

NOTICE

Decision filed 05/01/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2012 IL App (5th) 100591-U

NO. 5-10-0591

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Jasper County.
)	
v.)	No. 09-CM-104
)	
VALERIE HOLLIS,)	Honorable
)	Daniel E. Hartigan,
Defendant-Appellant.)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Spomer and Wexsten concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in ordering restitution in an amount not based on the fair market value of the property at the time it was damaged. The court must fix the method and time for payment of restitution and must consider the defendant's ability to pay when determining whether restitution should be paid in a single payment or in installments.

¶ 2 **BACKGROUND**

¶ 3 The defendant, Valerie Hollis, pled guilty to criminal trespass to a motor vehicle for knowingly and without authority entering a 1989 Mazda pickup truck belonging to Donna Wilson. At the time of the incident, the defendant was 17 years old. No factual basis was requested or given at the time of the plea to the misdemeanor charge. The record contains few facts about the incident except that the defendant and another individual or individuals were in the truck, and the truck crashed into a storage shed owned by Shull Storage, damaging the shed and the truck. The defendant was sentenced to court supervision for a term of 24 months and ordered to pay a \$150 fine. The matter of restitution was reserved.

¶ 4 On September 23, 2010, there was a hearing to determine restitution. The parties stipulated to \$500 restitution to be paid to Shull Storage. With respect to the damage to the truck, the defendant submitted three exhibits, and the State submitted one exhibit, which were admitted by agreement of the parties. The defendant's exhibit 1 was a page from the Kelly Blue Book which listed a 1990 Mazda truck as having a trade-in value of \$500 when in excellent condition, \$400 when in good condition, and \$250 when in fair condition. The defendant's exhibits 2 and 3 were photographs of the truck. The State's exhibit 1 was an estimate from Heartland Classics Collision Center for repairs to the truck in the amount of \$3,053.21.

¶ 5 Alan Hollis, the defendant's father, testified that he was familiar with the truck. He stated that since the accident the truck has been sitting at the side of the roadway. He described the truck as having "quite a bit of rust on it" and having body damage other than the damage caused by his daughter. He stated that he looked inside the truck on different occasions, and it was worn and in poor condition. On cross-examination Mr. Hollis was asked if the truck sat by the side of the road because it was inoperable, and he responded that he was "not sure if it's inoperable."

¶ 6 The court found:

"Court has examined the exhibits and you have no—Mr. Kibler the truck looks okay from the outside, other than the front which is what was damaged by the Defendant when—when she drove it into the storage shed, I guess. And I'm sure Miss Wilson wouldn't sell her pickup truck for \$500 before we had the accident or the event. So what I am going to do is find damages at \$2,500 and that will be amount ordered restitution."

The court went on to say, "Because I feel that's—if you had to—any truck, it's hard to buy a truck, anything reliable for less than \$2,500." The defendant was ordered to pay Shull

Storage \$500 and Donna Wilson \$2,500 in restitution.

¶ 7 On October 21, 2010, the defendant filed a motion to reconsider, alleging that the restitution order was excessive and that the trial court's determination of the amount of restitution was an abuse of discretion. The motion was heard on November 30, 2010, and the court denied the motion. The defendant filed a timely notice of appeal.

¶ 8 ANALYSIS

¶ 9 The defendant argues that the trial court erred in ordering \$2,500 in restitution for the damaged pickup truck. She asserts that the trial court did not base its order on the fair market value of the truck and instead chose a random figure to compensate the victim.

¶ 10 Under Illinois law, trial courts are authorized to order restitution as part of a defendant's sentence in any criminal case. 730 ILCS 5/5-5-6, 5-6-3(b)(8) (West 2008). The court may impose "restitution in cash, for out-of-pocket expenses, damages, losses, or injuries found to have been proximately caused by the conduct of the defendant." 730 ILCS 5/5-5-6(a) (West 2008). It is within the sound discretion of the trial judge whether to order restitution in a criminal case, and we will only overturn a trial court's ruling if it was an abuse of discretion. *In re Shatavia S.*, 403 Ill. App. 3d 414, 418 (2010).

¶ 11 "Restitution should be determined by using the fair market value of the property at the time the property was damaged or destroyed." *People v. Jones*, 145 Ill. App. 3d 835, 839 (1986). In the instant case, the defendant presented evidence of the Kelly Blue Book trade-in value for the truck. No evidence was presented regarding the Kelly Blue Book private party value or retail value. The trade-in value for the truck, if in excellent condition, was \$500. The State presented evidence of an estimate to repair the truck in the amount of \$3,053.21. However, no repairs had been made to the truck. At the restitution hearing, Mr. Hollis testified that the truck had been sitting by the roadway since the time of the accident. He stated that the interior of the truck was in poor condition and that it had damage to the body

other than the damage caused by the accident. The trial court stated that it was sure that, before the incident, Miss Wilson would not have sold her truck for \$500, the Kelly Blue Book value for a trade-in of the truck if it were in excellent condition. This was pure conjecture on the part of the trial court because there is nothing in the record that indicates whether Miss Wilson would have sold her truck for \$500 before the incident. The trial court ordered restitution in the amount of \$2,500. It stated that it based its decision on its feeling that it is hard to buy a reliable truck for less than \$2,500. No evidence was presented regarding the cost of a reliable truck. "Alleged losses which are unsupported by the evidence must not be used as a basis for awarding restitution." *People v. Jones*, 206 Ill. App. 3d 477, 482 (1990). There was no evidence that \$2,500 was the fair market value of the truck at the time of the crime, thus the trial court abused its discretion in ordering restitution in that amount.

¶ 12 The defendant next argues that the trial court erred in failing to consider her ability to pay restitution and in failing to set a schedule for her to do so. Section 5-5-6(f) of the Unified Code of Corrections provides, in pertinent part:

"Taking into consideration the ability of the defendant to pay, including any real or personal property or any other assets of the defendant, the court shall determine whether restitution shall be paid in a single payment or in installments, and shall fix a period of time not in excess of 5 years or the period of time specified in subsection (f-1), not including periods of incarceration, within which restitution is to be paid in full." 730 ILCS 5/5-5-6(f) (West 2008).

The defendant asserts that the trial court made no inquiry into whether she had the ability to pay the restitution ordered in this case. She asks this court to remand for a hearing to determine whether she has the ability to pay. Prior to July 1984, the statute required a court to consider a defendant's ability to pay in considering whether to impose restitution. *People*

v. Hamilton, 198 Ill. App. 3d 108, 114 (1990). The current statute "requires a court to consider the ability to pay only in conjunction with the method of payment, not in consideration of whether restitution should be ordered." *Id.* Thus, the court no longer needs to consider the defendant's ability to pay when ordering restitution. *Id.* The court, however, must fix a definite method and time for payment of restitution and must take into consideration the defendant's ability to pay in determining whether restitution shall be paid in a single payment or in installments. 730 ILCS 5/5-5-6(f) (West 2008). In the instant case, the restitution order lists the payment terms as "to be determined." On remand the court should fix the method and time for payment in accordance with the statute.

Finally, the defendant argues that she is entitled to a \$5 credit against her fine for each day spent in pretrial custody. The State concedes that she is entitled to a \$10 credit against her fine. The defendant agrees that a \$10 credit is appropriate.

¶ 13

CONCLUSION

¶ 14 For the foregoing reasons, the judgment of the circuit court of Jasper County is reversed. We remand to the circuit court for redetermination of restitution in accordance with our findings and to credit \$10 against the defendant's fine.

¶ 15 Reversed and remanded.