COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0075-CR **Cir. Ct. No. 02CF001174**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUSTIN DAVID SCHWARTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed.*

¶1 ANDERSON, P.J.[1] Justin David Schwartz appeals from an amended judgment of conviction for one count of misdemeanor theft. On appeal, he argues that the trial court erred in holding that it had the authority to amend the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

original sentence to include restitution. We conclude that because the trial court did not state its reasons for failing to provide for restitution in the original sentence, the original sentence was an unlawful sentence and the court possessed the inherent authority to correct its first judgment by amending the sentence to include restitution. We affirm the amended judgment.

FACTS

¶2 The relevant facts are undisputed. On October 24, 2002, the State filed a two-count criminal complaint, alleging Schwartz had been a party to a crime of misdemeanor theft and had also received stolen property with value between $1000 and $2500 dollars. A plea hearing was held on December 10, 2002. At the beginning of the hearing, the public defender explained to the court that an agreement had been reached between the parties and that Schwartz was prepared to change his plea. The public defender explained to the court that John Miller Carroll, the victim of the theft, had filed a civil suit for damages and had received payments from both Schwartz and Schwartz's mother's insurer as well as other sums from other parties. The public defender provided the court with the releases from liability, which applied solely to the civil suit. Both parties represented to the court that those payments had taken care of Schwartz's liability for restitution. The district attorney then explained to the court that sentencing would need to be continued because Carroll was not present and the State had informed Carroll of the plea, but it had not provided notice to Carroll that sentencing would occur.

¶3 The court accepted Schwartz's no contest plea and found him guilty of misdemeanor theft. The second count was dismissed and read in. The court set a sentencing date of January 6, 2003.

¶4 At the January 6 sentencing hearing, the district attorney stated that the district attorney's office had complied with WIS. STAT. ch. 950, the victim rights chapter. Carroll, however, did not appear at the January 6 sentencing. He later explained to the court that he did not appear at the sentencing hearing because the State informed him that it would be requesting an adjournment of the sentencing to a later date.

¶5 Upon the court's inquiry, the district attorney informed the court that he was not prepared to proceed to sentencing because he needed to obtain information about pending charges against Schwartz in another county. After the court obtained the relevant information, the case proceeded to sentencing. The district attorney stated the terms of the plea agreement, which included a withheld sentence and an eighteen-month term of probation with several conditions. The district attorney then concluded:

> I believe that in an attempt to make things right [Schwartz] did come up with a very large chunk of restitution to the point where I believe his share has been satisfied and the State is not recommending that he pay any more restitution.

The public defender also represented to the court that "restitution has been paid by Mr. Schwartz."

¶6 The court proceeded to sentence Schwartz to a six-month jail term, which was stayed, and a two-year term of probation with a variety of conditions. In handing down the sentence, the court did not order restitution nor did it discuss restitution at all. The court did not state why it chose not to impose restitution. The court signed the judgment of conviction on January 10, 2003.

¶7 On February 7, the court received a letter from Carroll. In the letter, Carroll objected to the State's representation that restitution issues were satisfied

and requested a restitution hearing. The court held a hearing on March 13 regarding the victim's restitution request. At the hearing, the public defender argued that the court did not have the authority to hold a hearing on restitution. The court set a hearing for April 28 to hear arguments regarding whether it could even hold a restitution hearing. Subsequently, Schwartz filed a motion to deny the restitution hearing. He cited to WIS. STAT. § 950.10(2) as grounds that the court was barred from modifying the judgment of conviction.[2]

¶8 At the April 28 motion hearing, the court found that WIS. STAT. § 950.10(2) did not apply to the facts of this case because Carroll was not denied a "right," to which the statute refers, but instead was denied an "opportunity" which is not covered by the statute. The court ordered that a restitution hearing take place. The restitution hearing took place on May 19. Carroll testified. On May 27, the court issued a written decision in which it ordered the judgment of conviction to be amended to reflect a $4615 balance of restitution due.[3] The amended judgment of conviction imposing the restitution was filed on May 28.

STANDARD OF REVIEW

¶9 Whether the trial court had the authority to amend the sentence is a question of law. *See* ***State v. Martin***, 121 Wis. 2d 670, 672-73, 360 N.W.2d 43

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[2] WISCONSIN STAT. § 950.10(2) provides in pertinent part:

> A failure to provide a right, service or notice to a victim under this chapter or ch. 938 or under article I, section 9m, of the Wisconsin constitution is not a ground for an appeal of a judgment of conviction or sentence and is not grounds for any court to reverse or modify a judgment of conviction or sentence.

[3] The amount of restitution ordered is not contested in this appeal.

(1985). We review questions of law independent of the trial court. ***Milas v. Labor Ass'n of Wis., Inc.***, 214 Wis. 2d 1, 8, 571 N.W.2d 656 (1997).

DISCUSSION

¶10 On appeal, the parties pick up where they left off at the April 28 motion hearing. Schwartz submits that WIS. STAT. § 950.10(2), which states that a trial court cannot reopen a judgment on the basis that a victim was denied a right, service or notice under WIS. STAT. ch. 950, precludes the trial court from amending the judgment to include restitution as part of Schwartz's sentence. The State responds that § 950.10(2) does not apply. The State reasons that Carroll was not denied the rights, services and notice referred to in § 950.10(2), but rather was denied the *opportunity* to exercise the right to provide the court with accurate restitution information. Because we conclude that the sentence was unlawful pursuant to WIS. STAT. § 973.20(1r) and, therefore, the court had the inherent power to correct the sentence by directing that Schwartz pay restitution, we need not address the merits of the parties' claims.

¶11 WISCONSIN STAT. § 973.20(1r) provides in relevant part:

> **(1r)** When imposing sentence or ordering probation for any crime … for which the defendant was convicted, the court, in addition to any other penalty authorized by law, *shall* order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing … unless the court finds substantial reason not to do so and states the reason on the record. (Emphasis added).

The direction that when imposing sentence or ordering probation the court "shall order the defendant to make full or partial restitution," is unambiguously mandatory. ***State v. Borst***, 181 Wis. 2d 118, 122, 510 N.W.2d 739. The statute

mandates that the court shall impose restitution unless it finds a substantial reason not to do so and states the reason on the record. ***Id.*** at 122-23.

¶12 In ***Borst***, our supreme court wrestled with the question of whether a trial court had the power to reopen a judgment of conviction and amend a sentence to provide for restitution. ***Id.*** at 120. There, the trial court sentenced the defendant without providing for restitution. ***Id.*** After sentencing, the State moved that the court order restitution. ***Id.*** The trial court amended the original judgment of conviction to reflect restitution. ***Id.*** The defendant then moved to modify his sentence on the grounds that the trial court lacked jurisdiction to order restitution after it had sentenced him without ordering restitution. ***Id.*** at 121. The trial court ruled that restitution was a new factor, which the court had intended to order but had been inadvertently omitted from the original sentence, and denied the defendant's motion. ***Id.***

¶13 On appeal, our supreme court held that the trial court had the inherent power to amend its original sentence to include restitution. ***Id.*** at 123. The court reasoned that because WIS. STAT. § 973.20 imposes a mandatory duty on a sentencing court to provide for restitution, the original sentence was "illegal" in the sense that it was incomplete without restitution or the explanation required by the statute. ***Borst***, 181 Wis. 2d at 123. Because the court reached this conclusion and it has the authority to affirm a correct decision on different grounds, the court determined that it did not need to reach the trial court's holding that a new factor justified modification of the sentence. ***Id.*** at 124.

¶14 Here, as in ***Borst***, the original sentence in this case was unlawful, in the sense that the court failed in its mandatory duty to order restitution or to give its reasons on the record for not doing so. While this case differs from ***Borst***

because the parties in this case did discuss restitution at the sentencing hearing, the fact remains that the trial court, in handing out Schwartz's sentence, did not even refer to the possibility of restitution, let alone state its reasons for not providing for restitution on the record. This is in clear violation of the statutory mandate. As ***Borst*** teaches, because the sentence was illegal, the trial court, upon reflection of the fact that it had not ordered restitution, properly exercised its inherent authority to reopen the judgment, hold a restitution hearing and amend Schwartz's sentence to include restitution. While the trial court did not specifically articulate a failure to comply with WIS. STAT. § 973.20 as its reason for reopening the judgment and amending the sentence, we may affirm a correct decision for reasons the court did not rely on. ***Borst***, 181 Wis. 2d at 122 (citing ***State v. Baudhuin***, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987)). We, therefore, affirm the trial court's amended judgment.

By the Court.—Judgment affirmed.

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