

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2013AP341-CR

Cir. Ct. No. 2011CF4283

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERICKA S. THOMAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL and MICHAEL D. GUOLEE, Judges.¹
Affirmed.

Before Fine, Kessler and Brennan, JJ.

¹ The Honorable Dennis R. Cimpl presided over the plea hearing and sentencing. The Honorable Michael D. Guolee denied Thomas's motion for postconviction relief.

¶1 FINE, J. Ericka A. Thomas entered pleas pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970) (persons may accept conviction even though they contend that they are innocent) to four counts of Medicaid fraud. *See* WIS. STAT. § 49.49(1)(a)1. *See State v. Garcia*, 192 Wis. 2d 845, 857–858, 532 N.W.2d 111, 115–116 (1995) (Wisconsin permits *Alford* pleas). She argues that she cannot pay the \$356,366.33 ordered in restitution. We affirm.

I.

¶2 Thomas helped her boyfriend and his relative defraud Medicaid of \$356,366.33 by making false claims with the Wisconsin Department of Health Services for reimbursement of medical equipment that was never bought. She used other persons’ identities without their knowledge. She also set up a fake business and opened several bank accounts that she used to cash the reimbursement checks. Thomas claims she got \$52,000 of the total amount.

¶3 The State charged Thomas with twenty-one counts of Medicaid fraud and ten counts of unauthorized use of personal identification information. The State and Thomas plea bargained the case, and the State and the circuit court allowed Thomas to enter *Alford* pleas to four of the Medicaid counts and the circuit court permitted the State to dismiss the other charges, which, according to the plea bargain, were to be “read in” at sentencing. *See* WIS. STAT. § 973.20(1g)(b) (“‘Read-in crime’ means any crime that is uncharged or that is dismissed as part of a plea agreement, that the defendant agrees to be considered by the court at the time of sentencing and that the court considers at the time of sentencing the defendant for the crime for which the defendant was convicted.”).

¶4 The circuit court sentenced Thomas to three-year terms of imprisonment, with one year of initial confinement followed by two years of

extended supervision for each of the four counts for which Thomas accepted formal conviction. The circuit court ordered that the sentences be consecutive to each other.

¶5 With exceptions that are not material here, restitution in Wisconsin is generally mandatory. *See* WIS. STAT. § 973.20(1r) (“When imposing sentence ... the court, in addition to any other penalty authorized by law, shall order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing or, if the victim is deceased, to his or her estate, unless the court finds substantial reason not to do so and states the reason on the record.”). Thomas’s lawyer told the circuit court at the sentencing hearing that: “Whatever [restitution] the court orders she won’t be able to fully pay it,” and that Thomas had been “working” “supporting herself,” but does not have “high paying jobs.” The circuit court set restitution at \$356,366.32. It explained:

I understand when I make that order that she’s never going to pay during the term of this sentence; but now *State v. Hernandez* [*sic—Fernandez?*] says I don’t have to order this then I have to consider all of the factors in 974.20 and certainly, a woman of 26 years of age has the ability to win the lottery or something like that so there is always the possibility she could. So I will order it paid during the sentence I give her and if it is not paid it will result in a judgment and I think that complies with the dictates of *Hernandez* [*sic—Fernandez?*].

Thomas’s postconviction motion repeated her lawyer’s contention that she could not pay what the circuit court ordered, arguing that it “exceeds the ability of Ms. Thomas to pay” as she has “extremely limited earning ability.” She also contended that the circuit court should not have considered that she might win the lottery. As we have seen, the postconviction court denied the motion. It explained, after noting, as did the sentencing court, that the restitution order could

be made into a judgment, and that the judgment would be open for what the postconviction court indicated was “at least 20 years,” an assertion that Thomas does not dispute on this appeal:

Who knows what’s going to happen in those periods of time. And people have talked about the lottery. That is just one aspect. She might get an inheritance. She might get involved in a car accident and get a settlement. There are lots of things that people may come into in the future and they should pay for their acts of the past.

Thomas repeats her no-ability-to-pay contentions on this appeal.

II.

¶6 Restitution is governed by WIS. STAT. § 973.20, which provides as material:

(13)(a) The court, in determining whether to order restitution and the amount hereof, 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.

....

(14) At any hearing under sub. (13), all of the following apply:

....

(b) *The burden of demonstrating, by the preponderance of the evidence, the financial resources of*

the defendant, the present and future earning ability of the defendant and the needs and earning ability of the defendant's dependents is on the defendant.

(Emphasis added.) We review *de novo* the circuit court's application of the restitution statute; the circuit court's decision as to the amount of restitution, however, is within its discretion. See *State v. Johnson*, 2002 WI App 166, ¶7, 256 Wis. 2d 871, 877, 649 N.W.2d 284, 287. Thus, we will affirm the circuit court's restitution decision unless the circuit court erroneously exercised its discretion. See *ibid.*

¶7 Thomas argues that her lawyer's words saying she could not pay such a large restitution amount satisfied her burden of proof. As we have seen, her lawyer told the circuit court that Thomas did not have "high paying jobs" and that she will not "be able to fully pay" any restitution amount. Saying it does not make it so.

¶8 As we see, WIS. STAT. § 973.20(14)(b) puts the burden on Thomas to prove by a preponderance of the evidence that she does not have and will not have the ability to pay the restitution. Critically, in attempting to meet this burden, she must present *evidence*. Her lawyer's conclusory statements are not enough. See *State v. Boffer*, 158 Wis. 2d 655, 663, 462 N.W.2d 906, 910 (Ct. App. 1990) ("The party who has the burden of proof cannot rely upon the [presentence investigation report] or argument of counsel to fulfill this obligation."). Further, as both the sentencing and postconviction courts recognized, the circuit court may take into account what may happen in the defendant's life after he or she completes the sentence. See *State v. Fernandez*, 2009 WI 29, ¶3, 316 Wis. 2d 598, 602–603, 764 N.W.2d 509, 511 ("[W]hen a court has considered the defendant's ability to pay in setting restitution, the length of the term of probation

or of the sentence does not have any limiting effect on the total amount of restitution that may be ordered.”). Thomas has not presented evidence of her financial resources or, indeed, what happened to most or all of the substantial sum she admits she got from the crimes. Simply put, as noted, her lawyer’s mere say so was not enough. *See Boffer*, 158 Wis. 2d at 663, 462 N.W.2d at 910. We affirm.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.

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¶9 KESSLER, J. (*Dissenting*). I conclude that Thomas is entitled to resentencing as to the restitution aspect of her sentence because the sentencing court relied on speculation about Thomas’s ability to pay the amount of restitution it set at \$356,366.33. The sentencing court speculated that Thomas “has the ability to win the lottery or something like that so there is always the possibility she could” pay the restitution. The postconviction court compounded the speculation to justify the amount by adding that Thomas “might get an inheritance. She might get involved in a car accident and get a settlement.”

¶10 Proper exercise of discretion is reviewed for an erroneous exercise of that discretion. *State v. Johnson*, 2002 WI App 166, ¶7, 256 Wis. 2d 871, 649 N.W.2d 284. Proper exercise of discretion requires that the court use “a demonstrated, rational process to reach a conclusion.” *Id.* Speculative evidence, is, in essence, evidence that is “merely possible.” See *Bode v. Buchman*, 68 Wis.2d 276, 291-92, 228 N.W.2d 718 (1975) (citation omitted). A court’s decision based on mere possibility or conjecture constitutes an erroneous exercise of discretion. See *Bentz v. Bentz*, 148 Wis. 2d 400, 403, 435 N.W.2d 293 (Ct. App. 1988).

¶11 The statute authorizing restitution,¹ WIS. STAT. § 973.20, governs ordering restitution in a criminal case. The statute provides, as relevant:

¹ There was no dispute that the amount of the total fraud was \$356,366.33. There was also no claim that Thomas had dependents. There is no dispute that other people were also involved in designing and perpetrating the fraud.

(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.

(Emphasis added.)

¶12 The statute plainly requires that the court *shall* consider these factors for two decisions: (1) whether to set restitution at all, and (2) if so, in what amount. Both decisions are inextricably linked by statute to the defendant's "financial resources" and to the defendant's "present and future earning ability."

¶13 This colloquy regarding restitution occurred between the court and Thomas's counsel:

COUNSEL: *Whatever the Court orders she won't be able to fully pay it, as I explained.*

COURT: *I know that too. I am going to make an order of \$356,366.32 and I understand when I make that order that she's never going to pay during the term of this sentence; ... I have to consider all of the factors in 973.20 and certainly, a woman of 26 years of age has the ability to win the lottery or something like that so there is always the possibility she could. So I will order it paid during the sentence I give her and if it is not paid it will result in a judgment[.]*

COUNSEL: I have no objection to that.

(Emphasis added.) Defense counsel’s stated lack of objection is consistent with the court’s immediately preceding concession that it understands Thomas will not be able to pay the full amount.

¶14 The Majority correctly notes that in *State v. Boffer*, 158 Wis. 2d 655, 663, 462 N.W.2d 906 (Ct. App. 1990), we discussed the evidence required by WIS. STAT. § 973.20. See Majority, ¶8. We held that reliance on the presentence investigation report or arguments of counsel do not fulfill the obligation to provide evidence of financial resources or earning capacity. See *Boffer*, 158 Wis. 2d at 663. Yet here it is apparent that both the sentencing court and counsel relied on exactly that information because there is no other evidence in the record on those subjects. The PSI, as material to Thomas’s financial circumstances, stated:

Ms. Thomas states that ... her last job was ... in Oshkosh where she was working as a dancer.... [S]he worked there for almost four months until the end of 2011.

Ms. Thomas cites past employment at two different McDonald’s for a period of about two years. She ... has worked at Duncan [sic] Donuts for about a year, Burger King for a period of six months and a long term temporary service placement at General Mills for about six months.

Ms. Thomas ... worked for her cousin’s day care, being paid cash, for about three months. To supplement her income, ... Thomas ... is a hair stylist and can easily make money styling adult and children’s hair.

[Ms. Thomas] denies having any assets. She ... has outstanding debts in the amount of \$2000 for unpaid utilities and \$1200 for cell phone bills. She describes herself as financially “good because I can always get help from my mom.”

¶15 During sentencing, Thomas’s counsel repeated substantially Thomas’s work history as reported in the PSI report. The sentencing court’s comments acknowledged that Thomas would only be able to pay the restitution if

she won the lottery. Those speculative comments suggest that the sentencing court did actually rely on the financial information in the PSI. The postconviction court's speculative comments that Thomas may come into an inheritance or be injured in a car accident and collect a large settlement in the future are not even supported by the PSI. We have held repeatedly, in many contexts, that a fact-finder may not base its findings on speculation or conjecture. Rather, a fact-finder must rely on evidence in the record. The record does not support the findings of either court that Thomas may develop the ability to pay the restitution amount by winning the lottery, inheriting a large sum of money, or receiving a settlement following an automobile accident. Nothing in the record suggests that these possibilities apply to Thomas any more than they apply to any other person in the country.

¶16 The restitution statute does not include a presumption that all defendants can pay restitution. Indeed, the very existence of factors a court must consider shows that the legislature knew there would be a wide range of ability to pay among defendants; otherwise the factors to consider would be unnecessary. When admissible evidence is not produced, but the court orders payment of a sum that it acknowledges will be impossible for a particular defendant ever to pay unless extraordinarily unlikely events occur, the court has not demonstrated a rational process to reach a discretionary conclusion about restitution.

¶17 Lawyers have an obligation to bring necessary evidence to the court's attention at sentencing. But when that does not happen, a sentencing court cannot impose, and the postconviction court cannot uphold, a restitution amount based on pure speculation. A court has the power to avoid being put in such an untenable situation by various means, including requiring testimony at sentencing from the defendant on present financial condition and work history, or developing

a standard order directing counsel to present evidence of defendant's financial resources and earnings history at the time of sentencing.

¶10 I recognize the difficult task of both courts, as there is no precise formula for determining appropriate restitution amounts. However, WIS. STAT. § 973.20(13)(a) requires a sentencing court to consider multiple factors as they pertain to individual victims and individual defendants. Here, both the sentencing court and the postconviction court made general findings, not supported by the record, that could apply to virtually any person—not Thomas in particular. Both courts applied a rationale that could render virtually any criminal defendant capable of paying virtually any restitution amount because any defendant might win the lottery, inherit a large sum of money, or recover a settlement following an automobile accident. Such an outcome would eviscerate § 973.20(13)(a).

¶11 I therefore respectfully disagree with the majority. I would reverse that portion of the sentence involving restitution and remand for resentencing as to that portion of the sentence.

