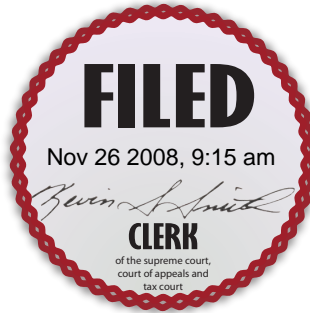


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

THOMAS M. THOMPSON
Thompson Law Firm
Connersville, Indiana

STEVE CARTER
Attorney General of Indiana

MARJORIE LAWYER-SMITH
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

DAVID DREW,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 21A05-0803-CR-148

APPEAL FROM THE FAYETTE CIRCUIT COURT
The Honorable Daniel Lee Pflum, Judge
Cause No. 21C01-0604-FD-105

November 26, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

David Drew appeals the trial court's judgment directing him to pay \$120,434.60 in restitution to Willie J. Wells. We affirm.

Issue

The sole restated issue is whether the trial court properly ordered restitution without inquiring into or making findings regarding Drew's ability to pay it.

Facts

Drew, along with two other individuals, stole large quantities of copper wire from a building owned by Wells in Fayette County. The State charged Drew with Class D felony theft, Class A misdemeanor criminal mischief, and alleged that he was an habitual offender. Drew agreed to plead guilty to theft and to being an habitual offender, with the State dismissing the criminal mischief charge. The sentence was set at a total of six years, with five years executed and one year suspended to be served on probation. The plea agreement also required Drew to pay restitution to Wells, but did not set the amount.

At Drew's sentencing hearing, the trial court took the amount of restitution under advisement. The sentencing order the trial court issued on September 4, 2007, was a preprinted form that included a box for restitution. On one side of this box was printed, "RESTITUTION IS A JUDGMENT LIEN I.C. 35-50-5-3(b)." App. p. 10. On the other side of the box was printed, "THE DEADLINE FOR PAYING RESTITUTION TO THE

CLERK IS 30 DAYS BEFORE THE END OF PROBATION [I.C. 35-38-2-3(f)(m)].”¹

Id. Also in this box was handwritten, “separate restitution shall be set.” App. p. 10.

The trial court conducted a restitution hearing on February 6, 2008. The State presented extensive evidence regarding the labor and materials cost of replacing the copper wire stolen from Wells’ building, which came to \$120,434.60. Drew also testified regarding his limited education and job opportunities, and that it would be “extremely difficult” to pay over \$120,000.00 in restitution. Tr. p. 87. At the conclusion of the hearing, the trial court stated, “There’s 2 different areas. One is a Judgment of Restitution, which may or may not be collected and then there’s the amount of restitution that we can order through probation to make ‘em pay. That’s what I need to look at so I’ll issue a ruling.” Id. at 93-94.

On February 11, 2008, the trial court entered a “Judgment of Restitution,” which stated in full, “The Court having taken the question of restitution under advisement, and being duly advised, now enters a Judgment against each Defendant jointly and severally in the amount of \$120,434.60 in favor of Willie J. Wells.” App. p. 29. Drew then was found indigent for purposes of appeal, as he was for purposes of trial, and appointed counsel. He now appeals the restitution judgment.

Analysis

Drew contends the trial court erred in entering a large restitution order without inquiring into or making any findings regarding his ability to pay that amount. A

¹ This statute does not contain a deadline for paying restitution.

restitution order must be supported by evidence of actual loss sustained by the victim or victims of a crime. Rich v. State, 890 N.E.2d 44, 49 (Ind. Ct. App. 2008), trans. denied. We review a restitution order for an abuse of discretion. Id. If there is sufficient evidence to support the trial court’s decision, we will affirm. Id. However, trial courts also are bound to comply with the applicable statutes when ordering restitution. Id. Whether a restitution order complies with the statutes is a question of law we review de novo. See id.

If a trial court enters an order of restitution as a condition of probation, the court is required to inquire into the defendant’s ability to pay. Pearson v. State, 883 N.E.2d 770, 772 (Ind. 2008) (citing Ind. Code § 35-38-2-2.3(a)(5)). “This is so in order to prevent indigent defendants from being imprisoned because of a probation violation based on a defendant’s failure to pay restitution.” Id. Alternatively, a trial court may order restitution as part of a defendant’s sentence wholly apart from probation. Id. at 772-73. If restitution is not ordered as a condition of probation or of a suspended sentence, an inquiry into the defendant’s ability to pay is not required. Id. at 773. In such a situation, restitution is merely a money judgment and a defendant cannot be imprisoned for non-payment. Id. (citing I.C. § 35-50-5-3(b)). In other words, restitution in this situation is like any other money judgment, as in a civil tort action where the amount of damages is measured by the plaintiff’s injuries and is not at all contingent upon the defendant’s ability to pay. Additionally, the expiration of a probationary period does not terminate an obligation to comply with a restitution order. Id. (citing I.C. § 35-50-5-3(f)).

Although the trial court's orders in this case could have been better drafted, we believe it is clear the trial court's judgment of restitution in this case was not intended to be a condition of Drew's probation or one-year suspended sentence. Although the original sentencing order said, in part, that restitution had to be paid no later than thirty days before the end of probation, that same order also stated that restitution would be ordered separately. This boilerplate language in the sentencing order regarding the restitution deadline does not apply to the separately-ordered restitution.

Moreover, the actual "Judgment of Restitution" makes no mention of probation or Drew's suspended sentence or in any way indicates that his probation could be revoked for failure to pay. App. p. 29. We further observe that the judgment imposes joint and several liability for restitution upon Drew and his two co-defendants. It would be unworkable to condition Drew's suspended sentence or continuation of probation upon a restitution order for which two other persons are jointly liable.

As indicated at the restitution hearing, the trial court was fully cognizant that it had two options in ordering restitution: as a separate money judgment, or as a condition of probation. The manner in which the trial court worded its restitution order leaves no doubt that it chose the first option. The restitution order is undeniably large and may be an albatross around Drew's neck for years to come, but he may not be imprisoned or have his probation revoked for failing to pay it. As such, no inquiry into Drew's ability to pay the restitution was required. See Pearson, 883 N.E.2d at 773. Drew does not otherwise challenge the sufficiency of the evidence supporting the restitution order.

Conclusion

The trial court did not abuse its discretion in ordering restitution in the amount of \$120,434.60 as a separate judgment and not a condition of Drew's probation or suspended sentence. We affirm.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.