COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2017AP506-CR **Cir. Ct. No. 2011CF187**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARISA B. MCFARLANE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: WILLIAM M. GABLER, SR., Judge. *Affirmed*.

Before Lundsten, P.J., Blanchard, and Fitzpatrick, JJ.

¶1 PER CURIAM. Marisa McFarlane entered pleas of no contest to charges of intentional failure to pay child support. Consistent with the plea agreement, the sentencing court issued a restitution order obligating McFarlane to pay all arrearages—child support that she had been previously ordered to pay that she had not paid—plus interest that had accrued on the arrearages and fees. McFarlane filed a post-conviction motion challenging the restitution order. She did not challenge the arrearages, interest, and fees owed, but asked the court to "convert" the restitution order into an order for payment of unpaid child support, which would allow her to avoid paying the automatic 10% surcharge that is added to all restitution orders. The circuit court denied the motion and McFarlane appeals. We affirm for the reasons provided below.

BACKGROUND

¶2 The following facts are undisputed. McFarlane was charged with ten counts of intentional failure to pay court-ordered child support, representing ten periods of non-payment, each over the course of 120 consecutive days, between a date in 2002, and a date in 2010, in each case contrary to WIS. STAT. § 948.22(2) (2015-16).[1] After McFarlane was extradited from Colorado to appear in Wisconsin circuit court, and while represented by counsel, she entered into a plea agreement with the State. Consistent with the terms of the agreement, McFarlane entered no contest pleas to three of the counts and the balance of the counts were dismissed but read-in. The agreement also contemplated that McFarlane would be placed on probation for seven years with no condition of

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

further jail time, but with conditions that she pay restitution, the restitution surcharge, court costs, a bench warrant fee, extradition costs, and that she participate in any counseling recommended by the probation agent.

¶3 The court accepted the agreement and decided to follow all of its recommendations. Consistent with the agreement, the court issued a restitution order, pursuant to WIS. STAT. § 973.20.[2] Also consistent with the agreement, the restitution order requires McFarlane to pay $91,780.07 ($55,956.92 in back support, plus $35,073.15 in interest, plus $750 in fees), plus 10% of $91,780.07 as the automatic restitution surcharge.[3]

¶4 McFarlane filed a post-conviction motion asking the court "to convert the restitution [order] in this case to an order for payment of unpaid child support under WIS. STAT. § 948.22(7)." The court denied this motion.

¶5 Before the circuit court and now on appeal, McFarlane does not contest that she should be ordered to pay $91,780.07 by the sentencing court. Instead, she challenges the court's authority to require this payment by way of a restitution order, including the mandatory 10% surcharge that must be paid under all restitution orders. According to McFarlane, the court instead should have ordered all costs related to past due child support under § 948.22(7), not as restitution.

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[2] A court ordering probation "shall order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing …." WIS. STAT. § 973.20(1r).

[3] If a court orders restitution, the court "shall" impose a surcharge equal to 10% of the restitution amount, "payable to the county treasurer for use by the county." WIS. STAT. § 973.06(1)(g).

¶6 McFarlane points out that WIS. STAT. § 948.22 is the statute that criminalizes failure to pay child support obligations, and that its subsection (7) provides in pertinent part the following direction:

> (b) In addition to or instead of imposing a penalty authorized for a Class I felony or a Class A misdemeanor, whichever is appropriate, the court shall:
>
> 1. If a court order requiring the defendant to pay child, grandchild or spousal support exists, order the defendant to pay the amount required including any amount necessary to meet a past legal obligation for support.

Section 948.22(7)(b)1.[4]

DISCUSSION

¶7 This appeal requires us to construe several statutes. "The interpretation of a statute and its application to undisputed facts is a question of law that we review de novo." ***Andersen v. DNR***, 2011 WI 19, ¶26, 332 Wis. 2d 41, 796 N.W.2d 1.

¶8 We resolve this appeal based on McFarlane's failure to point to any defect in the restitution order, either based on WIS. STAT. § 973.20 and case law addressing restitution, or on the terms of WIS. STAT. § 948.22, or another authority.[5]

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[4] There is no dispute that WIS. STAT. § 948.22(7)(b)2. does not apply here.

[5] We need not and do not address the State's argument that, because McFarlane agreed at the plea hearing that the court should issue the restitution order, McFarlane is judicially estopped from challenging the order.

¶9 To repeat, McFarlane does not ask that the circuit court be directed to modify the restitution order in any respect. Instead, her exclusive argument is that the circuit court must withdraw the restitution order and in its place enter an order under WIS. STAT. § 948.22(7)(b)1. McFarlane makes two basic arguments, each with supporting sub-arguments, in support of her contention that the only proper route for the sentencing court was an order under § 948.22(7)(b)1. The two basic arguments may overlap to a degree, but we characterize them as follows: (1) the restitution order should be considered invalid; (2) the restitution order is improper because it conflicts with one or more aspects of § 948.22, or perhaps with aspects of WIS. STAT. ch. 767. We now address these two basic arguments in turn.

I. VALIDITY OF RESTITUTION ORDER

¶10 We begin by addressing the two arguments that McFarlane makes that the restitution order issued by the court should, in itself, be considered invalid: (1) that the restitution order improperly requires her to pay impermissible "general damages," as opposed to the allowed "special damages"; and (2) that it cannot be properly enforced.[6]

[6] McFarlane also makes passing reference, at the tail end of a footnote in her principal brief, to the fact that the restitution order has an interest component, and suggests that this may have been a defect in the restitution order. We reject whatever argument McFarlane precisely intends to make, because she has not presented us with a developed legal argument on this topic. It is true that, as a general rule, sentencing courts cannot incorporate interest into a restitution order. *See* ***State v. Hufford***, 186 Wis. 2d 461, 522 N.W.2d 26 (Ct. App. 1994) (interpreting WIS. STAT. § 973.20). However, McFarlane has not asked us to order any revision to the restitution order in this case, and, to repeat, McFarlane does not dispute that she owes all $91,780.07, including the interest on amounts she was ordered to pay and did not pay. In addition, at no point, including at oral argument, has McFarlane developed an argument, based on ***Hufford***, that the sentencing court here was prohibited from including interest in the restitution order. We take (continued)

A. Special Damages

¶11 McFarlane's first argument is based on the statutory requirement that restitution orders may require defendants to "[p]ay all *special damages, but not general damages,* substantiated by evidence in the record, *which could be recovered in a civil action* against the defendant for his or her conduct in the commission of a crime considered at sentencing." *See* WIS. STAT. § 973.20(5)(a) (emphasis added); *see also* ***State v. Holmgren***, 229 Wis. 2d 358, 365, 599 N.W.2d 876 (Ct. App. 1999) (special damages "in the criminal restitution context encompass 'harm of a more material or pecuniary nature' and represent the victim's actual pecuniary losses.") (quoted source omitted). McFarlane argues that "[c]hild support arrears are not special damages that can be recovered in a civil action, but money already owed pursuant to a family court order."

¶12 McFarlane's argument fails because child support arrearages are special damages that can be collected in a "civil action" like any other debt. In ***Griffin v. Reeve***, 141 Wis. 2d 699, 416 N.W.2d 612 (1987), our supreme court held that contempt proceedings could be initiated under Chapter 767 against a parent who failed to pay child support even after the child turned 18. Our supreme court recognized that child support arrears could be collected through a "civil action":

> A nonpaying parent with no property subject to execution may prefer a civil action on a debt rather than a contempt proceeding. The parent dependent on support who has expended his or her own money to maintain the minor child

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no position on the question of whether various forms of interest may or may not be included in restitution orders following convictions in criminal non-support prosecutions.

> is unfairly denied the remedy of contempt and is left with the less effective civil action in debt.

Griffin, 141 Wis. 2d at 705-06. In light of this holding, we conclude that child support arrears are special damages that can be recovered in a civil action.

¶13 McFarlane also asserts that ordering defendants to pay arrearages "is not akin to" ordering defendants to pay "medical expenses or [compensation for] lost property that could be recovered in a new civil action." However, she fails to develop an argument as to how those convicted of failing to pay child support are different from those convicted of other types of crimes that result in damages that could be recovered in a civil action, at least in any way that could matter here. For example, there is no reasonable argument that McFarlane's failures to pay did not result in "actual pecuniary losses" to a victim. *See* ***Holmgren***, 229 Wis. 2d 358, 365. Moreover, to the extent McFarlane argues that the action must be an available "new" action, she fails to support the proposition.[7]

B. Enforcement

¶14 At oral argument, McFarlane suggested that insurmountable complications can be expected to arise when, as here, a sentencing court in a criminal failure to pay child support case uses a restitution order to require that arrearages, interest, and fees be paid, because of likely or inevitable "tension"

[7] At oral argument, McFarlane attempted to elaborate on her special damages argument by asserting that some fraction of any order to pay child support arrearages necessarily constitutes "general damages" due to the nature of the information that courts use to calculate original orders to pay child support. This argument was not well developed or supported, and we do not pursue this subtopic further.

between the way that family court orders are enforced and the way that restitution orders are enforced. We reject this argument.

¶15 There is no starting point for the argument because McFarlane never points to legal authority for the proposition that differences in enforcement mechanisms—even those that could result in complications of one kind or another for defendants, victims, or law enforcers—render a restitution order of the type at issue here invalid. As the State suggested at oral argument, the fact that there can be differences in enforcement mechanisms does not in itself demonstrate that the legislature intended to foreclose use of the restitution order route in this context. More broadly, McFarlane does not present a well-developed argument based on legal authority that potential or actual differences in enforcement are of a type that could render the restitution order here invalid. She fails to support her assertions that (1) the state department of corrections would be unable to properly prioritize the collection from inmates of restitution that includes child support arrearages, and (2) restitution orders are ineffective in compensating victims because, under some circumstances, victims must pursue restitution orders that have been converted to civil judgments.

C. Summary Regarding Validity Of Restitution Order

¶16 We discern no additional arguments in McFarlane's briefing, nor in the positions she took at oral argument, supporting her more general arguments that there is either a mismatch between the facts of record and the contents of the restitution order, or that the restitution order runs afoul of any of the detailed provisions in WIS. STAT. § 973.20. She also presents no developed legal argument

challenging imposition of the 10% surcharge as part of the restitution order here and does not dispute that the surcharge must be added to all restitution orders.[8] We note that § 973.20 does not by its terms exclude unpaid child support from the areas that may be addressed in restitution orders. For these reasons, we conclude that the circuit court here used a proper procedure under § 973.20 in ordering McFarlane to pay child support arrearages as restitution for her crimes.

II. CONFLICTS WITH OTHER STATUTES

¶17 This leaves McFarlane's suggestions that the restitution order is rendered invalid due to conflicts with one or more aspects of WIS. STAT. § 948.22, or perhaps by aspects of WIS. STAT. ch. 767, not already discussed above. As we now explain, we conclude that McFarlane fails to provide an explanation as to how any aspect of § 948.22 or ch. 767 conflicts with the restitution order here.

¶18 McFarlane contends that, because WIS. STAT. § 948.22(7)(b)1. directs that "the court *shall* … order the defendant to pay the amount required including any amount necessary to meet a past legal obligation for support," this "mandates that any past legal obligation for support must be imposed under § 948.22(7)(b)." However, as referenced above, circuit courts ordering probation are directed by a different "shall," in that those courts "*shall* order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing …." *See* WIS. STAT. § 973.20(1r).

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[8] McFarlane briefly asserts that the 10% surcharge cannot be imposed because it is "purely punitive," and "fundamental[ly] unfair[]," perhaps intending to suggest an unspecified constitutional defect in the surcharge, at least as applied to her. However, this argument is not well developed in her briefing (nor developed at all in oral argument) and on this basis we reject it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶19 Separately, McFarlane quotes a case interpreting WIS. STAT. § 948.22(7)(b), which explains that this provision "requires the court to order the defendant to pay past support as well as the amount due during the charged period. Its purpose is to make clear that the imposition of a criminal penalty does not relieve an obligation to pay support." *See* ***State v. Lenz***, 230 Wis. 2d 529, 535, 602 N.W.2d 173 (Ct. App. 1999). However, this proposition presents no conflict in this case. That is, the proposition that § 948.22(7)(b) establishes that a defendant convicted of nonpayment of child support should not be relieved of an obligation to pay support does not suggest any conflict here, because as explained above McFarlane does not dispute that the restitution order here in fact required her to pay all past due support, and did not "relieve [her] obligation to pay support."

¶20 It is the same result when McFarlane points to WIS. STAT. § 767.59(1m), which provides that a court "may not revise the amount of child support, …, or an amount of arrearages in child support, … that has accrued, prior to the date that notice of the action is given to the respondent, except to correct previous errors in calculations." There is no dispute that the restitution order here did not purport to revise an amount of support or the amount of arrearages.

¶21 McFarlane suggests at one point in her briefing that she is subject to conflicting orders to pay arrearages. However, we repeatedly pressed her at oral argument on related points and she had no persuasive case to make that she is subject to conflicting orders.

¶22 In a somewhat different vein, McFarlane apparently intends to argue that the legislature must have intended that circuit courts in these circumstances apply WIS. STAT. § 948.22(7)(b), and not WIS. STAT. § 973.20, because criminal

defendants have the right to contest proposed restitution orders under § 973.20(13)(c). McFarlane argues that, if a circuit court takes the restitution route, and the defendant contests arrearage amounts at a restitution hearing, the defendant can "basically collaterally attack a lawfully entered family court order." We have difficulty seeing how this feature of the criminal restitution statute reveals legislative intent that courts may not use a restitution order in this context. Nothing in § 973.20(13)(c) precludes a court from entering a restitution order that is entirely consistent with § 948.22(7)(b), as appears to have occurred in this case.

¶23 McFarlane cites the rule of interpretation that, when the results dictated by multiple statutes conflict, then specific statutes trump general statutes. *See* ***Gottsacker Real Estate Co. v. DOT***, 121 Wis. 2d 264, 269, 359 N.W.2d 164 (Ct. App. 1984). However, this proposition has no application here because McFarlane fails to point to a conflict between the restitution order issued in this case and any other statute. We express no opinion about the various circumstances under which a court perhaps *could* enter a restitution order that runs afoul of WIS. STAT. § 948.22(7)(b) or some other more specific statute involving child support. McFarlane fails to show that this occurred here.

CONCLUSION

¶24 For these reasons, we affirm the judgment of conviction and the order denying post-conviction relief.

By the Court.—Judgment and order affirmed.

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