

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

July 19, 1996

Plaintiff-Appellee,

v

No. 181979

LC No. 94-135242

JEROME CARLOS WASHINGTON, a/k/a
JAVON DAVIS,

Defendant-Appellant.

Before: Bandstra, P.J., and Markman and M.D. Schwartz,* JJ.

PER CURIAM.

Defendant pleaded guilty to armed robbery, MCL 750.529; MSA 28.797, and of being an habitual offender, third offense, MCL 769.11; MSA 28.1083. He was sentenced to four to twenty years' imprisonment and ordered to pay \$1,197.00 in restitution. Defendant now appeals, and we remand.

Defendant first argues that the amount of restitution ordered to be paid was set in an arbitrary fashion. We disagree. The restitution award in the amount of \$1,197.00 was supported adequately by the victim's impact statement contained in the presentence investigation report. *People v Hart*, 211 Mich App 703, 706; 536 NW2d 605 (1995). Further, defendant did not offer evidence in support of any other figure or request a hearing regarding the issue. *Id.* Thus, the amount of restitution was not set arbitrarily. *Id.*

Defendant next asserts that the trial court erred in ordering him to pay restitution without first having made a determination of his ability to pay pursuant to MCL 780.767(1); MSA 28.1287(767)(1). This subsection provides:

The court, in determining whether to order restitution under [MCL 780.766;
MSA 28.1287(766)] and the amount of that restitution, shall consider the amount of the

* Circuit judge, sitting on the Court of Appeals by assignment.

loss sustained by any victim as a result of the offense, the financial resources and earning ability of the defendant, the financial needs of the defendant and the defendant's dependents, and such other factors as the court considers appropriate.

MCL 780.766(13); MSA 28.1287(766)(13) reiterates the requirement that a trial court consider a defendant's ability to pay in determining the amount of restitution. This subsection provides:

In determining the amount of restitution, the court shall consider the defendant's earning ability, financial resources, and any other special circumstances that may have a bearing on the defendant's ability to pay.

In ordering restitution in this case, the trial court merely stated: "[A]pparently there's restitution that's going to be required to be paid in the amount of \$1,197.00." The trial court made no additional findings and did not consider the factors enumerated in the statute.

Furthermore, despite the fact that defendant did not object below to paying the restitution, consideration of defendant's ability to pay is mandated by the statute. *Id.* at 471. We also note that defendant did not agree to pay restitution in accordance with his plea bargain. Cf. *Hart, supra* at 708 ("[T]he existence of a restitution agreement is a unique 'special circumstance' that the court reasonably can consider as establishing a rebuttable presumption that a defendant has considered his own financial situation and has determined that he has or will have the ability to pay the amount ordered by the court."). We therefore remand for reconsideration of the order of restitution.

We also noticed in reviewing the lower court record that a discrepancy exists regarding whether defendant pleaded guilty to being a third habitual offender or a fourth habitual offender. The judgment of sentence in this case states that defendant pleaded guilty to being a fourth habitual offender. However, the plea transcript, the sentencing transcript, and the presentence investigation report indicate that defendant pleaded guilty to being a third habitual offender. On remand, the trial court should also review this matter and determine whether a corrected judgment of sentence is warranted.

We remand for reconsideration of the restitution award and review of the judgment of sentence. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Stephen J. Markman
/s/ Michael D. Schwartz