

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 9, 2014**

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. 2013AP1679-CR  
STATE OF WISCONSIN**

Cir. Ct. No. 2004CF203

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ANTHONY M. VOLPENDESTO,**

**DEFENDANT-APPELLANT.**

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APPEAL from orders of the circuit court for Washington County:  
JAMES G. POUROS, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Anthony Volpendesto appeals from circuit court orders denying his motion to modify his 2005 sentence due to a new factor, denying his request for a restitution hearing, and rejecting his challenges to the restitution imposed at his 2005 sentencing. We affirm the circuit court.

¶2 Volpendesto was sentenced in 2005 for stealing loose diamonds being displayed to him at Husar’s House of Fine Diamonds. The circuit court imposed a twelve-year sentence. Volpendesto stipulated to restitution to Husar’s insurance company and to the State of Wisconsin for extradition costs arising from his apprehension. The court ordered restitution of \$27,500 to Husar’s based upon information provided at sentencing by Marv and Michael Husar, principals in Husar’s. Michael informed the court that the \$27,500 claim was based upon Husar’s insurance deductible, loss of customer access and business on the day of the theft, and loss of diamonds for sale. The court made the restitution order “subject to [Volpendesto’s] right to request any further proceedings to review the restitution that was ordered.” The court asked Volpendesto whether he had any questions about the sentence. He responded, “No, your Honor.”

¶3 In September 2006, Volpendesto filed a motion to modify his sentence from consecutive to his Michigan sentence to concurrent to his Michigan consecutive sentence. The circuit court denied the motion.

¶4 In March 2012, Volpendesto filed a motion seeking a restitution hearing and objecting to all of the restitution ordered at his 2005 sentencing. At the April 2013 hearing on Volpendesto’s motion, Michael Husar testified how Husar’s calculated its \$27,500 restitution request, identified Husar’s diamond inventory cards which were submitted to Husar’s insurance company, and discussed the loss documentation available in 2005. Michael testified that Marv Husar handled the loss documentation, but Marv died in June 2010. Michael was unable to locate the loss documentation.

¶5 Volpendesto testified that he was present when restitution was discussed at sentencing, but he never discussed restitution with his counsel before

sentencing and his counsel would not let him ask questions about restitution at sentencing. Volpendesto claimed that he did not see the documentation for the restitution awards until 2012 when he received materials from his trial counsel. Volpendesto attributed the more than six-year delay in challenging restitution to the fact that he did not realize until 2012 that he owed restitution, trial counsel did not answer his letters, he had no assistance in Michigan where he was incarcerated, and he was unable to act until he started his Wisconsin sentence. Volpendesto also argued that his federal racketeering conspiracy conviction arising from the Husar's theft included restitution for Husar's. Finally, Volpendesto claimed no ability to pay restitution since he has been incarcerated, in one state or another, since 2004.

¶6 The State questioned Volpendesto about whether he currently suffered from any mental illness ("I wouldn't know") or whether he had received treatment for mental health issues ("no") or physical issues. Volpendesto admitted that he was not working in prison so that he could devote time to his legal issues. Volpendesto recalled being sentenced in 2005 and filing a sentence modification motion in 2006.

¶7 The circuit court found that Volpendesto was not credible when he claimed that he did not know the amount of restitution established by the court at sentencing pursuant to WIS. STAT. § 973.20 (2005-06)<sup>1</sup> and that he did not offer a credible explanation for why he did not challenge restitution for over six years. When the circuit court has made a credibility determination, "it is the ultimate

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<sup>1</sup> All subsequent references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

arbiter of the credibility of the witnesses and the weight given to each witness's testimony." *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. We are bound by these credibility determinations. *Id.* The court ruled that Volpendesto sat on his rights for more than six years and he waived his right to challenge restitution.

¶8 Turning to the amount of restitution awarded to Husar's in 2005, the circuit court noted that Marv Husar had more information about the loss sustained by Husar's, but he died in 2010. At the hearing on Volpendesto's 2012 motion challenging restitution, Michael Husar offered unopposed testimony about how Husar's calculated its \$27,500 restitution request. The court found Michael Husar's testimony credible and that it met the burden to prove amounts for restitution. WIS. STAT. § 973.20(14)(a). Therefore, the court confirmed Husar's 2005 restitution award. The court also considered Volpendesto's ability to pay restitution. The court found that Volpendesto was not credible when he claimed that he could not work while in prison.

¶9 On appeal, Volpendesto argues that he offered a valid reason for his delay in challenging restitution. The circuit court specifically found Volpendesto not credible in this regard. Volpendesto attended sentencing, he did not avail himself of the opportunity to challenge the restitution ordered by the circuit court, and he did not offer a credible excuse for the delay in challenging restitution.<sup>2</sup> The circuit court also did not find Volpendesto credible when he claimed that he does not have the ability to pay restitution. We are bound by these credibility

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<sup>2</sup> The State argues that the circuit court lacked authority in 2013 to hold a restitution hearing or to consider evidence relating to restitution. We need not address this argument to resolve this appeal.

determinations. *Peppertree Resort Villas*, 257 Wis. 2d 421, ¶19. The circuit court did not err in denying Volpendesto’s motion challenging restitution.

¶10 We turn to Volpendesto’s April 2013 sentence modification motion based on a new factor: a fifteen-month federal sentence imposed in 2011 after Volpendesto’s racketeering conspiracy conviction arising from the Husar’s theft. In his motion, Volpendesto speculated that had the Wisconsin court known that five years after sentencing in the Wisconsin case, Volpendesto would receive a fifteen-month federal sentence, the Wisconsin court might have sentenced Volpendesto differently.

¶11 The circuit court held that Volpendesto did not establish a new factor.<sup>3</sup> We agree that Volpendesto did not show facts “highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.” *State v. Harbor*, 2011 WI 28, ¶¶40, 52, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted).

¶12 The circuit court’s 2005 sentencing rationale was case-and offender-specific. In sentencing Volpendesto, the court noted that it had to impose a sentence that reflects “all of the background and circumstances here, given the nature of this offense, given the long criminal record here, given the value of the merchandise that has been taken.” The court ordered the sentence to be served consecutively to any Michigan sentence to “reflect[] the seriousness of what

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<sup>3</sup> Volpendesto bore the burden to establish the existence of a new factor. *State v. Harbor*, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828.

occurred here.” Given this sentencing rationale, a federal sentence imposed five years after the Wisconsin sentence is not highly relevant to the Wisconsin theft sentence.

*By the Court.*—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

