

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 28, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

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

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. 2017AP1085-CR

Cir. Ct. No. 2009CF1618

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

OSCAR J. MARTINEZ-GONZALEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
DAVID W. PAULSON, Judge. *Affirmed.*

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Oscar J. Martinez-Gonzalez appeals a judgment of conviction and challenges the denial of his motion to vacate an order of restitution. He contends that the arbitration process that determined the amount of restitution disregarded the statutory time limit and other requirements and violated his due process rights. Because Martinez-Gonzalez suffered no prejudice from the untimeliness of the restitution decision and failed to raise his other procedural claims in the circuit court, we affirm.

BACKGROUND

¶2 In June 2009, Martinez-Gonzalez and Alejandro Arroyo beat a twenty-one-year-old man, leaving him severely and permanently disabled. In January 2011, a jury found Martinez-Gonzalez guilty of aggravated battery and robbery. In March 2011, after sentencing him to twenty years' initial confinement and ten years' extended supervision, the circuit court ordered Martinez-Gonzalez to pay restitution in an amount to be addressed at a later hearing.

¶3 At an August 2011 hearing, counsel from both sides indicated that, because of the high damages, the determination of restitution would benefit from a third-party expert. The court informed the parties that, by statute, it could appoint an arbitrator, which would determine a final restitution amount, or a referee, which would submit proposed findings of fact and conclusions of law. *See* WIS. STAT. § 973.20(13)(c)3., 4. (2015-16).¹ Martinez-Gonzalez consented to arbitration.² Both sides agreed to the selection of the arbitrator.

¹ All references to the Wisconsin Statutes are to the 2015-16 version.

² Before a court refers restitution issues to arbitration, the defendant must consent. WIS. STAT. § 973.20(13)(c)3.

¶4 In April 2012, Arroyo pled guilty to the same charges and the court appointed the same arbitrator to decide restitution, as Arroyo and Martinez-Gonzalez agreed that each would owe restitution jointly and severally. Arroyo's efforts for postconviction relief were drawn out, concluding in April 2016 when we affirmed his convictions.

¶5 In September 2016, the circuit court held a status hearing on restitution.³ The court commented that the arbitrator had "not done what he was asked to do five years ago." The arbitrator told the court that he would file the restitution decision within ninety days.

¶6 More than four months later, Martinez-Gonzalez moved to deny restitution based on the delay, which was now beyond five years. The next day, the arbitrator filed his determination, awarding \$5,815,943.⁴ The arbitrator's decision recounted several consultations with the court. In his decision, the arbitrator indicated that, "with both the express and tacit approval" of the court, he decided to defer the final order until Arroyo's appeal concluded.

¶7 At the restitution hearing, the court found no valid reason for the five-year delay. It also concluded, however, that Martinez-Gonzalez was not

³ The Honorable Wayne J. Marik presided over the case at the time of sentencing and appointment of the arbitrator. Beginning with the September 2016 hearing, the Honorable David W. Paulson presided over the remainder of the case.

⁴ The arbitrator relied on the following figures: almost \$5 million for future nursing home care, almost \$799,240 for future lost wages, \$5038 for medical expenses, and \$40,000 to the Department of Justice Crime Victim Compensation Program.

prejudiced. It therefore accepted the arbitrator's decision, inserting the amount into an amended judgment. This appeal follows.

DISCUSSION

¶8 “[T]he interpretation of the restitution statute and its application to a given set of facts” are questions of law that we review de novo. *State v. Fernandez*, 2009 WI 29, ¶20, 316 Wis. 2d 598, 764 N.W.2d 509.

¶9 An arbitrator's “determination of the amount of restitution shall be filed with the court within 60 days after the date of referral and incorporated into the court's sentence or probation order.” WIS. STAT. § 973.20(13)(c)3. Although the statute uses the term “shall,” we have held that the sixty-day time period is directory, not mandatory. *State v. Ziegler*, 2005 WI App 69, ¶14, 280 Wis. 2d 860, 695 N.W.2d 895. But directory does not mean that a court has discretion to simply extend or disregard the provision. *Id.* When determined outside of the statutory time frame, a restitution order will be upheld based on the weighing of two factors: (1) whether valid reasons exist for the delay and (2) whether the delay has prejudiced the defendant. *Id.*, ¶¶14, 18. “[T]he court must balance the length and reasons for the delay against the injury, harm or prejudice to the defendant resulting from the delay.” *Id.*, ¶18.

¶10 Martinez-Gonzalez argues that the restitution order should be set aside because the length of the delay was extreme and without justification. We too see no valid reason for a delay of five years.

¶11 The arbitrator indicated that he postponed the decision until after Arroyo's appeal in order to lend certainty to the order and for the sake of judicial economy. Although those are goals worth considering, they do not warrant

extending the statutory deadline by a factor of thirty. The arbitrator's written decision does not reflect that Arroyo's involvement actually had any effect on the restitution amount. Moreover, the goals of certainty and economy do not explain why, after Arroyo's appeal ended, nine months passed without a decision.⁵

¶12 Despite the absence of a valid reason for the delay, however, no prejudice has been shown. Martinez-Gonzalez knew restitution was ordered and knew the damages were high. Further, unlike the circumstances in *Ziegler*, where evidence was no longer available after a fourteen-year delay, no evidence is claimed to be missing here, nor did the victim's medical condition change. *See id.*, ¶19. Also unlike *Ziegler*, where the defendant was out on parole and had an expectation of finality to his sentence, Martinez-Gonzalez's status has not changed—with a release date in 2029, he faces many more years in prison. *See id.*, ¶20.

¶13 Martinez-Gonzalez asserts that a restitution process that took five years rather than the expected two months caused anxiety and frustration. He cites the right to a speedy trial, which includes as one of the protected interests the prevention of anxiety and frustration. *See State v. Borhegyi*, 222 Wis. 2d 506, 515, 588 N.W.2d 89 (Ct. App. 1998). But the interest in preventing anxiety and frustration relates to those defendants facing criminal charges and awaiting a trial. By contrast, Martinez-Gonzalez had been convicted of the subject crimes, was serving his sentence, was already ordered to pay restitution, and knew he was

⁵ The State suggests that the complexity of the damages justified the delay. Although the damages were high, they plainly could have been assessed much more quickly. Entire lawsuits with high damages conclude in far less time. The arbitrator's damage calculation fits onto a two-page exhibit.

going to pay significant damages: the victim was unable to work for the rest of his life and was largely confined to bed with a feeding tube. Further, the record fails to show that Martinez-Gonzalez relayed his growing agitation to the court via any letter or motion requesting a status report or other action. No other actual prejudice is alleged.⁶

¶14 Martinez-Gonzalez asserts that he was prejudiced during the time of the delay because his due process rights were violated. He bases his due process claim upon being blocked from participating meaningfully in the process, i.e., no opportunity to object to the extensions of time allowed by the court, the communications between the court and arbitrator without the parties' involvement, and the lack of a hearing. We have explained why the delay did not result in prejudice. In any event, as discussed below, he forfeited his due process claim.

¶15 In sum, the reasons given for the five-year delay are unpersuasive. Outweighing the lack of a valid reason, however, is the lack of any showing as to how the delay affected the restitution amount or otherwise adversely affected Martinez-Gonzalez. The balancing of those factors tilt to upholding the restitution order.

¶16 Martinez-Gonzalez advances two more attacks, broader in scope, on the arbitration process. Grounded on statute, he argues that the process here did not constitute a "true" arbitration. Arbitration is understood, Martinez-Gonzalez

⁶ Indeed, the delay may have benefitted Martinez-Gonzalez. Both the arbitrator and the State point out that, during the five-year delay, no restitution payments were being made, and the order does not require retroactive payments. The restitution amount was based on the victim's life expectancy, which was fifty-three years at the time of the restitution order. Had there been no delay, the life expectancy would have been fifty-eight years, resulting in a higher total amount.

contends, to include notice of communications and an opportunity to object to time extensions (violated by the alleged *ex parte* communications instead of hearings), and a right to challenge and be heard on the restitution amount in an evidentiary hearing with the arbitrator (the arbitrator determined that no hearing was warranted), citing to WIS. STAT. ch. 788 (generally governing arbitration agreements) and WIS. STAT. § 973.20(14) (setting burdens of proof and other procedural rights for restitution hearings). For similar reasons, but on constitutional grounds, he asserts that the arbitration violated due process, which at its core requires an opportunity to be heard “in a meaningful manner.” *See Matthews v. Eldridge*, 424 U.S. 319, 332 (1976) (citation omitted).

¶17 Martinez-Gonzalez did not, however, argue these broader claims in the circuit court. We do not decide issues raised for the first time on appeal. *State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). Martinez-Gonzalez argues that he preserved these claims sufficiently via his motion and oral argument. We disagree. He moved to vacate restitution because of the statutory time-period violation. His motion contains no references, much less arguments, about the other alleged procedural infirmities. At the hearing, his counsel only criticized the lack of informational updates and made a glancing reference to “an overall due process argument to be made here.” But no overall or broader argument was actually made, which is no doubt why the circuit court, in rendering its decision, only addressed the time-period argument. *See id.* (“party raising the issue on appeal has the burden of establishing, by reference to the record, that the issue was raised before the circuit court”).

¶18 Because Martinez-Gonzalez forfeited his procedural arguments (other than the delay), we do not reach their merits, and this decision therefore should not be taken as an approval of the restitution process used in this case.

Forfeiture is a rule of judicial administration, so it does not affect our authority to address an issue. *State v. Gaulke*, 177 Wis. 2d 789, 794, 503 N.W.2d 330 (Ct. App. 1993). We have made exceptions for issues of law, but not when the briefing and record are insufficient. *Id.* Martinez-Gonzalez’s procedural arguments are not adequately supported in fact and law, and we cannot risk our neutrality to develop the arguments for him.⁷ *Industrial Risk Insurers v. American Eng’g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82. Requiring that issues be raised and argued in the court below properly defers to the “factual expertise of the trier of fact, encourages litigation of all issues at one time,” allows the trial court the opportunity to consider and rule upon the issues, and “simplifies the appellate task.” *Caban*, 210 Wis. 2d at 604-05; *Hopper v. City of Madison*, 79 Wis. 2d 120, 137, 256 N.W.2d 139 (1977).

By the Court.—Judgment affirmed.

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

⁷ As an example, despite pointing out the alleged ex parte communications, Martinez-Gonzalez failed to develop a factual record regarding those communications (the arbitrator attended and participated in the final restitution hearing) and failed on appeal to explain how those communications adversely affected the restitution amount. The briefing does not suggest, much less show, prejudice from the alleged due process violations, i.e., how the restitution amount would have been less had Martinez-Gonzalez been provided the opportunity to object to the time extensions, notice of the arbitrator’s communications with the court, and a hearing. We discussed our conclusion above that the extensions or delay did not cause prejudice. See *State v. Davis*, 95 Wis. 2d 55, 58, 288 N.W.2d 870 (Ct. App. 1980) (actual prejudice must be shown for a due process claim based on preindictment delay).

Martinez-Gonzalez also failed to challenge the calculation of the damages or the overall amount (other than a brief criticism of one category of damage). Although he insists that a hearing before the arbitrator’s restitution decision was necessary, he does not hint at what witnesses he would have called or what evidence he would have presented, leaving the point of a hearing unknown.

