

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 4, 2014**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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

**Appeal No. 2013AP2723-CR**

**Cir. Ct. No. 2011CM478**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**PATRICK L. HIBL,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Walworth County:  
JOHN R. RACE, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.<sup>1</sup> Patrick L. Hibl appeals from a judgment of conviction for negligent handling of burning material, party to a crime, including a

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<sup>1</sup> 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.

condition to pay \$24,220 in restitution to William Eubanks for fire damage to Eubanks's house. Hibel argues that there was no nexus established between the crime and the damage to the house. Additionally, Hibel argues that the trial court failed to consider Hibel's ability to pay the restitution. We reject Hibel's arguments and affirm.

¶2 A fire severely damaged Eubanks's two-flat house. There is conflicting information in the record regarding when the fire started vis-à-vis Hibel's arrival at the house. Hibel pled guilty to negligent handling of burning material in exchange for a recommendation of no jail time and the dismissal and read in of charges for possession of tetrahydrocannabinol (THC) and resisting or obstructing an officer. The circuit court sentenced Hibel to one year of probation and ordered restitution in the amount of \$337,900. Hibel moved for a hearing on restitution, and the circuit court referred the matter to a court commissioner. The court commissioner heard the matter and imposed restitution in the amount of \$24,220. The circuit court then entered an order adopting the court commissioner's findings of fact and conclusions of law and entered an amended judgment of conviction reflecting the new restitution amount. Hibel appeals.

¶3 Hibel makes two arguments. First, he contends that the requisite nexus between the crime and the damages was not established so as to justify the imposition of restitution. Second, Hibel argues that the record does not support the court commissioner's finding that Hibel had the ability to pay the restitution ordered.

*Restitution Standards*

¶4 Restitution to the victim of a crime is the rule, not the exception. *State v. Gibson*, 2012 WI App 103, ¶10, 344 Wis. 2d 220, 822 N.W.2d 500. The restitution statute, WIS. STAT. § 973.20, should be broadly interpreted to compensate the victim whose loss has resulted from criminal conduct. *Gibson*, 344 Wis. 2d 220, ¶10. In order for restitution to be ordered, the victim must establish a causal connection between the crime considered at sentencing and the victim’s loss. *Id.*, ¶11. There must be a showing that the defendant’s conduct was a substantial factor in causing the victim’s pecuniary loss. *Id.* “A defendant ‘cannot escape responsibility for restitution simply because his or her conduct did not directly cause the damage.’” *Id.* (citation omitted). The “crime” includes “all facts and reasonable inferences concerning the defendant’s activity related to the crime for which the defendant was convicted, not just those facts necessary to support the elements of the specific charge of which the defendant was convicted.” *State v. Madlock*, 230 Wis. 2d 324, 333, 602 N.W.2d 104 (Ct. App. 1999) (emphasis omitted). “Under the restitution statute, the sentencing court takes a defendant’s entire course of conduct into consideration.” *Id.* (citation omitted). Finally, the court may order the defendant to pay restitution based on charges that have been dismissed pursuant to a guilty plea but are read in for sentencing. *State v. Straszkowski*, 2008 WI 65, ¶93, 310 Wis. 2d 259, 750 N.W.2d 835.

¶5 A court’s decision on restitution is discretionary, and we will not reverse such a decision unless there has been an erroneous exercise of discretion. *Gibson*, 344 Wis. 2d 220, ¶8. However, whether the court is authorized to order restitution under a given set of facts is a question of law we review de novo. *Id.*

*Causal Connection Between Crime and Victim's Loss*

¶6 In his decision on restitution, the court commissioner found, *inter alia*, that Hibl “presented testimony exculpatory in nature suggesting he and his friends came upon the house . . . , observed smoke and acted as good Samaritans in attempting to extinguish the fire they observed upon their entry to the premises.” The court commissioner went on to note “the connection of defendant’s guilty plea to negligent handling of burning materials . . . and the burned house which was essentially destroyed.” The court commissioner found that the evidence suggested that the house was used for growing marijuana and noted that Hibl’s read-ins were for possession of THC and resisting or obstructing an officer.

¶7 Hibl argues that there was no evidence to support the finding that Hibl’s actions were a substantial factor in causing fire damage to the house. Hibl points to the testimony at the restitution hearing of several witnesses who said that Hibl arrived at the house after the fire was already underway. In reply to the State’s response that the criminal complaint provided facts to support the causal connection, Hibl maintains that the court commissioner impermissibly relied on hearsay reported in the criminal complaint. In particular, the complaint stated that a neighbor child reported to the police that Hibl was at the house for about forty-five minutes before the fire started.

¶8 Hibl did not object to the facts as recited in the complaint at his plea hearing. Hibl pled guilty to negligent handling of burning material in exchange for the dismissal of charges for possession of THC and resisting or obstructing an officer and a recommendation of no jail time. In compliance with its statutory duty, when taking a guilty plea, to satisfy itself that “the defendant in fact

committed the crime charged,” WIS. STAT. § 971.08(1)(b), the court asked the prosecutor for the factual basis for the charge. The prosecutor replied:

Your honor, as described in the criminal complaint on June 1st of 2010 officers were dispatched to this residence in Sharon for a house fire. Officers spoke with the defendant who admitted to being at the residence. ...[H]ash oil was being made at the residence which caught on fire. The defendant picked up a pot of hash oil and ran with it causing burns to himself as well as spreading the fire. Witnesses indicated that the defendant had been at the residence for approximately forty-five minutes before the fire started, so I believe that’s a factual basis for the negligent handling of burning material.

The court asked the defense, “Any argument with that?” Defense counsel replied, “No.”

¶9 In addition to Hibl’s guilty plea, other evidence in the record supports the inference that Hibl’s conduct was a substantial factor in causing the fire damage to the house. Sam Whittier, a friend of Hibl who was at the house during the fire, testified that Hibl emerged from the burning house with burning material and threw it “over the edge” of the second-floor unit. Another of Hibl’s witnesses, Katie Jaeger, testified that Hibl grabbed a burning object from the stove and ran outside with it. On the day of the fire, Hibl told police conflicting stories, admitting that he had changed his story regarding who was with him at the fire. Hibl testified that he believed that hash oil was cooking in the pot. In the course of the fire, Hibl suffered severe burns to his hand. Hibl told police that when he got to the house the day of the fire he saw “99 proof of Butyrl Alcohol ... on the table” and that “[t]hat’s what was in the pot ... you could smell the alcohol.” Hibl showed police where some of the burning substance had stained his shorts.

¶10 Finally, the police report was received into evidence at the restitution hearing, subject to the defense’s objection to the hearsay testimony of the neighbor

contained therein.<sup>2</sup> Aside from the neighbor's testimony that Hibl was there well before the fire started, the police report also contained confirmation of the testimony that Hibl had spilled a burning pot inside the house. There was an account, from Hibl's friend Matthew Borchardt, that the fire happened when Hibl and William Russ, who was staying at the house, were breaking down marijuana plants to manufacture hash oil and that Hibl and Russ then got into a fight about whose fault the fire was. A neighbor who sometimes socialized at the house testified that Hibl was there "a lot." This same neighbor told police that there was a marijuana growing operation underway at the house. Officers investigating the fire found marijuana pipes at the house, and Hibl confirmed that it was possible that his DNA would be found on the pipes.

¶11 It was within the court commissioner's discretion to assess the credibility of the testimony and the weight to be given to the evidence. Based on numerous statements in the police report, the court commissioner could have concluded that drug manufacturing was occurring at the house and that Hibl was part of that operation. The court commissioner could have further concluded that Hibl's participation in the drug manufacture was a substantial factor in causing the fire. Testimony at the restitution hearing and statements in the police report also support the conclusion that Hibl negligently handled a burning pot of hash oil inside the house as he carried it outside, spilling it along the way, including on his

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<sup>2</sup> The rules of evidence do not apply at restitution hearings. WIS. STAT. § 973.20(14)(d). Therefore, the court commissioner could have received the police report into evidence over Hibl's hearsay objection to Anthony Lange's testimony related therein. Instead, the court commissioner decided to receive it "but not ... rely on the hearsay statements," indicating, "I'll receive it subject to the objection and limit my consideration of it as appropriate." This decision was in response to Hibl's hearsay objection that was "specifically referring to Anthony Lange." In keeping with the court commissioner's ruling, we do not rely on Lange's statement as related in the police report, though we note that hearsay testimony can be admitted at a restitution hearing.

hand and arm. The record supports the conclusion that there was a causal connection between Hibl's criminal conduct—negligent handling of burning material—and the fire damage to the house. Furthermore, the rules of evidence do not apply at a restitution hearing, *Madlock*, 230 Wis. 2d at 335 (citing WIS. STAT. § 973.20(14)(d)), so Hibl's hearsay objection was not sustainable.

¶12 Hibl cannot use his guilty plea as both shield and sword. He gave up his right to a trial in exchange for a favorable recommendation at sentencing and the dismissal of two other charges. Now he complains that he was not able to put the State to its proof on the complaint and cross-examine the witnesses mentioned therein. Hibl cannot have it both ways. He pled guilty; the court commissioner could properly consider the crime to which he pled guilty and the charged crimes that were dismissed and read in.

*Consideration of Hibl's Ability to Pay Restitution*

¶13 The court commissioner heard ample testimony regarding the value of Eubanks's loss. Eubanks claimed that he sustained a \$327,400 loss. In contrast, Kevin Hibl, a realtor and the father of the defendant, testified that the house was only worth \$18,658.

¶14 The court commissioner allowed \$470 for the municipality boarding up the house and \$23,750 to Eubanks for the loss of the house. The court commissioner noted that Hibl's "income and assets are insubstantial," but indicated that he has a fulltime job paying \$13.52 per hour. The court commissioner then concluded that Hibl "has the ability to make restitution" and set restitution to Eubanks at \$24,220, to be paid during Hibl's probation period of one year. The court commissioner further provided that if the restitution amount

was not paid during Hibl's year of probation, then Eubanks would be entitled to a civil judgment for the unpaid portion.

¶15 Hibl argues that the record does not support the conclusion that Hibl has the ability to pay \$24,220 in restitution. Hibl testified that he has a fulltime job and sometimes, though not often, does side work cleaning up foreclosure houses. His girlfriend lives with him and their daughter, and the girlfriend is also employed. Hibl indicated that his gross reported income in 2012 was \$23,630, and Hibl owes his mother \$15,000 for expenses related to this case. Hibl's mother owns the house in which Hibl and his girlfriend live, and, regarding rent, they have "[n]o agreement, just informal." Hibl does not own a vehicle; he drives his father's vehicle. Defense counsel's only question at the hearing regarding Hibl's financial situation was whether he was able to afford to purchase his own automobile, to which Hibl answered, "No."

¶16 In deciding how much to impose in restitution, the court must consider the defendant's ability to pay. WIS. STAT. § 973.20(13)(a)3. The defendant has the burden to show his ability, or inability, to pay restitution. *Madlock*, 230 Wis. 2d at 336. The restitution amount does not need to be limited to what the defendant has the ability to pay during the term of his sentence. *State v. Fernandez*, 2009 WI 29, ¶5, 316 Wis. 2d 598, 764 N.W.2d 509.

¶17 The record supports the court commissioner's decision to order restitution in the amount of \$24,220. The court commissioner acknowledged that Hibl had a child and had "insubstantial" income and assets. However, the court commissioner also noted that Hibl had a fulltime job paying \$13.52 per hour and lived with his child's mother who was also employed. The court commissioner concluded that Hibl "has the ability to make restitution," recognizing that a civil

judgment could be entered to the extent that the restitution amount may not be fully paid during the period of probation. This conclusion is supported by the record.

*By the Court.*—Judgment affirmed.

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

