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**IN THE
COURT OF APPEALS OF INDIANA**

JOHN HOUTS,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 07A01-0801-CR-42
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE BROWN CIRCUIT COURT
The Honorable Judith A. Stewart, Judge
Cause No. 07C01-0409-FD-397

June 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

John Houts was convicted of conversion,¹ as a Class A misdemeanor after a jury trial and was ordered to pay restitution to the victim as a condition of his probation. He appeals, raising the following restated issue: whether the trial court erred when it ordered him to pay restitution because it failed to inquire as to his ability to pay and because it considered the income of Houts's wife in its order.

We affirm.

FACTS AND PROCEDURAL HISTORY

In September 2003, Houts was a jail officer at the Brown County Jail. Ricky Lee Pedigo was an inmate at the jail awaiting transfer to the Department of Correction. Houts befriended Pedigo and learned that Pedigo was the primary beneficiary of his grandfather's estate. During their conversations, Pedigo explained that his grandfather's estate owed debts and other obligations and that a part of the estate's land would have to be sold to pay these obligations. Houts was able to locate a potential buyer for a five-acre parcel of land from the estate. Pedigo eventually agreed to sell the five-acre parcel to this man for \$10,000.00.

Houts became the estate's personal representative and also acquired Pedigo's power of attorney, which authorized him to pay any money and sign any documents necessary to preserve and maintain the remaining real estate from Pedigo's grandfather's estate. Pedigo wanted his assets, including his money, land, and mobile home maintained and available to him on his release from incarceration.

On September 18, 2003, Pedigo was transferred from the Brown County Jail to the Department of Correction, and Houts had him sign documents to open a bank account into

¹ See IC 35-43-4-3(a).

which the money from the estate was to be transferred. Pedigo assumed that the \$6,400.00 he had inherited from his grandfather would be held in the account, but did not realize that it was a checking account on which Houts could write checks.

Pedigo believed that Houts should receive compensation for serving as personal representative of the estate and for maintaining the property and thought \$1,000.00 was a proper amount. Houts said they should put off discussions of the amount until a later time. Pedigo did not get a copy of the closing documents and did not know that Houts had received \$500.00 for serving as the estate's personal representative.. During the next several months, Pedigo was in contact with Houts about his property, and Houts indicated that he was maintaining the property. During this time, Houts deposited \$400.00 into Pedigo's Department of Correction trust account; later, he told Pedigo he deposited an additional \$300.00, but Pedigo never received it. In January 2004, Pedigo was no longer able to call Houts collect because "the phone wouldn't accept the calls anymore." *Tr.* at 79.

Pedigo was paroled in the summer of 2004. When Pedigo went to the mobile home on his property, he was surprised to find it had been "ransacked," the roof was sagging, and the floor was so rotted that the home was uninhabitable. Pedigo asked Houts for money to buy a car after he was released, but although Houts promised to send it, the money never arrived. When Pedigo learned that bad checks were being written on an account in his name, he met with Detective Scott Southerland of the Brown County Sheriff's Department. After this meeting, Detective Southerland obtained canceled checks written on Pedigo's account to Houts, cash, IGA, Wal-Mart, an automobile dealer, and Houts's wife. The balance in Pedigo's account was only \$43.15.

The State charged Houts with theft as a Class D felony. A jury trial was held on August 8 and 9, 2007, and the jury found Houts not guilty of theft, but guilty of the lesser included offense of conversion as a Class A misdemeanor. At the sentencing hearing, the trial court stated:

Considering all of that, I think that what an award of restitution that is supported by the evidence is [\$3,000.00]. And that's what the court's award will be. [\$3,000.00] on restitution. Rather than setting up exact payments, I'm just going to make payment of that a condition of probation as well as a condition of the sentence. And in making that a condition of probation, what I'm considering in terms of ability to pay, is that while you're only receiving [\$400.00] a month, right now your expenses are being able to be primarily met by your wife's employment so that you don't have, on your own shoulders, all of the expenses that someone would have without a second income into the home.

Id. at 547-48. At the hearing, Houts had testified that he received \$400.00 per month in military disability, but that he was not under any doctor's orders not to work. He also stated that his wife was employed and gave \$30,000.00 as a "ballpark" estimate as to how much she makes annually. *Id.* at 522. He testified that his nineteen-year-old child still lived at home and that his house payment was \$900.00 per month. Houts had also previously provided the trial court with information regarding his assets and expenses in his affidavit for appointed counsel. *Appellant's App.* at 70-72. The trial court further sentenced Houts to 180 days incarceration, all suspended except for one day already served. Houts now appeals.

DISCUSSION AND DECISION

As a condition of Houts's probation, the trial court ordered him to pay \$3,000.00 in restitution to Pedigo. The State argues that Houts has waived any challenge to the restitution order because he did not object to it at the time it was entered. "However, 'the issue of

whether a trial court has exceeded its authority in ordering restitution may be raised for the first time on appeal.”” *Laker v. State*, 869 N.E.2d 1216, 1220 (Ind. Ct. App. 2007) (quoting *Rumple v. State*, 529 N.E.2d 861, 864 (Ind. Ct. App. 1988), *trans. denied* (citing *People v. Evans*, 461 N.E.2d 634 (Ill. App. Ct. 1984))). Because the trial court ordered restitution as a part of Houts’s sentence, ““we treat this question like any other claim that a trial court has violated its statutory authority in imposing sentence, which amounts to fundamental error, and which may be raised for the first time on appeal.”” *Laker*, 869 N.E.2d at 1220 (quoting *Green v. State*, 811 N.E.2d 874, 877 (Ind. Ct. App. 2004)). Houts has not waived this issue, and we will address it on its merits.

Pursuant to IC 35-38-2-2.3(a), as a condition of probation, a trial court may order a defendant to:

Make restitution or reparation to the victim of the crime for damage or injury that was sustained by the victim. When restitution or reparation is a condition of probation, the court shall fix the amount, which may not exceed an amount the person can or will be able to pay, and shall fix the manner of performance.

IC 35-38-2-2.3(a)(5). “Although this statute does not specify the manner in which a trial court must inquire into the defendant’s ability to pay, the trial court must make such an inquiry.” *Laker*, 869 N.E.2d at 1220. This inquiry is required to ensure that a defendant is not imprisoned based on his inability to pay restitution. *Id.* at 1220-21. When a trial court makes this inquiry, it should consider factors such as the defendant’s current financial status, health, and employment history. *Id.* at 1221. Although a trial court may hold a hearing on the defendant’s ability to pay restitution, it is not required to do so, and “may make a proper

inquiry, depending on the circumstances, by such actions as reviewing the pre-sentence report and questioning witnesses.” *Id.*

Houts argues that the trial court erred when it ordered him to pay restitution as a condition of his probation because it did not inquire into his ability to pay restitution. He specifically contends that the trial court should have inquired into what amounts he owed on medical bills, utilities, and other necessities and examined what assets he owned at the time of the hearing. Additionally, he claims that it was error for the trial court to take his wife’s income into account in determining Houts’s ability to pay restitution.

Here, during the sentencing hearing, evidence was presented that Houts received \$400.00 per month in military disability pay due to a back injury he sustained during his service in the military and that this injury did not prevent him from working completely. *Tr.* at 522-23, 532. Houts also presented evidence that he had previously had heart surgery and was diagnosed with diabetes. *Id.* at 525. He had provided information regarding his medical bills in his application for appointed counsel, which included an explanation of benefits form showing that he owed less than \$750.00 in uninsured medical expenses. *Appellant’s App.* at 72. Evidence was also presented that Houts had a house payment of \$900.00 per month, and he owned a car worth \$500.00. *Tr.* at 530; *Appellant’s App.* at 70. Additionally, Houts testified that he was married, his wife made approximately \$30,000.00 per year, and that they had a nineteen-year old son who lived with them. *Tr.* at 522-23, 529. Therefore, this information was adequate to allow the trial court to make an informed and fair decision as to Houts’s ability to pay restitution. We conclude that the trial court made a sufficient inquiry into Houts’s ability to pay restitution and did not err in its restitution order.

Houts also contends that the trial court erred when it considered his wife's income in its inquiry about Houts's ability to pay restitution. He claims that this was error because she was not a party to the case, and judgments only bind "parties and their privies." *Appellant's Br.* at 14-15 (citing *Ind. State Highway Comm'n v. Speidel*, 181 Ind. App. 448, 453, 392 N.E.2d 1172, 1175 (1979)). At the sentencing hearing, when ordering restitution, the trial court stated that, in its consideration of Houts's ability to pay, it took into account "that while you're only receiving [\$400.00] a month, right now your expenses are being able to be primarily met by your wife's employment so that you don't have, on your own shoulders, all of the expenses that someone would have without a second income into the home." *Tr.* at 548.

We do not believe that this was an impermissible consideration, as the trial court was not finding Houts's wife to be responsible for making restitution to Pedigo. It was simply determining what hardship the restitution order may have on the Houts and whether he could still subsist after the restitution payments were made. "Imposition of restitution is a form of punishment and although it may cause some hardship, the trial court has discretion to determine the extent of the hardship and whether the defendant can still subsist after the payments." *Mitchell v. State*, 559 N.E.2d 313, 315 (Ind. Ct. App. 1990), *trans. denied*. The trial court did not err in its consideration of Houts's wife income in ordering restitution.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.