

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 29, 2008**

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. 2007AP2551-CR**

**Cir. Ct. No. 2006CF3010**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**EARL MILLER, JR.,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Judgment affirmed; order reversed and cause remanded for further proceedings.*

Before Curley, P.J., Wedemeyer<sup>1</sup> and Kessler, JJ.

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<sup>1</sup> This opinion was circulated and approved before Judge Wedemeyer's death.

¶1 PER CURIAM. Earl Miller, Jr. appeals from a judgment and an order entered after he pled no contest to one count of first-degree recklessly endangering safety, while armed, in violation of WIS. STAT. §§ 941.30(1) and 939.63(1)(b) (2005-06).<sup>2</sup> He challenges only the restitution order, which required that he pay \$7500. He asserts that under the facts and circumstances of this case, the restitution amount ordered is unreasonably high. Because the trial court erred in imposing the \$7500 restitution amount, we reverse.

### BACKGROUND

¶2 Miller is a homeless man. He was drinking in an alley with the victim when a fight ensued. Miller stabbed the victim with a knife. The victim was treated at Froedtert Hospital and incurred medical bills exceeding \$40,000. Both Miller and the victim are indigent.

¶3 Miller was charged with first-degree recklessly endangering safety, while armed as a result of the incident. He pled no contest. Miller was forty-eight years old at the time of the sentencing. The trial court was advised that Miller had a long history of drug and alcohol abuse as well as mental illness. He had received treatment for schizophrenia, and depression, and was diagnosed with renal cancer in 2005. He was on nine different prescription medications at the time of sentencing. He also had a lengthy criminal record going back to 1985, including seven misdemeanors and six felony convictions. He spent most of his adult life incarcerated in prison or at the House of Correction. He advised the trial court that he attended school through the 8th grade.

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 The trial court sentenced Miller to twelve years, consisting of seven years of initial confinement followed by five years of extended supervision. The trial court also ordered Miller to pay restitution in the amount of \$7500. Subsequent to the imposition of the sentence, Miller filed a postconviction motion seeking to reduce the amount of the restitution. He argued in the motion that he would never be able to pay the amount ordered and that ordering such an amount constituted an erroneous exercise of sentencing discretion. The trial court denied the motion. Miller now appeals.

### DISCUSSION

¶5 The issue in this case is whether the amount of restitution ordered should be reduced. The trial court has the discretion to determine the particular amount of restitution that is appropriate in each individual case. *State v. Loutsch*, 2003 WI App 16, ¶20, 259 Wis. 2d 901, 656 N.W.2d 781. Thus, we review the issue here under the erroneous exercise of discretion standard. In order to determine whether the trial court erroneously exercised its discretion, we look to see whether it considered the pertinent facts, applied the correct law and reached a reasonable determination. *See State v. Holmgren*, 229 Wis. 2d 358, 366, 599 N.W.2d 876 (Ct. App. 1999). Here, the pertinent law is found in WIS. STAT. § 973.20(13):

(a) The court, in determining whether to order restitution and the amount thereof, shall consider all of the following:

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.

¶6 The trial court used this statute and addressed generally Miller's ability to pay restitution, ruling:

He is to pay \$7500 in restitution. Court recognizes he does not have the ability to pay the full amount, but he should make an effort to make some payments towards that and he is responsible for what happened, and he should do what he can to address that.

Thus, the trial court recognized that Miller did not have the ability to pay the \$40,000 by setting restitution at a much lower amount than what was incurred. We hold, however, that even this lower amount was not reasonable. As noted, Miller is a homeless man with drug, alcohol, mental, and other health issues. He has never held a steady job, and will be sixty years old when his sentence is complete. Accordingly, the chances of Miller being gainfully employed upon completion of his sentence are slim. It was not disputed that Miller has no financial resources—he was a homeless man living on the streets. It was not disputed that Miller has no present or future earning ability, aside from wages earned while incarcerated, which will cover at most approximately half of the restitution ordered. He was an only child and both of his parents are deceased. He has no known next of kin.

¶7 The State points out that under *State v. Dugan*, 193 Wis. 2d 610, 625, 534 N.W.2d 897 (Ct. App. 1995), this court upheld a large restitution amount because a defendant's financial circumstances may change and because the defendant can move for a modification of the amount if his financial circumstances do not improve once out of prison. *Dugan*, however, is distinguishable from this case, as it did not involve a homeless man who will be

sixty years old at the time he completes his sentence, who has never held a steady job, has no family, and has mental and physical health issues.

¶8 Based on this record, the \$7500 restitution order is unreasonable. There is no factual basis in the record from which to conclude that Miller will ever likely be able to comply with the restitution order. Accordingly, we reverse the restitution order and remand with directions to the trial court to redetermine an appropriate amount of restitution, if any, based on the facts and circumstances of this case.

*By the Court.*—Judgment affirmed; order reversed and cause remanded for further proceedings.

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

