

2013 IL App (2d) 120653-U
No. 02-12-0653
Order filed September 13, 2013

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).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of De Kalb County.
Plaintiff-Appellee,)	
)	
v.)	No. 09-CF-523
)	
MICHAEL P. KOSEK,)	Honorable
)	Robbin J. Stuckert,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶1 *Held:* Restitution order was not invalid for failing to state trial court considered defendant's ability to pay restitution or for purportedly failing to set forth manner in which restitution was to be paid.

¶2 Following a bench trial, defendant, Michael P. Kosek, was convicted of one count of aggravated battery (720 ILCS 5/12-4 (West 2008)), two counts of resisting a peace officer (720 ILCS 5/31-1 (West 2008)), and one count of assault (720 ILCS 5/12-1 (West 2008)). Part of his sentence included an order to pay restitution in the amount of \$1,250 (\$450 of defendant's bond was applied

toward restitution, leaving \$800), to be paid within six months. Before this court, defendant challenges the restitution order as invalid, contending that it does not contain a finding regarding his ability to pay restitution or indicate the manner in which restitution is to be paid. For the reasons that follow, we affirm.

¶ 3 At issue in this appeal is whether the trial court's restitution order complied with section 5-5-6(f) of the Unified Code of Corrections (Code) (730 ILCS 5/5-5-6(f) (West 2008)), which provides, in pertinent part, as follows:

“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 ***, within which payment of restitution is to be paid in full. Complete restitution shall be paid in as short a time period as possible. However, if the court deems it necessary and in the best interest of the victim, the court may extend beyond 5 years the period of time within which the payment of restitution is to be paid. If the defendant is ordered to pay restitution and the court orders that restitution is to be paid over a period greater than 6 months, the court shall order that the defendant make monthly payments; the court may waive this requirement of monthly payments only if there is a specific finding of good cause for waiver.”

The construction of a statute is subject to *de novo* review. *People v. Chapman*, 2013 IL 111896, ¶ 23. An order that does not comply with section 5-5-6(f) must be remanded for a new hearing and compliance with the statute. *People v. Dickey*, 2011 IL App (3d) 100397, ¶ 24.

¶ 4 We first turn to defendant's contention that the trial court failed to set forth that it considered whether he had the ability to pay a restitution order. Defendant is correct that the statute expressly makes this a mandatory consideration. See 730 ILCS 5/5-5-6(f) (West 2008) (directing a trial court to "tak[e] into consideration the ability of the defendant to pay"); *Dickey*, 2011 IL App (3d) 100397, ¶ 10. We note, however, that a defendant's ability to pay restitution is relevant to determining the manner or time of payment rather than the amount of restitution imposed. *People v. Day*, 2011 IL App (2d) 091358, ¶ 56. The State points out that, at sentencing, the trial court stated that it had reviewed the presentence-investigation report and adopted the recommendations contained in it. Neither party objected. The report states that defendant is employed, earning \$8.50 per hour, and that he earns \$1,200 per month. It also states that defendant has \$100 in a savings account and that he had no debts. The State asserts that the trial court fulfilled its obligation to "consider the ability of the defendant to pay" when it considered the information presented in the presentence-investigation report. Defendant counters that the trial court made "no mention of his ability to pay the restitution within [the specified] period."

¶ 5 The State is correct; there is no requirement that the trial court explicitly state on the record that it considered a defendant's ability to pay restitution. We look first to the plain language of section 5-5-6(f). The statute states only that the trial court must "tak[e] into consideration" a defendant's ability to pay restitution. 730 ILCS 5/5-5-6(f) (West 2008). We, of course, may not depart from the plain language of the statute and read into it conditions, limitations, or expressions that the legislature did not express. *People v. Chambers*, 2011 IL App (3d) 090949, ¶ 11. Section 5-5-6(f) says nothing about making express findings on the record in this regard. See 730 ILCS 5/5-5-6(f) (West 2008).

¶ 6 Moreover, we note that this court has considered this question in the past. In *People v. Whitfield*, 146 Ill. App. 3d 322, 327 (1986), this court affirmed an order of restitution, holding: “Although the trial judge did not make findings or specifically address defendant's financial capability, the record shows that he had ample information to support his conclusion that defendant would be able to pay restitution.” Hence, consistent with the plain language of section 5-5-6(f) there is no requirement that the trial judge make any specific pronouncement on the record regarding a defendant’s ability to pay restitution. In this case, the trial court had adequate information before it in the form of the presentence-investigation report of the presentence investigation.

¶ 7 Defendant claims that *People v. Dickey*, 2011 IL App (3d) 100397, supports his position; however, we do not agree. In *Dickey*, the court held:

“However, section 5–5–6 also requires the court to consider the defendant's ability to pay in determining 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 [except as noted in the statute] * * * within which payment of restitution is to be paid in full.’ 730 ILCS 5/5-5-6(f) (West 2010). If the court orders restitution be paid over a period greater than six months, ‘the court shall order that the defendant make monthly payments’ unless the court waives this requirement by making ‘a specific finding of good cause for waiver.’ *Id.* The trial court ordered defendant to make restitution within the 30-month term of probation, but did not make a *specific finding* of good cause to waive the required monthly payments. There is also no indication that the court *considered* defendant's ability to pay in setting the time for restitution to be made. We vacate the order of restitution and remand for the trial court to

consider defendant's ability to pay in setting the time in which restitution must be paid.”

(Emphasis added.)

In this passage, the *Dickey* court expressly distinguished between the good-cause requirement (not at issue here), which requires an explicit finding and the ability-to-pay consideration, which does not. *Id.* As such, *Dickey* provides no support for defendant’s position that the trial court had to make an explicit finding that he had the ability to pay restitution. We further note that, unlike ability to pay, section 5-5-6(f) requires a “specific finding of good cause for waiver” (730 ILCS 5/5-5-6(f) (West 2008)), which provides a basis in the language of the statute for treating these two requirements differently.

¶ 8 Similarly, *In re Estate of Yucis*, 382 Ill. App. 3d 1062, 1067 (2008), upon which defendant relies, holds only that the failure to set a time period for payment of restitution is a fatal defect (here, the court set a period of six months). Defendant also cites *People v. Hamilton*, 198 Ill. App. 3d 108 (1990), *rev’d in part on other grounds by People v. Williams*, 149 Ill. 2d 467, 495 (1992). That case flatly holds, “The statute covering restitution *** does not require the court to find defendant has an ability to pay before ordering restitution.” *Id.* at 114. *Hamilton* provides little assistance to defendant here. Accordingly, defendant has not convinced us that the trial court erred by not making an express finding regarding his ability to pay restitution.

¶ 9 We now turn to defendant’s contention that the restitution order must be vacated because the trial court did not specify a manner of payment, *i.e.*, lump sum or installments. The trial court’s order set an amount and time limit in which that amount was to be paid (\$1,250 in six months, with \$450 applied against the \$1,250 from defendant’s bond). We see nothing in the plain language of section 5-5-6(f) that requires a court to expressly address this issue in its restitution order, at least

in the context of the instant case. See 730 ILCS 5/5-5-6(f) (West 2008). Moreover, the trial court set restitution at \$1,250 and ordered: “restitution to be paid by 11-20-12 at 8:45 AM.” The obvious and natural reading of the trial court’s order is that a lump sum of \$1,250 is due not later than six months from the date of sentencing. Nothing in section 5-5-6(f) requires more specificity. In fact, as we read this statute, the provisions pertaining to installment payments are designed to insure that the victim receives restitution in a timely manner. Notably, it states, “If the defendant is ordered to pay restitution and the court orders that restitution is to be paid over a period greater than 6 months, the court shall order that the defendant make monthly payments; the court may waive this requirement of monthly payments only if there is a specific finding of good cause for waiver.” 730 ILCS 5/5-5-6(f) (West 2008). Unless restitution is to be made fully within six months, installments must be ordered absent a finding of good cause. The effect of requiring installments is that the victim starts to receive restitution at an earlier time. Why a defendant would be able to use these provisions as a sword to undo a restitution order is not apparent to us, and defendant provides no such explanation. In short, we perceive no error here.

¶ 10 In light of the foregoing, we find neither of defendant’s contentions persuasive. Parenthetically, we further note that the net effect of the order after the application of defendant’s bond is that he pay \$800 in six months. As defendant makes \$1200 per month and has \$100 in savings, he has \$7,300 in assets to meet this obligation. Restitution orders are reviewed using the abuse-of-discretion standard. *Day*, 2011 IL App (2d) 091358, ¶ 56. Thus, since an abuse of discretion occurs only where no reasonable person could agree with the decision of the trial court (*Shaw v. St. John’s Hospital*, 2012 IL App (5th) 110088, ¶ 18), we could not find an abuse of

discretion under the circumstances present here. Accordingly, the trial court's restitution order is affirmed.

¶ 11 Affirmed.