

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 1, 2007

David R. Schanker
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. 2006AP3123-CR

Cir. Ct. No. 2005CF156

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEREMY J. VAN ERT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Wood County: GREGORY J. POTTER, Judge. *Reversed and cause remanded with directions.*

Before Higginbotham, P.J., Lundsten and Bridge, JJ.

¶1 PER CURIAM. Jeremy Van Ert appeals an amended judgment convicting him of two counts of arson and one count of second-degree recklessly endangering safety. He also appeals an order denying his motion for

postconviction relief. The sole issue on appeal is whether the record supports the trial court's determination that Van Ert would be able to pay \$100,000 in restitution by the end of his sentences. We conclude that it does not and, therefore, reverse and remand for a redetermination of the amount of restitution.

BACKGROUND

¶2 Van Ert was sentenced to concurrent terms of ten years of initial confinement and ten years of extended supervision on each of the arson counts and five years of initial confinement and five years of extended supervision on the reckless endangerment count. His extended supervision is due to begin in 2015 and end in 2025.

¶3 The PSI stated that the victims' losses from the arsons totaled \$1,126,313.53. The trial court initially ordered Van Ert to pay that entire amount, without making any findings as to his ability to pay. Following a postconviction hearing, the court reduced the amount of restitution to \$100,000. Van Ert now appeals the court's determination that he would have an ability to pay \$100,000 during his anticipated ten years of extended supervision.

¶4 Because the facts relevant to Van Ert's ability to pay are so intertwined with the trial court's decision, we will discuss them in our analysis section.

STANDARD OF REVIEW

¶5 We review the trial court's determination of the amount of restitution under the erroneous exercise of discretion standard. *State v. Loutsch*, 2003 WI App 16, ¶20, 259 Wis. 2d 901, 656 N.W.2d 781. In order to properly exercise discretion, a court must consider the facts of record under the proper legal

standard and reason its way to a rational conclusion. *Burkes v. Hales*, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991).

DISCUSSION

¶6 The trial court correctly recognized that it was required to consider a number of statutory factors when determining the amount of restitution. Those factors are:

1. The amount of loss suffered by any victim as a result of a crime considered at sentencing.
2. The financial resources of the defendant.
3. The present and future earning ability of the defendant.
4. The needs and earning ability of the defendant's dependents.
5. Any other factors which the court deems appropriate.

WIS. STAT. § 973.20(13)(a). (2005-06).¹ There does not appear to be any dispute between the parties regarding factors 1, 2, 4, or 5. That is, the amount of the victims' loss was over one and a quarter million dollars; the defendant has essentially no financial resources;² the defendant has no dependents; and the court

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² With regard to his financial resources, Van Ert testified that he had \$6.00 in his prison account, plus \$5.00 in a personal savings account. He had no real estate, vehicles, stock, insurance policies, retirement accounts, trust accounts, or personal property of substantial value. Van Ert had never met his father, who lived in Massachusetts; his mother worked at Culver's, and his sisters were in high school. He did not have any wealthy relatives, and was not, to his knowledge, named as the beneficiary of anyone's will. He also owed the Marshfield Clinic \$20,000 for in-patient rehab.

took no other special factors into account. The focus of both parties' arguments is on whether the trial court properly applied the third factor—the present and future earning ability of the defendant.

¶7 We have held that the third restitution factor—read in conjunction with other statutory provisions making restitution a condition of extended supervision and authorizing the court to order payments to end no later than the end of any period of extended supervision—requires the court to “order at sentencing an amount of restitution that it determines the defendant will be able to pay before the completion of the sentence.” *Loutsch*, 259 Wis. 2d 901, ¶25; see also WIS. STAT. § 973.20(1r), (10), and (13). The earning ability factor “plainly contemplates that the court will be making a prediction of what a defendant will be able to pay in the future.” *Loutsch*, 259 Wis. 2d 901, ¶25. Although we expressed sympathy in *Loutsch* for the difficulty a trial court would likely have in determining what a defendant's financial circumstances would be upon release from prison several years in the future, we concluded that evidence of such things as past earnings and earnings in prison was sufficient to provide an evidentiary basis for determining an amount that it would be reasonably probable the defendant would be able to pay. *Id.*, ¶28.

¶8 The State concedes that the “practical effect” of *Loutsch* is that restitution “is limited by the defendant's present and future earning ability no matter what the amount of loss suffered by the victims.” The State argues, however, that the holding in *Loutsch* is called into question by *Huml v. Vlazny*, 2006 WI 87, ¶¶20, 22, 293 Wis. 2d 169, 716 N.W.2d 807. The State's argument relies heavily on a footnote in *State v. Anthony D.*, 2006 WI App 218, 296 Wis. 2d 771, 723 N.W.2d 775, observing that the court in *Huml* “pass[ed] over without comment a total restitution figure that wildly exceeded the total amount of

payments the defendant was ordered to make.” *Anthony D.*, 296 Wis. 2d 771, ¶7 n.2. The appeal in *Huml*, however, arose from an order which dismissed the appellant’s motion to enforce a settlement agreement which would have precluded the victim from enforcing a civil judgment derived from a criminal restitution order. *Huml*, 293 Wis. 2d 169, ¶1. Because the criminal restitution order was not itself before the court, the court would not have had authority to address its validity. In sum, we are satisfied that *Loutsch* is still controlling authority.

¶9 We turn our attention to whether the record here supports the trial court’s determination that it was reasonably probable that Van Ert could pay \$100,000 in restitution by the end of his sentences. The following facts from the PSI and the restitution hearing were undisputed.

¶10 Van Ert dropped out of high school, but obtained a high school equivalency diploma from Mid State Technical College. He was unemployed at the time of sentencing and the restitution hearing and had no income beyond the \$2.00 a month he received in prison. He had held 23 different jobs between the ages of 18 and 25, when he was arrested on the current offenses. Among his jobs, he had worked at a Wendy’s for 15 or 16 months, earning \$6.25 an hour; at a Copps store for 8 months, earning \$7.00 an hour; at a shoe factory for less than a month, earning \$7.15 an hour; and at a Pick N Save, where he was fired for being drunk at work. Van Ert hoped, after leaving prison, to get a job as a computer technician that would pay \$10 to \$12 an hour, but admitted that he had no work experience in that area and did not know whether he would be able to get hired with a criminal record.

¶11 In addition to his scattered work history, a psychological report concluded that Van Ert was “severely alcoholic” with a pattern of heavy daily

alcohol use. The psychologist also felt it was likely that Van Ert met the criteria for Asperger's Disorder, and that his social skills were further impaired by physical abuse he suffered as a child.

¶12 Based on these facts, Van Ert requested that the restitution order be reduced to \$25,000. The State suggested that the court keep the full amount of restitution intact, but only require Van Ert to pay \$200 per month while on supervision, which would total \$24,000, unless there was a change in his circumstances. In the alternative, the State suggested that the court could reduce the amount of restitution and then order that the remaining amount of damages be converted to a civil judgment. The court accepted defense counsel's argument that the statute and case law prohibited imposing a restitution order in excess of the defendant's ability to pay, either accompanied by smaller required payments or with the intent of later converting the unpaid portion to a civil judgment.

¶13 The court found that Van Ert had a sporadic employment history and had never made more than \$7.15 an hour. Understandably, the court made no finding that Van Ert would be likely to get a computer job paying \$10 to \$12 an hour. That prospect seems unrealistic given Van Ert's employment history and mental problems, even assuming his alcoholism could be addressed in prison. However, the court reasoned that "if he starts off at a job that's paying approximately 15,000 over the course of ten years, his earning ability should go up as well with each year of employment." The court concluded that Van Ert had an ability to pay \$100,000 in restitution over a period of ten years, taking into account inflation and the possibility that his earning capacity could increase during his term of extended supervision.

¶14 We readily concede the difficulty and often impossibility of figuring out what a defendant might earn years in the future based on limited information available at the time of sentencing. Moreover, we understand that some judges are inclined to grant restitution on the off-chance that a defendant will have substantial earnings, knowing that it is highly unlikely the defendant will be reincarcerated for failing to pay. Nonetheless, we are bound by case law that requires that restitution amounts are based on reasonable projections of a defendant's future earning ability based on the actual evidence before it. Here, that evidence consisted of the defendant's sporadic work history and his lack of educational, technical, or social skills. We must conclude that the court's determination that Van Ert could pay \$10,000 in restitution each year while starting out earning \$15,000 per year is not reasonably probable given the facts in evidence. First, it fails to take into account that Van Ert would need to pay taxes and obtain food and shelter. Although the State suggests that Van Ert could perhaps live with a family member, there is nothing in the record to suggest that any family member has offered to or will house and feed him. Secondly, the possibility that Van Ert's earning capacity could significantly increase during his term of supervision is entirely speculative. The trial court may not take into account the mere possibility that Van Ert might, as the court commented, "discover the next pet rock ... come out with the next hula hoop ... [or] develop some computer program that's going to be the next Google or Yahoo" without some indication that such a project is already in the works, or that Van Ert would have any of the necessary skills to do something like that. Furthermore, while inflation might account for some increase in earnings, it would presumably be offset by increased living expenses as well.

¶15 We agree with the State that there is no precise mathematical formula for determining what percentage of a defendant's projected income could

reasonably be assigned to restitution. Still, the court may not enter an order that is not based on the evidence and reasonable projections based on that evidence. Therefore, we reverse the amended judgment and postconviction order with respect to restitution, and remand with directions that the trial court determine what amount of restitution Van Ert could reasonably pay, given his projected annual income of approximately \$15,000.

By the Court.—Judgment and order reversed and cause remanded with directions.

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

