

RESTITUTION OUTLINE

A summary of Wis. Stat. § 973.20 and case law

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A. The nature and purpose of restitution

1. The statute: Wis. Stat. § 973.20

The current statute was enacted in 1987.¹ Before that, restitution had been part of the probation statute in Wis. Stat. § 973.09(1m).²

INTERESTING! Before the enactment of Wis. Stat. § 973.20, a sentencing court could not order a defendant sentenced to prison to pay restitution.

“When imposing sentence or ordering probation for any crime ... for which the defendant was convicted, 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. When imposing sentence or ordering probation for a crime involving conduct that constitutes domestic abuse under 813.12(1)(a) or 968.075(1)(a) . . . the court . . . shall order the defendant to make full or partial restitution under this section to any victim of a crime . . . unless the court finds that imposing full or partial restitution will create undue hardship on the defendant or victim and describes the undue hardship on the record.”

***Also see: Wis. Stat. §§ 938.34(5) and 938.343(4) (juvenile delinquency); § 943.23(6) (operating vehicle without consent); § 943.245 (worthless checks); § 951.18(4) (animal crimes), as well as the separate outline titled, “Juvenile Restitution: A Summary of Chapter 938 Provisions and Interpretive Case Law.”

¹ *State v. Foley*, 153 Wis. 2d 748, 752–53, 451 N.W.2d 796 (1989) (stating that Wis. Stat. § 973.20 was created as part of 1987 Wis. Act 398).

² For a brief explanation of the statutory changes, read *Huml v. Vlazny*, 2006 WI 87, 293 Wis. 2d 169, 716 N.W.2d 807.

2. Case law

a. The word “shall” in § 973.20(1r) is mandatory and a sentence that fails to address restitution on the record is “unlawful” and subject to amendment without violating double jeopardy. *State v. Ziegler*, 2005 WI App 69, 280 Wis. 2d 860, 695 N.W.2d 895; *State v. Borst*, 181 Wis. 2d 118, 510 N.W.2d 739 (Ct. App. 1993).

b. Restitution serves two goals: to make crime victims whole and to rehabilitate the defendant. *State v. Sweat*, 208 Wis. 2d 409, 561 N.W.2d 695 (1997); *State v. Longmire*, 2004 WI App 90, 272 Wis. 2d 759, 681 N.W.2d 534; *State v. Dugan*, 193 Wis. 2d 610, 534 N.W.2d 897 (Ct. App. 1995).

c. Restitution statute is to be construed “broadly and liberally” to allow crime victims to recover losses from the defendant’s crimes. *State v. Longmire*, 2004 WI App 90, 272 Wis. 2d 759, 681 N.W.2d 534; *State v. Ross*, 2003 WI App 27, 260 Wis. 2d 291, 659 N.W.2d 122.

d. Crime victims should not have to bear the burden of losses if the defendant is capable of making restitution. *State v. Dzuiba*, 148 Wis. 2d 108, 435 N.W.2d 258 (1989); *State v. Longmire*, 2004 WI App 90, 272 Wis. 2d 759, 681 N.W.2d 534.

e. Wisconsin’s restitution statute is patterned on 18 U.S.C. § 3663. *State v. Boffer*, 158 Wis. 2d 655, 660 n.3, 462 N.W.2d 906 (Ct. App. 1990).

f. Restitution is an equitable remedy; its primary purpose is not punitive. *State v. Dugan*, 193 Wis. 2d 610, 618-27, 534 N.W.2d 897 (Ct. App. 1995).

TIP!

“[R]estitution is not punishment.” *State v. Dugan*, 193 Wis. 2d 610, 623, 534 N.W.2d 897 (Ct. App. 1995).

B. To whom restitution may be awarded

1. The statute

a. Restitution is to be awarded to “any victim of a crime considered at sentencing” or, if the victim is dead, to the victim’s estate, “unless the court finds a substantial reason not to do so and states the reason on the record.” Wis. Stat. § 973.20(1r).

b. A “[c]rime considered at sentencing” is “any crime for which the defendant was convicted and any read-in crime.” Wis. Stat. § 973.20(1g)(a).

c. A “[r]ead-in crime” is “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.” Wis. Stat. § 973.20(1g)(b).

d. A restitution order may require the defendant to “[r]eimburse any person or agency for amounts paid as rewards for information leading to the apprehension or successful prosecution of the defendant for a crime for which the defendant was convicted or to the apprehension or prosecution of the defendant for a read-in crime.” Wis. Stat. § 973.20(5)(c).

e. The restitution order may, “[i]f justice so requires,” require the defendant to “reimburse any insurer, surety or other person who has compensated a victim for a loss otherwise compensable” under the statute. Wis. Stat. § 973.20(5)(d).

f. The statute prioritizes the ordering of restitution awards when more than one person is to receive restitution. Wis. Stat. §§ 973.20(6) and (7).

g. The court is required to ask if a crime victim award was paid out under chapter 949 to determine if DOJ is subrogated. Wis. Stat. § 973.20(9).

2. Case law.

a. Victims: A “victim” is a person against whom a crime has been committed and includes “victims” of read-in crimes. *State v. Szarkowitz*, 157 Wis. 2d 740, 460 N.W.2d 819 (Ct. App. 1990). Generally, “victim” means a “person or thing killed, injured etc. as a result of another’s deed.” *State v. Howard-Hastings*, 218 Wis. 2d 152, 579 N.W.2d 290 (Ct. App. 1998).

(i) **Read-in victims**: When the defendant agrees to crimes being read in at the time of sentencing, the trial court “may require [the] defendant to pay restitution on the read-in charges.” *State v. Straszkowski*, 2008 WI 65, ¶ 93, 310 Wis. 2d 259, 750 N.W.2d 835.

- Further, read-in charges are acknowledged as true and are subject to restitution, whereas dismissed charges (not read-in) are not subject to restitution. *State v. Frey*, 2012 WI 99, ¶ 43, 343 Wis. 2d 358, 817 N.W.2d 436.
- A read-in victim for purposes of restitution may be an insurance company, even when the stolen property at issue was recovered but sold by the insurance company for a loss. *State v. Gibson*, 2012 WI App 103, ¶¶ 13-14, 344 Wis. 2d 220, 822 N.W.2d 500.

(ii) **Family member of victim**: “Victim,” for restitution purposes, is defined according to the crime-victim statute, Wis. Stat. § 950.02(4)(a). *State v. Gribble*, 2001 WI App 227, ¶¶ 70-71, 248 Wis. 2d 409, 636 N.W.2d 488. When the person against whom the crime was committed is a child, § 950.02(4)(a)2

provides that a “victim” also includes a “parent, guardian or legal custodian of the child.”

- ✓ **Stepparent:** The Legislature did not intend to include both natural parents and step-parents within the class of persons identified as “parent” in § 950.02(4)(a). *State v. Johnson*, 2002 WI App 166, 256 Wis. 2d 871, 649 N.W.2d 284.

(iii) **Bail-jumping victim:** A person who posts a defendant’s bail and then loses that bail as the result of the defendant’s bail-jumping is a victim of the crime of bail-jumping. *State v. Agosto*, 2008 WI App 149, ¶¶ 8-9, 314 Wis. 2d 385, 760 N.W.2d 415.

(iv) **Homeowner in grow operation house:** Despite the defendant’s argument that a drug case is a victimless crime, the court affirmed the circuit court’s award of restitution to a homeowner for the damages that the defendant caused to the residence from the marijuana “grow operation.” *State v. Hoseman*, 2011 WI App 88, 334 Wis. 2d 415, 799 N.W.2d 479.

(v) **Construction victims:** Laborers, subcontractors, materialmen, as well as homeowners, are entitled to restitution as victims of contractor’s misappropriation of trust fund. *State v. Foley*, 142 Wis. 2d 331, 417 N.W.2d 920 (Ct. App. 1987).

(vi) **Out-of-state victims and transactions:** Restitution may be ordered to out-of-state victims of defendant’s racketeering activities because defendant’s fraudulent activities in Wisconsin was a substantial factor that attracted the investors. *State v. Ross*, 2003 WI App 27, ¶¶ 52-57, 260 Wis. 2d 291, 659 N.W.2d 122.

(vii) **Government entities:** A government entity can be a “victim” entitled to restitution where the defendant’s crime

involved vandalizing government property. *State v. Howard-Hastings*, 218 Wis. 2d 152, 579 N.W.2d 290 (Ct. App. 1998).

- **Firefighting:** A government entity, however, is **not** a “victim” entitled to restitution for the cost of fighting a fire and cleaning up after the fire that the defendant caused through criminal recklessness in a motor vehicle accident. *State v. Schmaling*, 198 Wis. 2d 757, 543 N.W.2d 555 (Ct. App. 1995).
- **School district:** School district was victim of defendant’s conduct of making a false bomb scare and was entitled to restitution for loss of employee productivity attributable to bomb scare. *State v. Vanbeek*, 2009 WI App 37, 316 Wis. 2d 527, 765 N.W.2d 834.
- **Human services department:** County human services department may be awarded restitution for paying victim’s hospital expenses via medical assistance program. *State v. Baker*, 2001 WI App 100, 243 Wis. 2d 77, 626 N.W.2d 862.
- **Police:**
 - ✓ **Overtime & SWAT costs:** City is **not** a “victim” entitled to restitution for the cost of police overtime and SWAT team in responding to a standoff with the defendant, who was later convicted of obstruction and threat to injure while armed. *State v. Ortiz*, 2001 WI App 215, 247 Wis. 2d 836, 634 N.W.2d 860.
 - ✓ **Stop sticks:** Police department is **not** a “victim” entitled to restitution for “stop sticks” destroyed by defendant while attempting to flee from officers, because destruction of stop

sticks entails a normal cost of law enforcement. *State v. Storlie*, 2002 WI App 163, 256 Wis. 2d 500, 647 N.W.2d 926.

- ✓ **Patrol car:** Sheriff's department is **not** a "direct victim" of defendant's crime of fleeing traffic officer where patrol car burst into flames while pursuing defendant's car through rough terrain of a farm field. *State v. Haase*, 2006 WI App 86, 293 Wis. 2d 322, 716 N.W.2d 526.
- ✓ **Worker's compensation:** Police officer who was injured while attempting to apprehend a defendant who fled from scene of crime was **not** a "victim" for restitution purposes because defendant was sentenced for a crime related to fleeing. *State v. Lee*, 2008 WI App 185, ¶¶ 10-14, 314 Wis. 2d 764, 762 N.W.2d 431.
- ✓ **Drug buy money:** A law enforcement agency **cannot** recover "drug buy money" as restitution. *State v. Evans*, 181 Wis. 2d 978, 512 N.W.2d 259 (Ct. App. 1994).

*****BUT→** Drug buy money is recoverable as a "cost" under § 973.06(1)(am). It also is recoverable as a condition of probation. *State v. Connelly*, 143 Wis. 2d 500, 421 N.W.2d 859 (Ct. App. 1988); cf. *State v. Amato*, 126 Wis. 2d 212, 376 N.W.2d 75 (Ct. App. 1985) (a "cost"-related condition of probation is proper only if the "cost" would otherwise be recoverable under § 973.06).

- ✓ **Extradition costs:** A government agency **cannot** recover extradition expenses as restitution but **can** do so as a "cost" under

§ 973.06(1)(a). *State v. Perry*, 215 Wis. 2d 696, 573 N.W.2d 876 (Ct. App. 1997).

✓ **Genetic & drug testing costs:** A law enforcement agency **cannot** recover as restitution the cost of genetic testing or drug testing. *State v. Beiersdorf*, 208 Wis. 2d 492, 561 N.W.2d 749 (Ct. App. 1997) (genetic testing); *State v. Ferguson*, 202 Wis. 2d 233, 549 N.W.2d 718 (1996) (drug testing).

*****BUT**→ Law enforcement may be able to recover the costs as part of a condition of the defendant's probation under Wis. Stat. § 973.09(1)(a). *State v. Beiersdorf*, 208 Wis. 2d 492, 502–03, 561 N.W.2d 749 (Ct. App. 1997).

*****BUT**→ The fee for testing done by a private lab may be recoverable as a "cost" under the "expert witness provision of § 973.06(1)(c). *State v. Beiersdorf*, 208 Wis. 2d 492, 504–08, 561 N.W.2d 749 (Ct. App. 1997).

- b. Other-acts witnesses: "Other-acts" witnesses who are not victims of charged crime or read-ins presented at sentencing do **not** qualify as "victims" for restitution, even though they were harmed by the defendant. *State v. Mattes*, 175 Wis. 2d 572, 499 N.W.2d 711 (Ct. App. 1993).
- c. Insurers, sureties & any other person: Wis. Stat. § 973.20(5)(d).
 - The insurer of a burglarized business is entitled to restitution for the amount it paid to the victim, including the amount the victim proved was lost in future profits. *State v. Johnson*, 2005 WI App 201, 287 Wis. 2d 381, 704 N.W.2d 625.

- The circuit court properly exercised its discretion in awarding restitution to an insurance company even when the stolen car was recovered, and the insurance company opted to sell it at auction for less than it was valued. *State v. Gibson*, 2012 WI App 103, ¶¶ 1–3, 7–8, 13–14, 344 Wis. 2d 220, 922 N.W.2d 500.
- A circuit court is permitted to order restitution to any other person who has compensated a victim for a loss as a result of the defendant’s crime. Wis. Stat. § 973.20(5)(d). Thus, a victim’s stepfather may recover the costs in restitution of a home security system he had installed to help the victim feel safer as a result of the defendant’s crime. *State v. Johnson*, 2002 WI App 166, ¶¶ 20–21, 256 Wis. 2d 871, 649 N.W.2d 284.

d. Crime considered at sentencing: A “[c]rime considered at sentencing” is defined in broad terms to encompass all facts and reasonable inferences concerning the defendant’s activity related to the “crime” for which the defendant was convicted and is not limited to the elements of the crime of conviction. *State v. Madlock*, 230 Wis. 2d 324, 33–34, 602 N.W.2d 104 (Ct. App. 1999).

e. Causation: There must be a “causal” nexus between the defendant’s criminal activity and the victim’s loss, although the victim’s loss does not need to be directly caused by the criminal conduct. *State v. Longmire*, 2004 WI App 90, ¶ 24, 272 Wis. 2d 759, 681 N.W.2d 534. The victim bears the burden to show that the defendant’s criminal activity was a “substantial factor” in causing the harm. *State v. Ross*, 2003 WI App 27, ¶ 54, 260 Wis. 2d 291, 659 N.W.2d 122.

***Examples of “causal nexus”:

- (i) *State v. Behnke*, 203 Wis. 2d 43, 59, 553 N.W.2d 265 (Ct. App. 1996). The court affirmed the circuit court’s restitution

award, concluding that the victim proved that the defendant attacked her and that her mental health regressed as a result. She did not have to prove that the defendant's actions were the sole factor that required her to seek treatment; her preexisting condition did not foreclose restitution. Moreover, the defendant failed to produce any evidence of how liability should be shared among previous abusers (employing "precipitating cause" and "natural consequence" language).

(ii) *State v. Rodriguez*, 205 Wis. 2d 620, 628–29, 556 N.W.2d 140 (Ct. App. 1996). The court affirmed the restitution award because the circuit court examines the defendant's entire course of conduct to determine whether he has committed a crime for which restitution may be ordered.

(iii) *State v. Madlock*, 230 Wis. 2d 324, 335–336, 602 N.W.2d 104 (Ct. App. 1999). The court remanded the case for a hearing on both the basis for the restitution request, as well as proof of the nexus between the defendant's conduct and the damage to the car. The court concluded that the circuit court erred in granting the restitution request without allowing the defendant a hearing.

(iv) *State v. Canady*, 2000 WI App 87, ¶¶ 11–12, 234 Wis. 2d 261, 610 N.W.2d 147. The court affirmed the circuit court's conclusion that the defendant was liable for the damage to the broken door even though the police officer was the most immediate cause of the damage. This is because the defendant's "actions were a substantial factor" in causing the damage in a "but for" sense.

(v) *State v. Rash*, 2003 WI App 32, ¶¶ 4, 7–8, 260 Wis. 2d 369, 659 N.W.2d 189. The court affirmed the circuit court's award of restitution, finding that the defendant was liable for damage and loss caused by third party after the defendant had abducted the victim from the parking lot, leaving the victim's

car unlocked and vulnerable. The court said that a “‘precipitating cause’ merely means that the defendant’s criminal act set into motion events that resulted in the damage or injury.” A “‘substantial factor’ denotes that the defendant’s conduct had such an effect in producing the harm as to lead the trier of fact, as a reasonable person, to regard it as a cause, using that word in the popular sense.” A victim’s burden to show causation is not higher (and may be substantially lower) than a plaintiff’s comparable burden in a civil case.

(vi) *State v. Ross*, 2003 WI App 27, ¶¶ 55-57, 260 Wis. 2d 291, 659 N.W.2d 122. The court of appeals affirmed the restitution award, concluding that the defendant’s fraud and lack of full disclosure were substantial factors in attracting investors, leading to the losses they suffered. In addition, the defendant’s fraud in Wisconsin was a substantial factor that attracted investors in other states, which was the nexus between the crime and the losses to out-of-state victims.

(vii) *State v. Queever*, 2016 WI App 87, ¶¶ 13–19, 372 Wis. 2d 388, 887 N.W.2d 912. The court of appeals affirmed the trial court’s award of restitution for the cost of a security system that the victim had installed *before* the crime for which the defendant was convicted, but that she had installed as a result of the defendant’s criminal course of conduct. The court concluded that the circuit court’s findings that the defendant had committed the earlier crimes were not clearly erroneous. The court held that “crime considered at sentencing” is to be construed broadly, reaffirming *Canady*. And because the earlier criminal activity was causally related to the victim’s losses, restitution was appropriate.

SUPER NEW!

(viii) *State v. Wiskerchen*, 2019 WI 1, ¶¶ 22, 25, 30, 42–44, 385 Wis. 2d 120, 921 N.W.2d 730. The supreme court reaffirmed that restitution is the rule, not the exception and that the statute must be interpreted broadly. And “crime considered at

sentencing” must be interpreted broadly, as well. The appellate court will affirm a circuit court’s finding of fact if it is not clearly erroneous. “[A] circuit court’s finding of fact is not clearly erroneous unless it is against the great weight and clear preponderance of the evidence.” The court distinguished *Queever* on the ground that the circuit court in *Wiskerchen* did not consider multiple burglaries in its restitution award but only the one to which the defendant pleaded.

f. Unmet obligation in unrelated case: Trial court lacks authority to order defendant, as a condition of probation in current case, to pay outstanding restitution obligations from unrelated cases. *State v. Torpen*, 2001 WI App 273, 248 Wis. 2d 951, 637 N.W.2d 481.

C. For what restitution may be awarded

1. The statute: Wis. Stat. §§ 973.20(2) through (5).

a. Restitution order may require the defendant to return the property to the owner. Wis. Stat. § 973.20(2)(a).

b. If the return of property is not viable, restitution order may require the defendant to “pay the owner or owner’s designee the reasonable repair or replacement cost or the greater of” either (1) the property value on date of damage, loss or destruction, or (2) the property value on date of sentencing minus value of any returned part of the property. Wis. Stat. § 973.20(2)(b).

c. In **bodily injury** cases, restitution order may require the defendant to do one or more of the following:

- Pay cost of “necessary medical and related professional services and devices relating to physical, psychiatric and psychological care and treatment.” Wis. Stat. § 973.20(3)(a);

- Pay cost of “necessary physical and occupational therapy and rehabilitation.” Wis. Stat. § 973.20(3)(b);
- Reimburse injured person “for income lost.” Wis. Stat. § 973.20(3)(c);
- If injured party was a “homemaker,” pay “an amount sufficient to ensure that the duties are continued until the person is able to resume” the duties. Wis. Stat. § 973.20(d).

d. In cases of **death**, restitution order may require the defendant to “pay an amount equal to the cost of necessary funeral and related services under s. 895.04(5).” Wis. Stat. § 973.20(4).

e. In certain **sexual assault** cases, restitution order may require the defendant to pay up to \$10,000 for “cost of necessary professional services relating to psychiatric and psychological care and treatment” not otherwise covered by the restitution provisions. Wis. Stat. § 973.20(4m).

f. For crimes of **human trafficking** in which no property loss or bodily injury occurred, the restitution order may require the defendant to pay any of the following: “[t]he costs of necessary transportation, housing, and child care for the victim;” the greater of the gross income gained by the defendant from the victim’s services or the value of the victim’s services pursuant to minimum wage law; the cost of the victim’s relocation for personal safety; and other relocation costs. Wis. Stat. § 973.20(4o).

g. In any case, restitution order may require the defendant to “[p]ay all special damages, but not general damages, substantiated by evidence in the record, which could be recovered in a civil action against the defendant.” Wis. Stat. § 973.20(5)(a).

h. In any case, restitution order may require the defendant to “[p]ay an amount equal to the income lost, and reasonable out-of-

pocket expenses incurred” by the victim which resulted from “the filing of charges or cooperating in the investigation and prosecution of the crime.” Wis. Stat. § 973.20(5)(b).

i. A restitution order may require the defendant to “[r]eimburse any person or agency for amounts paid as rewards for information” that led to the apprehension or successful prosecution of the defendant. Wis. Stat. § 973.20(5)(c).

j. A restitution order may require the defendant to reimburse insurers, sureties and the like who have compensated a crime victim, “[i]f justice so requires.” Wis. Stat. § 973.20(5)(d).

k. For theft from a cemetery of an object relating to a deceased veteran, a restitution order shall require the defendant to “reimburse an individual, organization, or governmental entity” for the replacement cost. Wis. Stat. § 973.20(15).

2. Case law.

a. Special vs. general damages:

- Special damages, which are recoverable as restitution, refer to the victim’s “actual pecuniary losses.” *State v. Stowers*, 177 Wis. 2d 798, 804, 503 N.W.2d 8 (Ct. App. 1993); *State v. Anderson*, 215 Wis. 2d 667, 573 N.W.2d 872 (Ct. App. 1997).
- “General” damages, which are not recoverable as restitution, refer to things not readily susceptible of direct proof or easily estimable in monetary terms, such as pain and suffering, anguish or humiliation. *State v. Behnke*, 203 Wis. 2d 43, 553 N.W.2d 265 (Ct. App. 1996).

b. Breach-of-contract claim: A breach-of-contract claim **cannot** be piggybacked onto a victim’s pecuniary losses for purposes of

restitution in a theft-by contractor case. *State v. Longmire*, 2004 WI App 90, ¶ 25, 272 Wis. 2d 759, 681 N.W.2d 534.

c. Costs related to theft by employee: Unearned vacation time and benefits, personal use of company car and company advertising costs to hire replacement employee are **not** special damages recoverable as restitution for employee's theft by wrongful use of credit card. But the cost of an audit and expert fee for auditor's testimony are recoverable as restitution. *State v. Holmgren*, 229 Wis. 2d 358, 599 N.W.2d 876 (Ct. App. 1999).

d. Attempt: Although the defendant was convicted of the attempted crime, the defendant's failure to object to PSI's restitution summary and the restitution order at sentencing allowed the sentencing court to assume the defendant had stipulated to the restitution order. *State v. Hopkins*, 196 Wis. 2d 36, 43–44, 538 N.W.2d 543 (Ct. App. 1995).

e. Future needs & unmanifested injuries: Restitution order may **not** require the defendant to pay for speculative, future counseling when there is no evidence in the record that the victims will seek counseling. *See State v. Handley*, 173 Wis. 2d 838, 496 N.W.2d 725 (Ct. App. 1993).

*****BUT→** If injuries manifest later, the victim may seek modification of probation or parole to provide for restitution.
Id.

*****IMPORTANT:** In *Handley*, the court ordered the defendant to pay money to a fund as part of the defendant's probation. The defendant argued that this made the condition restitution and subjected it to the additional requirements of § 973.20. The court of appeals held that the record did not support the condition regardless of how it was characterized so it "need not decide whether the condition imposed in this case was restitution."

f. Mental health care: Although a victim has mental health problems before the defendant's crime, the victim nonetheless is entitled to restitution for post-crime mental health care that the victim can link to the crime. *State v. Behnke*, 203 Wis. 2d 43, 553 N.W.2d 265 (Ct. App. 1996).

g. Counseling of family member: Cost of mother's counseling relating to child's death may be ordered as restitution. *State v. Gribble*, 2001 WI App 227, 248 Wis. 2d 409, 636 N.W.2d 488.

h. Locks and alarms: Victim's purchase of a new door lock out of fear that the defendant may come after her when free constitutes a special damage recoverable as restitution. *State v. Johnson*, 2002 WI App 166, 256 Wis. 2d 871, 649 N.W.2d 284; *State v. Behnke*, 203 Wis. 2d 43, 553 N.W.2d 265 (Ct. App. 1996).

NOTE: Discussion of the alarm as a condition of probation when then the circuit court ordered the defendant to pay the victim \$4000 either as reimbursement for the alarm or for pain and suffering. *State v. Heyn*, 155 Wis. 2d 621, 456 N.W.2d 157 (1990).

****NEW!!** Unpublished but authored case discussing the victim's burden and quantum of proof necessary to establish her award for a replacement door following a burglary. *State v. Robinson*, No. 2018AP259, 2018 WL 5619692 (Wis. Ct. App. Oct. 30, 2018) (unpublished).

i. Loss of use of property: The cost to replace a stolen television *and* the rental fees incurred by victim in renting another television are recoverable as restitution — as long as the rental period was for a time reasonably required for replacement. *State v. Kayon*, 2002 WI App 178, 256 Wis. 2d 577, 649 N.W.2d 334.

j. Attorney fees: “The award of attorney fees as restitution is consistent with the purpose of restitution.” Attorney fees incurred by victim to recover damages from the defendant’s accounting firm, which was civilly responsible for the defendant’s crimes, are recoverable as restitution. *State v. Anderson*, 215 Wis. 2d 667, 682, 573 N.W.2d 872, 875 (Ct. App. 1997).

*****BUT**→ The supreme court has said, “We cannot conclude that the legislature intended to include in ‘special damages’ attorney fees for pursuing arguably unnecessary [civil] litigation.” *State v. Longmire*, 2004 WI App 90, ¶ 32, 272 Wis. 2d 759, 681 N.W.2d 534.

k. Interest on unpaid restitution: Trial court’s award of restitution plus annualized rate of 10% interest on unpaid amount was overturned on appeal. The court of appeals, examining legislative history, noted that the old restitution statute allowed for 5% interest, but then the Legislature expressed an “intent to do away with interest all together.” The court then stated that § 973.20 is a blend of the federal statute and Wisconsin’s old statute and shows the Legislature’s intent not to allow interest as part of restitution. *State v. Hufford*, 186 Wis. 2d 461, 465–70, 522 N.W.2d 26 (Ct. App. 1994).

l. Employer’s lost employee time: Citing § 973.20(5)(a), the court of appeals approved of the award of restitution in the amount a bank paid its employees to investigate the defendant’s forgery as special damages, even though the bank would have paid the same amount of wages regardless. The court reasoned that the bank had lost its employees’ time, which they could have spent on other matters. *State v. Rouse*, 2002 WI App 107, ¶¶ 15–16, 254 Wis. 2d 761, 647 N.W.2d 286.

m. Lost business profits: Lost profits from the defendant’s theft of computer equipment were recoverable as restitution by the insurance company who had reimbursed the business for the loss. *State v. Johnson*, 2005 WI App 201, 287 Wis. 3d 381, 704 N.W.2d 625.

n. Lost wages to attend court proceedings: Lost wages to attend court proceedings is limited to a person against whom a crime was committed, as stated in Wis. Stat. § 973.20(5)(b). *State v. Johnson*, 2002 WI App 166, ¶¶ 22–23, 256 Wis. 2d 871, 649 N.W.2d 284.

o. Victim's loss of sick leave: Victim's loss of sick leave constituted special damages and was therefore recoverable as restitution. *State v. Loutsch*, 2003 WI App 16, ¶ 2, 259 Wis. 2d 901, 656 N.W.2d 781 (overruled on other grounds by *State v. Fernandez*, 2009 WI 29, ¶ 5, 316 Wis. 2d 598, 764 N.W.2d 509).

p. Damages to leased residence: Homeowner is entitled to restitution for damages to residence caused by the his tenant's marijuana "grow operation." *State v. Hoseman*, 2011 WI App 88, 334 Wis. 2d 415, 799 N.W.2d 479.

q. Lost income/ child porn victim's mom: Defendant was convicted of possession of child pornography. The mother of one of the victims of the pornography sought restitution for lost income because her husband, who had produced the pornographic images, was now in prison as a result of his own crime. The court said that the mother had not proven that her lost income was the result of the defendant's crime. *State v. Tarlo*, 2016 WI App 81, ¶¶ 2–3, 19, 372 Wis. 2d 333, 887 N.W.2d 898.

****NOTE:** The State is currently taking a State's appeal in *State v. Hinrichs*, 2019AP970-CR (Dane Co.) from the denial of a restitution hearing in a child-pornography-possession case.

r. Limited to what is recoverable in a civil action: The defendant argued that the State was prohibited from recovering the costs of restitution for a security system that was upgraded after the defendant's crime under two theories: (1) that the upgrades were not special damages; and (2) that the upgrades were not recoverable in a civil suit as required by Wis. Stat. § 973.20(5)(a). The court rejected the

first argument but agreed with the second because it did not find that the State had adequately refuted it on appeal. *State v. Steppke*, 2017AP1683, 2018 WL 1137105 (Wis. Ct. App. Mar. 1, 2018) (unpublished).

s. Child support arrearages: {Note: This case is unpublished and not citable as persuasive.} The defendant, convicted of failing to pay child support, argued that her judgment of conviction should be amended so child support arrearages were in an order under the child support statute, as opposed to the restitution order that subjected her to the surcharge. The court rejected the argument, concluding nothing prevented the circuit court from structuring the sentence in the way it did. *State v. McFarlane*, No. 2017AP506, 2018 WL 672594 (Wis. Ct. App. Feb. 1, 2018) (unpublished).

REMINDER: *McFarlane* may not be cited as persuasive authority. See Wis. Stat. § 809.23(3). But you may use its reasoning without citation if you face a similar challenge.

NEW!!

****BUT** The court of appeals approved converting a defendant's repayment order from restitution to child-support arrearages when the State stipulated that the judgment should be treated as failure to support. *State v. Stewart*, 2018 WI App 41, 383 Wis. 2d 546, 916 N.W.2d 188.

D. Determining the amount of restitution

1. **The statute: Wis. Stat. §§ 973.20(10)–(14)**

a. When to pay: "The court **may** require that restitution be paid immediately, within a specified period or in specified installments." If the court sentences the defendant to probation or prison, the specified period cannot be later than the end of the sentence. Wis. Stat. § 973.20(10)(a).

NEW!

****BUT** A court may not impose and stay a sentence but order the impose sentence “lifted” if the defendant does not pay the full amount of restitution within the probationary term. This is because the executive branch has the sole authority over the administration of probation. *State v. Lokken*, No. 2017AP2087, 2019 WL 4431416 (Wis. Ct. App. Sept. 17, 2019) (unpublished).

- b. When defendant fails to comply with § 973.20(10)(a): DOC or the clerk of courts **may** certify an amount the defendant owes to the Department of Revenue. Wis. Stat. § 973.20(10)(b).
- c. Where to pay: Restitution order shall require the defendant to deliver the money or property to DOC if the defendant is sentenced to prison or placed on probation. Otherwise, the delivery is to the clerk of circuit court. Five percent surcharge required on all restitution, costs, attorney fees, fines and “related payments.” Wis. Stat. § 973.20(11)(a).
- d. Defendant’s obligations: If a defendant is given a term of imprisonment and ordered to pay restitution, he must authorize, as part of the court order, DOC to collect, from his wages or other money in his trust account, an amount or a percentage that DOC determines is reasonable for payment to the victims. Wis. Stat. § 973.20(11)(c).
- e. Form of order: When the court orders restitution, the court must enter a single order, signed by the judge (not the clerk), that includes fines, costs, fees, surcharges, restitution and all payments due under Wis. Stat. § 304.074. If the costs for legal counsel have not yet been established, they can be added at a later time. Wis. Stat. § 973.20(12)(a).
- f. Priority: Generally, a defendant’s payments are applied first to satisfy restitution then to the fines as set out in Wis Stat. § 973.05. Wis. Stat. § 973.20(12)(b).

g. Factors: In determining whether to order restitution and how much, the court “shall” consider the following: Wis. Stat. § 973.20(13)(a)(1)–(5).

- “The amount of loss suffered by any victim as a result of a crime considered at sentencing.”
- “The financial resources of the defendant.”
- “The present and future earning ability of the defendant.”
- “The needs and earning ability of the defendant’s dependents.”
- “Any other factors which the court deems appropriate.”

h. Role of the State: “The district attorney shall attempt to obtain from the victim prior to sentencing information pertaining to” the victim’s loss. Law enforcement and DOC shall assist the DA in this obligation. DOJ shall provide technical assistance to DAs in this regard and develop model forms and procedures for collecting and documenting this information. Wis. Stat. § 973.20(13)(b).

i. General procedure at sentencing: Wis. Stat. 973.20(13)(c)(1)–(4).

- Court must ask DA for the amount of claimed restitution.
- Defendant can stipulate to restitution or “present evidence and argument” on relevant factors.
- Restitution can be determined at sentencing, OR court may do any of the following:

- Order restitution for undisputed amounts and direct proper agency to file proposed restitution order within 90 days;
- Adjourn sentencing for up to 60 days pending resolution of restitution;
- With the defendant's consent, refer disputed restitution to arbitrator whose determination is to be made within 60 days;
- Refer disputed restitution to court commissioner or referee for a hearing and proposed findings and conclusions, to be submitted to court within 60 days, after which court makes final decision within 30 days.

j. The restitution hearing: Wis. Stat. § 973.20(14)(a)–(d).

At the restitution hearing, all of the following apply:

- The victim has the burden of proving loss by preponderance of the evidence. “The district attorney is not required to represent any victim unless the hearing is held at or prior to the sentencing proceeding or the court so orders.”
- The defendant has the burden regarding financial resources, earning ability and needs of dependents, also by a preponderance showing. The defendant “may assert any defense that he or she could raise in a civil action for the loss sought to be compensated.” The public defender is not required to represent any indigent defendant unless the hearing is held at or before sentencing, the defendant is incarcerated when the hearing is held or the court orders representation.

- As to any other matter, the court can put a preponderance of the evidence burden of proof on whichever party it chooses, “as justice requires.”
- The parties have the right to present evidence and cross-examine witnesses, but discovery is not available without good cause. The official in charge of the hearing “may waive the rules of practice, procedure, pleading or evidence,” except for those relating to privileged communications and to contacts with a decedent or mentally ill person.

2. Case law

a. Restitution hearing procedures:

- **Relaxed rules:**

- A restitution hearing is not the equivalent of a civil trial and does **not** require strict adherence to the rules of evidence and burden of proof. *State v. Loutsch*, 2003 WI App 16, ¶ 21, 259 Wis. 2d 901, 656 N.W.2d 781 (overruled on other grounds); *State v. Anderson*, 215 Wis. 2d 667, 573 N.W.2d 872 (Ct. App. 1997).
- Restitution hearing is an informal evidentiary hearing. *State v. Madlock*, 230 Wis. 2d 324, 335, 602 N.W.2d 104 (Ct. App. 1999).
- “A restitution hearing is not a full-blown civil trial as evidenced by the dispensing of the normal rules of evidence. Normal rules of practice, procedure and pleading are also waived.” *State v. Madlock*, 230 Wis. 2d 324, 335, 602 N.W.2d 104 (Ct. App. 1999).

- There is no right to a jury trial on the imposition or amount of restitution. *State v. Dziuba*, 148 Wis. 2d 108, 435 N.W.2d 258 (1989).
- **Four statutory options to determine amount:** Trial court must follow one of the four statutory options set forth in § 973.20(13)(c), and can ask “an appropriate agency,” such as DOC, to submit a “proposed” restitution order within 90 days. But the court must ultimately determine the restitution and *cannot completely defer* the determination to an agency like DOC. *State v. Evans*, 2000 WI App 178, 238 Wis. 2d 411, 617 N.W.2d 220.

- **§ 973.20(13)(c) timing:**

(i) The court of appeals reversed the circuit court’s order holding open restitution “in case the postal inspector identifies some of the victims” because it violates Wis. Stat. § 973.20(13)(c), which creates a maximum 90-day period to hold restitution open after sentencing. *State v. Simonetto*, 2000 WI App 17, ¶ 10, 232 Wis. 2d 315, 606 N.W.2d 275.

*****BUT→** This may be because the court left the time period open past 90 days *and* there were no identified victims in the case. *Id.* ¶ 10 n.2. Because after *Simonetto*, the court has said that all time periods in Wis. Stat. 973.20(13) are directory. *State v. Johnson*, 2002 WI 166, ¶ 8, 256 Wis. 2d 871, 649 N.W.2d 284.

(ii) But, the sixty-day period after sentencing for a referee to make findings and a recommendation to the court is directory, not mandatory. *State v. Krohn*, 2002 WI App 96, ¶¶ 10-13, 252 Wis. 2d 757, 643 N.W.2d 874; *State v. Perry*, 181 Wis. 2d 43, 53, 510 N.W.2d 722 (Ct. App. 1993).

(iii) When a sentencing court fails to determine restitution within the statutory time frame and fails to follow the four alternative statutory procedures under § 973.20(13), the case may still be remanded for a restitution determination. *State v. Krohn*, 2002 WI App 96, ¶¶ 10–13, 252 Wis. 2d 757, 643 N.W.2d 874.

(iv) Restitution orders from proceedings held outside the statutory time period for valid reasons may be upheld, provided that doing so will not prejudice the defendant. *State v. Johnson*, 2002 WI App 166, ¶ 8, 256 Wis. 2d 871, 649 N.W.2d 284.

(v) Where restitution hearing is delayed beyond the statutory time period, “the court must balance the length and reason for the delay against the injury, harm or prejudice to the defendant resulting from the delay.” A fourteen-year delay between sentencing and the restitution determination prejudiced the defendant because he had a legitimate expectation of finality in his sentence. *State v. Ziegler*, 2005 WI App 69, ¶¶ 18–19, 280 Wis. 2d 860, 695 N.W.2d 895.

b. Judicial discretion, authority & obligations:

- **Amount:** Within the statutory parameters and relevant factors, the ultimate determination of the amount of restitution owed rests in the discretion of the trial court. *State v. Boffer*, 158 Wis. 2d 655, 462 N.W.2d 906 (Ct. App. 1990); *State v. Anderson*, 215 Wis. 2d 667, 573 N.W.2d 872 (Ct. App. 1997).
 - In probation cases, the court may consider the amount of restitution owed in determining length of probation. *State v. Kuba*, 150 Wis. 2d 618, 443 N.W.2d 17 (Ct. App. 1989).

- **Form:** Court may choose whether defendant must return property, pay repair cost, pay replacement cost or pay value of property on date of loss or date of sentencing, whichever is greater. *State v. Kennedy*, 190 Wis. 2d 252, 258-59, 528 N.W.2d 9 (Ct. App. 1994); *State v. Boffer*, 158 Wis. 2d 655, 661-62, 462 N.W.2d 906 (Ct. App. 1990).
- **Fact-finding:** Sentencing court is not bound by jury determination of value in fixing restitution. To conclude otherwise would eliminate the sentencing judge's discretion. *State v. Kennedy*, 190 Wis. 2d 252, 258-59, 528 N.W.2d 9 (Ct. App. 1994).
 - In addition, the court was free to reject the testimony regarding the amount of the stolen item at the preliminary hearing in favor of the amount of the item at the restitution hearing. *State v. Boffer*, 158 Wis. 2d 655, 662-63, 462 N.W.2d 906 (Ct. App. 1990).
- **NEW!! Factors:** Although a sentencing court may not punish a defendant for exercising his right to challenge the amount of restitution, it may consider the defendant's lack of remorse—"evidenced by his attitude regarding restitution"—as a factor. In addition, defendant's right to challenge restitution comes from statute, not Constitution. *State v. Williams*, 2018 WI 59, ¶ 50, 381 Wis. 2d 661, 912 N.W.2d 373.
- **Obligations:** Court must consider the defendant's ability to pay in setting the amount of restitution, but the length of the defendant's sentence has no limiting effect on the total amount of restitution that the court orders. *State v. Fernandez*, 2009 WI 29, ¶¶ 3-5, 316 Wis. 2d 598, 764 N.W.2d 509.
 - **NEW!!** An unpublished but authored decision discussing the defendant's right to a restitution hearing before a bias-free court. *State v. Driver*,

No. 2018AP870, 2019 WL 1921458 (Wis. Ct. App. Feb. 26, 2019) (unpublished).

- c. Defendant's rights/obligations/defenses & ability to pay:
- Defendant may contest not only the amount of restitution, but also the fact of damage or causation. *State v. Madlock*, 230 Wis. 2d 324, 335, 602 N.W.2d 104 (Ct. App. 1999).
 - If restitution is not determined at sentencing, the defendant must be given a chance to contest or stipulate to a later restitution determination. *State v. Rodriguez*, 205 Wis. 2d 613, 556 N.W.2d 140 (Ct. App. 1996).
 - Some financial discomfort to the defendant is consistent with the rehabilitative goal of probation and rehabilitation. *State v. Foley*, 153 Wis. 2d 748, 754, 451 N.W.2d 796 (Ct. App. 1989).
 - The defendant's failure to present evidence on his financial resources and ability to pay, when given the chance to do so, bars a challenge to the court's failure to address such factors. *State v. Dugan*, 193 Wis. 2d 610, 624–25, 534 N.W.2d 897 (Ct. App. 1995); *State v. Boffer*, 158 Wis. 2d 655, 663, 462 N.W.2d 906 (Ct. App. 1990); *State v. Szarkowitz*, 157 Wis. 2d 740, 749–50, 460 N.W.2d 819 (Ct. App. 1990).
 - A defendant's failure to contest the imposition of restitution or the amount imposed constitutes a "constructive" stipulation to the restitution order, foreclosing future challenge. *State v. Hopkins*, 196 Wis. 2d 36, 538 N.W.2d 543 (Ct. App. 1995); *State v. Leighton*, 2001 WI App 156, 237 Wis. 2d 709, 616 N.W.2d 126.
 - It "may be" that a defendant's income should be assessed at pre-tax value, but a defendant must bring this argument to the circuit court. *State v. Foley*, 153 Wis. 2d 748, 753–54, 451 N.W.2d 796 (Ct. App. 1989).

ALSO→

- **Liability defenses:** Applying Wis. Stat. § 973.20(14)(b), the supreme court has held that a defendant may not raise “any defense” related to restitution, but instead a defense related only to the amount of loss at issue. A defendant is, for example, allowed to argue mitigation or satisfaction, but not contributory negligence or lack of jurisdiction. *State v. Sweat*, 208 Wis. 2d 409, 417–424, 561 N.W.2d 695 (1997).
 - For further discussion of *Sweat*, see *State v. Walters*, 224 Wis. 2d 897, 591 N.W.2d 874 (Ct. App. 1999) and *State v. Knoll*, 2000 WI App 135, 237 Wis. 2d 384, 614 N.W.2d 20.

TIP!

“Restitution is not a claim that is owned by an individual but a remedy of the State.” *State v. Knoll*, 2000 WI App 135, ¶ 16, 237 Wis. 2d 384, 614 N.W.2d 20.

- **Statute of limitations:** The same statute of limitations that governs the underlying criminal prosecution applies to related restitution proceedings. *State v. Sweat*, 208 Wis. 2d 409, 412, 561 N.W.2d 695 (1997).
- d. Setoffs, accord and satisfaction:
- The civil defense of “accord and satisfaction” does not bar a court from ordering restitution, but a court may consider a defendant’s payment to a victim in a civil proceeding when it determines the amount of restitution. *State v. Walters*, 224 Wis. 2d 897, 904-05, 591 N.W.2d 874 (Ct. App. 1999); *Herr v. Lanaghan*, 2006 WI App 29, 289 Wis. 2d 440, 710 N.W.2d 496.
 - A civil settlement agreement can have no effect upon a restitution order while the defendant remains under sentence or on probation unless the circuit court finds that enforcement of the restitution order would result in double recovery for the

victim. *Huml v. Vlazny*, 2006 WI 87, ¶¶ 50, 56, 293 Wis. 2d 169, 716 N.W.2d 807.

- But, after release from probation or completion of sentence, a civil agreement may, depending on its terms—such as a “global” agreement—preclude the victim from enforcing the judgment for unpaid restitution. *Huml v. Vlazny*, 2006 WI 87, ¶¶ 53–55, 293 Wis. 2d 169, 716 N.W.2d 807.
- The burden of demonstrating applicable setoff to restitution rests with the defendant. *State v. Walters*, 224 Wis. 2d 897, 591 N.W.2d 874 (Ct. App. 1999); *State v. Behnke*, 203 Wis. 2d 43, 553 N.W.2d 265 (Ct. App. 1996).

*****BUT→**

- In securities fraud case, the defendant’s interest payments to investors were not returns of capital that would warrant their deduction from restitution amount. *State v. Anderson*, 215 Wis. 2d 673, 573 N.W.2d 872 (Ct. App. 1997).
- The defendant’s claim that the victims owed more money to him on a separate contract than the amount of restitution that the defendant owed them is a matter for litigation in the civil courts and does not defeat restitution. *State v. Sobkowiak*, 173 Wis. 2d 327, 341, 496 N.W.2d 620 (Ct. App. 1992).
- Although the defendant took only a percentage of the stolen money, with the rest taken by his accomplices, the defendant nonetheless could be ordered to pay restitution for full amount of the theft. *State v. Huntington*, 132 Wis. 2d 25, 389 N.W.2d 74 (Ct. App. 1986).

*****ON THE OTHER HAND→**

- Reopening civil judgment to allow consideration of whether to offset restitution ordered in related criminal case may be justified. *Herr v. Lanaghan*, 2006 WI App 29, ¶ 18, 289 Wis. 2d 440, 710 N.W.2d 496.

e. Applying bail:

- **For bail deposited on or after June 6, 2006:** Wis. Stat. § 969.03(4) allows bail to be applied to restitution after a judgment of conviction. *See also* Wis. Stat. § 969.13(5) (forfeited bail shall be applied to payment of recompense to victim). But if a surety posted bail and “surrenders” the defendant back into custody before a judgment of conviction is entered, the surety can avoid losing bail. *State v. Iglesias*, 185 Wis. 2d 118, 144 n.8, 517 N.W.2d 175 (1994).
- **For bail deposited before June 6, 2006:** the trial court cannot order a defendant’s cash bail to be applied to restitution. *Olson v. Kaprelian*, 202 Wis. 2d 377, 382, 550 N.W.2d 712 (Ct. App. 1996); *State v. Cetnarowski*, 166 Wis. 2d 700, 710, 480 N.W.2d 790 (Ct. App. 1992).

f. Prison wages and other money:

Note: Wis. Stat. § 973.20(11)(c) now expressly states that the defendant must authorize DOC to collect restitution from the prisoner’s prison trust fund in an amount that DOC determines is reasonable.

In *State v. Williams*, 2018 WI App 20, 380 Wis. 2d. 440, 909 N.W.2d 177, the defendant challenged DOC’s collection of restitution from his prison trust account. The court of appeals held that the circuit court, sitting in its role as the sentencing court, lacked competency to address the defendant’s motion.

The court said that the defendant's recourse was with the inmate complaint review system. Further, the court held that DOC's collection did not violate the defendant's judgment of conviction.

NEW!

In *State ex rel. Markovic v. Litscher*, 2018 WI App 44, 383 Wis. 2d 576, 916 N.W.2d 202, the court of appeals held that DOC is not authorized under Wis. Stat. § 303.01(8)(b) to withhold an inmate's earnings to satisfy a restitution award on a sentence he has already completed, but it may withhold it under Wis. Stat. § 301.32(1) because it is for his benefit.

- **Prison wages:** Restitution **can** be withheld from a defendant's prison wages. *State v. Baker*, 2001 WI App 100, 243 Wis. 2d 77, 626 N.W.2d 862; *State ex rel. Lindell v. Litscher*, 2005 WI App 39, 280 Wis. 2d 159, 694 N.W.2d 396.
- **Gifted funds:** Court can order a defendant to pay restitution from all of his financial resources, including gifted funds, available at time of restitution order and as funds become available to defendant at a later time. *State v. Greene*, 2008 WI App 100, 313 Wis. 2d 211, 756 N.W.2d 411.
- **Home equity:** In absence of defense objection, court could condition probation on payment of restitution secured by the equity in the defendant's home and, upon the defendant's nonpayment, could force the sale of the home and apply the proceeds toward restitution. *State v. Dziuba*, 148 Wis. 2d 108, 435 N.W.2d 258 (1989).

***NOTE: *Dziuba* is a condition of probation case with restitution ordered under the old restitution statute. Unclear if this matters.

***BUT→ Pension funds: Court **cannot** order the defendant to withdraw pension funds and transfer money to crime victims

to satisfy part of restitution that is owed. *State v. Kenyon*, 225 Wis. 2d 657, 663–71, 593 N.W.2d 491 (Ct. App. 1999).

E. Other matters

1. Bankruptcy: A defendant's discharge of his or her debts in a Chapter 7 bankruptcy does **not** enable the defendant to escape a restitution obligation. *State v. Foley*, 142 Wis. 2d 331, 336–37, 417 N.W.2d 920 (Ct. App. 1987); *State v. Sweat*, 202 Wis. 2d 366, 550 N.W.2d 709 (Ct. App. 1996), *rev'd on other grounds*, 208 Wis. 2d 409 (1997); *but see Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552 (1990) (dischargeable under Chapter 13 bankruptcy).

2. Nonpayment: Under § 973.20(1r), when probation or parole ends, or if the defendant was not placed on probation or parole, a restitution order "is enforceable in the same manner as a judgment in a civil action by the victim named in the order to receive restitution or enforced under ch. 785" [contempt of court].

3. Revoking or extending probation:

a. Civil judgment under § 973.09(3)(b):

- Ninety days before a defendant's probation is to expire, DOC shall notify court, DA and victim of unpaid restitution.
- If restitution is still owed, a probation review hearing is to be held unless waived by the defendant.
- If the court does not extend probation, it "shall issue a judgment for the unpaid restitution and direct the clerk of circuit court to file and enter the judgment in the judgment and lien docket," with notice of the civil judgment to be mailed to the defendant.

b. Extending probation under § 973.09(3)(c):

The court may extend a defendant's probation for any of the following reasons:

- If the probationer has not made a good faith effort to pay restitution;
- If the probationer and victim agree to the probationer's performance of community service during an extension of probation in satisfaction of the unpaid restitution; or
- If the probationer stipulates to the extension of probation to pay restitution

Then probation may be extended. Wis. Stat. § 973.20(3)(c)1–3.

*****BUT→**

- A probationer's failure to pay restitution is **not** cause for extending probation if the probationer has shown a good faith effort to pay but lacks the ability to pay during the probation period. *State v. Jackson*, 128 Wis. 2d 356, 382 N.W.2d 429 (1986); *State v. Davis*, 127 Wis. 2d 486, 381 N.W.2d 333 (1986); *Huggett v. State*, 83 Wis. 2d 790, 266 N.W.2d 403 (1978).
- If probationer can show newly discovered evidence that trial court lacked cause to extend probation so that probationer is entitled to release from probation, unpaid restitution should be reduced to a civil judgment. *State v. Gudgeon*, 2006 WI App 143, 295 Wis. 2d 189, 720 N.W.2d 114.

4. Overcollection: Although DOC erroneously took money from the defendant's prison account to pay for restitution after restitution obligation no longer existed, the defendant could not recoup the

overage by a postconviction action in the criminal case, but instead had to pursue a separate suit against the State. *State v. Minniecheske*, 223 Wis. 2d 493, 590 N.W.2d 17 (Ct. App. 1998).

5. Wisconsin Constitution Article I, § 9m: This constitutional provision, which requires the State to “treat crime victims, as defined by law, with fairness, dignity and respect for their privacy,” is a statement of purpose and does not provide an enforceable, self-executing right. *Schilling v. State Crime Victims Rights Board*, 2005 WI 17, ¶ 1, 278 Wis. 2d 216, 692 N.W.2d 623.