment and the ability to earn a living. *id.* A-AP: 01, P. 8.

Finally, Mr. Hodgkins states that in comparing the above arguments and positions of law. Hodgkins also would like to point this out as well that as this Honorable Court is quite aware that the Sentencing Court has the inherent powers and authority to modify a criminal

Sentences upon the defendant's showing of a "New Factor." State v. Harbor, 2011 WI 28, ¶¶ 35, 333 Wis. 2d 53, 747 N.W. 2d 828. (Cited in, State v. Mitchell, 2015 WI App. 68, ¶ 10); A New Factor is:

"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 overlooked by all of the parties."

Id., ¶ 40 (quoting Rosado v. State, 70 Wis. 2d 280, 281, 234 N.W. 2d 69 (1975)). Deciding a motion for sentence modification based on a New Factor is a two-step inquiry. Id., ¶ 36. The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor. Id. Whether the proffered fact or set of facts constitutes a new factor does not, however, automatically entitle the defendant to sentence modification. Id. ¶ 37. Rather, if a new factor is present, the circuit court ~~has~~ has the discretion whether that New Factor justifies sentence modification. Id.

Mr. Hodajins asks that this court review the issues presented, reverse the circuit court's

decision in denying his Motion for a sentence Modification. That it remand this case back to the circuit court to clarify its sentencing intent and in reducing his restitution to 25 percent the statutory guidelines.

Also, that his initial confinement or a sentence that it runs concurrent to his current revoked sentence in order for him to take care of his child.

CONCLUSION

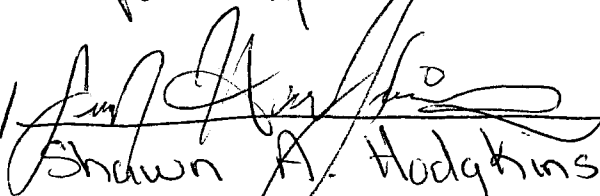
For the reasons stated, Mr. Hodgkins respectfully request that this Court of Appeals reverse and remand with discretions to the circuit court to implement the issues raised in this brief.

That this court reviews all attached appendix herein, along with appellate's arguments.

Dated at Green Bay, Wisconsin. This 26 day of ~~December~~ 2017.

Respectfully Submitted By:

GREEN BAY CORR. INST.
P.O. BOX. 19033
GREEN BAY, WI.
54307-9033.

/s/ 
Shawn A. Hodgkins
(# 445500),

Cc: File.

Pro Se, Appellate.

LENGTH AND FORM CERTIFICATION

This brief meets the form and length requirements of Rule § 809.19 (b), and (12), in that it is 13 pages in length, handwritten with a proportional font, with the half inch space, 1 1/2 inch margin on the left and 1 inch margin on the other three sides.
Dated this 26 day of DECEMBER, 2017.

151 Shawn A. Hodgkins
Shawn A. Hodgkins

CERTIFICATION OF MAILING

I, Shawn A. Hodgkins, do hereby certify pursuant to Wis. Stat. § 809.80(4)(b) that on this 26 day of DECEMBER, 2017, I have placed one original and four copies of Defendant-Appellant's brief in chief with attached appendix in the Green Bay, Correctional Institution, Cell-hall mail box designated for inmates general and legal mailing card, that further postage has been pre-paid via a disbursement affixed to same. Additionally a copy of this brief is being served upon the state, in the same manner, on this same date.

(14)

151 Shawn A. Hodgkins

APPENDIX

(18)

Appellants Record Of Appendix On Appeal

Table of Contents

1. Sentencing Transcripts
'218/116', Pgs. 1-20. A-AP:01.
2. Judgment Of Conviction
Pg. 1-8. A-AP:02.
3. Inmate Account Statement
Certify Six Month. A-AP:03.
4. Chelsea Polster's letter
Pg. 2. A-AP:04.
5. Motion Hearing Transcripts
'21 117' Pgs. _____ A-AP:05.
6. Circuit Courts Decision and
Order Denying Defendant's Motion. A-AP:06.