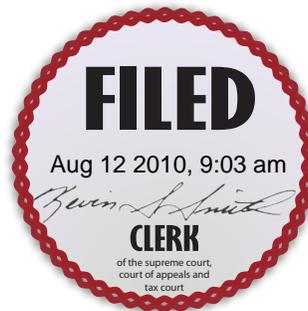


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ERNEST L. CLEARY,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 49A02-0912-CR-1272

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant W. Hawkins, Judge
Cause No. 49G05-0812-FC-285661

August 12, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Ernest Cleary pled guilty to Class C felony operating a motor vehicle after license forfeited for life and Class D felony auto theft. As a condition of probation, Cleary was ordered to pay restitution in the amount of \$7,717.00 to the victim for the victim's lost items and for the loss of use of his van. Cleary contends that the trial court erred in making no inquiry or finding about his ability to pay the restitution as ordered and that our restitution statute does not authorize a trial court to order a defendant to pay for the loss of use of a damaged vehicle. Finding the trial court did not err in determining that Cleary has the ability to pay the restitution, but the court did abuse its discretion in ordering restitution for the van's loss of use, we affirm in part, reverse in part, and remand with instructions.

Facts and Procedural History

On July 27, 2008, Jeffrey Scheumpert parked his van to go fishing but discovered it was missing after he received a phone call from his girlfriend, Christina Lang, who indicated his van was parked at Cash N Pawn. Both Scheumpert and Lang called the police. After arriving at Cash N Pawn, the police spoke to Rosie Torzewski, who indicated that an individual, later identified as Cleary, had pawned tools and a toolbox. Cleary was identified by his fingerprints on a pawn card that matched the fingerprints on the van, which was found a few days later. Scheumpert identified the pawned tools and toolbox as his. A video also showed Cleary driving away from Cash N Pawn in the van wearing one of Scheumpert's baseball caps.

The State charged Cleary with Class C felony operating a motor vehicle after license forfeited for life and Class D felony auto theft. Cleary and the State entered into a plea agreement whereby Cleary pled guilty to both counts. The trial court sentenced Cleary to seven years with two years suspended to probation on the first count and two years on the second count, with both sentences running concurrently. Cleary also agreed to “pay restitution through the Marion County Probation Department to Jeffrey Schunert [sic] in the amount of TBD.” Appellant’s App. p. 41.

At the restitution hearing, Scheumpert indicated that when the van was returned to him the steering column was torn out, a window was broken, the right front wheel had been damaged and eventually broke, and the van was not drivable. According to an estimate for repairs by an auto shop, to put the van back in drivable condition costs approximately \$1,435.00. State’s Ex. 2. Items in the van that Scheumpert did not recover included “a laptop, camcorder, car stereo, Xbox, Playstation, Kicker Box, iPods, DVDs, TVs, radios and some CDs.” Tr. p. 66-67. Scheumpert estimated the value of these items to be \$5,535.00 based upon his newspaper research and knowledge of some of the items’ costs. The trial court issued the following restitution order on December 4, 2009:

Okay, for the loss of that property I am going to value it at half. Mr. Stern made a good case for the fact that while it might cost you \$5,000 plus to replace it, that doesn’t mean if you had a yard sale you’d get \$5,000. I’m going to take about half off, so you’ll get half of that money if you ever collect it, but not all of it. You also made another statement and that is that the vehicle hasn’t been operable since you got it back. That’s 495 days from July 27, 2008 until today. At \$10 dollars a day loss of use that’s \$4,950.00, sounds like a total of \$7,737.00 - - \$7,717.00 restitution due Mr. Scheumpert during the period of probation.

Id. at 93-94. Notably, the amount of restitution ordered does not include the cost to repair the van. Cleary objected to the restitution amount at the hearing. Tr. p. 95. He now appeals the trial court's order that he pay restitution in the amount of \$7,717.00 for Scheumpert's lost items and his van's loss of use.

Discussion and Decision

Cleary makes two arguments on appeal. First, he contends that the trial court erred in making no inquiry or finding about his ability to pay the restitution as ordered. Second, he contends that our restitution statute does not authorize a trial court to order a defendant to pay for the loss of use of a damaged vehicle.

Initially, the State argues that Cleary has waived any complaint he has regarding restitution as he offered to pay it as part of his plea agreement and he did not object to it at the time it was entered. We find this argument unavailing. Cleary agreed to restitution but did not agree to an amount of restitution, and at the restitution hearing Cleary objected to the amount of restitution ordered.

I. Ability to Pay

As a condition of probation, the trial court may order a defendant to:

[m]ake 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.

Ind. Code § 35-38-2-2.3(a)(5). This statute does not specify the manner in which a trial court must inquire into the defendant's ability to pay, but the trial court must make such an inquiry. *Laker v. State*, 869 N.E.2d 1216, 1220 (Ind. Ct. App. 2007) (citing *Smith v.*

State, 655 N.E.2d 133, 134 (Ind. Ct. App. 1995), *trans. denied*). This inquiry requirement ensures that an indigent defendant is not imprisoned based on a probation violation due to his or her inability to pay restitution. *Pearson v. State*, 883 N.E.2d 770, 772 (Ind. 2008). The trial court should consider factors such as the defendant's current financial status, health, and employment history when making the inquiry. *Laker*, 869 N.E.2d at 1221 (citing *Champlain v. State*, 717 N.E.2d 567, 570 (Ind. 1999)). The trial court could properly choose to hold a hearing on a defendant's ability to pay restitution, but it is not required to do so, and may make a proper inquiry, depending on circumstances, by such actions as reviewing the pre-sentence report and questioning witnesses. *Id.*

The trial court here properly determined the amount Cleary could or would be able to pay. Cleary's pre-sentence report indicates that since 1980, he has been employed by Local Union 119 as a roofer, but he is currently unemployed. PSI p. 10. At the sentencing hearing, Cleary's counsel emphasized that Cleary "makes real good money, he's a journeyman roofer and he worked on the Lucas Oil Stadium and he made good money doing it," and "it's clear [he] has an ability to work." Tr. p. 52, 92. Cleary also said, "I believe that the right thing to do is pay the victim back what was missing, whatever that may be . . . I think that I should be liable to him to pay him back and that's what I want to do." *Id.* at 53. The pre-sentence report shows Cleary has the ability to work. Moreover, the trial court made clear that Cleary would not be required to pay restitution while he served the five year executed portion of his sentence. Rather, the court indicated that Cleary would pay his restitution during his period of probation, *id.*,

and that he would violate his probation if he had the ability to pay but chose not to, *id.* at 92-93.

Finally, Cleary argues that since the trial court appointed a public defender to represent him in appealing the court's restitution decision, this appointment shows he does not have the ability to pay. However, we have previously stated that ordering an indigent individual to pay restitution does not mean the court abused its discretion. This is so because the appointment of a public defender is to ensure the defendant's right to representation while imposition of restitution is a form of punishment in which the trial court has the discretion to determine the extent of the hardship and whether the defendant can subsist after the payments. *See Polen v. State*, 578 N.E.2d 755, 759 (Ind. Ct. App. 1991). Thus, Cleary's argument fails.

II. Loss of Use

Cleary next argues that our restitution statute does not authorize a trial court to order a defendant to pay for the loss of use of a damaged vehicle. Specifically, he complains that the trial court erred by ordering him to pay the victim ten dollars per day for 495 days for the loss of use of the victim's van.

Indiana Code section 35-50-5-3(a) provides:

[I]n addition to any sentence imposed under this article for a felony or misdemeanor, the court may, as a condition of probation or without placing the person on probation, order the person to make restitution to the victim of the crime, the victim's estate, or the family of a victim who is deceased. The court shall base its restitution order upon a consideration of:

(1) property damages of the victim incurred as a result of the crime, based on the *actual cost of repair* (or replacement if repair is inappropriate);

(2) medical and hospital costs incurred by the victim (before the date of sentencing) as a result of the crime;

(3) the costs of medical laboratory tests to determine if the crime has caused the victim to contract a disease or other medical condition;

(4) earnings lost by the victim (before the date of sentencing) as a result of the crime including earnings lost while the victim was hospitalized or participating in the investigation or trial of the crime; and

(5) funeral, burial, or cremation costs incurred by the family or estate of a homicide victim as a result of the crime.

(Emphasis added). An order of restitution is a matter within the trial court's discretion, and we will reverse only when an abuse of discretion occurs. *Lang v. State*, 911 N.E.2d 131, 135 (Ind. Ct. App. 2009). An abuse of discretion occurs when the trial court misinterprets or misapplies the law. *Id.*

The issue of whether an award of restitution for the van's loss of use is proper involves a question of statutory interpretation. *See Rich v. State*, 890 N.E.2d 44, 49 (Ind. Ct. App. 2008). When interpreting a criminal statute, "[w]ords and phrases shall be taken in their plain, or ordinary and usual, sense." Ind. Code § 1-1-4-1(1). The plain language of our restitution statute indicates that victims of property crimes may receive restitution for "property damages," and that the amount shall be based on the cost of "repair." *Rich*, 890 N.E.2d at 52. The cost of "repair" should include the amount used "[t]o restore to sound condition after damage or injury." *Id.* (quoting *American Heritage* at 1478).

Here the trial court ordered Cleary to reimburse Scheumpert for the loss of use of the van. The restitution statute does not provide for such a loss; rather, the statute allows for the actual cost of repair. The actual cost of repair was \$1,435.00. Therefore, the

correct total restitution is \$4,202.00, which reflects the cost of repairs plus the \$2,767.00¹ the trial court determined as the value of the items stolen but not recovered. Accordingly, we remand to the trial court with instructions to order Cleary to pay \$4,202.00 in restitution as a condition of his probation.

Affirmed in part, reversed in part, and remanded with instructions.

NAJAM, J., and BROWN, J., concur.

¹ We are not asked to decide and express no opinion on whether the calculation of restitution for the stolen personal property is correct.