COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 97-2671-FT

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

IN THE INTEREST OF CHRISTOPHER L.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CHRISTOPHER L.,

RESPONDENT-APPELLANT.

APPEAL from order of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed.*

SNYDER, P.J. Christopher L. appeals from an order requiring him to pay $525 in restitution as part of a delinquency adjudication. Christopher contends that the juvenile court misused its discretion when it set restitution because at the time of the order Christopher was institutionalized and had no source of income. Christopher bases this claim on his further argument that "[t]he

law is clear and unambiguous, a court can order a juvenile to pay only that restitution that he alone can pay before the end of the dispositional order." According to Christopher, the court made an explicit finding that he was unable to pay restitution; therefore, its order of restitution violated the statutory mandates.

We disagree; instead, we conclude that the court properly considered Christopher's ability to pay and found that he was able to pay by virtue of his age and future employment possibilities. We construe the statutory language as requiring the court to consider whether restitution is set at an amount that the juvenile ordered to pay would have the ability to earn, and not whether the juvenile has a present ability to obtain a job and begin making restitution. We therefore hold that the juvenile court properly exercised its discretion in ordering Christopher to pay restitution and affirm.

Christopher admitted to two misdemeanors as a party to a crime[1] and was adjudged delinquent on October 11, 1996. Dispositional hearings were held on November 8, 1996 and again on November 21 and 27, while the parties sought a suitable placement for Christopher. When no suitable residential placement could be identified that had openings, the court placed Christopher at Ethan Allen in a correctional setting. This was because of the court's determination that "[e]very other alternative to corrections is fraught with personal danger, not only to the juvenile but to the public at large …." The court also ordered that Christopher "pay his proportionate share of restitution for the damage done at the Clark Station."

[1] He pled guilty to attempted theft, *see* § 943.20(1)(a), STATS., and criminal damage to property, *see* § 943.01(1), STATS. He admitted that he was trying to help another juvenile open a shed that was behind a gas station. Nothing was taken.

On July 23, 1997, defense counsel brought a postconviction motion claiming that: (1) a scrivener's error on the dispositional order should be corrected; (2) the restitution order should be vacated because of the court's failure to make a finding that "the juvenile alone is financially able to pay," *see* § 938.34(5)(a), STATS.; and (3) the inability of the court to place Christopher in a residential setting did not warrant his placement in corrections at Ethan Allen. The court granted the first motion but denied the other two. Christopher now appeals the denial of the second motion and asks this court to hold that the imposition of restitution was a misuse of discretion.

Christopher argues that the juvenile court's order which required him to pay $525 was in violation of § 938.34(5)(a), STATS. He bases this on the following language in that subsection: "Any [restitution] order *shall include a finding that the juvenile alone is financially able to pay* and may allow up to the date of the expiration of the order for the payment." ***Id.*** (emphasis added). He raises a dual challenge to the court's order: he claims that the statutory language requires a finding by the court that he has the present ability to make restitution, and he argues that the court made an explicit finding that he did not have the ability to pay.

We must evaluate whether the juvenile court erred in making its restitution order under a misuse of discretion standard. *See* ***State v. Behnke,*** 203 Wis.2d 43, 57, 553 N.W.2d 265, 272 (Ct. App. 1996). We will reverse a discretionary decision only if the juvenile court applied the wrong legal standard or did not ground its decision on a logical interpretation of the facts. *See* ***id.*** at 58, 553 N.W.2d at 272. We will not set aside findings of a juvenile court unless they are clearly erroneous. *See* § 805.17(2), STATS.; *see also* ***Novelly Oil Co. v. Mathy Constr. Co.,*** 147 Wis.2d 613, 617-18, 433 N.W.2d 628, 630 (Ct. App. 1988). In

this case we are also required to apply the court's findings of fact to the statutory requirements of § 938.34(5)(a), STATS. We begin with an analysis of the applicable statute, § 938.34(5)(a).

Construction of a statute presents a question of law which we review de novo. *See* ***R.W.S. v. State,*** 156 Wis.2d 526, 529, 457 N.W.2d 498, 499 (Ct. App. 1990), *aff'd,* 162 Wis.2d 862, 471 N.W.2d 16 (1991). The first step is to determine if the statutory language is clear or ambiguous; the test of ambiguity is whether the statute is capable of being construed in more than one way by reasonable people. *See* ***id.*** We conclude that § 938.34(5)(a), STATS., is ambiguous because reasonable minds could differ over whether it requires that the juvenile court make a finding that the imposed restitution is an amount that the juvenile can be expected to pay, or whether the court can impose restitution only if the juvenile has a present ability to immediately find a job and begin making payments. *See* ***R.W.S.***, 156 Wis.2d at 529, 457 N.W.2d at 499.

In construing a statute, we are to give effect to the intent of the legislature. *See* ***State v. Wilke,*** 152 Wis.2d 243, 247, 448 N.W.2d 13, 14 (Ct. App. 1989). We will not construe a statute to work an absurd result. *See* ***State v. Clausen,*** 105 Wis.2d 231, 245, 313 N.W.2d 819, 826 (1982).

We begin our analysis by noting that the twofold purpose of a juvenile restitution statute is to rehabilitate the juvenile and to redress the victim. *See* ***I.V. v. State,*** 109 Wis.2d 407, 412-13, 326 N.W.2d 127, 130 (Ct. App. 1982). Section 938.34(5)(a), STATS., provides:

> Subject to par. (c), if the juvenile is found to have committed a delinquent act which has resulted in damage to the property of another, or actual physical injury to another excluding pain and suffering, [the judge may] order the juvenile to repair damage to property or to make reasonable

> restitution for the damage or injury if the court, after taking into consideration the well-being and needs of the victim, considers it beneficial to the well-being and behavior of the juvenile. *Any such order shall include a finding that the juvenile alone is financially able to pay* and may allow up to the date of the expiration of the order for the payment. Objection by the juvenile to the amount of damages claimed shall entitle the juvenile to a hearing on the question of damages before the amount of restitution is ordered. [Emphasis added.]

Christopher contends that the juvenile court's order for restitution is not supportable because the court "made a finding that [he] had no ability to pay."[2] He further argues that "[s]ince that finding is not erroneous but based on the facts of this case, restitution must be vacated."

We are not persuaded by Christopher's construction of this section. We read the statute as requiring the juvenile court to consider whether the restitution amount is a sum of money that the juvenile, on his or her own, can be expected to pay within a year, the period of time covered by an initial dispositional order. We do not agree, as Christopher argues, that the juvenile court must find that the juvenile necessarily has the ability to immediately pay or begin to pay the ordered amount. There is no indication in the statutory language that the legislature intended such a requirement. Furthermore, to construe this statutory section as Christopher does would mean that in practice juveniles who commit more serious infractions would be able to avoid restitution because of their placement in a correctional setting. Or a juvenile could claim an inability to find a job and thereby avoid paying restitution. Such a construction would plainly

[2] The statement that Christopher directs us to is as follows:

> THE COURT: I will concede – I will concede that he can't pay now. I'll accept your representation that he's – he's institutionalized and has no source of income for purposes of my decision.

undermine the rehabilitative purpose of restitution. *See* ***I.V.,*** 109 Wis.2d at 412-13, 326 N.W.2d at 130.[3]

The second aspect of Christopher's challenge is his contention that the trial court never made the requisite finding that he had the ability to pay the ordered restitution; rather, he argues that the court "properly found that [he] could not pay, and therefore the restitution order must be vacated." We agree that the statute mandates that a restitution order must include a finding that the juvenile alone has the ability to pay the restitution, but we conclude that by focusing on a single statement which was part of a much lengthier discussion of this issue, Christopher has misconstrued the court's ultimate finding.

Although restitution was summarily ordered at the dispositional hearing without any findings being placed on the record, no objection was lodged at that time. Later, at the postconviction hearing, a request was made by defense counsel that the restitution order be vacated. He argued that the court's failure to make a finding that Christopher alone is financially able to pay the required amount invalidated the order. The pertinent portion of the motion hearing reads:

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[3] In addition, our interpretation squares with another general provision of ch. 938, STATS., which permits a juvenile court to extend dispositional orders. *See* § 938.365, STATS. Whenever a juvenile court considers an extension of a dispositional order, it is required to hold a hearing, *see* § 938.365(2), and at such hearing "the person or agency primarily responsible for providing services to the child shall file with the court a written report stating to what extent the dispositional order has been meeting the objectives of the plan for the child's rehabilitation …." Section 938.365(2g)(a).

Because restitution is one form of rehabilitation and the Juvenile Justice Code clearly allows a juvenile court to extend any dispositions after hearing "to what extent the dispositional order has been meeting the objectives of the plan for the child's rehabilitation or care or treatment," *see* ***id.,*** it follows that a juvenile court may choose to examine whether a juvenile offender has paid restitution and whether an extension of a dispositional order requiring restitution is warranted.

[DEFENSE COUNSEL]: Well, we have no objection to the $525.00. The problem is that [Christopher] is in Ethan Allen, has no ability to pay that kind of amount…. [Section 938.34(5)(a), STATS.,] [r]equires that any restitution order shall include a finding that the juvenile alone is financially able to pay, and may allow up to the date of the expiration of the order for the payment.

THE COURT: How would I know that? He goes to Ethan Allen and is turned around and comes back in two months and goes to work at McDonalds. How do I know whether he is able to pay? It is an ongoing thing, and so you're asking me to make a guesstimate. My guesstimate is— How old is he?

[DEFENSE COUNSEL]: He's fourteen.

THE COURT: That he can get a paper route, and he can contribute. That is my guesstimate. What do you propose that I find?

[DEFENSE COUNSEL]: Well, if you want to let him go, I believe he has the ability to pay.

THE COURT: My experience in the year and 13 days that I have been a juvenile judge is that it is a bit of a revolving door up at Ethan Allen. It is a revolving door. They go up there and are there for a short period of time, and they are let out and come back in the community in some sort of a program. And, if they go to school, they go to school in our community part time and have lots of time on their hands, and they can get part time jobs. So, I would anticipate during the year that he would have lots of opportunity to earn money.

> Now, that is a generic kind of a response…. Assuming he is in good health, and there's no learning disability or other genetic problems, he would fit that pattern.
>
> ….
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> THE COURT: … Let me just say on the issue of restitution. [Christopher] committed a crime. He was found delinquent for committing a crime. I ordered restitution. There is a mechanism for a hearing for restitution…. I'm going to deny your motion on that basis for the reasons I've given indicating it is still an open issue …. Certainly before the Court would take some action, I would have to make findings in terms of either the attempt of the juvenile to pay or the ability or opportunity for him to pay ….

When read in its entirety we conclude that the juvenile court made an appropriate finding before imposing restitution. The court found that while Christopher may not have had an ability to begin to pay restitution immediately, that was not the issue. Rather, at issue was whether he would have the ability to earn money for restitution during the initial dispositional order. The court noted on the record that experience would suggest that Christopher would not have an extended term at Ethan Allen. In considering his age, the court concluded that Christopher should be able to get a job and use some of his earnings towards restitution.

The juvenile court's analysis also comports with the following statutory provision found in § 938.34(5)(am), STATS.:

> … [A court may] order a juvenile who owes restitution under par. (a) and who is receiving income while placed in a secured correctional facility, residential treatment center or other out-of-home placement to contribute a stated percentage of that income towards that restitution.

The plain language of this section supports our analysis that the legislature did not intend to exempt those juveniles for whom a restitution order is appropriate, but who are placed in a secure setting, from also paying restitution as part of their rehabilitation.[4]

Because we conclude that the juvenile court properly exercised its discretion in finding that $525 in restitution is an amount that Christopher would be able to pay, the statutory requirements were fulfilled. The court's findings which support the restitution order serve the intended legislative purpose of juvenile rehabilitation and comply with the statutory requirements of § 938.34(5)(a), STATS.

By the Court.—Order affirmed.

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

[4] In its brief the State informs us that Ethan Allen has a program whereby juveniles who are placed there can work at the facility for pay. If that is the case, Christopher may have had an ability to earn some money towards restitution even during his initial placement.