

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**MARCH 4, 1997**

**NOTICE**

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2257-CR

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**LOUIS H. LA COUNT,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Brown County:  
RICHARD G. GREENWOOD, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Louis LaCount appeals an amended judgment of conviction for theft by fraud requiring restitution of \$100,000 to the victim, Angela Barta. LaCount contends that the circuit court failed to hold an evidentiary hearing to determine the amount of restitution and, in any case, that it should be barred from holding a hearing more than two and one-half years after the initial sentence. Alternatively, LaCount contends that we must reverse and remand for a restitution hearing to allow him to present evidence and assert defenses.

We reject LaCount's contentions for various and sundry reasons. First, the time restrictions for restitution determinations made pursuant to § 973.20, STATS., are directory rather than mandatory. Second, the trial court stated at the time of the original sentence that it intended that LaCount make restitution to Barta, and indicated that the evidence at trial showed her loss to be \$100,000. Third, following the original sentence, the issue of LaCount's debt to Barta was the subject of a civil action tried before the same court, the result of which was a judgment for Barta for the \$100,000 together with other sums. This court affirmed that judgment on appeal, *Valley Bank Northeast v. Barta*, 201 Wis.2d 215, 549 N.W.2d 792 (Ct. App. 1996). Finally, LaCount does not assert that he sought a restitution hearing in the circuit court, nor does he explain, in light of the trial court's indication of its intent, as well as the judgment in the civil proceeding, why a restitution hearing would make any difference. We therefore conclude that failure to hold an evidentiary hearing prior to amending the judgment was harmless error. We affirm the amended judgment.

In 1993, a jury found LaCount guilty of theft by fraud from Barta, pursuant to an information charging the theft of \$100,000, along with other felony thefts. The court sentenced LaCount to six years' imprisonment on the count relating to the theft from Barta, sentenced him to a consecutive six-year term for a separate theft, stayed the latter sentence and placed the defendant on probation on condition he make restitution. At the time of sentence on November 12, 1993, the circuit court made the following remarks regarding restitution to Barta:

He's stole money from his best friend's widow. ...

[S]he's out \$100,000, her husband is dead, she's working, and she's got no pension. I think the principal consideration for me is making sure she gets her money back.

I'm really more interested in her than anybody else. ... I'm interested in her, although I think a restitution order would be appropriate. And I agree ... that the restitution that I set in this case will have to be agreed upon between the lawyers. If the lawyers aren't able to agree upon what the proper restitution is, I'll have an evidentiary restitutional hearing if that's necessary.

Also, I'm going to say up front that that restitution goes to her first. Just like she's the number one in the--the tier to be paid restitution. Angela Barta gets paid first.

During the course of sentencing, the court also stated:

A condition of probation will be that he make restitution as I heretofore outlined in the record. If there's any doubt about it, number one recipient of ... restitution before any money is paid out to anybody else is Angela Barta.

Contrary to the preceding remarks, the written judgments of conviction did not reflect the trial court's references to restitution. In March 1996, the State filed a motion to amend the judgments of conviction to reflect that LaCount must pay restitution. Following briefing by the parties, the court rendered a decision in June 1996. The court indicated that it had initially intended that LaCount pay the full \$100,000 as restitution to Barta as part of its stay of sentence and imposition of probation on count four of the conviction. LaCount appeals the amended judgment.

*State v. Perry*, 181 Wis.2d 43, 53, 510 N.W.2d 722, 725 (Ct. App. 1993), holds that the time restrictions relating to restitution established in § 973.20, STATS., are directory rather than mandatory. *State v. Borst*, 181 Wis.2d 118, 123, 510 N.W.2d 739, 741 (Ct. App. 1993), held that an original sentence could be modified at a later date to include restitution where the court had initially failed to determine whether restitution was appropriate.

The trial court unquestionably intended that LaCount make restitution to Barta. The court's statements concerning the amount of restitution were initially somewhat ambiguous. The court implied that the entire \$100,000 LaCount was accused of stealing for which the jury found him guilty should be repaid, but it also indicated that if the attorneys could not stipulate to the amount, it would hold a restitution hearing, "if necessary." The record before us now fails to disclose either that a stipulation was reached or that there was a restitution hearing, or for that matter a request for such a

hearing. We conclude, however, based upon the particular circumstances presented, that the failure to hold a hearing was harmless error.

Not only did the circuit court unequivocally order restitution at the original sentencing hearing, and imply that the sum should be \$100,000, the same court later presided over a civil proceeding in which the court granted a civil judgment to Barta against LaCount for the same sum. That judgment was upheld by this court on appeal. Thereafter, the circuit court indicated that it had originally intended to order restitution in the full amount. The court's 1996 decision resolved the ambiguity in its original sentencing statement. In light of the subsequent civil litigation and the court's statement of its intent in the amended judgment, we see no reason to remand the matter to the circuit court to hear further evidence. LaCount does not suggest what evidence, if any, he could present at a restitution hearing that was unavailable during the civil proceeding or would alter the court's amended judgment. We therefore affirm the judgment as amended.

*By the Court.* – Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.