

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 99-0198-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL JOHN NOONAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Florence County:
ROBERT A. KENNEDY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

CANE, C.J. Michael Noonan appeals an order requiring him to pay Florence County \$6,502.04 in costs incurred in connection with his arrest. He argues that there is no factual basis to support the trial court's determination that

the costs were necessary or incurred in connection with his arrest. We affirm the order.

Following plea negotiations, Noonan pled guilty to endangering safety by reckless use of a dangerous weapon, contrary to § 941.20(2)(a), STATS.¹ Noonan received two years probation with six months jail time as a condition. Noonan stipulated that the facts adduced at the preliminary hearing constituted a basis for the charge. At sentencing, Noonan objected to the imposition of \$6,502.04 costs incurred by the Florence County Sheriff's Department as a result of requesting assistance from a Brown County SWAT team. After receiving briefs, the sentencing court found that § 973.06(1)(a), STATS., authorized the taxation of costs incurred in connection with a defendant's arrest. It stated: "On the record of this case, the court finds that the Florence County Sheriff[']s Department did incur expenses in the amount of \$6,502.04 for mutual aid from the Brown County SWAT team and that said expense was ... a necessary disbursement incurred in connection with the arrest of the defendant." Noonan appeals the order assessing the SWAT team costs.

Noonan argues that no factual basis supports the court's finding that the costs were necessary or incurred in connection with Noonan's arrest. He contends that the record fails to show that the SWAT team ever arrived on the scene or were utilized in any way in making the arrest. The State responds that the preliminary hearing transcript and the concession Noonan made at sentencing

¹ Noonan was initially charged with one count of recklessly endangering safety, a felony, contrary to § 941.30(1), STATS.; one count of reckless conduct in the operation of a firearm, contrary to § 941.20(1)(a), STATS.; one count of going armed with a firearm while under the influence of an intoxicant, contrary to § 941.20(1)(b); and one count of possession of a controlled substance, contrary to § 961.573(1), STATS. These charges were dismissed in exchange for his plea.

support the imposition of SWAT team costs. At sentencing, defense counsel stated: “The swat team arrived approximately two hours after, I think, after the shots were fired and they then went up and made the arrest. Mr. Noonan was found in his bed asleep and basically that’s the story.”

We conclude that the record supports the trial court’s discretionary determination to impose costs. Costs are taxable under § 973.06(1), STATS., against a defendant as part of his sentence. See *State v. Grant*, 168 Wis.2d 682, 684, 484 N.W.2d 370, 371 (Ct. App. 1992). The decision whether to assess costs as part of a defendant’s sentence is addressed to trial court discretion. See *State v. Gerard*, 57 Wis.2d 611, 626-27, 205 N.W.2d 374, 382-83 (1973). We affirm a trial court’s exercise of discretion if the record reveals a rational basis for its determination. See *State v. Sullivan*, 216 Wis.2d 768, 780-81, 576 N.W.2d 30, 36 (1998).

Section 973.06(1)(a), STATS., provides:

(1) Except as provided in s. 93.20, the costs taxable against the defendant shall consist of the following items and no others:

(a) The necessary disbursements and fees of officers allowed by law and incurred in connection with the arrest, preliminary examination and trial of the defendant, including, in the discretion of the court, the fees and disbursements of the agent appointed to return a defendant from another state or country.

At the preliminary hearing, Jeff Rickaby, the Florence County sheriff, testified that he received a call advising him that thirty to forty shots had been fired in a rural area on Settlement Road and that there was a possibility that a family was either trapped or taken hostage because of gunfire. Rickaby explained that Noonan lived in a trailer a short distance from the Ritchie family. As a

result, Rickaby requested “a tactical or swat team respond from Brown County ... to assist us in resolving the incident.” Rickaby testified that his officers secured the perimeter at approximately 9:30 p.m. and that Noonan was arrested after 2:30 a.m. Rickaby testified that he heard no rifle fire after 11 p.m. Upon investigation, Rickaby documented twenty-six bullet holes in Noonan’s trailer, his vehicle, and trees along the road where officers had been approaching. The bullet holes indicated that a .22 caliber rifle had been used.

Mary Jensen, a deputy sheriff, testified that she was called to the scene because of a report of an intoxicated driver stuck in the ditch. A second call advised that there was a woman at the scene who was possibly being assaulted. After more radio calls, Jensen proceeded toward the Ritchie residence where another deputy had already arrived. They heard about five or six rifle shots coming from just east of the Ritchies’ house.

It was around 7:30 p.m. and dark when Jensen attempted to proceed up the Ritchies’ driveway, with her headlights off, stopping approximately eighty yards from the house. She saw a child run out of the house and then run back in. Shortly thereafter, she saw the silhouette of a man she recognized as Noonan carrying a rifle and walking along the west side of the house. She lost sight of him and did not know if he went into the house or the trailer. At about 8 p.m., she heard fifteen more rounds whistling near her and hitting trees near her squad. She backed out and called her supervisor.

Other officers from Forest County arrived and attempted to approach the house. They heard five or six more shots and retreated to their squads for cover. Sporadic gunfire continued. At approximately 10:45 p.m. officers were able to observe the interior of the Ritchie residence with a scope and saw members

of the family inside. The father came outside his residence and asked the officers to get them out of the house. He advised that Noonan was not in the house but was in his trailer as far as he knew. He also advised that Noonan had come to his door and said that “I am out of ammo and am leaving the gun right here.” Ritchie had not checked to see where the gun was.

Mrs. Ritchie testified that earlier in the evening, she had helped pull Noonan’s truck out of the ditch and that they had gotten into an argument on the road. Noonan appeared to have been drinking. Later, she heard shots and put the children in the basement. Her husband said he heard Noonan say he was going to kill himself. After 8:10 p.m. she heard no more shots.

The record supports the trial court’s exercise of discretion. The preliminary hearing transcript demonstrates that the sheriff called for assistance in connection with Noonan’s conduct, which later led to his arrest. Also, the court was entitled to rely on Noonan’s attorney’s concession at sentencing that the SWAT team arrived two hours after the shots were fired and that they then went in to make the arrest. As a result, the record supports the trial court’s finding that the SWAT team costs were incurred in connection with the arrest. Because the record discloses a rational basis for the court’s decision to assess the costs of the SWAT team, we do not reverse it on appeal.²

² The State also contended that Noonan waived his claim of error by failing to raise it at the trial court level. In his trial court brief, Noonan argued that this item of cost was not allowable as restitution under § 973.20, STATS., because only victims are entitled to receive restitution under that section, and the county was not a victim. See *State v. Schmaling*, 198 Wis.2d 756, 761, 543 N.W.2d 555, 557 (Ct. App. 1995). He further argued that there was no specific statutory section permitting the costs of a SWAT team to be recovered. We conclude that Noonan adequately preserved the issue for appeal.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

