

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING  
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

A.C.,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 2D18-1643
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
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Opinion filed December 11, 2020.

Appeal from the Circuit Court for Polk  
County; Mark H. Hofstad and Melissa  
Gravitt, Judges.

Howard L. Dimmig, II, Public Defender, and  
Matthew D. Bernstein, Assistant Public  
Defender, Bartow, for Appellant.

Ashley Moody, Attorney General,  
Tallahassee, and Chelsea N. Simms,  
Assistant Attorney General, Tampa, for  
Appellee.

KHOUZAM, Chief Judge.

A.C., a juvenile, timely appeals her adjudication and sentence for petit theft of a cell phone. She raises two claims that she set forth in her two motions for correction of disposition, which were filed pursuant to Florida Rule of Juvenile

Procedure 8.135(b)(2) and were deemed denied. We reverse and remand for further proceedings because the circuit court erred by (1) failing to make required findings before ordering restitution and (2) failing to give A.C. notice of her right to contest the \$100 public defender fee before imposing it.

### **I. Restitution**

A.C. argues that the trial court erred by failing to make any findings concerning what A.C. or her parent or guardian could reasonably be expected to pay or make. Section 985.437(2), Florida Statutes (2017), provides that "[w]hen restitution is ordered by the court, the amount of restitution may not exceed an amount the child and the parent or guardian could reasonably be expected to pay or make." "Although a child need not have a present ability to pay restitution, the court must make a finding as to the juvenile's expected earning capacity prior to setting an amount for restitution." S.S. v. State, 122 So. 3d 499, 503 (Fla. 4th DCA 2013). "In the absence of such findings, the appellate court must reverse the restitution order and remand for a hearing to determine the child's ability to pay." Id.

The State argues that this issue was not preserved for appellate review. However, A.C. sufficiently preserved this issue by raising it in a rule 8.135(b)(2) motion. See S.S., 122 So. 3d at 502 (concluding that issue of failure to make finding of ability to pay was properly preserved via the juveniles' rule 8.135(b)(2) motions); L.W. v. State, 163 So. 3d 598, 601 (Fla. 3d DCA 2015) ("L.W. did preserve the issue for appeal by informing the trial court that it was required to make a factual finding on L.W.'s reasonable ability to pay the order and also by filing his motion for postconviction relief

under [rule] 8.135(b)(2)."). The State correctly concedes that if this issue was properly preserved, A.C. is entitled to remand for a new restitution hearing.

Accordingly, because the record shows that the court did not make any findings regarding expected earning capacity prior to determining the amount of restitution, we reverse and remand for a new hearing on this issue.

## **II. Public Defender Fee**

A.C. also argues that the trial court erred by imposing the \$100 public defender fee without giving her notice of her right to contest this fee when imposing it at the disposition hearing. We agree. In Newton v. State, 262 So. 3d 849, 849-50 (Fla. 2d DCA 2018), this court held that the trial court erroneously denied Newton's motion to correct sentencing error "because contrary to our precedent and to the plain language of [Florida Rule of Criminal Procedure] 3.720(d)(1), read together with section 938.29(5), [Florida Statutes (2016),] the court had failed to give Newton notice of his right to a hearing to contest the \$100 fee when pronouncing its imposition at sentencing." We applied the same reasoning in the context of juvenile delinquency in J.S. v. State, 277 So. 3d 270, 276 (Fla. 2d DCA 2019).

We decline the State's request to recede from Newton. The State asks us to adopt the contrary reasoning set forth by the First District in Mills v. State, 177 So. 3d 984 (Fla. 1st DCA 2015) (en banc). But we have repeatedly reaffirmed our holding in Newton and have continued to certify conflict with Mills as we did in Newton. See, e.g., Aponte-Velez v. State, 45 Fla. L. Weekly D2417, D2417 (Fla. 2d DCA Oct. 28, 2020); J.A.R. v. State, 45 Fla. L. Weekly D2361, D2362 (Fla. 2d DCA Oct. 16, 2020).

In this case, the record shows that the trial court did not give A.C. notice of her right to a hearing to contest the \$100 public defender fee. Therefore, we must reverse and remand for the court to give A.C. notice and the opportunity to be heard before the \$100 public defender fee is imposed. We again certify conflict with the First District's decision in Mills and the Fourth District's decision in Alexis v. State, 211 So. 3d 81 (Fla. 4th DCA 2017).

Accordingly, we reverse and remand for proceedings consistent with this opinion.

Reversed and remanded; conflict certified.

NORTHCUTT and ROTHSTEIN-YOUAKIM, JJ., Concur.