

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2014AP451-CR

Cir. Ct. No. 2012CF000053

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY D. RUSSELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Kessler, Brennan, JJ., and Thomas Cane, Reserve Judge.

¶1 BRENNAN, J. Timothy D. Russell appeals from a judgment of conviction entered after he pled guilty to one count of theft, *see* WIS. STAT.

§ 943.20(1)(b) (2011-12),¹ and from an order denying his motion for postconviction relief. Russell argues that: (1) he was deprived of due process when the circuit court allegedly erroneously sentenced him for the crime of misconduct in public office; and (2) the circuit court erred when it ordered Russell to pay restitution for a West Milwaukee office space because he alleges that the State failed to demonstrate a causal nexus between the office space and his crimes. Because the record belies Russell's assertions in both instances, we affirm.

BACKGROUND

¶2 On January 5, 2012, the State filed a criminal complaint charging Russell with three counts of felony theft by embezzlement.

¶3 Count 1 alleged that Russell embezzled more than \$10,000 from the Heritage Guard Preservation Society, Inc. ("HGPS"), a corporation he controlled, in violation of WIS. STAT. §§ 943.20(1)(b) & (3)(c). According to the criminal complaint, Russell operated HGPS for the purpose of raising funds for Operation Freedom, an event sponsored by the Milwaukee County Executive's Office to honor military veterans. County employees processed donations for deposit in an HGPS account that Russell controlled. In 2009 and 2010, Russell transferred in excess of \$20,000 from HGPS accounts into his personal accounts, to pay, in part, for Caribbean and Hawaiian vacations. At the time HGPS began managing Operation Freedom's funds, Russell was the deputy chief of staff to then-County Executive Scott Walker.

¹ All references to the Wisconsin Statutes are to the 2011-12 version. The statutes relevant to this case have not changed since Russell committed his crimes.

¶4 Count 2 alleged that in 2007 Russell embezzled \$3000 from the Friends of Chris Kujawa campaign finance account, in violation of WIS. STAT. §§ 943.20(1)(b) & (3)(bf). At the time, Kujawa was running for Milwaukee County Supervisor. Russell had sole control of the Friends of Chris Kujawa campaign finance account.

¶5 Count 3 alleged that in 2010 Russell embezzled \$550 from the Friends of Larry Spicer campaign finance account, in violation of WIS. STAT. §§ 943.20(1)(b) & (3)(a). At the time, Spicer, like Kujawa previously, was running for Milwaukee County Supervisor. Russell assisted Spicer and was in sole control of Spicer's campaign finance account.

¶6 On November 29, 2012, Russell pled guilty to count 1. Count 2 and count 3 were dismissed and read in for sentencing.

¶7 The circuit court held the sentencing hearing on January 22, 2013. During the hearing, the circuit court questioned how Russell convinced Walker to transfer control of the Operation Freedom funds from the Alonzo Cudworth American Legion Post, who the parties agreed had been discharging its financial duties in an exemplary fashion, to HGPS, which Russell controlled. Russell confirmed that Walker knew that HGPS was controlled by Russell at the time HGPS took over Operation Freedom's financial matters.

¶8 After hearing arguments and sentencing recommendations from both the State and Russell, the circuit court made the following statements that are relevant to Russell's appeal:

There's three counts here. The defendant pled guilty to count one, a series of thefts from the Heritage Guard Preservation Society. It's a 10-year felony. Five

years of confinement. Five years of extended supervision is the maximum penalty.

....

The most serious and disturbing charge obviously is count one, the charge the defendant pled guilty to, which is misconduct in public office. It is not a theft as I think has been reported. It's misconduct in public office which I think is a lot more serious than a misdemeanor theft or even a felony theft. The felony -- the fact that money was stolen, which is a felony which led to the misconduct in public office, I think is very important.

....

I think the charge, as I said, misconduct in public office, speaks for itself. The defendant in this case was the number three official in the county executive's office and clearly had a hand in transferring the funds being held in trust by the Alonzo Cudworth Post to the Heritage Guard Preservation Fund which he had taken control of. And that's why I asked the questions I did. To me it appears to be a scheme to gain control of the funds and that's why he either lobbied or convinced the county executive at that time to transfer the funds which obviously was a mistake, especially in light of the fact that the funds had been stolen by a private individual previously[.] ...

¶9 The circuit court subsequently rejected the presentence report writer's recommendation for probation with condition time, stating, as relevant to Russell's appeal:

I respect her recommendation but I'm not bound, especially since misconduct in public office is not a common crime such as felony theft, robbery or burglary which I believe are more relevant for a COMPAS evaluation and recommendation from the presentence writers.[²]

...

² COMPAS is a statewide automated risk and needs assessment tool utilized by the Wisconsin Department of Corrections.

Therefore, I find, based upon all the facts that I've discussed here, that probation is inappropriate and would duly [sic] diminish the serious nature of all these crimes, especially count one, which is a crime that you pled guilty to.

Therefore, based upon all these factors, the court is sentencing you to seven years in the Wisconsin state prison broken down to two years of confinement, five years of extended supervision. ...

¶10 Later that same day, the circuit court recalled the case with the parties present, and the following exchange occurred:

THE COURT: Okay. We're here on my own motion. In fact, I tried to after sentencing within a couple minutes, I wanted to go back on the record to clarify something but [defense counsel] had left already. In fact, both parties had left already and we had other cases. So I had my clerk call you to ask you to come back this afternoon. I'm sorry for dragging you up here.

And this is on my own motion because it was my recollection, and I know I said it, I talked during sentencing about misconduct in public office. And I think I made the statement, and I wrote this down, misconduct in public office speaks for itself I believe I said that.

The defendant was not charged with misconduct in public office. I was aware of that. I even said in the beginning he pled guilty to count one which was theft. The court's reference to misconduct in public office was a reference to him being deputy chief of staff at the time. It was a characterization. I was viewing this as a fact, not as a charge, because this happened while he was in public office.

So the court did not sentence him, and I'm just doing this for the record, for misconduct in public office but for the felony theft case. And the court only made reference at that point, and I think I said it later on at the end talking about the presentence about misconduct in public office is not a common crime. It should have been theft by an official in public office is not a common crime. And that's why I thought the COMPAS evaluation was insufficient.

So again, this was on my own motion. It wasn't asked for by the defense or the state. But I think just for the record in case there's any appellate issue, I wanted to clarify what the court meant. And I think I inartfully characterized his position. While I knew his position but I inartfully described one of the factors that the court considered. The state wish to add anything or not?

[PROSECUTOR]: No. Other than to say that I understood your remarks always as being misconduct with a small M as opposed to a reference to the actual charge.

THE COURT: And I think other people in the court took it that way. But when you read a transcript, and I don't know how my court reporter would type that up, it could be put in capitals. So I just want to make sure that there's no misunderstanding. [Defense counsel.]

[DEFENSE COUNSEL]: I don't wanna drag this out any further than it needs to be. However, the phrase was not just misconduct. It was in public office which in Your Honor's view aggravated the crime. And Mr. Russell has a due process right to be sentenced on accurate information, accurate facts. And all the information that's been presented to the court indicates that the actions, what Mr. Russell pled guilty to, never occurred while he was in public office. So I don't know -- That's where the confusion lies.

THE COURT: Okay.

[DEFENSE COUNSEL]: Public office. Not misconduct. Clearly there was misconduct because there was a theft.

THE COURT: Okay. I think the court emphasized the fact that -- And I read the letter from Scott Walker to the Alonzo Cudworth Post and I asked the questions about who came up with the idea. And at the time when it was transferred I think he was deputy chief of staff. Correct me if I'm wrong. Was he?

[DEFENSE COUNSEL]: In that position or part of the housing.

THE COURT: No. I don't think he was at WHEDA. He was deputy chief of staff at the time. Well, he can clarify it. Or he doesn't have to say anything.

[PROSECUTOR]: Judge, the defendant was the deputy chief of staff from 2009 through March of 2010. And then in March of 2010 he transferred over to the city campus building where he was director of housing.

THE COURT: Okay.

[PROSECUTOR]: So when the initial transfers were made and when the corporation was turned over to him, he was in fact the deputy chief of staff.

THE COURT: And that was my point. And that's why I asked about the letters between Scott Walker sent the Alonzo Cudworth Post and asked him the question whose idea was it. Did you -- Was it Scott Walker or your idea. And that's why maybe I went off track about the reference.

But as I said, the court had the presentence, took the plea, I sentenced him based upon I believe accurate information. I may have misspoke about minor aspects of this and that's why on my own motion I brought the parties back here.

¶11 On April 26, 2013, the circuit court held a restitution hearing. During the hearing, the State introduced evidence demonstrating that Russell applied for and was granted an occupancy permit for HGPS office space at 5304 West Greenfield Avenue in the Village of West Milwaukee for an "office providing services to veterans." The State also introduced evidence showing that Russell issued two HGPS checks to the property owner of that office space, a \$550 security deposit, and \$4500 in rent from August 10, 2010, until July 31, 2011. At the time the office was originally rented in August, HGPS had concluded its latest Operation Freedom event more than a month prior and Operation Freedom had no future events planned.

¶12 Robert Stelter, an investigator for the Milwaukee County District Attorney's office, testified that he assisted in the execution of a search warrant at the West Milwaukee office on December 7, 2010. He testified that based upon his observations of the premises, it did not appear to house an operation that was

dedicated to the service of veterans. With respect to HGPS's operations, Stelter testified that he recovered:

- some cards announcing an HGPS-sponsored Operation Freedom event planned for July 2011;
- a letter from the Forrest County Potawatomi Foundation regarding a \$15,000 donation;
- a folder for HGPS taxes; and
- the occupancy permit naming HGPS as the occupant.

¶13 Stelter also testified that he uncovered other documents and items at the office that demonstrated that Russell was using the office for his own personal endeavors, including:

- a large sign for Regent Realty, a business owned by Russell;
- a Regent Realty client trust account checkbook;
- a file folder for the Soldiers Home Foundation, of which Russell was the treasurer;
- business cards for Runner Media (a business owned by Russell), Regent Realty, and for a State Farm insurance agent;

- two file cabinets containing mostly real estate files, including one drawer labeled “active listings,” but also containing records relating to Russell’s employment by Milwaukee County and a variety of other things having nothing to do with HGPS;
- Regent Realty “for sale” signs in a back storage area;
- emails regarding Russell’s political work;
- a letter from the Government Accountability Board telling Russell, who was the treasurer for the Milwaukee County Republican Party, that he failed to file a continuing campaign report; and
- correspondence relating to Russell’s preparation to move to a condominium he planned to purchase in Sun Prairie, Wisconsin.

¶14 The State argued, based upon the documents found in the West Milwaukee office space, that it was not used “predominantly” for Operation Freedom, and that therefore Russell should be required to pay \$5050 in restitution, that is, the \$550 security deposit and the \$4500 in rent. The circuit court agreed and included the \$5050 as part of the total restitution order for \$23,621.04.

¶15 Russell filed a postconviction motion requesting resentencing on the basis that the circuit court relied on inaccurate information at sentencing, and a reduction of the restitution order by \$5050 for the West Milwaukee office rental. The circuit court denied his motion. Russell now appeals.

DISCUSSION

¶16 Russell raises two issues on appeal. First, he argues that he was denied his right to due process when the circuit court allegedly sentenced him for the offense of misconduct in public office, rather than the felony theft offense with which he was charged and pled guilty. Second, he contends that the circuit court erred when it ordered Russell to pay restitution for rental of the West Milwaukee office space because Russell believes that the State failed to prove a causal nexus between the office space and the theft charges. We address each of Russell's claims in turn.

I. Russell has not proven that the circuit court erroneously sentenced him for the offense of misconduct in public office.

¶17 Russell first argues that his right to due process was violated when the circuit court sentenced him on inaccurate information, that is, the circuit court's allegedly erroneous belief that Russell's conduct constituted the offense of misconduct in public office. The record belies his assertion.

¶18 “A defendant has a constitutionally protected due process right to be sentenced upon accurate information.” *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. “A defendant who requests resentencing due to the circuit court's use of inaccurate information at the sentencing hearing ‘must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing.’” *Id.*, ¶26 (one set of internal quotation marks and quoted sources omitted). Our review is *de novo*. See *id.*, ¶9.

¶19 Here, Russell has failed to set forth evidence demonstrating that the circuit court “actually relied on the inaccurate information in the sentencing,” to wit, he has not shown that the circuit court inaccurately sentenced him for the

offense of misconduct in public office. *See id.*, ¶26 (one set of internal quotation marks and quoted sources omitted).

¶20 Russell argues that the circuit court's remarks at sentencing reflect that, at the time it imposed sentence, the court believed it was sentencing Russell for the offense of misconduct in public office, an offense that is separate and distinct from the crime of theft. *See* WIS. STAT. §§ 946.12 & 943.20(1)(b).³

³ WISCONSIN STAT. § 946.12 states:

Misconduct in public office. Any public officer or public employee who does any of the following is guilty of a Class I felony:

(1) Intentionally fails or refuses to perform a known mandatory, nondiscretionary, ministerial duty of the officer's or employee's office or employment within the time or in the manner required by law; or

(2) In the officer's or employee's capacity as such officer or employee, does an act which the officer or employee knows is in excess of the officer's or employee's lawful authority or which the officer or employee knows the officer or employee is forbidden by law to do in the officer's or employee's official capacity; or

(3) Whether by act of commission or omission, in the officer's or employee's capacity as such officer or employee exercises a discretionary power in a manner inconsistent with the duties of the officer's or employee's office or employment or the rights of others and with intent to obtain a dishonest advantage for the officer or employee or another; or

(4) In the officer's or employee's capacity as such officer or employee, makes an entry in an account or record book or return, certificate, report or statement which in a material respect the officer or employee intentionally falsifies; or

(5) Under color of the officer's or employee's office or employment, intentionally solicits or accepts for the performance of any service or duty anything of value which the officer or employee knows is greater or less than is fixed by law.

(continued)

Indeed, some of the circuit court’s statements at sentencing, when viewed in isolation, suggest that the circuit court mistakenly thought that Russell was pleading guilty to the crime of misconduct in public office. However, upon reading the transcript as a whole, it is clear that the circuit court knew that Russell was pleading guilty to theft and sentenced him appropriately.

¶21 First, the circuit court, within a few hours of the sentencing, explicitly told the parties that it did not believe it was sentencing Russell for misconduct in public office, that is, that it did not “rel[y] on ... inaccurate information in the sentencing.” See *Tiepelman*, 291 Wis. 2d 179, ¶26 (one set of internal quotation marks and quoted sources omitted). Immediately after the sentencing hearing, the court realized some of its statements referencing misconduct in public office could be misconstrued and reconvened the parties that

WISCONSIN STAT. § 943.20(1)(b) states:

Theft. (1) ACTS. Whoever does any of the following may be penalized as provided in sub. (3):

(a)

(b) By virtue of his or her office, business or employment, or as trustee or bailee, having possession or custody of money or of a negotiable security, instrument, paper or other negotiable writing of another, intentionally uses, transfers, conceals, or retains possession of such money, security, instrument, paper or writing without the owner’s consent, contrary to his or her authority, and with intent to convert to his or her own use or to the use of any other person except the owner. A refusal to deliver any money or a negotiable security, instrument, paper or other negotiable writing, which is in his or her possession or custody by virtue of his or her office, business or employment, or as trustee or bailee, upon demand of the person entitled to receive it, or as required by law, is prima facie evidence of an intent to convert to his or her own use within the meaning of this paragraph.

afternoon to clarify its comments. When the court was able to reconvene the parties a few hours after the initial sentencing, it explained that its “reference to misconduct in public office was a reference to him being deputy chief of staff at the time. It was a characterization. I was viewing this as a fact, not as a charge, because this happened while he was in public office.” The circuit court went on to explicitly state that it “did not sentence him ... for misconduct in public office but for the felony theft case.”

¶22 Second, even if the circuit court had not clarified its statements regarding misconduct in public office, it is clear from the record that the court properly sentenced Russell to the theft charge to which he pled. The court began its sentencing remarks by correctly stating that “[t]he defendant pled guilty to count one, a series of thefts from the Heritage Guard Preservation Society. It’s a 10-year felony. Five years of confinement. Five years of extended supervision is the maximum penalty.” In other words, the trial court began the sentencing hearing by explicitly noting that Russell was pleading guilty to theft, not misconduct in public office, and the court then correctly recited the maximum penalties for theft. The court then noted that the two charges that were dismissed were also theft counts. The court also made many references to Russell’s acts of theft, stating that Russell “st[ole] funds from a charity”; engaged in a “brazen act of greed”; “stole ... 50 cents for every dollar that was raised”; and “took out some money as soon as [he] took control of the corporation.” Furthermore, the court’s sentence—seven years of custody—while well within the range of penalties permitted for a theft of more than \$10,000, *see* WIS. STAT. §§ 939.50(3)(g) & 943.20(3)(c), is more than twice the maximum penalty permitted for the crime of misconduct in public office, *see* WIS. STAT. §§ 939.50(3)(i) & 946.12.

¶23 The sentencing transcript, when read as a whole, makes it clear that the circuit court did not believe it was sentencing Russell for the offense of misconduct in public office. Rather, by referencing misconduct in public office the circuit court merely intended to note that Russell committed the offense of theft by virtue of his public position as deputy chief of staff to then-County Executive Scott Walker. Because the sentencing transcript demonstrates that the circuit court properly sentenced Russell for the crime of theft, and not for the crime of misconduct in public office, we affirm.

II. The circuit court did not err when it ordered Russell to pay restitution for the West Milwaukee office space.

¶24 Finally, Russell argues that the State failed to establish that the security deposit and rental payment for the West Milwaukee office space were properly included as restitution because Russell does not believe that the State showed a causal nexus between the office space and his crimes. Russell believes that because investigators uncovered some nominal evidence that HGPS business occurred in the office, HGPS is not entitled to restitution for payment of the security deposit and rent. We disagree and affirm.

¶25 Restitution is governed by WIS. STAT. § 973.20, which requires courts to order restitution to the victim of a crime. Section 973.20(1r) requires a circuit court to “order the defendant to make full or partial restitution ... to any victim of a crime considered at sentencing ... unless the court finds substantial reason not to do so and states the reason on the record.” A “[c]rime considered at sentencing” is “any crime for which the defendant was convicted and any read-in crime.” *See* § 973.20(1g)(a).

¶26 Before a circuit court can order restitution, however, a causal nexus must be shown between the crime considered at sentencing and the disputed damage. *State v. Canady*, 2000 WI App 87, ¶9, 234 Wis. 2d 261, 610 N.W.2d 147. “In proving causation, a victim must show that the defendant’s criminal activity was a ‘substantial factor’ in causing damage.” *Id.* (citation omitted). “The defendant’s actions must be the ‘precipitating cause of the injury’ and the harm must have resulted from ‘the natural consequence[s] of the actions.’” *Id.* (citation omitted; brackets in *Canady*). The burden is on the victim to prove the amount of loss sustained as a result of a crime by the preponderance of the evidence. WIS. STAT. § 973.20(14).

¶27 A restitution request, including calculation of the appropriate amount of restitution, is addressed to the circuit court’s discretion, and will be disturbed only where there has been an erroneous exercise of the discretion. *State v. Gibson*, 2012 WI App 103, ¶8, 344 Wis. 2d 220, 822 N.W.2d 500. Whether the circuit court is authorized to order restitution under a particular set of facts, however, presents a question of law subject to our *de novo* review. *Id.*

¶28 Here, the State produced sufficient evidence at the restitution hearing from which the circuit court could conclude that Russell used HGPS funds to rent an office used primarily for Russell’s personal benefit rather than for HGPS’s business activity. As such, the State met its burden of proving a causal nexus between Russell’s theft conviction and the security deposit and the rent paid for the West Milwaukee office.

¶29 First, investigators found very little evidence of HGPS activity in the office, finding only: some cards announcing a HGPS-sponsored Operation Freedom event; a donation letter; a folder for HGPS taxes; and the occupancy

permit with HGPS's name. However, investigators found plenty of evidence in the office demonstrating that Russell used the office primarily to support his personal business and political activity, including: a variety of large Regent Realty signs; a Regent Realty client trust account checkbook; a file folder for the Soldiers Home Foundation; business cards for Russell's various business entities; two file cabinets containing mostly real estate files, including one drawer labeled "active listings"; emails and a letter regarding Russell's political work; and correspondence relating to the purchase of a condominium.

¶30 Second, the State presented evidence demonstrating that, at the time Russell rented the office space in August 2010, HGPS had no ongoing activity that required office space. The last HGPS-sponsored event had been held more than a month earlier in July 2010, and preparation for the next event, assuming another would ever have been held, would not begin until December or January. Yet, HGPS alone paid the security deposit and rent on the office space from August 10, 2010, until July 31, 2011.

¶31 In sum, the evidence supports the circuit court's conclusion that a causal nexus existed between Russell's theft from HGPS and HGPS's payments for the West Milwaukee office. As such, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

