

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 1, 2009

David R. Schanker
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. 2009AP426-CR

Cir. Ct. No. 2008CM761

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAEGEN J. THOMAS,

DEFENDANT-APPELLANT.

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

¶1 FINE, J. Jaegen J. Thomas pled guilty, as party to a crime, to misdemeanor theft of movable property with a value of less than \$2,500. See WIS. STAT. §§ 943.20(1)(a), (3)(a) & 939.05. He contends that the judgment making him jointly and severally liable for restitution with his co-actor violates his right to due process under both the federal and Wisconsin constitutions. This contention

was rejected by the circuit court in an order denying Thomas's motion for postconviction relief. Thomas appeals.¹

¶2 WISCONSIN STAT. § 973.20(7) provides, as material: “If more than one defendant is ordered to make [restitution] payments to the same person, the court may apportion liability between the defendants or specify joint and several liability.” Statutes are presumed to be constitutional and a party contending otherwise must show that beyond a reasonable doubt. *Aicher ex rel. LaBarge v. Wisconsin Patients Comp. Fund*, 2000 WI 98, ¶¶18–19, 237 Wis. 2d 99, 110–111, 613 N.W.2d 849, 857. Thomas concedes on appeal that “the damage done [to the victim] was not divisible, the defendant and his co-defendant were jointly responsible for the offense, and each can be said in some sense to be 100 percent responsible for it.” He also does not challenge the circuit court's setting of restitution at \$2521.30, and did not request a hearing to determine the proper amount of restitution even though he had such a right under § 973.20(13) & (14).²

¹ The judgment convicting Thomas was entered August 11, 2008. The circuit court's order denying Thomas's motion for postconviction relief was entered January 27, 2009. Thomas's notice of appeal, filed with the circuit court on February 16, 2009, does not reference the judgment. It recites that Thomas's appeal “will be taken from the orders [of] the Circuit Court for Milwaukee County, Branch 46, Hon. Bonnie L. Gordon, entered on June 6, 2008 and August 1, 2008 (convicting the defendant and issuing sentence, respectively).” June 6, 2008, was when Thomas pled guilty. He was sentenced on August 1, 2008. The appeal is properly from the judgment, not the circuit court's oral determinations. See *State v. Malone*, 136 Wis. 2d 250, 257–258, 401 N.W.2d 563, 566 (1987). Nevertheless, we have jurisdiction over Thomas's appeal in connection with the judgment. See WIS. STAT. RULE 809.10(1)(f) (“An inconsequential error in the content of the notice of appeal is not a jurisdictional defect.”); *State v. Long*, 163 Wis. 2d 261, 263 n.1, 471 N.W.2d 248, 249 n.1 (Ct. App. 1991) (appeal from non-final order denying a motion to suppress evidence construed to encompass the judgment of conviction when the appeal was filed after entry of the judgment). Thomas's notice of appeal correctly identifies the circuit court's order denying his motion for postconviction relief. Judge Gordon accepted Thomas's guilty plea and imposed sentence. The Honorable Raymond E. Gieringer, reserve judge, denied Thomas's motion for postconviction relief.

² Thomas also does not argue that he could not be legally ordered to pay more than the \$2,500-threshold under which he was charged and to which he pled guilty.

Indeed, in response to the prosecutor's assertion at the sentencing hearing that the proper restitution was "\$2,521.30," Thomas's lawyer asked the circuit court "to set the restitution as outlined by the State. Mr. Thomas is more than willing to pay that back as best he can." The only issue on appeal is whether the circuit court violated Thomas's due-process rights in following § 973.20(7) and imposing a joint-and-several restitution obligation.

¶3 Although Wisconsin case law recognizes that, as WIS. STAT. § 973.20(7) permits, sentencing courts may impose joint and several liability for restitution, *see State v. Madlock*, 230 Wis. 2d 324, 336, 602 N.W.2d 104, 110 (Ct. App. 1999) ("If damage results from a criminal episode in which the defendant's conduct played only a small and isolated part, the defendant is nonetheless properly held to pay restitution on a joint and several basis."), Thomas argues that joint-and-several liability unfairly puts the amount he will have to pay, at least initially, in the hands of his co-actor, and, without specifying a distinction between the federal and Wisconsin constitutions, argues that this deprives him of due process. We disagree.

¶4 First, he acknowledges that he could be fairly asked to pay all of the \$2521.30. Second, as the State points out, and as Judge Gieringer recognized in denying Thomas's motion for postconviction relief, if Thomas pays more than what he believes is his fair share of the \$2521.30, he can seek contribution from his co-actor. *See McGee v. Bates*, 2005 WI App 19, ¶6, 278 Wis. 2d 588, 593–594, 691 N.W.2d 920, 923. Further, in signing the guilty-plea-and-waiver-of-rights questionnaire before pleading guilty, Thomas acknowledged that the plea bargain offered by the State and accepted by him called for, as handwritten on the questionnaire, "restitution – jt. + several." He thus waived his right to complain about that on appeal. *See State v. Randle*, 2002 WI App 116, ¶16, 252 Wis. 2d

743, 752, 647 N.W.2d 324, 329. Thomas has not explained why he should not be held to that bargain, and has also not demonstrated that either WIS. STAT. § 970.23(7) is unconstitutional or the circuit court denied him his right to due process.³ Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4

³ Thomas asserts that restitution can not only implicate the United States Constitution’s Eighth-Amendment prohibition against the imposition of excess fines, citing *State v. Izzolena*, 609 N.W.2d 541 (IA 2000), but also has a “punishment” component under Wisconsin law. *Izzolena* upheld application of an Iowa statute that directed sentencing courts “[i]n all criminal cases in which the offender is convicted of a felony in which the act or acts committed by the offender caused the death of another person” to impose at least \$150,000 “in restitution to the victim’s estate” over and above money designed to compensate the “victim for pecuniary damages.” *Id.*, 609 N.W.2d at 546. *Izzolena* is inapposite here because the restitution amount, to which Thomas agreed, was no more than that to make the victim whole. Further, restitution in Wisconsin is primarily designed to make victims whole, although it also “makes at least some of the injury inflicted upon the victim tangible to the defendant.” *Huml v. Vlazny*, 2006 WI 87, ¶20, 293 Wis. 2d 169, 182, 716 N.W.2d 807, 813. It does not follow that making Thomas jointly and severally liable for the restitution violates his due-process rights; any resulting punishment serves, as *Huml* recognizes, the legitimate interest to help right the scales of justice that were skewed by his crime.

