

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 4, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

Nos. 97-0310-CR and 97-0311-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GRAHAM GREENE,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for La Crosse County: PETER G. PAPPAS and RAMONA A. GONZALEZ, Judges. *Judgments affirmed in part and reversed in part; order reversed and cause remanded.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

ROGGENSACK, J. Graham Greene appeals the restitution condition of his probation which resulted from his conviction for violating a harassment injunction. He also appeals his convictions for bail-jumping and the

denial of his motion for postconviction relief. Greene argues that the circuit court lacked authority under § 973.20, STATS., 1993-94 to order him to reimburse a department store for increased security measures the store took, because the store was not a victim of the crime. The State responds that, even if the circuit court lacked authority to order restitution under § 973.20, the payment provision was a reasonable and appropriate condition of parole under § 973.09(1)(a), STATS. We agree with Greene that the department store does not qualify as a victim of the crime of which he was convicted, and we further conclude that the circuit court erroneously exercised its discretion when it required a sixty-nine-year-old man with a heart condition, no assets and a \$300-a-week job at a lumber company to pay \$14,939.18 over a period of four years. Accordingly, the part of the judgment¹ imposing restitution is reversed and the cause is remanded for reconsideration of restitution.

BACKGROUND

On March 4, 1995, Greene was charged with disorderly conduct and violating a harassment injunction prohibiting contact with his ex-girlfriend, Victoria Hanson,² after he had their dog euthanized and placed in her car, which was parked while she was at work. As a result of the incident, and a warning by police that Greene might seek to harm Hanson's new boyfriend, Kirk Schreiner,

¹ Although Greene has appealed all judgments, the restitution provision was attached only to the conviction for violating the injunction. Therefore, since Greene does not challenge his underlying convictions or terms of probation for the bail-jumping convictions, they are affirmed in all respects.

² Hanson sought the injunction after Greene forced her car off the road in order to speak to her, when she had repeatedly tried to show him she wanted nothing to do with him.

who worked at the Dayton's department store,³ Dayton's increased its security by hiring off-duty La Crosse police officers to patrol the store and by financing a rental car to send Schreiner on a paid vacation to Colorado. As it turned out, Greene was either hospitalized or incarcerated during much of this time.

At Greene's initial appearance on March 6, 1995, the court imposed a no-contact provision with Hanson, as a condition of bail. After violating the no-contact provision on several occasions between March 25 and April 5, Greene was charged with seven counts of bail-jumping. The cases were consolidated for the purpose of pleas and sentencing, and Greene pled guilty to violating the injunction and to four counts of bail-jumping. The other counts were dismissed.

At the sentencing hearing on July 31, 1995, Greene received six months in jail and was placed on concurrent probation terms of four years each, for his violation of the restraining order and for the bail-jumping counts. As a condition of probation on the § 813.125(7), STATS., conviction, Greene was required to pay Dayton's \$14,939.18 to reimburse it for the increased security precautions which were triggered by Greene's conduct. In postconviction motions, Greene objected to the restitution, but the circuit court reaffirmed its requirement.

³ In addition to the incident with the dog, the police were concerned that Greene might attempt violence against Schreiner because of a suicide note which Greene had written to his attorney. It prompted the attorney to call the police, who interpreted the note as threatening to Hanson, her daughter and Schreiner. The police also found a loaded shotgun in the trunk of Greene's car.

DISCUSSION

Standard of Review.

The imposition of conditions of probation is a discretionary determination. *State v. Brown*, 174 Wis.2d 550, 553, 497 N.W.2d 463, 464 (Ct. App. 1993). Upon review, we analyze discretionary decisions to determine whether the circuit court logically interpreted the facts of record and whether it applied the correct legal standard to those facts to reach a rational result. *State v. Behnke*, 203 Wis.2d 43, 58, 553 N.W.2d 265, 272 (Ct. App. 1996). However, we will independently consider whether the circuit court had authority to order restitution given a particular set of facts. *State v. Schmaling*, 198 Wis.2d 756, 760-61, 543 N.W.2d 555, 557-58 (Ct. App. 1995).

Restitution.

Section 973.20(1), STATS., 1993-94,⁴ which was in effect at the time of Greene's conviction, required the circuit court to order a criminal defendant to pay restitution "to any victim of the crime" absent a substantial reason for not doing so. The "victim" to whom the statute referred was the victim of the crime of conviction.⁵ *State v. Mattes*, 175 Wis.2d 572, 581, 499 N.W.2d 711, 715 (Ct. App. 1993). This has been interpreted to mean the victim against whom the crime was directed, as opposed to any passive victim who may also have incurred special

⁴ Section 973.20, STATS., 1993-94 was amended to codify case law which distinguished the interpretation of Wisconsin's restitution statute from the analogous federal rule. *See* 1995 Wis. Acts 141 and 161 *and State v. Szarkowitz*, 157 Wis.2d 740, 460 N.W.2d 819 (Ct. App. 1990).

⁵ The restitution statute now explicitly allows consideration of any read-in crimes, as well as any crimes for which the defendant was convicted. Section 973.20(1g) and (1r), STATS.

damages. *Schmaling*, 198 Wis.2d at 761 n.3, 543 N.W.2d at 557 n.3. (holding that a county which paid the fire-fighting and clean-up costs resulting from a traffic accident caused by defendant's reckless driving was not a victim within the meaning of the restitution statute); *see also State v. Evans*, 181 Wis.2d 978, 983-84, 512 N.W.2d 259, 261 (Ct. App. 1994) (holding that a city narcotics unit which had used public funds as "buy money" in an undercover narcotics operation was not entitled to restitution as a victim).

Under this standard, Dayton's was not a victim of the crimes of which Greene was convicted. Hanson was the victim of the injunction violation. Although Dayton's may have incurred expenses in its efforts to prevent Greene from contacting or harassing Schreiner, it cannot qualify for restitution under § 973.20(1), 1993-94, STATS.

Conditions of Parole.

The State, appearing to recognize that restitution in this case was not authorized under § 973.20, STATS., 1993-94 and current case law,⁶ argues that the payments to Dayton's could also be considered a condition of Greene's probation. Section 973.09(1)(a), STATS., allows the circuit court to "impose any conditions which appear to be reasonable and appropriate" when it places an offender on probation. *State v. Connelly*, 143 Wis.2d 500, 503, 421 N.W.2d 859, 860 (Ct. App. 1988). Thus, the circuit court's restitution powers are broader in the probation context than in the sentencing context. *See id.*; *State v. Beiersdorf*, 208 Wis.2d 492, 503 n.9, 561 N.W.2d 749, 754 n.9 (Ct. App. 1997).

⁶ The attorney general nonetheless raises the issue to preserve it for further review.

While we agree with the State that the circuit court may in some probations order compensatory payments which could not be ordered as restitution, *see id.* at 501, 561 N.W.2d at 754, and we also note that this court may affirm the circuit court on grounds other than those it relied upon, *id.* at 502 n.8, 561 N.W.2d at 754 n.8, we disagree that the circuit court's award in this case can be affirmed as a condition of probation.

Whether a probation condition is reasonable and appropriate is determined by how well it serves the dual goals of probation: rehabilitation of the offender and protection of state and community interests. *Brown*, 174 Wis.2d at 554, 497 N.W.2d at 464. While requiring an offender to pay restitution may impress upon him or her "the full extent of the harm caused by his or her criminal activities," benefiting both the offender and the community, it is also true that "conditioning probation on the satisfaction of requirements which are beyond the convicted person's control undermines the rehabilitation of the offender." *State v. Heyn*, 155 Wis.2d 621, 629-30, 456 N.W.2d 157, 161 (1990). Therefore, any restitution condition issued under § 973.09(1)(a), STATS., "must be fairly related to the damage caused by the offender and to his or her ability to pay." *Heyn*, 155 Wis.2d at 629, 456 N.W.2d at 161. Factors to consider in making the determination of ability to pay include, but are not limited to, the offender's age, health, current income and expenses, education, employment history and the cost of supporting any other dependents. *See State v. Jackson*, 128 Wis.2d 356, 364, 382 N.W.2d 429, 433 (1986).

Dayton's incurred the following expenses which it claims were reasonably related to Greene's conduct: \$1,198.25 (car rental for Schreiner), \$2,349.5 (Schreiner's salary, while out of the state), \$200 (voucher for Schreiner's miscellaneous out-of-state expenses), \$10,395 (security officers for Dayton's

store), and \$1,467.18 (double security coverage, including court and police station visits). In all, Dayton's spent \$14, 939.18.

Greene denies both that Dayton's increased security measures were reasonably related to his conduct and that he has the ability to pay the restitution required during the term of his probation. He first claims that there is no evidence of his threatening Dayton's employee, Schreiner, so Dayton's actions were not reasonable. He is correct in regard to the threat; however, Dayton's was encouraged by La Crosse law enforcement personnel to be on the look-out for Greene and warned that they considered him armed and dangerous. While the expenses Dayton's incurred were substantial, with the exception of the expenditures for the rental car and voucher, we cannot say that they were not reasonably related to circumstances which Greene set in motion. We do conclude, however, that Dayton's went to an extraordinary expense when it rented a car for Schreiner, who already had a car in which he could have taken a trip, and paid him \$200 above his full wages. Therefore, we conclude only \$13,540.93 reasonably was spent by Dayton's due to Greene's conduct.

In regard to whether Greene had the ability to pay the \$14,939.18 of restitution ordered by the circuit court during the four years of his probation, the record shows that Greene was a month shy of being seventy years old; that he was on medication for a heart condition and for a bipolar disorder; that he had had major bypass surgery; and that he had maintained only sporadic employment during recent years. At the time of the restitution hearing, he was earning \$300 a week from a job at a lumber yard, and he received \$514 a month in Social Security. However, Greene also testified that he had to travel ninety-four miles each way from the Huber Center to work, and that the job required him to travel throughout the state. Accordingly, his monthly car payments of \$214, plus \$200

in arrearages on the car loan, \$115 in gas and \$169 in insurance payments per month, were expenses necessitated by his employment. Greene also introduced an exhibit showing that he paid \$240 for food and housing at the Huber Center. There was no indication of how much Greene, who was otherwise homeless, might have to pay for food and housing after he was released from the Huber Center, but \$240 a month seems a low estimate. In addition, Greene testified that he incurred expenses for his heart and depression medications, and that he had \$10,000 in other prior indebtedness, with no offsetting assets. No evidence was submitted to controvert Greene's testimony. Notwithstanding the lack of evidence, the circuit court found, "Mr. Greene can come up with whatever money it is that he wants to come up with at any point in time." Apparently this was based on his educational achievements and early employment history.⁷

However, in order for this condition of probation to be reasonable and appropriate, there must be facts in the record to support the circuit court's conclusion that Greene had the ability to pay \$14,939.19 during the four years of his probation. This computes to \$311.23/month or \$3,734.76/year. The circuit court did not establish a particular payment plan, but it did conclude that Greene could pay the full amount Dayton's requested. Because there is no support in the record for the finding that Greene can pay so large an amount in four years, it is clearly erroneous. *Noll v. Dimicelli's, Inc.*, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983). Furthermore, as the Supreme Court said in *Huggett v. State*, 83 Wis.2d 790, 798-99, 266 N.W.2d 403, 407 (1978), "conditioning probation on the satisfaction of requirements which are beyond the probationer's

⁷ Among other things, Greene had taught at the University of Illinois for twelve years, worked as a radio broadcaster in Washington, D.C. and in Chicago, started his own marketing company, and served as vice-president of the La Crosse Chamber of Commerce.

control undermines the probationer's sense of responsibility." Because the record is devoid of facts to support a finding that Greene had, or would have, the ability to pay Dayton's nearly \$15,000 during the four years of probation, the restitution order is not a reasonable and appropriate condition of probation. Therefore, we must conclude that the circuit court's requirement that he do so as a condition of probation was an erroneous exercise of discretion, not reasonably calculated to further the goals of probation. Accordingly, we reverse the portion of the judgment relating to the total amount of restitution Greene is to pay and we remand to the circuit court to make a determination of what amount Greene can reasonably be expected to pay over four years.

CONCLUSION

Dayton's cannot qualify as a victim of the crime of conviction within the meaning of the restitution statute because the injunction prohibited contact only with Hanson, not with Dayton's. Nor was a \$14,939.18 restitution requirement a reasonable and appropriate condition of probation for a man of Greene's age, health, mental condition, and ability to pay.

By the Court.—Judgments affirmed in part and reversed in part; order reversed and cause remanded.

Not recommended for publication in the official reports.

