

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 22, 2015

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. 2014AP2917-CR

Cir. Ct. No. 2012CF5480

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT DALE RAMCZYK,

DEFENDANT-APPELLANT.

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

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. Robert Dale Ramczyk appeals a judgment of conviction and an order denying postconviction relief. Ramczyk contends that he is entitled to resentencing as to restitution and eligibility for the Challenge

Incarceration Program (CIP). We reject those arguments for the reasons set forth below. We affirm.

¶2 In September 2013, Ramczyk pled guilty to recklessly endangering safety and possession of a firearm by a felon. In January 2014, the circuit court sentenced Ramczyk to a total of six years' initial confinement and five years' extended supervision. The court determined that Ramczyk would not be eligible for CIP. The court set a restitution hearing for February 2014.

¶3 At the restitution hearing, defense counsel appeared on Ramczyk's behalf. Defense counsel informed the circuit court that Ramczyk had been brought to the courthouse from the prison but had not been produced for the hearing. Defense counsel stated that he saw no need to bring Ramczyk in for the hearing, and the court conducted the restitution hearing in Ramczyk's absence. The court imposed restitution in the amount of \$500.

¶4 Ramczyk moved for postconviction relief. Ramczyk argued that, as to restitution, the circuit court failed to follow the statutory procedure for determining disputed restitution and denied Ramczyk his right to be present at the restitution hearing. Ramczyk argued that, as to CIP eligibility, the court erroneously exercised its discretion by denying Ramczyk eligibility while granting eligibility to Ramczyk's co-defendant.¹ The court denied the motion. Ramczyk appeals his judgment of conviction and the order denying postconviction relief.

¹ Ramczyk also challenged the imposition of the DNA surcharge, but does not pursue that issue on appeal.

¶5 Ramczyk argues that he is entitled to a new restitution hearing because the circuit court failed to follow any of the four alternative procedures set forth by the legislature for when restitution cannot be determined at the sentencing hearing. *See* WIS. STAT. § 973.20(13)(c) (2013-14)² (setting forth alternative procedures to resolve restitution disputes); *State v. Evans*, 2000 WI App 178, ¶¶11, 14, 238 Wis. 2d 411, 617 N.W.2d 220 (circuit court may not depart from statutory procedures for determining restitution in favor of “an entirely different procedure”).³ Ramczyk acknowledges that, under § 973.20(13)(c)2., the circuit court may “[a]djourning the sentencing proceeding for up to 60 days pending resolution of the amount of restitution by the court, referee or arbitrator.” Ramczyk argues, however, that the circuit court failed to follow § 973.20(13)(c)2. because the court did not adjourn the entire sentencing until restitution was resolved. Ramczyk interprets § 973.20(13)(c)2. as requiring the circuit court to postpone sentencing until after the restitution hearing. We do not share Ramczyk’s interpretation of the statute.

¶6 We have explained that WIS. STAT. § 973.20(13)(c) “sets forth a list of four alternative procedures that the court may use to finalize the amount [of restitution] due” when the court “orders restitution, but does not determine the

² All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

³ Ramczyk also argues that the circuit court conceded that it failed to follow any of the four statutory alternative procedures when it stated, in its order denying postconviction relief, that “to the extent [the court] utilized a procedure for determining restitution that is not expressly sanctioned by section 973.20(13)(c), Stats., the error was harmless.” First, we disagree with Ramczyk that the court conceded that it failed to follow statutory procedure; rather, the court stated that, even if it did, the error was harmless. Moreover, the interpretation of a statute is a question of law, which we review *de novo*. *See Orion Flight Servs., Inc. v. Basler Flight Serv.*, 2006 WI 51, ¶16, 290 Wis. 2d 421, 714 N.W.2d 130.

amount of restitution at sentencing.” *State v. Ziegler*, 2005 WI App 69, ¶12, 280 Wis. 2d 860, 695 N.W.2d 895. Thus, in *State v. Stephen Perry*, 181 Wis. 2d 43, 53, 57-58, 510 N.W.2d 722 (Ct. App. 1993), we held that “the procedures undertaken by the [circuit] court to determine Perry’s restitution obligation conformed with [§] 973.20(13)(c)2.,” where the court imposed restitution after the defendant had been sentenced and begun serving his sentence.⁴ Similarly, in *State v. Joseph Perry*, 215 Wis. 2d 696, 703-04, 714, 573 N.W.2d 876 (Ct. App. 1997), we held that the circuit court had properly imposed restitution after sentencing because “[§] 973.20(13)(c) ... specifically authorizes a court to ‘[a]djourn the sentencing proceeding for up to 60 days pending resolution of the amount of restitution.’” We explained “that handling disputes over restitution in this fashion promotes judicial economy.”⁵ *Id.* at 714. Accordingly, we reject Ramczyk’s argument as contrary to the plain language of the statute and prior case law.

¶7 Next, Ramczyk argues that he was denied his right to be present at the restitution hearing. Ramczyk cites WIS. STAT. § 971.04(1)(g) for the proposition that “the defendant shall be present ... [a]t the pronouncement of judgment and the imposition of sentence.” Ramczyk contends that, because

⁴ In *State v. Stephen Perry*, 181 Wis. 2d 43, 53, 57-58, 510 N.W.2d 722 (Ct. App. 1993), we addressed whether the sixty-day time frame for resolving restitution in WIS. STAT. § 973.20(13)(c)2. is mandatory or directive and whether imposing restitution after sentencing violates Double Jeopardy. As part of our analysis, we interpreted § 973.20(13)(c)2. as allowing restitution to be imposed after a defendant begins serving his or her sentence.

⁵ The issue we addressed in *State v. Joseph Perry*, 215 Wis. 2d 696, 703-04, 711-14, 573 N.W.2d 876 (Ct. App. 1997), was whether the circuit court erred by imposing extradition costs after sentencing. In concluding that the court lacked authority to impose costs under WIS. STAT. § 973.06 after sentencing, we noted that, in contrast, the determination of the amount of restitution may be “deferred as permitted by statute.” *Id.* at 714.

restitution is part of sentencing, Ramczyk had the right to be present at the restitution hearing. We disagree.

¶8 Under WIS. STAT. § 973.20(14)(d), all parties with an interest in the restitution “shall have an opportunity to be heard, personally or through counsel, to present evidence and to cross-examine witnesses called by other parties” at the restitution hearing. Further, “[i]f the defendant is incarcerated, he or she may participate by telephone under s. 807.13 unless the court issues a writ or subpoena compelling the defendant to appear in person.” WIS. STAT. § 973.20(14)(d). Ramczyk argues that nothing in § 973.20(14)(d) detracts from a defendant’s right to be present at the restitution hearing as part of his or her sentencing. However, Ramczyk is plainly a “part[y] interested in the matter” under § 973.20(14)(d), and thus had the option to appear by counsel, as happened here. Additionally, Ramczyk’s argument that a defendant has a right to appear personally at the hearing imposing restitution is undercut by statutory provisions allowing restitution to be entered without a hearing following referral to an agency or arbitrator. *See* WIS. STAT. § 973.20(13)(c)1. and 3. Finally, as set forth above, the statutes contemplate a bifurcated process when restitution cannot be determined at sentencing. In those cases, sentence is imposed at the sentencing hearing, in the defendant’s presence, and restitution is resolved under one of the alternatives set forth in § 973.20(13)(c), only some of which appear to contemplate the defendant’s presence. We are not persuaded that WIS. STAT. § 971.04(1)(g) requires a defendant’s presence when restitution is imposed.

¶9 Finally, Ramczyk argues that the circuit court erroneously exercised its discretion by ordering Ramczyk ineligible for CIP. *See* WIS. STAT. § 973.01(3m). Ramczyk argues that, at the sentencing hearing, the court gave no reason for denying Ramczyk eligibility. Ramczyk also argues that the court’s

decision to deny Ramczyk eligibility while granting eligibility to Ramczyk's co-defendant was arbitrary. Ramczyk argues that, while he and his co-defendant shared some negative personal histories and characteristics, his co-defendant was less deserving of eligibility in that he had eluded custody and had to be returned to Milwaukee; had attempted a sexual assault during the underlying criminal event and was thwarted by Ramczyk; and had a longer criminal history than Ramczyk. Thus, Ramczyk asserts, there was no basis for the court to grant eligibility to the co-defendant and deny it to Ramczyk. We disagree.

¶10 When we review the circuit court's exercise of its sentencing discretion, we presume the court acted reasonably, and the burden is on the appellant to "show some unreasonable or unjustifiable basis in the record for the sentence complained of." *State v. Thompson*, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992) (quoted source omitted). A sentencing court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. It should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public. *State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. Our review of the court's exercise of its sentencing discretion may include a postconviction order, because the court has an additional opportunity to explain its sentence when challenged by postconviction motion. See *State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶11 Here, the circuit court explained its reasons for denying Ramczyk eligibility for CIP in its postconviction order. The court explained that it considered that Ramczyk devised the criminal plan and enlisted his co-defendant

to assist him; that Ramczyk displayed a higher level of violence in this case by firing a weapon near the victim and hitting the victim in the head, causing a laceration that required staples; that Ramczyk's criminal history began at an earlier age than did his co-defendant's; and that Ramczyk presented with greater rehabilitative needs. We conclude that the circuit court properly exercised its discretion in denying Ramczyk eligibility for CIP by considering facts relevant to the standard sentencing factors and objectives, as well as the facts that differentiated Ramczyk from his co-defendant in pertinent ways.

By the Court.—Judgment and order affirmed.

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

