

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

November 22, 1995

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.

**NOTICE**

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

No. 94-1937-CR

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT II

STATE OF WISCONSIN,

Plaintiff,

v.

SCOTT A. MORGAN,

Defendant-Appellant,

DENNIS BUTEK,

Intervenor-Respondent.

APPEAL from a judgment and an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Reversed and cause remanded with directions.*

Before Anderson, P.J., Brown and Snyder, JJ.

SNYDER, J. Scott A. Morgan appeals from an order and amended judgment holding that his civil settlement with Dennis Butek did not

cover restitution ordered pursuant to § 973.20, STATS.<sup>1</sup> Morgan raises three issues on appeal: (1) whether the trial court erred when it conducted a de novo review of the court commissioner's restitution hearing after entering an order adopting the commissioner's findings; (2) whether the trial court's finding that the payment of \$100,400 did not satisfy Morgan's restitution was in error; and (3) whether the trial court erred when it found that Butek had inserted a valid reservation of rights within a general release. Because we conclude that the trial court was without authority to award a de novo restitution hearing, we reverse.

Morgan was convicted of causing Butek serious injury by intoxicated operation of his truck in violation of § 940.25(1)(a) and (3), STATS., and the companion charge of having an illegal blood alcohol content contrary to § 940.25(1)(b) and (3). At Morgan's June 15, 1992, sentencing proceeding, the trial court withheld sentence and placed him on three years probation. As conditions of probation, Morgan was ordered to serve six months in jail and to pay restitution to Butek for medical expenses and lost wages in an amount to be determined.<sup>2</sup>

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<sup>1</sup> We note that Morgan brings this appeal on the basis of an order issued by the trial court on January 27, 1993, which stated “[t]he clerk of court shall prepare an amended Judgment of conviction in conformity with this Order.” The amended judgment of conviction was then entered on February 1, 1993. The restitution issue appealed was identical in both the order and the judgment. No one was misled by the failure to specifically identify the judgment as the document appealed from. See *Northridge Bank v. Community Eye Care Center*, 94 Wis.2d 201, 203, 287 N.W.2d 810, 811 (1980). The identification in a notice of appeal of the order granting judgment as the order appealed from is an “inconsequential violation” of the rules of appellate procedure. See *Carrington v. St. Paul Fire & Marine Ins. Co.*, 169 Wis.2d 211, 217 n.2, 485 N.W.2d 267, 269 (1992).

<sup>2</sup> According to the restitution statute, § 973.20, STATS., if a crime results in bodily injury, the restitution order may include the victim's costs for medical services, including therapy and

On August 4, 1992, Butek's counsel sent a letter to Morgan memorializing a settlement discussion which had occurred at a prior deposition. The letter stated that Butek would "execute a full and complete release of claims" against Morgan upon payment of \$100,400.<sup>3</sup>

In response to the settlement letter, Morgan and his insurer forwarded two checks to Butek totaling \$100,400. Butek negotiated the checks and executed a release to Morgan and his insurer on August 14, 1992. Unknown to Morgan, Butek's counsel included the following reservation of rights in the standard release form:

This Release does not affect in any way the obligation imposed upon Scott A. Morgan by the Walworth County, Wisconsin, Circuit Court under the terms of a Judgment of Conviction ... to pay restitution for medical expenses and lost wages.

Butek filed a restitution claim for \$25,429.70 on the same date that he executed the civil settlement release, and the Department of Corrections submitted the claim in that amount to the trial court.

Morgan disputed the restitution request based upon his payment of the settlement money and requested a hearing pursuant to § 973.20(13)(c)4, STATS. A court commissioner conducted the hearing on October 20, 1992, and

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rehabilitation, and income lost due to the crime. *Id.* at subsec. (3)(a), (b) and (c).

<sup>3</sup> This represented the \$100,000 policy limits of Morgan's American Standard automobile policy and "all cash deposits available in any bank or credit union accounts." The balance of Morgan's cash accounts was \$400.

agreed with Morgan that the § 973.20 restitution amount was set off by the civil settlement of \$100,400.<sup>4</sup>

On January 27, 1993, the trial court signed an order adopting the court commissioner's findings and directing the clerk of court to prepare an amended judgment of conviction and sentence. The amended judgment, stating that restitution was paid, was signed by the trial court and filed on February 1, 1993, *nunc pro tunc* to the original judgment of conviction.

On April 6, 1993, Butek petitioned the trial court for a de novo restitution review and a hearing to determine Morgan's restitution obligation. On April 12, 1993, the trial court granted Butek's petition. On November 8, 1993, after a hearing, the trial court found "plain legal error" in that the court commissioner ignored the plain language of the release and that there was no authority to offset Butek's special damages against the civil settlement under § 973.20, STATS. The trial court remanded the issue of restitution to the court commissioner to determine Butek's damages under § 973.20(3)(a),(b) and (c).

On May 9, 1994, the court commissioner ordered Morgan to pay \$21,395.06 in restitution, crediting only an amount previously paid in wage assignments against Butek's claim.<sup>5</sup> The same day, the trial court adopted the

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<sup>4</sup> The court commissioner's specific finding was that because the settlement did not differentiate between general and special damages, there was no indication that special damages were not included in the settlement. Special damages are described as those which represent the victim's actual monetary losses. *State v. Stowers*, 177 Wis.2d 798, 804, 503 N.W.2d 8, 10 (Ct. App. 1993). In this case, because of the criminal conviction, Butek's special damages were covered by the ordered restitution.

<sup>5</sup> Morgan had already paid \$4034.64 in wage assignments, which the court commissioner subtracted from the total of \$25,429.70. The commissioner found that Morgan owed Butek

court commissioner's new restitution findings and directed the clerk of court to again prepare an amended judgment of conviction and sentence. On May 10, 1994, the amended judgment of conviction and sentence, increasing the prior sentence to include \$21,395.06 in restitution, was filed *nunc pro tunc* to the original judgment of conviction.

Morgan brought a motion asking the trial court to reconsider the restitution order imposed by the second amended judgment of conviction and sentencing. That motion was denied and the trial court affirmed the change of the judgment order from "paid" to an amount owed of \$21,774.57.<sup>6</sup> It is from this series of hearings that Morgan appeals.

Morgan contends that the grant of a *de novo* review of the court commissioner's findings was error because it occurred after the trial court had adopted those findings. We see a more fundamental problem than that framed by Morgan and argued by the parties: the trial court's unauthorized vacation of a judgment of criminal conviction and sentencing.<sup>7</sup> Even the agreement of the

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\$21,395.06. At this point, Butek had received \$100,000 from Morgan's insurer, \$400 from Morgan as part of the civil settlement, and past wage assignments of \$4034.64.

<sup>6</sup> This figure represents the restitution amount of \$21,395.06 and \$379.51 in court costs.

<sup>7</sup> Citing § 973.20(14), STATS., the district attorney did not participate in this matter. That section reads in relevant part:

**(14)** At any hearing under sub. (13) ....

(a) .... The district attorney is not required to represent any victim unless the hearing is held at or prior to the sentencing proceeding or the court so orders.

Because we ultimately conclude that Butek's petition for a sub. (13) hearing required the trial court

parties on questions of law does not bind an appellate court. *State v. Olson*, 127 Wis.2d 412, 419, 380 N.W.2d 375, 379 (Ct. App. 1986).

Upon the adoption of the court commissioner's findings that restitution was paid, those findings were incorporated into an amended judgment of conviction and sentence. Butek's April 6, 1993, petition to review restitution was subsequent to that amended judgment's filing on February 1, 1993. Therefore, the granting of Butek's petition vacated a criminal judgment imposing a sentence and resulted in a resentencing with an increased penalty.

When examining proceedings in the trial court, this court need not give deference to the trial court since its decision that the review was proper is a conclusion of law. *Cf. Omernick v. Lepak*, 112 Wis.2d 285, 290, 290 N.W.2d 307, 309 (1983). An appellate court is not bound by a trial court's conclusions of law and decides the matter de novo. *First Nat'l Leasing Corp. v. City of Madison*, 81 Wis.2d 205, 208, 260 N.W.2d 251, 253 (1977).

A court is not free to modify a sentence solely on reconsideration and a deliberate change of mind. *State v. Martin*, 121 Wis.2d 670, 674 n.1, 360 N.W.2d 43, 45 (1985). This is based on the constitutional guarantee against double jeopardy, which protects the integrity of final judgments. *Id.* at 674-75, 360 N.W.2d at 45-46. The double jeopardy clause assures finality and fairness in the criminal justice system. *Id.* at 675, 360 N.W.2d at 46. Double jeopardy  
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to first vacate a legal judgment of conviction and sentence that included an order for victim restitution, we strongly urge prosecutors to review such requests to determine if more than a sub. (13) restitution hearing is involved. Here, the underlying problem with Butek's postjudgment efforts may have been timely addressed and this whole legal exercise avoided.

concerns also prevent a trial court from increasing a sentence after a defendant has commenced serving it. See *State v. North*, 91 Wis.2d at 507, 509-10, 283 N.W.2d 457, 458-59 (Ct. App. 1979).

Once a sentence has been entered, it is subject to modification or resentencing only if the initial sentence is illegal, *Bozza v. United States*, 330 U.S. 160, 166-67 (1947), or after retrial, *North Carolina v. Pearce*, 395 U.S. 711, 718-19 (1969). Morgan was not retried; in fact, he had already served the required jail time and was on probation. Since we have concluded that the postjudgment proceedings vacated the judgment and modified the sentence, the only valid way to do so is if the initial sentence was illegal.

In order to determine whether Morgan's initial sentence was illegal, we turn to the second issue: whether the trial court erred when it adopted the court commissioner's finding that the civil settlement satisfied the remaining amount Morgan owed as restitution. This issue is governed by § 973.20, STATS., and involves the application of a statute to a set of facts. Whether a trial court properly interpreted and constructed a statute is a question of law which is reviewed de novo. *Plachta v. Plachta*, 118 Wis.2d 329, 332, 348 N.W.2d 193, 195 (Ct. App. 1984).

Section 973.20, STATS., mandates that as part of the sentencing of a criminal defendant, the court must order the defendant to make restitution to any victim of the crime. Section 973.20(1). Under subsec. (3), the court may require the following for a defendant whose crime resulted in bodily injury:

- (a) Pay an amount equal to the cost of necessary medical and related professional services ....

....

(c) Reimburse the injured person for income lost as a result of the crime.

In this case, the court ordered Morgan to pay restitution to Butek. Butek submitted an affidavit outlining his medical expenses and lost wages, and the trial court set the restitution amount at \$25,429.70. Morgan disputed Butek's filed claim for restitution, and the trial court referred the dispute to a court commissioner. *See* § 973.20(13)(c)4. Morgan's claim was founded upon the civil settlement of \$100,400, and he asserted that the money Butek had received in that settlement should include satisfaction of the restitution owed.

The court commissioner was obligated, under § 973.20(13)(c)4, STATS., to "conduct a hearing on the matter, and submit the record thereof, together with proposed findings of fact and conclusions of law, to the court ...." At such a hearing, according to statute, "[t]he defendant may assert any defense that he or she could raise in a civil action for the loss sought to be compensated." Section 973.20(14)(b).

The court commissioner was presented with the amount of restitution owed (\$25,429.70) and the amount of the civil settlement (\$100,400). The court commissioner found that the civil settlement did not attempt to allocate the funds between Butek's medical expenses and lost wages (special



damages) and pain and suffering (general damages). It was within the court commissioner's discretion to take into account the effect of any other payments by a defendant. *See* § 973.20(14)(b), STATS. The court commissioner concluded that absent evidence to the contrary, the settlement incorporated the restitution owed by Morgan.

We find further support for the commissioner's findings in § 973.09(3)(b), STATS., which speaks directly to the issue of restitution and the completion of the probationary period. It states in relevant part:  
If payment as ordered has not been made, the court shall hold a probation review hearing .... If the court does not extend probation, it shall issue a judgment for the unpaid restitution ... unless it finds that the victim *has already recovered a judgment against the probationer for the damages covered by the restitution order.* [Emphasis added.]

In this case, the settlement entered into was in lieu of a judgment. The court commissioner's finding that the restitution amount should be set off against the civil settlement was a valid determination consistent with statutory guidelines.

Based on this analysis, we conclude that the judgment and sentence, in which the civil settlement off-set restitution owed, was not illegal. Since Morgan's initial sentence does not meet either criterion for modification, the trial court was without authority to vacate the earlier judgment and resentence.

As to the third issue raised by Morgan, we note that the trial court found "plain legal error" in the commissioner's first application of Butek's

reservation of rights provision to the restitution claim. We disagree that plain error occurred.<sup>8</sup> At a hearing under § 973.20(13), STATS., a defendant may assert any defense that he or she could raise in a civil action concerning the loss to be compensated.<sup>9</sup> Morgan requested the hearing to assert the defense of the \$100,400 civil settlement. We are satisfied that Morgan was not estopped from asserting the defense where the amount of a prior civil settlement exceeded Butek's restitution claim.

In addition, we conclude that the court commissioner's analysis of the civil settlement was consistent with the legislative directive that “the restitution order may require that the defendant ... *pay all special damages, but not general damages*, substantiated by the evidence in the record, *which could be recovered in a civil action against the defendant*” due to the underlying criminal act. Section 973.20(5)(a), STATS. (emphasis added). While Butek may contend that

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<sup>8</sup> We note that even if there had been “plain legal error,” once the trial court had issued the judgment of conviction, the proper review would have been by this court.

<sup>9</sup> Section 973.20(14)(b), STATS., states in relevant part:

**(14)** At any hearing under sub. (13), all of the following apply:

....

(b) .... The defendant may assert any defense that he or she could raise in a civil action for the loss sought to be compensated.

the settlement did not affect Morgan's restitution obligation, he cannot argue that the reservation of rights clause he inserted controlled the application of the restitution statute. A civil settlement agreement would not automatically usurp the language and application of § 973.20(5)(a).<sup>10</sup> When Morgan asserted his defense that the civil settlement with Butek included both special and general damages, the trial court was obligated to address the issue. The court commissioner merely complied with the law.

We conclude that the trial court erred when it conducted postjudgment proceedings, which had the legal effect of vacating a judgment and increasing Morgan's sentence. Accordingly, we reverse and direct that the amended judgment of conviction, entered February 1, 1993, be reinstated.

*By the Court.*—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

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<sup>10</sup> We are also concerned with the actions of Butek's counsel, who stated in a letter that upon payment of the agreed upon settlement amount, a “full and complete release of claims” would be executed. The reservation of rights clause was then appended to the release without notice to Morgan. Morgan was entitled to know about the reservation provision before the transfer of the settlement money.