COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2127-CR **Cir. Ct. No. 2012CF262**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL J. WILLIQUETTE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Wood County: TODD P. WOLF, Judge. *Affirmed*.

¶1 BLANCHARD, P.J.[1] This appeal concerns the amount of restitution ordered as part of Paul Williquette's sentence following his conviction

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

for criminal damage to property arising from damage that Williquette intentionally caused to another person's vehicle. Williquette appeals a circuit court order denying Williquette's motion for postconviction relief seeking modification of the restitution order. Williquette argues that evidence of the actual amounts that the victim paid to repair and for the related clean up of his vehicle, which Williquette learned about only after the plea and sentencing hearing, constitutes a new factor that justifies modification of the restitution order. I agree with the circuit court that the actual amount that the victim paid to repair and clean up the damaged vehicle is not a new factor that justifies modification of Williquette's sentence. Accordingly, I affirm.

BACKGROUND

¶2 The State charged Paul Williquette with felony criminal damage to property, and another charge not relevant to this appeal, stemming from a June 23, 2012 incident during which, according to the criminal complaint, Williquette damaged the victim's vehicle by "smashing the windshield and exterior" of the vehicle and "flatten[ing] all of the tires."

¶3 The victim provided the police with estimates for the cost to repair the damage and for the related clean up of his vehicle, which totaled $2,576.27. The State provided pretrial discovery to the defense, which included the following: a written estimate of $963.38 from a local tire store for the purchase and installation of four new tires; a written estimate of $250 from a local automotive store for cleaning out the interior of the vehicle, including removing all of the shards of broken glass; and a written estimate of $1,362.89 from a Milwaukee area auto glass business to replace the broken vehicle glass.

¶4 On September 20, 2012, Williquette pleaded no contest to both charges, including a reduced charge of misdemeanor criminal damage to property, and he was sentenced during the same hearing. During the course of this same hearing, the State dismissed but asked the court to read-in a separate misdemeanor criminal damage to property case against Williquette (hereafter "the separate case"). The court agreed to the read-in for restitution purposes.

¶5 The plea questionnaire that Williquette and his attorney signed had an attachment that included the following language: "DA will recommend 2 years probation, restitution ($2581.22 + $79.99 = $2,661.21), $100 plus costs on each count, ..." The record reflects that the $79.99 was attributed to restitution for the separate case. At the outset of the plea and sentencing hearing, the prosecutor summarized to the court, "My recommendation is sentence be withheld. Mr. Williquette [to be] placed on probation for a period of 2 years, pay restitution in the amount of 2,581.22 and in [the separate case] the amount 179.99,[2] ...." In response, Williquette's attorney replied, "That is my understanding of the agreement also, Your Honor."

¶6 In later addressing the court, defense counsel noted Williquette's limited income, stating, "I only note that because we would like to minimize any fines in this case. He [Williquette] understands he is going to be paying restitution which is significant, ..."

¶7 As part of its sentencing order, the court required Williquette to pay $2,581.22 in restitution in the instant case, as well as $79.99 in the separate case,

[2] It is evident that either the prosecutor misspoke or the court reporter erred in typing 179.99, as opposed to 79.99, which is the correct number.

for a total of $2,661.21, as reflected on the judgment of conviction. For the sake of simplicity, I ignore the $79.99 portion of the restitution order for the balance of this opinion, because it has not been challenged.

¶8 As further discussed below, I conclude that, while neither party nor the court used the formal term "stipulation," the record is plain that Williquette in fact stipulated to the amount of restitution at the time of his plea and sentencing. *See* WIS. STAT. § 973.20(13)(c).[3]

¶9 In his postconviction motion, Williquette requested modification of the circuit court's restitution order. He asserted that, after the plea and sentencing hearing, he learned for the first time that the actual amount that the victim paid to repair and clean up the vehicle was less than the restitution award of $2,581.22. He argued that this lower amount constituted a new factor requiring sentence modification. Williquette submitted with his motion an affidavit of a witness who avers that the victim spent only $1,035 on repair and clean up. The witness explains that this difference between the estimates and what the victim actually spent is accounted for by the following: work that the victim did himself to clean glass from the vehicle; the use of a window replacement company that charged less than the company that provided the estimates; and the victim's replacement of

[3] WISCONSIN STAT. § 973.20 addresses restitution. Subsection (13)(c) directs the sentencing court, before imposing sentence, to "inquire of the district attorney regarding the amount of restitution, if any, that the victim claims" and to "give the defendant the opportunity to stipulate to the restitution claimed by the victim and to present evidence and arguments on the factors specified in" subsection (13)(a)1., which includes the "amount of loss suffered by any victim as a result of a crime considered at sentencing." Subsection (13)(c) provides that if, as in this case, the defendant stipulates to the restitution claimed by the victim "the court shall determine the amount of restitution before imposing sentence or ordering probation."

his damaged tires with used tires gifted by a friend, as opposed to replacement with new tires purchased at ordinary, retail prices.

¶10 After a hearing, the circuit court denied Williquette's motion for postconviction relief on the grounds that there was not a new factor justifying sentence modification.[4] Williquette now appeals.

DISCUSSION

¶11 Williquette argues that the circuit court erred in denying his motion for postconviction relief requesting sentence modification based on the existence of a new factor. Williquette asserts that the lesser amount of money that the victim actually spent to repair and clean up his vehicle constitutes a new factor that justifies modification of the restitution order, which was based upon estimates. For the following reasons, I disagree.

¶12 "Deciding a motion for sentence modification based on a new factor is a two-step inquiry." ***State v. Harbor***, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. First, Williquette must "demonstrate by clear and convincing evidence the existence of a new factor." *See* ***id.*** 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, even though it was then in existence, it was unknowingly overlooked by all of the parties."

[4] The circuit court also concluded that Williquette's motion for postconviction relief was untimely. However, on October 28, 2013, this court retroactively extended the time for Williquette to file this motion to August 1, 2013. I acknowledge Williquette's question as to the necessity of this court's October 28th order, but there is no need for me to decide whether the order was necessary. Under any view of the record, Williquette's motion was timely filed, and the State does not now argue to the contrary.

Id., ¶40 (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Whether a fact or set of facts constitutes a new factor is a question of law subject to de novo review. *See* ***id.***, ¶36.

¶13 In the second step of this inquiry, if a new factor is present, the circuit court has the discretion to decide whether that new factor justifies modification of the originally imposed sentence, a decision which will be overturned only if the circuit court erroneously exercised its discretion. *See* ***id.***, ¶¶33, 37. For reasons discussed below, I do not reach this second step.

¶14 Williquette argues that the actual sum the victim spent to repair and clean up his vehicle is a "new factor" because this lesser amount was unknown to the circuit court at the time of sentencing and is "highly relevant" to the amount of restitution ordered. According to Williquette, this sum is "highly relevant" because "[i]f the trial court knew the actual repair costs at the time of sentencing, it should have led to a different restitution award." I disagree.

¶15 The primary purpose of restitution is to "return the victims to the position they were in before the defendant injured them," and, thus, the restitution statute must be construed "broadly and liberally to allow victims to recover their losses resulting from the defendant's criminal conduct." *See* ***State v. Holmgren***, 229 Wis. 2d 358, 366, 599 N.W.2d 876 (Ct. App. 1999); *see also* ***State v. Kennedy***, 190 Wis. 2d 252, 258, 528 N.W.2d 9 (Ct. App. 1994) ("The restitution statute reflects a strong equitable public policy that victims should not have to bear the burden of losses if the defendant is capable of making restitution." (citation omitted)). Additionally, "[r]estitution is an important element of the offender's rehabilitation because it may serve to strengthen his or her sense of responsibility and teach the offender to consider more carefully the consequences of his or her

actions." ***Kennedy***, 190 Wis. 2d at 257-58 (citing ***Huggett v. State***, 83 Wis. 2d 790, 798, 266 N.W.2d 403 (1978)).

¶16 The circuit court's decision to order restitution in any particular amount is discretionary. ***State v. Longmire***, 2004 WI App 90, ¶16, 272 Wis. 2d 759, 681 N.W.2d 534. As pertinent here, when setting restitution involving loss of or damage to property resulting from a crime, the court has several options, one option being the discretion to require that the defendant "pay the reasonable repair cost" of the damaged property. ***Kennedy***, 190 Wis. 2d at 258-59 (citing WIS. STAT. § 973.20(2)). In determining the "reasonable repair cost" of damaged property, the court has the discretion to "accept and reject evidence and to give accepted evidence such weight as it desires." ***State v. Boffer***, 158 Wis. 2d 655, 663, 462 N.W.2d 906 (Ct. App. 1990); *see also* ***Kennedy***, 190 Wis. 2d at 259-60 (noting that the circuit court has the discretion to award restitution based on the "reasonable repair costs" of a vehicle, even where those costs exceed the vehicle's fair market value); ***State v. Foley***, 142 Wis. 2d 331, 342-43, 417 N.W.2d 920 (Ct. App. 1987) (a circuit court's discretion to set restitution is not constrained by a jury verdict).

¶17 I conclude that Williquette's argument that the actual repair costs are a new factor fails for at least two reasons. First, it rests in part on the contention that the estimates the victim provided to the State regarding vehicle repairs, and which the State provided to the defense and the circuit court, were not reasonable or legitimate as reflecting the pecuniary value of the damage Williquette caused. For example, Williquette asserts that the amount that the victim actually spent on replacing the broken windows "was not the inflated amount off of the internet for a shop in Milwaukee, but the $975 that it cost at [a different repair shop]." In the same vein, Williquette argues that the victim was put "in a better position" by the

restitution award because it was premised on replacement with brand new tires, while the tires that Williquette damaged were "in bad condition."

¶18 This aspect of Williquette's argument fails because he stipulated to the reasonableness of the estimates at the plea and sentencing hearing, and because he has not demonstrated that his stipulation was based on estimates that were illegitimate or unreasonable. Williquette had the option at sentencing to present evidence that the victim's estimates were not reasonable because they were obtained from an overly expensive repair shop or because they did not account for the age of the victim's tires. *See* WIS. STAT. § 973.20(13)(c). Williquette did not do so, but instead, stipulated to the amount of restitution that the State proposed based on those estimates. *See* ***State v. Szarkowitz***, 157 Wis. 2d 740, 749, 460 N.W.2d 819 (Ct. App. 1990) (where a defendant has notice of the claimed amount of restitution and does not object to that sum, the circuit court may proceed as though that amount is not in dispute); *see also* ***State v. Leighton***, 2000 WI App 156, ¶¶54-56, 237 Wis. 2d 709, 616 N.W.2d 126. Indeed, Williquette's counsel also suggested to the court at the time of sentencing that other penalties in the sentence need not be harsher because Williquette "understands he is going to be paying restitution which is significant." No one at the hearing used the word "stipulation," but as the court explained in ***Szarkowitz***, "The use of the word 'stipulate' in [§] 973.20(13)(c) does not imply a requirement of a formal written stipulation, signed by the defendant, as to the amount of restitution claimed." 157 Wis. 2d at 749.

¶19 The time to address what constituted the reasonable repair and clean up costs, such as the age of the tires or the cost to replace the windows, was at the sentencing hearing, if not before that hearing. Williquette stipulated that the estimates provided at the hearing represented reasonable repair and clean up costs,

regardless of the details of how the victim might end up economizing, doing-it-himself, or cutting a better than usual deal with a vendor or service provider. Furthermore, Williquette does not assert, nor does he provide any new evidence indicating, that those estimates were somehow illegitimate because, for example, the victim obtained demonstrably inflated estimates. The victim's economizing is what lead to the new amount that Williquette argues is a "new factor" justifying sentence modification, and thus, there is nothing suggesting that the original estimates were illegitimate or unreasonable.

¶20 Second, regardless of the fact that the money actually spent by the victim was not known by either of the parties or the court at the time of the plea and sentencing hearing, Williquette fails to persuade me that this factor is "highly relevant" to the amount of restitution that the circuit court ordered. Even if the court was aware of this amount, it was within its discretion to set restitution based upon the victim's estimates, which were treated at sentencing as legitimate estimates of reasonable repair and clean up costs. *See* ***Kennedy***, 190 Wis. 2d at 259-60; *see also* ***Boffer***, 158 Wis. 2d at 663. If Williquette had presented this same evidence to the circuit court at the time of the sentencing hearing, namely, that the victim had found ways to economize in an attempt to return his vehicle to its pre-damage condition, the circuit court would still have had the discretion to set restitution based upon the victim's estimates. Therefore the amount that the victim decided to spend in his efforts to repair his vehicle is not "highly relevant" to the court's decision to award restitution based upon legitimate estimates of the reasonable repair and clean up costs.

¶21 To illustrate my view, I offer the following hypothetical. Assume all facts as they are here, including the fact that Williquette failed to suggest at any time that the estimates were illegitimate or unreasonable. The change in the

hypothetical would be that, at the time of the plea and sentencing hearing, Williquette offered evidence that the victim had not repaired his car in any respect and was not planning to do so. In those circumstances, the court could have found this new, hypothetical evidence about the victim's decision not to repair to be credible, yet still exercised its discretion to award to the victim the value of the reasonable repair costs based on legitimate estimates. The victim in the hypothetical would have sustained the pecuniary damages awarded by the court, in an amount recognized under WIS. STAT. § 973.20 and supported by credible, unrebutted evidence. An award based on this hypothetical would not be restitution in excess of the actual losses caused by the criminal conduct of Williquette. Instead, it would be restitution equal to actual losses established by credible, unrebutted evidence, regardless of how the victim chose to spend the award.

¶22 Having concluded that there is not a "new factor," I need not consider Williquette's argument as to why the actual sums that the victim spent to repair his vehicle justify sentence modification. *See* ***Harbor***, 333 Wis. 2d 53, ¶38 (if a court determines there is no "new factor," that ends the inquiry).

CONCLUSION

¶23 For the foregoing reasons, I affirm the order of the circuit court denying Williquette's motion for postconviction relief.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.