STATE OF MINNESOTA

IN SUPREME COURT

A20-0857

Court of Appeals — Thissen, J.

State of Minnesota,

Respondent,

vs.

Filed: December 22, 2021
Office of Appellate Courts

Darrell James Wigham,

Appellant.

Cathryn Middlebrook, Chief Appellate Public Defender, Adam Lozeau, Assistant State Public Defender, Saint Paul, Minnesota, for appellant.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Kristen Nelsen, Mower County Attorney, Austin Minnesota; and

Scott A. Hersey, Special Assistant Mower County Attorney, Austin, Minnesota, for respondent.

S Y L L A B U S

When ordering restitution under Minn. Stat. § 611A.045, subd. 1 (2020), a district court must expressly state, either orally or in writing, that it considered the defendant's income, resources, and obligations. The district court need not make express findings about the defendant's income, resources, and obligations, but the record must include

sufficient evidence about the defendant's income, resources, and obligations to allow a district court to consider the defendant's ability to pay the amount of restitution ordered.

Reversed and remanded.

O P I N I O N

THISSEN, Justice.

A district court is required to consider the defendant's income, resources, and obligations when it is determining whether to award restitution and the amount of restitution. *See* Minn. Stat. § 611A.045, subd. 1(a)(2) (2020). In this case, neither the parties nor the county probation office provided meaningful information to the district court about appellant Darrell Wigham's income, resources, and obligations. After a restitution hearing that focused on the timeliness of the restitution request and the amounts of the victims' losses, the district court ordered Wigham to pay a total of $87,500 in restitution to two victims. The record does not reflect that the district court considered Wigham's ability to pay.[1]

We hold that a district court must expressly state, either orally or in writing, that it has considered a defendant's income, resources, and obligations when ordering restitution, and that the record must include sufficient evidence about the defendant's income, resources, and obligations to allow a district court to consider the defendant's ability to pay

[1] We have referred to "the income, resources, and obligations of the defendant" as the defendant's "ability to pay." *See, e.g.*, *State v. Boettcher*, 931 N.W.2d 376, 380 (Minn. 2019); *State v. Riggs*, 865 N.W.2d 679, 683 (Minn. 2015); *State v. Lopez-Solis*, 589 N.W.2d 290, 293 (Minn. 1999).

the amount of restitution ordered. Accordingly, we reverse the decision of the court of appeals and remand to the district court for further proceedings on restitution.

FACTS

A fire destroyed the home of the victim homeowner in this case. Following an investigation into the fire's origins, Wigham was charged with several crimes, including arson. Wigham entered an *Alford* plea[2] to first-degree arson, and the Mower County District Court dismissed all remaining related counts. Before sentencing, a presentence investigation report (PSI) was completed. The PSI summarized Wigham's incarceration and probation history, recommended the presumptive 88-month sentence, and recorded the restitution requested as of the date of filing. But the PSI included neither any information on Wigham's income, resources, or obligations, nor any discussion of his ability to pay restitution.

Both the homeowner and his insurer submitted affidavits of restitution. The insurance company's affidavit requested $71,500 in restitution for payments made to the homeowner. Those payments included $65,000 for the value of the lost residence and $6,500 for lost rent. The homeowner's affidavit lacked clarity and was confusing. It itemized $71,600 in losses. The homeowner claimed lost rent for three years totaling $21,600; $35,000 for the value of the destroyed home not covered by insurance; and $15,000 to cover removal and cleanup costs. The homeowner's affidavit also stated that

[2] *North Carolina v. Alford*, 400 U.S. 25, 38 (1970) (holding that in some circumstances, a court may constitutionally accept a defendant's guilty plea even though the defendant maintained his or her innocence).

he paid a $1,000 insurance deductible and noted an unspecified "additional loss" of $16,000 not covered by insurance. It is not clear if or how those amounts were included in his requested $71,600 in restitution.

On April 25, 2019, the district court sentenced Wigham to 88 months in prison. The State recognized a possible duplication error in the restitution amounts requested in the affidavits submitted by the insurance company and the homeowner. The prosecutor stated: "The way the affidavits are currently may be too much requested, so we will confirm that." Wigham's lawyer agreed: "As for the restitution, I also have some concerns, and even some confusion with it . . . ." Accordingly, the district court deferred ruling on restitution, allowing 60 days for clarification of the restitution requests. There was no mention of Wigham's income, resources, or obligations at the sentencing hearing.

On September 17, more than 60 days after the sentencing hearing, the State filed a letter with the district court requesting $87,500 in restitution: $16,000 (reflecting the "additional loss, not covered by insurance") from the homeowner's affidavit and the original request of $71,500 from the insurance company's affidavit. The next day, the court issued a criminal restitution order for $87,500—the full amount requested by the State. The restitution order included spaces for the court to either fill in and indicate the monthly payments that Wigham must make or, alternatively, to name the person delegated to develop a restitution payment schedule. Both spaces were left blank. The restitution order made no mention of Wigham's ability to pay restitution.

Wigham timely filed a demand for a restitution hearing and an affidavit challenging the restitution order pursuant to section 611.045, subdivision 3. Wigham asserted that the

district court lacked authority to order any restitution because the State had failed to timely file its updated restitution request within the 60-day deadline set by the court and that the homeowner's claim for $16,000 in restitution was not supported by sufficient documentation. Wigham's affidavit made no mention of his income, resources, or obligations.

The district court held a restitution hearing over parts of three separate days. The legal dispute in the hearing focused primarily on whether the State's restitution request was timely. The court made no mention, and neither the State nor Wigham offered evidence, of Wigham's income, resources, or obligations.

A representative of the insurance company verified the amounts in the affidavit that the insurer had previously filed. The representative testified that the insurance company had reimbursed the homeowner $71,500—$65,000 for the value of the lost home and $6,500 for lost rent.

The homeowner also testified at the restitution hearing, reciting losses that totaled $46,300. He clarified that his lost rent not covered by insurance was $1,300, rather than the $21,600 listed in his affidavit. He asserted that $15,000 in cleanup expenses had not been covered by insurance. He further stated that, although he was claiming a property value loss of $35,000 (the portion not covered by insurance), he still owned the lot and was paying taxes on it. He said that he valued the lot at zero because no one wanted it, stating, "I can't give it away." Ultimately, the homeowner limited his request for restitution to $16,000. In its closing argument, the State stated that the homeowner "understands Mr. Wigham is in prison" and clarified that it was merely asking that "the Order previously

made by this Court and entered remain." Wigham did not contest the amount of restitution in that order.

The district court subsequently issued a restitution order for the same $87,500 amount it had originally ordered. Neither the order nor the accompanying memorandum mentioned Wigham's income, resources, or obligations. The order neither included a payment structure nor scheduled nor directed anyone else to prepare a payment structure or schedule. In the accompanying memorandum, the court limited its discussion to the issue of whether the State's request for restitution was timely. In its discussion of that issue, the court stated:

> In balancing the interests of Defendant and the victims, the Court sees no unfair prejudice to Defendant in ordering restitution *at this time* in the total amount of $87,500, because it is considerably less than the total amount of $143,100 [the incorrect amount reflected in the original restitution affidavits] which the Court could have ordered at sentencing.

(Emphasis added.) The court rejected Wigham's timeliness challenge because Wigham benefited from the delay, which allowed the parties to clear up the duplication in the original restitution requests.

Wigham appealed on several grounds, including that the district court failed to consider his ability to pay when it ordered restitution. *See State v. Wigham*, No. A20-0857, 2021 WL 416413, at *3 (Minn. App. Feb. 8, 2021). The court of appeals affirmed, concluding that "the record reveals that the district court considered Wigham's ability to pay." *Id.* at *4. The court of appeals reasoned:

> First, the district court did not order Wigham to pay the full $143,100 that was originally requested by the state. Second, the district court only ordered Wigham to pay the requested $16,000 to the homeowner, instead of requiring

> Wigham to fully compensate the homeowner for all the losses that he testified to. Third, the district court acknowledged that it "balance[ed] the interests of [Wigham] and the victims" in ordering restitution.

Id.

Wigham petitioned our court, and we granted review, on the sole issue of whether the district court fulfilled its statutory obligation to consider the defendant's ability to pay restitution under section 611A.045.

ANALYSIS

We generally review a restitution order for an abuse of the district court's "broad discretion." *State v. Andersen*, 871 N.W.2d 910, 913 (Minn. 2015). That discretion, however, is constrained by the statutory requirements set forth in Minn. Stat. § 611A.045 (2020). The question before us is whether the court fulfilled its statutory obligation to consider Wigham's ability to pay when it ordered Wigham to pay $87,500 in restitution.[3]

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[3] The State argues that Wigham forfeited his argument that the district court failed to properly consider his ability to pay because he did not raise it before the district court. The State made the same forfeiture argument before the court of appeals, but the court of appeals addressed the issue on the merits. *See Wigham*, 2021 WL 416413, at *4–5.

In its letter of notice responding to Wigham's petition for review, the State did not argue that the issue of whether the district court properly considered Wigham's ability to pay—the only question on which Wigham sought review—was forfeited. Instead, the State responded that it "agreed with the Court of Appeals' analysis"—an analysis that reached the merits of the issue. We also observe that the relevant factual record on appeal is not disputed, and both parties have thoroughly briefed the decisive legal question. *See State v. Thompson*, 937 N.W.2d 418, 421–22 n.2 (Minn. 2020) (stating that "[w]e may consider arguments not addressed by the district court when addressing them would not work an unfair surprise on a party," when "all the parties have briefed the issues," and when the only dispute is over "an issue of law" (citation omitted) (internal quotation marks omitted)); *State v. Hill*, 871 N.W.2d 900, 905 n.4 (Minn. 2015) (stating that our consideration of a question not raised in the district court "does not prejudice the State" when the question involves an issue of law and the State has fully briefed the issue). Accordingly, we will

That inquiry requires us to analyze what the statute requires in its mandate that a court "shall consider . . . the income, resources, and obligations of the defendant." Minn. Stat. § 611A.045, subd. 1. That is a question of law and statutory interpretation, which we review de novo. *Anderson*, 871 N.W.2d at 913 (stating that questions concerning the authority of the court to order restitution are questions of law subject to de novo review).

We begin our analysis by reviewing the statutory procedure the Legislature has mandated that district courts must follow when ordering restitution. First, subdivision 1, provides: "The court, in determining whether to order restitution and the amount of the restitution, *shall* consider the following factors: (1) the amount of economic loss sustained by the victim as a result of the offense; *and* (2) the income, resources, and obligations of the defendant." Minn. Stat. § 611A.45, subd. 1 (emphasis added).

Second, subdivision 2 requires that information regarding the offender's income, resources, and obligations be included in the PSI: "The presentence investigation report made pursuant to section 609.115, subdivision 1, *must* contain information pertaining to the factors set forth in subdivision 1." (emphasis added).

Third, subdivision 2a requires a district court to include in "*every* restitution order a provision requiring a payment schedule or structure." *Id.*, subd. 2a (emphasis added). Although subdivision 2a permits the court to "assign the responsibility for developing the schedule or structure to the court administrator, a probation officer, or another designated person," the statute mandates that, "[t]he person who develops the payment schedule or

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proceed to examine the question of whether the district court considered Wigham's ability to pay when ordering restitution.

structure *shall consider relevant information supplied by the defendant*." *Id.* (emphasis added).

With that background in mind, we turn to the question of what a district court must do to fulfill its obligation when considering a defendant's ability to pay. We have recognized that section 611A.045 is "not explicit as to *how* the court must consider the income, resources, and obligations of the appellant . . . ." *State v. Maidi*, 537 N.W.2d 280, 285 (Minn. 1995) (emphasis added). But the fact that we properly allow flexibility in how a court considers a defendant's ability to pay and structures a restitution order does not answer the question of what steps a court must take to fulfill its statutory mandate to consider the defendant's ability to pay.

While we stop short of holding that the district court must make specific findings regarding the defendant's income, resources, and obligations, the statutory requirement that a court "consider" the defendant's ability to pay means that the court must affirmatively take into account the defendant's ability to pay when awarding and setting the amount of restitution. *See* Minn. Stat. § 611A.045, subd. 1; *see also Merriam Webster's Collegiate Dictionary* 246 (10th ed. 2001) (defining "consider" as "to take into account" when the word is used in a sentence like, "[The] defendant's age must be considered"—the same sentence structure used in section 611A.045, subdivision 1); *see also Maidi*, 537 N.W.2d at 285–86 (referring to restitution orders that "take into account" a defendant's ability to pay).

This reading is supported by the indisputably mandatory nature of the directive that the district court "*shall* consider" the defendant's ability to pay. Minn. Stat. § 611A.045,

subd. 1 (emphasis added). "Shall" is a mandatory directive. Minn. Stat. § 645.44, subd. 16 (2020); *Dukowitz v. Hannon Sec. Servs.*, 841 N.W.2d 147, 155 (Minn. 2014) ("The use of the word 'shall' in a statute . . . indicates a duty that is mandatory, not one that is optional or discretionary." (citation omitted) (internal quotation marks omitted)); *see also Lopez-Solis*, 589 N.W.2d at 293 (stating that the statutory language in Minn. Stat. § 611A.045 "requir[ing] inquiry into a criminal defendant's ability to pay" is "plain"). This interpretation is further supported by the specificity and concreteness of the items the court must consider: "income, resources, and obligations." Minn. Stat. § 611A.045, subd. 1(a)(2).

The statutory provisions in subdivisions 2 and 2a requiring a district court to ensure that, when ordering restitution, the record contains relevant information about the defendant's ability to pay are additional textual signals that the Legislature intended to require courts to affirmatively take into account information about the defendant's ability to pay. *See id.*, subds. 2 (requiring that the PSI "must contain information pertaining to the factors set forth in subdivision 1," *i.e.*, the victim's economic loss and the defendant's income, resources, and obligations), 2a (requiring the court to include "in every restitution order a provision requiring a payment schedule or structure" developed in consideration of the defendant's ability to pay, noting that the court may assign the responsibility of developing the payment plan to another).

We have also recognized that the payment schedule or structure included in a restitution order should reflect the defendant's ability to pay. *Maidi*, 537 N.W.2d at 285–86 (holding that because "the sentencing court properly considered the defendant's ability

to pay" by setting a payment schedule that he could afford based on his earnings, it did not abuse its discretion by ordering restitution in an amount the defendant could "mathematically . . . never pay off").[4]

We have previously decided that a district court may show that it has considered the defendant's ability to pay by expressly stating that it has considered the defendant's ability to pay. *State v. Lindsey*, 632 N.W.2d 652, 664 (Minn. 2001) (noting that "the postconviction court, which was also the trial court, specifically stated that it 'considered the petitioner's ability to pay when it ordered restitution to be paid from prison earnings' "). Notably, the district court's statements in *Lindsey* were supported by record evidence that the amount of restitution ordered was tied to the defendant's established income stream. *Id.* That is important because it is difficult to see how a court could affirmatively consider or take into account the defendant's income, resources, and obligations without any evidence in the record about the defendant's income, resources, and obligations. *See* Minn. State Court Administrator's Office, *Minnesota Judges Criminal Benchbook*, § 2602.04(IV) (7th ed. 2021) ("[T]he district court must ensure there is a record of the defendant's ability to pay.").

[4] Although the statutory requirement mandates that courts consider a defendant's ability to pay, it does not require courts to limit a restitution award amount to only what the defendant can afford. *See State v. Lindsey*, 632 N.W.2d 652, 663–64 (Minn. 2001) (finding that no abuse of discretion occurred when the district court stated that it considered the defendant's ability to pay and ordered $32,682.93 in restitution to be paid from prison earnings, even though the defendant was indigent, incarcerated, and unable to pay the total amount).

Accordingly, we hold that a district court fulfills its statutory duty to consider a defendant's income, resources, and obligations in awarding and setting the amount of restitution when it expressly states, either orally or in writing, that it considered the defendant's ability to pay.[5] Further, while we do not require that the district court make

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[5] The court of appeals' understandable effort to reverse engineer the district court's thought process by searching the record to see what it might reveal about Wigham's ability to pay, *see Wigham*, 2021 WL 416413, at *4, demonstrates the need for a clear statement by a district court that, before awarding restitution, it considered a defendant's ability to pay. Such a clear statement avoids the need to scour bits and pieces of information to try to glean what the district court *may* have considered.

For instance, the court of appeals stated that the district court must have considered Wigham's ability to pay because the court awarded only $16,000 in restitution to the homeowner, even though the record arguably supported the conclusion that the homeowner suffered economic losses greater than $16,000. *Id.* The award of $16,000 to the homeowner, however, provides no proof that the court considered Wigham's ability to pay. The $16,000 award reflects the full amount that the State asked for in its corrected restitution request, the full amount that the court awarded in its initial order, and the full amount to which the homeowner limited his request at the restitution hearing. Imputing consideration of Wigham's ability to pay to the district court's decision to affirm its earlier restitution order instead of ordering more restitution—when the victims were not requesting any more restitution—is after-the-fact speculation.

The argument that the PSI "reveals" the district court's consideration of Wigham's ability to pay restitution is similarly too attenuated. As noted, the PSI includes no information about Wigham's income, resources, and obligations, and the district court made no reference in its order or during the restitution hearing that it considered any information in the PSI. The PSI documented that Wigham had previously been on probation and was currently in prison and included Wigham's birthdate, age, and "anticipated release date" ("with good time"). We find these factors too remote to serve as evidence that the court considered Wigham's ability to pay. Such scattered bits of information are insufficient to demonstrate a court's consideration of a defendant's ability to pay.

The State also observes that two years before awarding restitution, the district court approved Wigham's application for a public defender. The State generally notes that public defender applications include financial information. Accordingly, the State asserts that there was "ample information" to support the conclusion that the court considered Wigham's ability to pay. We disagree. First, Wigham's public defender application is not in the record so we can glean no information from it. Second, the court never mentioned

specific findings about the defendant's income, resources, and obligations to support a court's express statement that it considered the defendant's ability to pay,[6] we hold that the record must include sufficient evidence about the defendant's income, resources, and obligations to allow a district court to consider the defendant's ability to pay the amount of restitution ordered.

Our decisions, and decisions by the court of appeals, provide useful examples of the type of ability-to-pay evidence that meaningfully informs a district court's decision to order restitution. For instance, we have found it sufficient that the record includes specific, concrete evidence of the defendant's income, resources, and obligations. *See, e.g.*, *State v. Palubicki*, 727 N.W.2d 662, 667–68 (Minn. 2007) (affirming a restitution award and noting that it was "established" at the restitution hearing that the defendant had no assets and earned only $1.25 per hour working at a prison job).

When a PSI includes information about the defendant's income, resources, and obligations, it also may be sufficient evidence of an ability to pay. *See State v. Alexander*, 855 N.W.2d 340, 344 (Minn. 2014) (finding proper consideration of the defendant's ability

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the public defender application during the restitution hearing or in its restitution order. Third, the public defender application was submitted 2 years before restitution was awarded.

[6] It is best practice for a district court to make express findings about a defendant's ability to pay restitution. Such a practice provides more transparency for all the parties involved and allows for more effective appellate review. *See State v. Modtland*, 695 N.W.2d 602, 608 (Minn. 2005) (stating that "it is not the role of appellate courts to scour the record to determine if sufficient evidence exists to support the district court's" exercise of its discretion); *Stich v. Stich*, 435 N.W.2d 52, 53 (Minn. 1999) (observing that sufficiently detailed findings of fact assist appellate courts in effectively reviewing decisions subject to an abuse of discretion review).

to pay, in part because the court informed the defendant that it would rely on the relevant PSI information when making its restitution decision and because it heard evidence regarding the defendant's future ability to pay); *State v. Miller*, 842 N.W.2d 474, 479 (Minn. App. 2014) (reversing and remanding for proper consideration of the defendant's ability to pay because there was no PSI and restitution hearing did not address the defendant's ability to pay). The PSI in this case did not include information about Wigham's income, resources, and obligations.

A defendant's express concession that he or she could pay the amount of restitution awarded also may be sufficient ability-to-pay evidence. *See, e.g.*, *State v. Nelson*, 796 N.W.2d 343, 349 (Minn. App. 2011) (affirming a $156 restitution award as to the defendant's ability to pay despite a record "devoid of any . . . evidence that would have established appellant's ability to pay restitution" only because appellant conceded at oral argument that she could pay it, but stating that "we remind the district court that it retains a duty to consider an offender's ability to pay restitution"), *overruled on other grounds by State v. Boettcher*, 931 N.W.2d 376, 381 (Minn. 2019). No such concession was made here. The defendant, of course, may assist the district court in fulfilling its duty to consider the defendant's ability to pay by providing information about his or her income, resources, and obligations.

We have also concluded that consideration of a defendant's ability to pay may be shown by including a restitution payment schedule or structure that reflects the defendant's ability to make the periodic payments. *Maidi*, 537 N.W.2d at 285–86; *see* Minn. Stat. 611A.045, subd. 2a (requiring a district court to include in "every restitution order" a

payment schedule or structure and providing that "[t]he court may assign the responsibility for developing the schedule or structure to the court administrator, a probation officer, or another designated person.").

We now turn to the restitution order in this case. The district court did not expressly state that it considered Wigham's income, resources, and obligations. The court of appeals suggested that the district court made such a statement when it indicated in the restitution order memorandum that it "balance[ed] the interests of Defendant and the victims." *See Wigham*, 2021 WL 416413, at *2. We disagree. The district court's memorandum makes clear that the statement was limited to its consideration of Wigham's argument that the State's renewed restitution request was untimely. The district court was balancing detriment to Wigham of the delayed restitution order and the interests of the victims (persons separate from the State) in receiving fair compensation for their economic losses. The district court found that Wigham suffered no detriment from the delay because the delay allowed the court and parties to resolve confusion over whether the amounts initially requested by the insurance company and the homeowner were excessive and duplicative. The court was not balancing the victims' economic losses against Wigham's ability to pay. In addition, the record does not contain sufficient information to meaningfully inform a consideration of Wigham's ability to pay restitution.

Accordingly, because the district court did not expressly state that it considered Wigham's ability to pay, and because the record does not include sufficient evidence about Wigham's income, resources, and obligations to allow the court to consider Wigham's ability to pay the amount of restitution ordered, we conclude that the court did not consider

Wigham's ability to pay as required by section 611A.045, subd. 1. We therefore reverse the decision of the court of appeals and remand to the district court for further proceedings on restitution. Before ordering restitution on remand, the district court should ensure that the PSI is updated to include information on Wigham's income, resources, and obligations. *See* Minn. Stat. § 611A.045, subd. 2. The district court must also expressly state, either orally or in writing, that it has considered Wigham's ability to pay—his income, resources, and obligations—when ordering restitution. *See id.*, subd. 1(a)(2). Further, the restitution order must provide for a payment schedule or structure that reflects Wigham's ability to pay or assign the responsibility for developing a schedule or structure to the court administrator, a probation officer, or another designated person. *See id.* , subd. 2a.

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals and remand to the district court for further proceedings consistent with this opinion.

Reversed and remanded.