

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 30, 2012

Diane M. Fremgen
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. 2010AP1056-CR

Cir. Ct. No. 2003CF612

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ERIC ARCHIE ARMSTRONG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: RICHARD J. KREUL, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 CURLEY, P.J. Eric Archie Armstrong appeals the judgment convicting him of attempted second-degree intentional homicide, contrary to WIS.

STAT. §§ 940.05(1)(a) and 939.32 (2009-10),¹ and setting restitution at over \$250,000. He also appeals the order denying his postconviction motion. Armstrong argues that the restitution award—set approximately four years after he was originally sentenced—violated his double jeopardy protections. We disagree. Armstrong did not have an expectation of finality regarding restitution because he was still serving his prison sentence when the award was set, and in fact had over three-quarters of his sentence left; there were attempts to obtain restitution prior to, during, and after sentencing that Armstrong knew about; to a large extent, Armstrong did not dispute the victim’s damages; and his appeal had not yet concluded. We therefore affirm the judgment and order.

BACKGROUND

¶2 Armstrong pled guilty to one count of attempted second-degree intentional homicide. According to the criminal complaint, Armstrong shot victim Daniel Hoeft on May 21, 2003, causing extensive injuries—including a gunshot wound to the head.

¶3 At Armstrong’s sentencing hearing on June 15, 2004, the State indicated there were restitution issues, but explained that it was unknown whether final bills existed. Defense counsel responded that “this is the first time I’ve heard of the restitution,” and requested time to speak to Armstrong about the matter and to review the bills to ensure their accuracy. Defense counsel agreed to determine within thirty days whether Armstrong would stipulate to the restitution amount.

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 The trial court then ordered restitution “because there was a[n] injury, it was obvious, open, and incapacitating, and it resulted in disability to the victim.” The court noted that as to the amount:

The amount thereof is going to be determined at a future point in time. [Defense counsel] will notify the Court in writing and with a copy to the assistant district attorney indicating whether or not there is agreement and, if so, to what amount; and if not, the matter will be put over to a hearing to be determined as to the the date, and that hearing will be conducted within thirty days unless it is adjourned at the agreement of the parties for an additional thirty days and at that point the hearing will be conducted. The court commissioner will then make a recommendation to the Court relative to the amount of restitution.

¶5 The trial court then sentenced Armstrong to twenty years’ imprisonment, consisting of ten years of initial confinement and ten years of extended supervision.

¶6 On June 28, 2004, defense counsel faxed a letter to the trial court and to the State indicating that he had not received any written information from the State regarding restitution and seeking to adjourn the issue for two weeks. The trial court granted the request. On July 9, 2004, defense counsel sent another letter to the trial court and the State, stating that he still had no documentation as to restitution and requested an additional three weeks. Defense counsel further requested that the trial court decline to order restitution should the State fail to respond by July 23, 2004. Defense counsel faxed yet another letter to the trial court and to the State on August 3, 2004, indicating that he still had not received complete information from the State concerning restitution, and that Armstrong objected to the imposition of restitution and requested a hearing.

¶7 Following defense counsel's letters, the trial court issued an amended judgment of conviction on August 26, 2004, which set the restitution amount at zero.

¶8 Nearly nine months later, on May 20, 2005, Hoeft filed a civil suit against Armstrong seeking damages for injuries received as a result of the shooting. For reasons unknown and not provided in the record, the parties agreed to dismiss the case on the merits.

¶9 On March 28, 2007, Hoeft, *pro se*, filed a motion seeking an order for restitution. According to Hoeft, an attorney had inquired on his behalf concerning restitution sometime in 2005. Hoeft was told that the State had made a mistake regarding restitution and that there was nothing that could be done to rectify the matter. Hoeft claimed that he himself did not know at the time how to address the situation and only learned how to do so after he had personally started to research the law and after a friend had helped him. The trial court denied Hoeft's motion.

¶10 On July 27, 2007, Hoeft, again *pro se*, moved for reconsideration. In that motion, Hoeft alleged that his mother had gone to the office of the Victim Witness Program in the Racine County District Attorney's Office long before Armstrong was sentenced, and that she had seen two date-stamped medical bills in the file. Copies of those bills were attached to Hoeft's motion. The trial court granted the motion to reconsider, concluding that Hoeft should be given the opportunity to prove his claim.

¶11 On July 2, 2008, the court commissioner held a restitution hearing. Following the restitution hearing, the court commissioner concluded that Hoeft was entitled to restitution in the amount of \$267,815.65. The trial court

consequently issued an amended judgment of conviction on July 31, 2008, that set restitution at that amount. Armstrong filed a motion for reconsideration, which he later withdrew.

¶12 Armstrong subsequently filed a WIS. STAT. § 809.30 postconviction motion seeking to vacate, or, in the alternative, reduce the restitution award. The trial court granted the motion in part and denied it in part, ultimately reducing the amount of restitution by \$5396.87 on the ground the Hoeft failed to meet his burden of proof as to that amount.

¶13 Armstrong appealed the trial court's decision. Appellate counsel filed a no-merit report, but this court rejected it. Armstrong now appeals.

ANALYSIS

¶14 Armstrong's sole argument on appeal is that the restitution award violated his right to be free from double jeopardy. See *State v. Greene*, 2008 WI App 100, ¶15, 313 Wis. 2d 211, 756 N.W.2d 411 ("The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Article I, § 8 of the Wisconsin Constitution protect individuals from being subjected to ... multiple punishments for the same offense."); *State v. Ziegler*, 2005 WI App 69, ¶19, 280 Wis. 2d 860, 695 N.W.2d 895 (double jeopardy protection applies to restitution orders). This is an issue we review *de novo*. See *Greene*, 313 Wis. 2d 211, ¶14.

¶15 Whether the amended judgment violated Armstrong's double jeopardy protections turns on whether he "had a legitimate expectation of finality in the first judgment." See *id.*, ¶15. In determining whether Armstrong had a legitimate expectation of finality, we may consider several factors, including the passage of time, whether Armstrong completed his sentence, the pendency of an

appeal, or whether Armstrong engaged in misconduct in obtaining his sentence. *See State v. Jones*, 2002 WI App 208, ¶10, 257 Wis. 2d 163, 650 N.W.2d 844.

¶16 While Armstrong presents several factors to support his claim that he had a legitimate expectation of finality, we must reject them because competing factors tip the balance in favor of affirming the restitution award. We do agree with Armstrong that he did not engage in any misconduct in obtaining his sentence. *See id.* We do not agree, however, that the fact that Armstrong had already served a portion of his sentence evinces an expectation of finality in this particular case because he served less than half of his total prison sentence and less than a quarter of his total sentence. *Compare Ziegler*, 280 Wis. 2d 860, ¶19 (concluding that defendant had expectation of finality in part because he had already served his prison sentence and was on parole). Similarly, we do not agree that the fact that the court had set the restitution award at zero when Armstrong began serving his sentence is dispositive because the State made known at sentencing that Hoefft had significant medical expenses stemming from the shooting, and the trial court noted that restitution would in fact be ordered at some point in the future. Additionally, Hoefft made numerous, if not always successful, attempts to obtain restitution that Armstrong knew about.² Moreover, with the exception of an extremely small percentage of the total, Armstrong did not dispute the amount of the award, even though he had the opportunity to do so. *Compare id.* (“[B]y the time the court held the restitution hearing, much of the

² Armstrong additionally argues that the fact that the parties agreed to dismiss Hoefft’s civil case on the merits shows an expectation of finality. We do not find this argument persuasive, however, because, as noted, the details of the civil case and the reasons it settled are not in the record. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (“We may decline to review issues inadequately briefed.”).

documentation concerning the victim's damages had been lost or destroyed and the victim could not exactly recall the origin of his calculations."'). Also, the fact that Armstrong did not initially pursue postconviction relief is of no consequence because Armstrong's appeal has not yet concluded. See *United States v. DiFrancesco*, 449 U.S. 117, 137 (1980) (suggesting that a defendant has no expectation of finality in sentence until appeal is concluded); *United States v. Daddino*, 5 F.3d 262, 265 (7th Cir. 1993) (same). Furthermore, we do not agree that this case is analogous to a situation in which the trial court misapplied the law. See *State v. Willet*, 2000 WI App 212, ¶¶1, 6, 238 Wis. 2d 621, 618 N.W.2d 881. Rather, this was a case where the victim's attempts to obtain restitution were ongoing,³ and the trial court was ultimately convinced that restitution was warranted.

¶17 In sum, we conclude that, in this particular case, Armstrong did not have a legitimate expectation of finality. As noted, Armstrong was still serving his prison sentence, and in fact had over three-quarters of his sentence left; there was ample evidence in the record that the victim was continuously attempting to obtain restitution; to a large extent, Armstrong did not dispute the victim's damages; and his appeal had not yet concluded. Under these circumstances, we do not find the lapse of four years between the original judgment of conviction and the imposition of restitution prejudicial or indicative of a legitimate expectation of finality. Therefore, Armstrong's double jeopardy protections were not violated,

³ Indeed, given our review of the record, it does appear that Hoeft submitted medical bills regarding restitution nearly a year before Armstrong's sentencing, and any subsequent inattentiveness was with the district attorney's office.

and we uphold the most recent amended judgment of conviction as well as the postconviction order.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

