

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 2, 2001

Cornelia G. Clark
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.

No. 00-3202-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN ROBERT JOHN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marinette County: CHARLES D. HEATH, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. John Robert John appeals his amended judgment of conviction for burglary, party to a crime, contrary to WIS. STAT. § 943.10(1)(a), requiring him to pay restitution in the amount of \$27,980. He also appeals an order denying his motion to enjoin the entry of the restitution order. John argues that the circuit court lost jurisdiction to determine the amount of restitution to be

imposed as a condition of probation because of its failure to comply with the ninety-day time limit of WIS. STAT. § 973.20(13)(c)1. We conclude that John waived the ninety-day time limit through his attorney. Therefore, we affirm the judgment and order.

BACKGROUND

¶2 The criminal complaint alleged that John entered ERDA, a business in Peshtigo, and took eleven video monitors.¹ John subsequently pled no contest to burglary. As part of a plea agreement, John was required to pay restitution for any damage to the monitors. At the sentencing on April 26, 1999, the State told the circuit court that the restitution amount had not yet been determined. The court placed John on five years' probation and, as one of the conditions, ordered restitution in an amount to be determined by the Department of Corrections.

¶3 On May 10, 1999, John's probation officer sent a memo to the circuit court asking that a restitution hearing be held because the department was unable to determine a restitution amount. The court scheduled a hearing for August 16, 1999, after a telephone conference with the State and the public defender. However, John's attorney was a private attorney appointed through the public defender's office and had not participated in the scheduling. When his attorney discovered that a hearing had already been scheduled, she requested that it be rescheduled to September 13, 1999.

¶4 At the September 13 hearing, the insurance claims adjuster was unavailable, so the hearing was rescheduled again, this time to December 13,

¹ ERDA manufactures the video monitors for use in commercial airlines.

1999. At the December 13 hearing, the State still did not have a restitution amount and informed the circuit court that John had agreed to give the insurance company another chance to provide the needed information to determine restitution. The court then set a status conference for February 18, 2000.

¶5 The State finally received a restitution amount from ERDA and its insurance company. At the February 18, 2000, status conference, the court was informed that an agreement had been reached. John's attorney then prepared a written stipulation that reflected a restitution amount of \$27,980. However, the State disagreed with the figure, claiming that the correct amount was \$28,730. Another hearing was scheduled for July 5, 2000, to address the dispute.

¶6 On May 15, 2000, John filed a motion seeking that restitution not be entered because of the circuit court's failure to comply with the time limit of WIS. STAT. § 973.20(13)(c)(1). The State argued that noncompliance with the time limit was the result of a delay in receiving information from ERDA and its insurance company. The circuit court denied John's motion and found that the amount of actual loss was \$27,980.

¶7 John appealed. The State filed a motion to remand to the circuit court for the purpose of taking additional evidence regarding the circumstances of the delay in entering the restitution order. On March 15, 2001, we granted the State's motion and remanded the case to the circuit court for further proceedings.

¶8 On April 4, 2001, evidence was taken regarding the circumstances causing the delay. The circuit court determined that neither John nor his attorney had objected to the delays in setting the restitution amount until shortly before the final restitution hearing was scheduled. The court found that by not objecting, John had waived the time limits. This appeal followed.

STANDARD OF REVIEW

¶9 We review whether the circuit court erred in making the restitution order under the erroneous exercise of discretion standard. *State v. Behnke*, 203 Wis. 2d 43, 57-58, 553 N.W.2d 265 (Ct. App. 1996). We analyze a discretionary decision to determine whether the circuit court logically interpreted the facts of record and whether it applied the correct legal standard to those facts. *Id.* at 58.

DISCUSSION

¶10 John argues that WIS. STAT. § 973.20(13)(c)1 prescribes a ninety-day time limit within which the court is required to determine the amount of restitution. John contends that, because restitution was not determined within ninety days, the trial court lost jurisdiction to determine the amount of restitution to be imposed as a condition of probation. He also argues that his attorney did not waive the time limit, nor did he personally waive the time limits.²

¶11 Restitution is governed by WIS. STAT. § 973.20. Section 973.20(13)(c)1 specifies that the court may, “[o]rder restitution of amounts not in dispute as part of the sentence or probation order imposed and direct the appropriate agency to file a proposed restitution order with the court within 90 days thereafter”

¶12 We conclude that the circuit court properly exercised its discretion by finding that John and his attorney waived the time limit. John was sentenced

² John argues that the ninety-day time limit is mandatory rather than directory. Because our resolution of the waiver issue is dispositive of the appeal, we do not address this argument. *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983)

on April 26, 1999. The restitution hearing was originally scheduled for August 16. However, on June 2, 1999, thirty-seven days after sentencing, John's attorney rescheduled the hearing to September 13, 1999, one hundred and forty days after sentencing. John was notified of the change.

¶13 Within the ninety-day time period specified by WIS. STAT. § 973.20(13)(c)1, both John and his attorney had actual notice of the need for a hearing to determine restitution. Further, before the ninety days expired, John's attorney knew that a restitution hearing had been scheduled beyond the ninety-day statutory period. However, rather than object to the date and demand a hearing within the ninety days, his attorney asked for an extension of the restitution hearing to September 13, 1999, which was fifty days after the time limit had expired. John's attorney also agreed without objection to two later reschedulings of the hearing. Therefore, any objection to the timeliness of the hearing has been waived. John is precluded from objecting to the circuit court's failure to comply with the time limit. *Cf. State v. Howard*, 211 Wis. 2d 269, 286-87, 564 N.W.2d 753 (1997).

¶14 John argues that the waiver should have come from him personally and not from his attorney. We disagree. Waiver of the time limit in a restitution hearing is a strategic decision which a lawyer is entitled to make. This type of waiver is not a fundamental constitutional right that requires an express and personal waiver. *See State v. Albright*, 96 Wis. 2d 122, 129-30, 291 N.W.2d 487 (1980). Fundamental rights that require personal consent include the right to the assistance of counsel, the right to refrain from self-incrimination, and the right to have a trial by jury. *Id.* at 130 (citations omitted).

¶15 Waiver of the time limit for determining restitution does not fall within the category of fundamental constitutional rights. *See id.* There are no similar characteristics between the fundamental rights identified in *Albright* and waiver of the time limit in WIS. STAT. § 973.20(13)(c)1. In this case, waiver of the time limit does not “go to the very heart of the adjudicatory process.” *Id.*

¶16 Therefore, the circuit court did not need John’s personal waiver and could instead rely on the conduct of his attorney to find waiver. Because of the waiver, the court did not err by determining the amount of restitution after the expiration of the ninety-day time limit.

By the Court.—Judgment and order affirmed.

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

