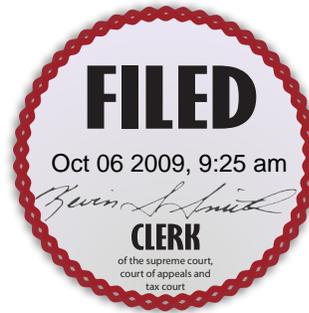


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

WILLIAM JERDE,)

Appellant-Defendant,)

vs.)

No. 49A04-0903-CR-136

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark Jones, Judge Pro Tempore
Cause No. 49G05-0801-FB-6426

October 6, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

William Jerde appeals the sentence and restitution order imposed by the trial court following his convictions for class B felony burglary and class B felony robbery. We affirm in part, reverse in part, and remand with instructions.

Issues

Jerde presents two issues for our review which we restate as:

- I. Whether the trial court abused its discretion when it declined to fully suspend Jerde's sentence; and
- II. Whether the trial court abused its discretion when it ordered restitution.

Facts and Procedural History

The relevant facts indicate that sometime after 2:00 a.m. on September 24, 2007, Jerde and four other men, one armed with a baseball bat, kicked in the front door of the home where William Lafara lived with his mother. Jerde knew Lafara and specifically targeted him because Jerde believed Lafara would have marijuana and money for the men to steal. The group took cash, twenty-eight grams of marijuana, car keys, a cell phone, a wallet, and identification from the home.

Following a trial, on January 27, 2009, a jury convicted Jerde of class B felony burglary and class B felony robbery. The trial court sentenced Jerde to eight years, with six years suspended and four years of probation. As a condition of probation, the trial court ordered that Jerde was jointly and severally liable with three of his co-offenders to pay \$1463.43 in restitution to his victims. The trial court also ruled that if Jerde served six

months of his executed sentence with good behavior, he could petition for a modification of sentence.

Jerde appealed, and this Court obtained jurisdiction on April 1, 2009, pursuant to Indiana Appellate Rule 8. On August 28, 2009, Jerde filed a motion with the trial court requesting a modification of his sentence. On September 8, 2009, we granted Jerde's verified motion for limited remand to the trial court for the limited purpose of hearing and ruling on Jerde's motion for sentence modification. The modification hearing was held that same day and, following that hearing, the trial court released Jerde immediately to probation. Pursuant to Indiana Appellate Rule 37(B), Jerde's appeal has been held in abeyance while this Court retained jurisdiction. We now consider the merits of his appeal.

Discussion and Decision

I. Sentence

We first consider Jerde's contention that the trial court abused its discretion when it ordered him to execute two years of his eight-year sentence. On appeal, Jerde does not challenge his convictions or the length of his sentence. He merely challenges the trial court's decision not to suspend his entire sentence. However, following the September 8, 2009, sentence modification hearing, the balance of his sentence was suspended and Jerde was released to probation. He has effectively received the relief requested, and thus the issue is moot. A case is deemed moot when no effective relief can be rendered to the parties before the court. *State v. Thomas*, 827 N.E.2d 577, 579 (Ind. Ct. App. 2005). Because Jerde has

already completed the executed portion of his sentence, it is unnecessary for us to consider Jerde's challenge.

II. Restitution

Jerde also asserts that the trial court abused its discretion when it ordered him to pay restitution of \$1,463.43 as a condition of his probation. Specifically, Jerde asserts that the trial court failed to inquire into his ability to pay restitution or to fix the manner of performance.¹ Trial courts are accorded broad discretion when establishing conditions of probation. *Rodriguez v. State*, 714 N.E.2d 667, 670 (Ind. Ct. App. 1999), *trans. denied*. We will set aside a probation order only upon a showing that the trial court abused its discretion. *Id.*

When the trial court enters an order of restitution as part of 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). Indiana Code Section 35-38-2-2.3(a)(5) provides, "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." This prevents indigent defendants from being imprisoned because of a probation violation based on a defendant's failure to pay restitution. *Pearson*, 883 N.E.2d at 772. When making the inquiry into a defendant's ability to pay, the trial court should consider factors such as the defendant's current financial status, health, and employment

¹ We note that Jerde did not object to the restitution order at trial. However, a defendant may challenge a restitution order for the first time on appeal. *Laker v. State*, 869 N.E.2d 1216, 1220 (Ind. Ct. App. 2007); *see also Lohmiller v. State*, 884 N.E.2d 903, 916 (Ind. Ct. App. 2008).

history. *Laker v. State*, 869 N.E.2d 1216, 1221 (Ind. Ct. App. 2007). The trial court is not required to hold a hearing on the defendant's ability to pay restitution but may make a proper inquiry by such actions as reviewing the presentence report and questioning witnesses. *Polen v. State*, 578 N.E.2d 755, 758-59 (Ind. Ct. App. 1991), *trans. denied*.

With regard to his ability to pay restitution, Jerde's presentence report reveals a steady employment record as well as no past-due debts or other expenses. The report also shows that Jerde was in excellent health and that he owned a vehicle. At the time of the sentencing hearing, Jerde testified that he was employed at a wage of \$8.00 per hour. In fact, Jerde specifically told the court that if he was ordered to pay restitution to his victims, he had confidence in his ability to "deal with it." Tr. at 503. This information was adequate to allow the trial court to make an informed and fair decision that Jerde has the ability to pay restitution to his victims.

Although the trial court sufficiently inquired into Jerde's ability to pay, we must agree with Jerde that the trial court abused its discretion when it failed to fix the manner of performance of restitution. The trial court's order is brief and addresses only the total amounts due each victim. The order lacks any detail concerning when payment is due or any type of payment schedule. The court engaged in the following colloquy during sentencing:

[Court]: You're going to have four years of probation following the execution of your sentence. Terms of probation include restitution in the amount of \$550 payable through the Probation Department to Dequana Whitehead; in the amount of \$393.43 payable to Janet Lafara; and in the amount of \$520 to William Lafara, all payable through the Marion County Probation Department, all joint and several liability with Brandon Dafoure, Sean Evans and David Greene. What that means is whichever one of you pays it, if you're going to expect reimbursement, you've got to get it from one of those three, but you are

liable for the whole amount unless somebody else pays it off. Do you understand that?

[Jerde]: You mean I have to get the money back from the people in my case?

[Court]: If you want reimbursement, if you expect reimbursement, yeah. You owe this money, just the same as they do. The victims don't get paid three times, they don't get three times the amount of their damages, or four times. But each of you owe it.

[Jerde]: So I'm like the one obligated to pay?

[Court]: Yeah, as a condition of probation.

Id. at 513-14.

The State concedes that the trial court did not specify a time frame for payment. Nonetheless, because the trial court ordered Jerde to serve four years of probation, the State urges that we infer that Jerde has four years within which to pay his debt. It is the trial court's statutory duty to identify the manner and time frame for which a defendant must pay restitution. *See Laker*, 869 N.E.2d at 1221 (remanding with instructions for trial court to identify manner and time frame for restitution); *see also Garrett v. State*, 680 N.E.2d 1, 3 (Ind. Ct. App. 1997) (concluding that restitution order that did not fix method of payment did not comply with Ind. Code § 35-38-2-2.3). Absent sufficient detail provided by the trial

court as to when or how Jerde must pay restitution, we will draw no inferences in that regard.²

In addition, the trial court ordered that Jerde was jointly and severally liable with his co-offenders for the entire amount owed to his victims. However, because the trial court failed to fix a time or manner of performance, it is unclear how Jerde, his co-offenders, or the Marion County Probation Department is to proceed. It appears to us that it would be unworkable to condition the continuation of Jerde's probation upon a restitution order which specifies no time or manner of payment and for which three other individuals are jointly and severally liable. Because the trial court's order is lacking sufficient clarity concerning the form of payment and the time frame in which payment shall be made, we remand with instructions for the trial court to fix the manner of performance.

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

MAY, J., and BROWN, J., concur.

² The State's argument assumes that Jerde's obligation to make restitution could extend only four years. This is not so. The expiration of a probationary period does not terminate an obligation to make restitution to a crime victim. *See* Ind. Code § 35-50-5-3(f). Moreover, the four-year window we are urged by the State to infer has become less plausible due to recent developments. During the September 8, 2009, sentence modification hearing, the trial court amended the original terms of Jerde's probation. The abstract of judgment indicates that if Jerde successfully completes one year of probation, the remaining probationary period may be converted to non-reporting probation if the trial court deems fit.