COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1019-CR **Cir. Ct. No. 99-CF-62**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Portage County: THOMAS T. FLUGAUR, Judge. *Affirmed.*

Before Vergeront, P.J., Roggensack and Lundsten, JJ.

¶1 LUNDSTEN, J. Larry H. Anderson appeals an order of the circuit court amending his judgment of conviction. The court changed a $7100 payment

ordered at sentencing from "restitution" to a "cost" under WIS. STAT. § 973.06(1)(am) (1997-98).[1] For the following reasons, we affirm.

Background

¶2 Anderson was charged with two counts of delivery of cocaine as a subsequent offender, contrary to WIS. STAT. §§ 961.41(1)(cm)4 and 961.48. Anderson pled guilty to one count of delivery of cocaine as a subsequent offender in exchange for a dismissal and read-in of the second count, and a limit of twenty years' imprisonment on the State's sentencing recommendation.

¶3 At the sentencing hearing, the State recommended twenty years' imprisonment and restitution to the Portage County Sheriff's Department in the amount of $7100. The prosecutor argued that Anderson was a major supplier of cocaine to central Wisconsin as reflected in part by "the $7,100 restitution request for monies that were expended during the course of the investigation of Mr. Anderson."

¶4 In imposing sentence, the court stated as follows:

> I'm going to order that the defendant be confined to the Wisconsin State Prison System for a period of eight-and-a-half years which is one hundred two months.
>
> … The Court will also order that there be a victim/witness surcharge of $70 and a $20 filing fee. Restitution of $7,100. I believe that was the restitution figure as part of the parole.

[1] All further references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Anderson did not object to either the prosecutor's or the judge's characterization of the request for reimbursement of the police investigative expenditure as "restitution."

¶5 After sentencing, Anderson filed a motion to amend his sentence by "deleting the requirement that he pay restitution in the amount of $7,100." Anderson relied on ***State v. Evans***, 181 Wis. 2d 978, 512 N.W.2d 259 (Ct. App. 1994), to support his argument that a court may not order restitution for "buy money" in drug cases. At a hearing on Anderson's motion, the State agreed that buy money may not be ordered reimbursed as an item of restitution, but stated it may properly be ordered as a cost pursuant to WIS. STAT. § 973.06(1)(am). The prosecutor stated: "And that's really how it should have been reflected in the judgment of conviction, and that is an appropriate figure." The circuit court agreed and entered an order amending the judgment of conviction to reflect the $7100 reimbursement to the Portage County Sheriff's Department as a cost, rather than restitution.

¶6 For the reasons that follow, we affirm the amended judgment.

Discussion

¶7 The question presented is whether the circuit court erred when it refused Anderson's request to discharge the requirement that he pay $7100 as restitution and, instead, amended the judgment of conviction to relabel the payment as an item of cost.

¶8 The parties agree that investigative expenditures of a police agency are not a proper subject of restitution. Pursuant to WIS. STAT. § 973.20(1r), a court may order a defendant to pay restitution to his or her "victim." Restitution

may not be ordered to a law enforcement agency for drug buy money because law enforcement agencies, and the public that funds them, are not "victims" under the statute. *See* ***Evans***, 181 Wis. 2d at 982-84.

¶9 A court may, however, order a defendant to reimburse a law enforcement agency for specified expenditures as costs under WIS. STAT. § 973.06(1)(am). Anderson does not dispute that the $7100 police expenditure in this case could have been imposed as a cost under § 973.06(1)(am). Instead, he argues that costs may be imposed only at the time of sentencing. Relying on ***State v. Perry***, 215 Wis. 2d 696, 573 N.W.2d 876 (Ct. App. 1997), he argues that the circuit court erred because it first imposed the $7100 as a cost nearly ten months after his sentence. We conclude that ***Perry*** does not address the situation in this case.

¶10 In ***Perry***, the trial court ordered the defendant to pay restitution at sentencing. The amount of restitution was held open, pursuant to WIS. STAT. § 973.20(13)(c), to allow the state to submit a proposed restitution order. At the subsequent restitution hearing, the State presented a request for restitution, but also, for the first time, requested extradition costs of $1235, pursuant to WIS. STAT. § 973.06(1)(a). ***Id.*** at 703. The circuit court granted the State's requested extradition costs. We reversed. Citing ***State v. Grant***, 168 Wis. 2d 682, 484 N.W.2d 370 (Ct. App. 1992), we stated that costs sought pursuant to § 973.06 "could not be taxed in an order subsequent to and 'separate from the sentence.'" ***Perry***, 215 Wis. 2d at 712.[2]

[2] This holding was based solely upon the statutory language of WIS. STAT. § 973.06 (relating to failure to pay costs). *See* ***State v. Perry***, 215 Wis. 2d 696, 712-13, 573 N.W.2d 876 (Ct. App. 1997); ***State v. Grant***, 168 Wis. 2d 682, 684-85, 484 N.W.2d 370 (Ct. App. 1992).

¶11 Thus, ***Perry*** addressed the situation in which a cost was first imposed long after the sentencing hearing. The situation here is different. In this case, the circuit court at sentencing ordered a specific amount of reimbursement to the police department, but mistakenly labeled it "restitution." The court did not assess a new monetary obligation against Anderson after sentencing, but rather corrected the label of a timely imposed and proper item of reimbursement. This relabeling situation has been addressed in ***State v. Beiersdorf***, 208 Wis. 2d 492, 561 N.W.2d 749 (Ct. App. 1997), and ***State v. Heyn***, 155 Wis. 2d 621, 456 N.W.2d 157 (1990).

¶12 In ***Beiersdorf***, the sentencing court ordered the defendant to pay a $250 reimbursement, "as a term and condition of probation," for the cost of genetic testing performed on the defendant and the victim of his sexual assault to determine whether the defendant was the father of the fetus carried by the victim. ***Beiersdorf***, 208 Wis. 2d at 495. During a hearing on the defendant's postconviction motion, the circuit court declared that the amount was not ordered as a "cost" under WIS. STAT. § 973.06, but instead imposed as "restitution which is reasonably related to the rehabilitation of the defendant." ***Id.*** at 500. On appeal, the State conceded that the cost of genetic testing was not assessable as "restitution" under WIS. STAT. § 973.20 because neither the State nor the testing facility was a "victim" of the crime. Despite this mislabeling in ***Beiersdorf***, we affirmed the order. Pertinent to this discussion, we agreed with the State that the amount was proper as a "cost" under § 973.06(1)(c). ***Id.*** at 501.

¶13 Similarly, the supreme court has affirmed a reimbursement order contained in a judgment of conviction by relabeling the item from "restitution" to a "reasonable and appropriate condition of probation." ***Heyn***, 155 Wis. 2d at 627-30.

¶14 Anderson suggests that ***Beiersdorf*** (and implicitly ***Heyn***) is not applicable here because ***Beiersdorf*** involved an order of probation and not a sentence. He does not, however, attempt to explain why this distinction matters. We discern no distinction relevant to the issue before us. The readily apparent lesson of ***Beiersdorf*** and ***Heyn*** is that no substantive right of a defendant is harmed if at sentencing a court accurately identifies an amount and purpose of an item of reimbursement, imposes that amount, and then at a later date a court relabels the item from "restitution" to "cost."

¶15 Because the circuit court did not assess additional costs after sentencing, but merely relabeled the $7100 payment as costs, we affirm the court's order amending the judgment of conviction.

By the Court.—Judgment and order affirmed.

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