

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant,

Supreme Court No. 146626
Court of Appeals No. 307102
Lower Court No. 11-4309FC

-vs-

CHAD JAMES GARRISON

Defendant-Appellee.

CHEBOYGAN COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

ANN M. PRATER (P64660)
Attorney for Defendant-Appellee

146626
**APPELLEE'S BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE
(ORAL ARGUMENT REQUESTED)**

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STATEMENT OF JURISDICTION

Defendant-Appellee was convicted in the Cheboygan County Circuit Court on January 3, 2011 by plea of guilty to Larceny \$1,000 - \$20,000, MCL 750.356(3)(a), habitual second, MCL 769.10. He was sentenced on February 15, 2011 to 28 months to 7 years 6 months with the MDOC and ordered to pay restitution of \$11,134.84. A restitution hearing was held on March 29, 2011 and Defendant-Appellee's restitution was lowered to \$10,957 on March 29, 2011.

Defendant-Appellee requested Appellate Counsel on March 24, 2011 and Appellate Counsel was appointed on March 24, 2011. Defendant-Appellee's Application for Leave to Appeal was filed on November 15, 2011 pursuant to MCR 7.203(B) and MCR 7.205. Leave to Appeal was granted on January 17, 2012. The Court of Appeals, with one dissenting opinion, remanded to the trial court regarding restitution for traveling expenses in an unpublished order. *People v Garrison*, unpublished opinion of the Court of Appeals, issued December 20, 2012 (Docket No 307102).

Plaintiff-Appellant filed for leave to appeal in the Michigan Supreme Court on February 1, 2013 with a notice of hearing for March 5, 2013. Defendant-Appellee now files this brief in opposition pursuant to MCR 7.302(D).

STATEMENT OF QUESTION PRESENTED

- I. IS DEFENDANT-APPELLEE ENTITLED TO RESENTENCING AS REQUIRED BY THE DUE PROCESS CLAUSE TO DETERMINE THE PROPER AMOUNT OF RESTITUTION BECAUSE THE RESTITUTION AMOUNT WRONGFULLY INCLUDED TRAVEL EXPENSES CONTRARY TO THE CRIME VICTIM'S RIGHTS ACT?

Trial Court answers, "No".

Plaintiff-Appellant answers, "No".

The Michigan Court of Appeals answers, "Yes".

Defendant-Appellee answers, "Yes".

STATEMENT OF FACTS

Defendant-Appellee was convicted in the Cheboygan County Circuit Court on January 3, 2011 by plea of guilty to Larceny \$1,000 - \$20,000, MCL 750.356(3)(a), habitual second, MCL 769.10. He was sentenced on February 15, 2011 to 28 months to 7 years 6 months with the MDOC and ordered to pay restitution of \$11,134.84.

A restitution hearing was held on March 29, 2011 and Defendant-Appellee's restitution was lowered to \$10,957. At this hearing, Defendant-Appellee was ordered to pay to Michael Mikolon \$175, \$210 to Frederick Mikolon, and approximately \$740 to Neil Casaceli for mileage not just to and from court but also to check on the items taken from them. RH 8-9, 16, 32-33.

Defendant-Appellee was also ordered to pay more than the actual value of the Triton trailer taken. RH33. (It is difficult to determine what amount the lower court decided upon to use as a final figure because it is not broken down during the restitution hearing.) The fair market value of the trailer was able to be ascertained and was not in dispute at the hearing. Evidence was presented at the hearing that estimated the value of the trailer in question to be worth \$1958.29 based on an insurance estimate. RH 18. In ordering Defendant-Appellee to pay for the trailer, the lower court stated, "I've come up with a median figure between actual cash value and estimated repair appraisal. The victim is entitled to go buy a new trailer and I came up with one in the middle figure, which is a little higher than the actual cash value. Because I am not sure he can get one exactly the same for the [sic \$]1958, so I've left a little cushion because he should be able to restore it with a trailer at least as nice, and he's going to have to shop around to do that." RH 33.

Defendant-Appellee requested Appellate Counsel on March 24, 2011 and Appellate Counsel was appointed on March 24, 2011. Defendant-Appellee's Application for Leave to

Appeal was filed on November 15, 2011 pursuant to MCR 7.203(B) and MCR 7.205. Leave to Appeal was granted on January 17, 2012. The Court of Appeals, with one dissenting opinion, remanded to the trial court regarding restitution for traveling expenses in an unpublished order. *People v Garrison*, unpublished opinion of the Court of Appeals, issued December 20, 2012 (Docket No 307102).

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ARGUMENT

- I. DEFENDANT-APPELLEE IS ENTITLED TO RESENTENCING AS REQUIRED BY THE DUE PROCESS CLAUSE TO DETERMINE THE PROPER AMOUNT OF RESTITUTION BECAUSE THE RESTITUTION AMOUNT WRONGFULLY INCLUDED TRAVEL EXPENSES CONTRARY TO THE CRIME VICTIM'S RIGHTS ACT.

STANDARD OF REVIEW: A trial court's order of restitution is typically reviewed for abuse of discretion. However, when the determination of restitution involves statutory interpretation, the review is de novo. The trial court's factual determination is reviewed for clear error. MCR 2.613(C), *People v Byard*, 265 Mich App 510; 696 NW2d 783 (2005); *People v Allen*, 295 Mich App 277, 281, n 1; 813 NW2d 806 (2012); and *People v Bell*, 276 Mich App 342, 741 NW2d 57 (2007).

PRESERVATION OF ISSUE: Defendant-Appellee raised these issues via a restitution hearing held on March 29, 2011 and objected to the methods used to calculate the value and travel expenses as well. RH 29-30.

DISCUSSION: The Due Process Clause of US Const, Am XIV requires that a trial court impose a sentence based on accurate information. *Townsend v Burke*, 334 US 736; 68 S Ct 1252; 92 L Ed 1690 (1948). See also, *Const 1963*, Art 1, § 17. A sentence based on inaccurate information is invalid. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997).

Expenses that are not reimbursable under the relevant statutes may not be included in a restitution order. See, e.g., *People v Jones*, 168 Mich App 191, 196 (1988) (the trial court erred in ordering restitution of the victim's traveling expenses). In the instant case, Defendant-Appellee was ordered to pay to Michael Mikolon \$175, \$210 to Frederick Mikolon, and approximately \$740 to Neil Casaceli for mileage not just to and from court but also to check on the items taken from them. RH 8-9, 16, 32-33. Neither MCL 780.766; MSA 28.1287(766) nor

MCL 769.1a; MSA 28.1073 allow for travel expenses, such as mileage, to be ordered as part of restitution. The Court in *Jones* held:

“In the instant case, the sentencing court ordered defendant to pay \$450 in restitution to reimburse the victim for traveling expenses. We do not read either MCL 780.766; MSA 28.1287(766) or MCL 769.1a; MSA 28.1073 as authorizing the sentencing court to order defendant to pay such expenses. Accordingly, we conclude that the sentencing court erred in so ordering.”
[*Jones*, at 196.]

In addition, the Michigan Court of Appeals nicely summed up the reasons behind the denial of traveling expenses as part of restitution in its unpublished opinion in the instant case, stating:

“It is inaccurate to say that a trial court has discretion to award restitution; rather, “a trial court must order the defendant to pay restitution and the amount must fully compensate the defendant’s victims.” *People v Allen*, 295 Mich App 277, 281, n 1; 813 NW2d 806 (2012). A trial court therefore abuses its discretion when it orders restitution other than full restitution. *Id.* at n 1. “Whether and to what a extent a loss must be compensated is a matter of statutory interpretation; and this Court reviews de novo the proper interpretation of statutes.” *Id.*, citing *People v Bemer*, 286 Mich App 26, 31; 777 NW2d 464 (2009). We review a trial court’s factual findings underlying a restitution order for clear error. MCR 2.613(C). A finding is clearly erroneous if this Court is left with the definite and firm conviction that a mistake has been made. *Allen*, 295 Mich App at 281.

Restitution is not a substitute for civil damages, but encompasses only those losses that are easily ascertained and directly result from defendant’s criminal conduct. *People v White*, 212 Mich App 298, 316; 536 NW2d 876 (1995). A trial court may require a convicted felon to pay costs only if such costs are expressly authorized by statute. *People v Slocum*, 213 Mich App 239, 242; 539 NW2d 572 (1995). Both MCL 769.1a and the Crime Victim’s Rights Act (CVRA), MCL 780.751 et seq., provide that the sentencing court shall order a defendant to pay restitution in addition to any other penalty authorized by law. See MCL 769.1a; MCL 780.766.

This Court has previously held that neither MCL 769.1a nor the CVRA, MCL 780.766, authorizes the sentencing court to order a defendant to pay restitution to reimburse the victim for traveling expenses. *People v Jones*, 168 Mich App 191; 423 NW2d 614 (1988). We agree with the *Jones* court, and do not read either statute to provide a court with the authority to order the defendant to pay such expenses. Therefore, the trial court abused its discretion in ordering defendant to pay for travel expenses. *Allen*, 295 Mich App at 281 n 1.”
People v Garrison, unpub. opinion of the Court of Appeals, 12/20/12, #307102, pp 1-2.

The Michigan Court of Appeals held *Jones*, supra., to still be valid, stating, “Although *Jones* was decided before the 2005 amendments to the CVRA, 2005 PA 184, we do not find that the amendments overruled or modified *Jones*. Rather, the amendments only made the ordering of restitution mandatory rather than permissive. See *People v Gubachy*, 272 Mich App 706, 712-713; 728 NW2d 891 (2006).” *People v Garrison*, unpub. opinion of the Court of Appeals, 12/20/12, #307102, footnote 1.

Because Defendant-Appellee, as in *Jones*, was ordered to pay mileage as part of his restitution owed, the \$1,125 in travel expenses must be subtracted and stricken from the order of restitution.

The restitution as currently order renders Defendant-Appellee’s sentence partially invalid. The remedy for a partially invalid sentence is a remand for resentencing. *People v Benda*, 162 Mich App 255; 412 NW2d 705 (1987).

SUMMARY AND REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellee asks that this Honorable Court denial Plaintiff-Appellant's application for leave to appeal, and reaffirm the Michigan Court of Appeals order and opinion remanding this matter for resentencing to correct the amount of restitution owed.

Dated: February 20, 2013

Respectfully submitted,

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