

REPORT AND RECOMMENDATION OF THE WISCONSIN CRIME VICTIMS RIGHTS BOARD

Wisconsin Statutes section 950.09(3) authorizes the Crime Victims Rights Board ("Board") to "issue reports and recommendations concerning the securing and provision of crime victims' rights and services." The Board has become aware of a situation that raises concerns about the manner in which circuit courts might determine whether a victim wanted to make an oral victim impact statement at a sentencing hearing. The situation also provides the Board with an opportunity to commend to courts, prosecutors, and victim witness professionals the best practice for determining whether a crime victim wants to make an oral victim impact statement at sentencing.

Factual Background

Soon after a homicide case was filed against the mother of a child victim, the child's father submitted a written victim impact statement to the district attorney's office, expressing disagreement with the decision to prosecute the defendant, and specifically stating that, if the defendant was sentenced he would like to speak as the child's father. Pursuant to its regular practice, the district attorney's office transmitted the written victim impact statement to the circuit court assigned to the case. The assigned judge read the father's victim impact statement when it arrived. More than seven months later, the defendant pleaded no contest to a reduced charge. A sentencing hearing was scheduled for approximately two months later. Between the date of the plea and the date of the sentencing hearing, the child's father submitted a letter in support of the defendant, describing the emotional effect the loss of his son had on him and on the defendant.

The judge, the prosecutor, and the defendant's counsel met in chambers on the day of the sentencing hearing prior to the start of the hearing. Until that time, the judge expected that the child's father would make an oral victim impact statement in court. The prosecutor told the judge that the state would put on an expert witness and would present no other testimony. The defense counsel told the judge that the defense would not be calling anyone, but would rely on letters previously sent to the court. The prosecutor also told the judge that the child's father was present in court but that the prosecutor understood that the father would not be saying anything. Based on that information, the judge came to the view, though unexpressed, that the child's father did not want to make an oral victim impact statement. The judge did not know at that time that the prosecutor had no personal knowledge as to whether the father wanted to make an oral statement in court, but instead had drawn a mistaken inference from the prosecutor's earlier conversation with defense counsel.

The court recognized at the beginning of the sentencing hearing that the child's father was present in the courtroom. At the sentencing hearing, the expert witness was examined by both counsel. After the completion of the witness's testimony, the court asked both the prosecutor and the defense counsel whether they had any other testimony, and both said no. The court then heard the attorneys' oral arguments, asked the defendant whether she wished to say anything, and proceeded directly to imposing sentence on the defendant. At no time during the sentencing hearing did the court ask the child's father whether he wanted to make an oral statement to the court. The judge's determination that the child's father had changed his mind and no longer wanted to make an oral victim impact statement was erroneous.

Statutes Involved

Wisconsin Stat. § 950.04(1v)(m) provides that victims of crime have the right to "provide statements concerning sentencing, disposition or parole, as provided under ss. 304.06(1)(e), 938.32(1)(b)1., 938.335(3m)(a) and 972.14(3)(a)."

Wisconsin Stat. § 972.14(3)(a) provides that:

Before pronouncing sentence, the court shall determine whether a victim of a crime considered at sentencing wants to make a statement to the court. If a victim wants to make a statement, the court shall allow the victim to make a statement in court or submit a written statement to be read in court. The court may allow any other person to make or submit a statement under this paragraph. Any statement under this paragraph must be relevant to the sentence.

Report and Recommendation

A circuit court's duties under Wis. Stat. § 972.14(3)(a) are twofold: first, to "determine whether a victim of a crime considered at sentencing wants to make a statement to the court;" and second, to "allow the victim to make a statement" to the court, orally or in writing according to the victim's choice. The circuit court made the first determination, though it did so erroneously.

The circuit court's duty to "determine" whether a victim wants to make a statement is not satisfied simply by making a "decision" one way or another. If a circuit court's erroneous decision is unreasonable, the mere fact that the decision was made will not be adequate to insulate the court from liability for violating a victim's right to make an oral statement at sentencing.

The reasonableness of the circuit court's erroneous determination that the child's father no longer wanted to make an oral statement at sentencing is not free from doubt. The judge knew from the father's written victim impact statement that the father opposed the prosecution decision. The judge knew that the father's written statement specifically requested the opportunity to speak as the child's father, in the event that the defendant was sentenced. The judge was aware that a victim's right to make an oral victim impact

statement at sentencing was not dependent upon the consent of the prosecution, the defendant, or the defendant's counsel. Based on the prosecutor's representation in chambers that the child's father was present in the courtroom, the judge reasonably should have expected that the child's father would be present in the courtroom when the sentencing hearing began. Up to the point of the meeting in chambers with the parties' attorneys, the judge expected that the child's father would make an oral victim impact statement at the sentencing hearing. The only contrary information presented to the judge was the prosecutor's expressed understanding that the child's father would not be saying anything.

Faced with such inconsistent information, the most reasonable course of action, and the best practice, would have been for the court to simply ask the child's father in open court whether he wanted to give an oral impact statement. Neither the prosecution nor the defense has the right to act as gatekeeper in determining whether a victim makes an oral statement to the court at sentencing. The prosecutor represents the state's interests in the prosecution, and those interests are not always fully consistent with the victim's interests. Courts should not rely on the representations of prosecutors in determining whether victims want to make statements at sentencing. Similarly, courts and prosecutors should not rely on the representations of defense counsel in determine whether victims they perceive to be favorable to the defendant want to make statements at sentencing. In sentencing hearings, victims have a status independent of any of the parties in the case, and the only reliable way for a court to determine whether a victim wants to make an oral statement is to ask the victim that question during the course of the sentencing hearing, prior to imposing sentence.

Following the sentencing hearing described above, the court has changed its practice, and now asks in every sentencing hearing whether there is a victim present in the courtroom who wants to make an oral victim impact statement. If the court determines from the response that the person is a victim and wants to make a victim impact statement, the court allows the victim to make that statement either from the witness stand or the gallery, in whichever place the victim feels most comfortable, so long as the victim is audible.

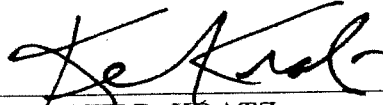
This circuit court's current approach in determining whether a victim wants to make a statement to the court, and in assisting the victim to exercise his or her right to make a statement at sentencing represents the best practice in this area. The Board recommends this practice to all circuit courts in the state.

Finally, the Board would discourage victim witness programs from sending victim impact statements to the court at the early stages of a pending case, since those statements are not relevant to the decisions that must be made by the court at the early stages of the case, and become relevant to the court only after conviction.

Giving victims an opportunity at the outset of the case to provide a written statement about the impact of the crime on their lives is not necessarily problematic as long as doing so does not foreclose victims from making new victim impact statements closer to the time of sentencing, that perhaps reflects the longer-term impact that a crime has had on their lives.

Best practice is for victim witness programs to retain early-filed victim impact statements until the prosecution has obtained a conviction, and to send the statements or any updated statement submitted by the victim(s) to the court at that time. The best practice for judges who receive victim impact statements prior to conviction is leave the victim impact statements in the file, unread, until they become relevant at the time of sentencing.

Dated this 21st day of DECEMBER, 2005.



KENNETH R. KRATZ
Chairperson
Crime Victims Rights Board

: Service list