

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 9, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-3661-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOSEPH A. WEISS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

FINE, J. Joseph A. Weiss appeals from a judgment convicting him of violating § 346.67, STATS., which makes it a crime for any person involved in an automobile accident that either causes another's injury or death, or "damage to a vehicle which is driven or attended by any person," not to stop and remain at the accident scene to give his or her name and other information to the "person

struck.”¹ He complains that the trial court erred by requiring him to pay restitution to the other driver, even though Weiss's failure to comply with § 346.67 was not a cause of either the accident or of the other driver's damages. We affirm.

I.

Weiss backed out of a motel parking lot and was struck by Joel Kassabian, who was driving a motorcycle. Weiss left the scene in violation of § 346.67, STATS. Although Kassabian was injured, and § 346.74(5)(e), STATS., makes what Weiss did a felony, the case was plea bargained to pretend that Kassabian was not injured. This allowed Weiss to plead “no contest” under

¹ Section 346.67, STATS., provides:

Duty upon striking person or attended or occupied vehicle.

(1) The operator of any vehicle involved in an accident resulting in injury to or death of any person or in damage to a vehicle which is driven or attended by any person shall immediately stop such vehicle at the scene of the accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until the operator has fulfilled the following requirements:

(a) The operator shall give his or her name, address and the registration number of the vehicle he or she is driving to the person struck or to the operator or occupant of or person attending any vehicle collided with; and

(b) The operator shall, upon request and if available, exhibit his or her operator's license to the person struck or to the operator or occupant of or person attending any vehicle collided with; and

(c) The operator shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person.

There is only subsection “(1).”

§ 346.74(5)(a), STATS., which makes violation of § 346.67, STATS., a misdemeanor “if the accident did not involve ... injury to a person.”²

If a defendant is convicted of a crime in Wisconsin, the trial court may “order the defendant to make full or partial restitution ... to any victim of a crime considered at sentencing.” Section 973.20(1r), STATS.³ Weiss claims,

² Section 346.74(5), STATS., provides:

Any person violating any provision of s. 346.67:

(a) Shall be fined not less than \$300 nor more than \$1,000 or imprisoned not more than 6 months or both if the accident did not involve death or injury to a person.

(b) Shall be fined not less than \$300 nor more than \$5,000 or imprisoned not less than 10 days nor more than one year or both if the accident involved injury to a person but the person did not suffer great bodily harm.

(c) May be fined not more than \$10,000 or imprisoned not more than 2 years or both if the accident involved injury to a person and the person suffered great bodily harm.

(d) May be fined not more than \$10,000 or imprisoned not more than 5 years or both if the accident involved death to a person.

(e) Is guilty of a felony if the accident involved death or injury to a person.

³ Section 973.20(1r), STATS., provides:

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 or parole served by the defendant for a crime for which the defendant was convicted. After the termination of probation or parole, or if the defendant is not placed on probation 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.

however, that restitution is limited to the specific act that makes a course of conduct criminal. Thus, he argues, he is not liable for restitution to Kassabian because Weiss's leaving the scene without complying with § 346.67, STATS., did not cause any of Kassabian's damages. We disagree.

II.

Whether § 973.20(1r), STATS., permits the trial court to order a person convicted of violating § 346.67, STATS., to pay restitution even though leaving the scene did not cause any of the injuries or damages for which restitution is sought presents a legal issue that we review *de novo*. *State v. Rodriguez*, 205 Wis.2d 620, 626, 556 N.W.2d 140, 142 (Ct. App. 1996).

As the trial court in this case recognized, *Rodriguez* is dispositive here. It, too, involved a “no contest” plea to violating § 346.67, STATS., in a case that, tragically, involved death. *Id.*, 205 Wis.2d at 623, 556 N.W.2d at 141. *Rodriguez* held that the predecessor of § 973.20(1r), § 973.20(1), STATS. (1993–94), which is identical to the current provision in all respects material to this appeal, “permits the sentencing court to order restitution upon a defendant's conviction of a crime without regard to whether there is a causal link between a specific element of the crime and the victim's damages.” *Id.*, 205 Wis.2d at 624, 556 N.W.2d at 141. *See also id.*, 205 Wis.2d at 629, 556 N.W.2d at 143 (restitution may be ordered in connection with a crime even though one or more elements may not, by themselves, “constitute a crime”). Although a party's liability for punitive damages in civil cases is different, *see Kehl v. Economy Fire & Casualty Co.*, 147 Wis.2d 531, 433 N.W.2d 279 (Ct. App. 1988), rules of civil liability are not readily transferable to the criminal code, *see State v. Sweat*, 208 Wis.2d 409, 423–425, 561 N.W.2d 695, 700–701 (1997); *State v. Dziuba*, 148

Wis.2d 108, 117–118, 435 N.W.2d 258, 262 (1989), and *Rodriguez* is dispositive here.⁴

Weiss also argues an issue that, apparently, was not presented in *Rodriguez*; he contends that it violates due process and fundamental fairness to order him to make restitution for Kassabian's damages when Weiss's leaving the scene did not cause those damages. Again, we disagree. Restitution serves two of the main goals of the criminal justice system: 1) to punish and thereby help to rehabilitate the defendant; and 2) to make victims whole. *Sweat*, 208 Wis.2d at 422–423, 561 N.W.2d at 700.⁵ The legislature has broad berth in setting penalties for crimes. See *Harmelin v. Michigan*, 501 U.S. 957, 962–996 (1991) (Eighth Amendment analysis). In connection with violations of § 346.67, STATS., not only does the potential amount of restitution vary with the seriousness of the victim's injuries, but so does the potential severity of other punishment—incarceration and

⁴ Thus, the many non-Wisconsin decisions that Weiss cites and that apply different statutes are not pertinent to our interpretation of § 973.20(1r), STATS. For example, *People v. Escobar*, 1 Cal. Rptr. 2d 579 (Cal. App. 1991), opined that the “gravamen” of the California equivalent to § 346.67, STATS., “is not the initial injury of the victim, but leaving the scene without presenting identification or rendering aid,” and thus “[r]estitution is proper only to the extent that the victim's injuries are caused or exacerbated by the offender's leaving the scene.” *Id.*, 1 Cal. Rptr. 2d at 582. By the same token, *Hughey v. United States*, 495 U.S. 411 (1990), also turned on the unique wording of a federal restitution statute in concluding that restitution may not be ordered when the act that made criminal the defendant's conduct did not cause damages for which restitution was sought. *Id.*, 495 U.S. at 412–413, 416–420. As we have seen, *Rodriguez*, which is controlling here, is to the contrary.

⁵ *Sweat* also notes that the court of appeals decision in that case recognized that “the primary purpose of restitution is not to punish the defendant, but to compensate the victim.” *Id.*, 208 Wis.2d at 422, 561 N.W.2d at 700. (Emphasis added.) This statement does not negate *Sweat*'s later recognition that restitution has a “punishment” component, in an effort to make criminals responsible for their crimes. See *id.*, 208 Wis.2d at 428–429, 561 N.W.2d at 703.

finer. *See* § 346.74(5), STATS.⁶ Although Weiss's argument is mirrored in some out-of-state decisions, we see no due-process violation in making a fleeing driver liable to restitution for the victim's injuries.⁷

By the Court.—Judgment affirmed.⁸

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

⁶ There is good reason for this sliding scale of severity; a driver who flees the scene of an accident makes investigation into the cause of the accident and the degree of his or her own inebriation difficult, if not impossible. Thus, the legislature could rationally conclude that at least some of those who violate § 346.67, STATS., are trying to avoid potentially more serious punishment. For example, a person who causes “great bodily harm” by driving while drunk faces potential punishment of up to five years in prison. Sections 940.25(1) & 939.50, STATS. A person who leaves the scene of an accident that results in “great bodily harm” faces a maximum of two years in prison. Section 346.74(5)(c), STATS. The legislature has seemingly balanced, on the one hand, the need to deter drunk drivers from fleeing the scene, and, on the other hand, the likelihood that some of those violating § 346.67, STATS., will not be intoxicated. The five/two ratio for potential imprisonment appears to be a reasonable accommodation of the competing considerations.

⁷ These cases are founded on principles that run contrary to Wisconsin law. Thus, for example, *Escobar*, 1 Cal. Rptr. 2d at 582–583, prohibited imposition of restitution under circumstances similar to those underlying this appeal because in its view a restitution order would violate the defendant's right to have a jury determine civil liability and damages. In Wisconsin, however, a defendant in a criminal case does not have the right to a jury trial on the amount of restitution. *State v. Dziuba*, 148 Wis.2d 108, 117–118, 435 N.W.2d 258, 262–263 (1989). *People v. Becker*, 84 N.W.2d 833 (Mich. 1957), also relied on by Weiss, held that a restitution order imposed by the trial judge based on the judge's own “investigation” lacked the fact-finding safeguards deemed necessary. *Id.*, 84 N.W.2d at 839–840. As *Dziuba* recognizes, however, the restitutionary scheme in Wisconsin has appropriate fact-finding safeguards. *Id.*, 148 Wis.2d at 117–118, 435 N.W.2d at 262–263. Moreover, insofar as *Becker* can be read as prohibiting restitution for unlawfully leaving the scene of an accident because that act did not cause or contribute to either the accident or the other driver's damages, we decline to follow it. Indeed, the Michigan Supreme Court has itself stated that *Becker* is not controlling precedent in Michigan because no majority of the justices who participated in the *Becker* decision agreed as to its reasoning. *See People v. Gahan*, 571 N.W.2d 503, 507–508 (Mich. 1997). Although both *Becker* and Weiss seem to rely on constitutional principles beyond the due-process right to accurate fact-finding, neither *Becker* nor Weiss identifies the principles allegedly violated; they do not explain why the legislature is not as free to set restitution as part of the package of sanctions imposed upon conviction as it is free to authorize other punishment.

⁸ Weiss does not challenge the *amount* of restitution that he was ordered to pay.

