

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 12, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**Nos. 99-0018-CR
99-0019-CR
99-0020-CR**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JEFFREY A. DUERST,

DEFENDANT-APPELLANT.

APPEALS from an order of the circuit court for Dane County:
DANIEL R. MOESER, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

PER CURIAM. Jeffrey Duerst appeals an order denying his motions to set aside or modify a restitution order. He claims the restitution order should have been extinguished when his probation was revoked and also

challenges the seizure of money from his prison account to apply towards restitution. For the reasons discussed below, we affirm.

BACKGROUND

In 1993, Duerst pled no contest to charges of burglary, armed burglary, aggravated battery, criminal damage to property and theft, in a combined proceeding. The court sentenced him to four years of probation on each count, to be served concurrently. Among the conditions of his probation, Duerst was required to serve a year in the county jail and to pay \$11,916.11 in restitution to his victims.

After Duerst's probation was revoked in 1996, the trial court sentenced him to a total of ten years in prison. In addition, the court stated:

[W]ith respect to restitution, previous restitution orders are confirmed. I'm afraid all that changing it to a civil judgment does is relieve the Department of the responsibility of attempting to collect it. I don't think they should be relieved of that responsibility.

The Department of Corrections subsequently seized \$7,980.70 from Duerst's prison account to apply toward his restitution.

Duerst filed a series of motions in the trial court objecting to the continuation of the restitution order and the seizure of the funds from his prison account, which he claimed should have been partially exempt because they came from a worker's compensation award. The trial court denied Duerst's motions and this appeal followed.

STANDARD OF REVIEW

Whether the trial court has authority to order restitution under a particular set of facts is a question of law which we review independently. *State v. Walters*, 224 Wis.2d 897, 901, 591 N.W.2d 874, 875 (Ct. App. 1999). If the trial court does have authority to order restitution, it has discretion to set the terms of the restitution order. *See State v. Boffer*, 158 Wis.2d 655, 658, 462 N.W.2d 906, 907-08 (Ct. App. 1990). We will sustain discretionary acts by the trial court so long as the court “examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *Modica v. Verhulst*, 195 Wis.2d 633, 650, 536 N.W.2d 466, 474 (Ct. App. 1995).

ANALYSIS

Duerst claims: (1) the trial court never actually ordered restitution as part of his sentence, but only as part of his probation; (2) the trial court lacked authority to order restitution as what he terms a condition of his confinement; (3) the trial court erroneously failed to establish a schedule for his restitution payments; (4) the trial court erroneously exercised its discretion by failing to take into account his ability to pay while in prison; and (5) the Department of Corrections lacked authority to withhold and disperse his entire worker’s compensation award because the amount of such a dispersion should have been limited to twenty-five percent under § 973.05(4)(b), STATS. We consider each argument in turn.

First, we disagree with appellant’s characterization of the trial court’s restitution order. The trial court’s “confirmation” of the prior restitution

orders was not merely an acknowledgment that they had previously existed under the revoked probation; it was an affirmative act to reimpose the same amounts of restitution along with the sentences. The trial court had the authority to impose the same restitution at sentencing as it had imposed for probation under § 973.20(1r), STATS., which states:

When imposing sentence or ordering probation for any crime for which the defendant was convicted, the court, in addition to any other penalty authorized by law, shall order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing or, if the victim is deceased, to his or her estate, unless the court finds substantial reason not to do so and states the reason on the record. Restitution ordered under this section is a condition of probation, extended supervision or parole served by the defendant for a crime for which the defendant was convicted. After the termination of probation, extended supervision or parole, or if the defendant is not placed on probation, extended supervision or parole, restitution ordered under this section is enforceable in the same manner as a judgment in a civil action by the victim named in the order to receive restitution or enforced under ch. 785.

The fact that restitution imposed at sentencing eventually becomes a condition of the defendant's parole does not mean that it is not also in effect while the defendant is in prison.

Even if the trial court had the authority to order the payment of restitution while he was in prison, Duerst claims it erred by failing to set forth a specific payment schedule. He points to a number of federal cases which hold that a district court cannot delegate the specification of a restitution payment schedule to probation or prison authorities. However, those cases are based upon the language of the federal restitution statute, 18 U.S.C. § 3663, which only applies in federal court. As we have discussed above, the relevant statute here is

Wisconsin's restitution statute, § 973.20, STATS. We see nothing in the language of § 973.20 which requires circuit courts of this state to establish payment schedules for restitution orders.

Duerst's claim that the trial court erroneously exercised its discretion by failing to consider his ability to pay restitution while in prison fails because he did not object to the reimposition of restitution at sentencing and offered no evidence of his inability to pay. *See State v. Dugan*, 193 Wis.2d 610, 624-25, 534 N.W.2d 897, 902 (Ct. App. 1995); § 973.20(14)(b), STATS. We therefore conclude the restitution order is valid and the judgment of conviction need not be modified.

Finally, we lack competence to review the Department's collection method or to order the State to refund money collected under the order. *State v. Minniecheske*, 223 Wis.2d 493, 495, 590 N.W.2d 17, 18 (Ct. App. 1998). The issue of the Department's seizure of funds from Duerst's prison trust account must be raised through a claim filed with the state claims board or in a separate civil suit following the exhaustion of remedies under the inmate complaint system.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

