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**IN THE
COURT OF APPEALS OF INDIANA**

CHARLES DALE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A05-0603-CR-141

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Reuben Hill, Judge
Cause No. 49F18-0410-FD-192930

October 24, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Charles Dale (Dale), appeals the trial court's Order of restitution as a condition of probation.

We affirm.

ISSUE

Dale raises one issue on appeal, which we restate as: Whether the trial court abused its discretion in ordering Dale to pay restitution as a term of his probation without inquiring as to his ability to pay.

FACTS AND PROCEDURAL HISTORY

On March 2, 2005, Dale pled guilty to theft and was sentenced to 1,095 days in the Department of Correction with 550 days suspended and one year of probation. As a condition of his probation, he was ordered to make restitution to the victim in the amount of \$500.44 in six installments over six months during his probation.

On August 5, 2005, the State filed a notice of probation violation for Dale's failure to report to probation after release from the Department of Correction. On August 11, 2005, the State amended the notice of probation violation to reflect Dale's arrest and new charge of resisting law enforcement on August 8, 2005. At the revocation hearing on September 9, 2005, the trial court found Dale to be in violation of his probation, ordered him to serve the previously suspended sentence, and imposed a civil judgment.

Dale now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Dale contends that the trial court abused its discretion by ordering him to pay restitution as a term of his probation without making a specific inquiry regarding his ability to pay. However, prior to addressing the issue raised by Dale, we must address the State's argument that Dale's claim on appeal is moot because Dale had already violated his probation and his probation was revoked on a basis other than the restitution order. Accordingly, even if Dale would prevail, the State maintains that this would not alter the fact that probation was properly revoked. Additionally, as a further argument that Dale's claim is moot, the State argues that the trial court converted the restitution order into a civil judgment.

The long-standing rule in Indiana courts has been that a case is deemed moot when no effective relief can be rendered to the parties before the court. *Hamed v. State*, 852 N.E.2d 619, 621 (Ind. Ct. App. 2006). When the concrete controversy at issue in a case has been ended or settled, or in some manner disposed of, so as to render it unnecessary to decide the question involved, the case will be dismissed. *Id.* at 621-622. However, a case may be decided on its merits under an exception to the general rule when the case involves questions of "great public interest." *Id.* at 622 (quoting *Matter of Lawrence*, 579 N.E.2d 32, 37 (Ind. 1991)). Cases found to fall within the public interest exception typically contain issues likely to recur. *Id.* Further, an appeal may be heard which might otherwise be dismissed as moot where leaving the judgment undisturbed might lead to negative collateral consequences. *Roark v. Roark*, 551 N.E.2d 865, 867 (Ind. Ct. App. 1990) (noting that it is far better to eliminate the source of a potential legal disability than

to require the citizen to suffer the possibly unjustified consequence of the disability itself for an indefinite period of time.) Thus, we will address the merits of Dale's claim because the issue is likely to recur and because of the possible negative collateral consequences involved.

Turning to Dale's argument, he contends the trial court abused its discretion in ordering him to pay restitution as a term of his probation without making a specific inquiry as to his ability to pay. We disagree. Sentencing decisions are within the sound discretion of the trial court. *Jones v. State*, 790 N.E.2d 536, 539 (Ind. Ct. App. 2003). When reviewing an order of restitution, we will reverse such an order only upon a showing that an abuse of discretion occurred. *Jaramillo v. State*, 803 N.E. 2d 243, 250 (Ind. Ct. App. 2004), *trans. granted on other grounds*. Moreover, 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*.

Ind. Code § 35-38-2-2.3(a)(5) states, "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." Interpreting the statute, we have stated that, "[a]lthough the statute requires the trial court to determine the defendant's ability to pay the amount of restitution ordered, it is not specific as to the form the court must follow in determining the defendant's financial status." *Antcliff v. State*, 688 N.E.2d 166, 170 (Ind. Ct. App. 1997). Further, in *Mitchell*, we found that review of a pre-sentence investigation report prepared by a probation officer, an officer of

the court, containing the defendant's financial and employment status was adequate to allow the trial court to make an informed and fair decision as to the amount of restitution to be paid. *Mitchell*, 559 N.E.2d at 315. *See also Maxwell v. State*, 455 N.E.2d 1171, 1176 (Ind. Ct. App. 1983), *reh'g denied, trans. denied* (holding that the trial court did not abuse its discretion in ordering restitution "so long as [the defendant] was not required to pay any significant percentage of the total in any one payment").

Here, in preparing its order of restitution, our review shows the trial court considered Dale's ability to pay. The record indicates that the trial court had been advised during the hearing by Dale's attorney that Dale worked for a construction company and also had a part-time job. It was proper for the trial court to rely on this information made part of the record by Dale's attorney, an officer of the court. Therefore, although the court did not make a specific inquiry of the defendant regarding his ability to pay, no such inquiry was required, as the court was adequately informed by Dale's counsel. *See Mitchell*, 559 N.E.2d at 315. Moreover, as required by statute, the court fixed both the amount and manner of performance for the restitution to be paid by the defendant. *See I.C. § 35-38-2-2.3(a)(5)*. Thus, we find that the trial court did not abuse its discretion by ordering Dale to pay restitution as a term of his probation without making a specific inquiry into his ability to pay. Accordingly, we must decline Dale's invitation to invade the purview of the trial court's discretion.

CONCLUSION

Based on the foregoing, we find the trial court did not abuse its discretion in ordering Dale to pay restitution as a term of his probation without making a specific inquiry as to his ability to pay.

Affirmed.

BAILEY, J., and MAY, J., concur.