No. 2021-1060

IN THE SUPREME COURT OF OHIO

DISCRETIONARY APPEAL FROM THE
BUTLER COUNTY COURT OF APPEALS,
TWELFTH APPELLATE DISTRICT,
CASE NO. CA2020-08-094

STATE OF OHIO,
Plaintiff-Appellant,

&

D.H.,
Intervenor-Appellant,

v.

KYLE BRASHER,
Defendant-Appellee.

MERIT BRIEF OF APPELLEE KYLE BRASHER

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INTRODUCTION

Like all constitutional rights, Marsy's Laws' protections can be waived and forfeited. Here, the state and the victim have never claimed that the victim was unaware of the original sentencing hearing, but she did not exercise her constitutional right to appear, and no one objected when the trial court said that Mr. Brasher couldn't pay restitution and the victim could not specify the amount of loss. When the trial court exercised its statutory authority not to impose restitution, no one objected.

Before Marsy's Law, victims were effectively guests at criminal cases. Perhaps they were witnesses, but they did not have legal interests at stake, and therefore were not parties to the action. Marsy's Law changed that. Here, the victim-intervenor successfully intervened in the court of appeals and appealed an adverse ruling to this court. The intervenor has not explained how she had the right to intervene in the court of appeals but not in the trial court.

Like many litigants, victims have constitutional rights. Like all litigants, victims can forfeit or waive those rights by failing to timely assert them. Marsy's Law does not give victim's carte blanche to protect those rights using any procedural mechanism they want at any time of their choosing.

A direct appeal from the original judgment is not only the procedurally correct way to challenge a judgment entry of sentence, it is the only mechanism that does not raise complicated questions of notice and the right to counsel at all critical stages of a

criminal proceeding, which would include extraordinary writs if they may be used to impose criminal sanctions.

This court should either dismiss this case as improvidently allowed or affirm the decision of the Twelfth Appellate District.

STATEMENT OF THE CASE AND THE FACTS

Mr. Brasher will not restate the entire case history, but he makes the following clarifications and corrections.

The trial court considered restitution at Mr. Brasher's original sentencing hearing.

The state alleges that at Kyle Brasher's original sentencing proceeding, "a restitution hearing was not held[,]" but that is correct only to the extent that no hearing *solely* addressing restitution was held. State's Brief at 4. At the original sentencing hearing, the trial court expressly considered restitution, and then exercised its discretion not to award restitution for the damaged car:

> You put somebody else in there with you, and you went down to Cincinnati to buy drugs, and then you left the guy's car down there where it got damaged. And here this poor guy is left to pick up the pieces. You don't come into court with any restitution or anything, nothing to fix it. So this guy is left on his own. I don't even know what to tell him because he can't come up with a figure to even tell us what it's worth.

T.p. 6–7 (First sentencing hearing).

The victim-intervenor did not attend the hearing, and the prosecutor expressly waived the right to comment. No one asserted rights under Marsy's Law.

The prosecutor did not object. In fact, the prosecutor expressly waived the right to say anything:

> THE COURT: Does the State wish to be heard?
> MR. BISSELL: No, Your Honor. Thank you.

Id. at 5.

Although the victim-intervenor submitted written statements in support of restitution, she did not attend the sentencing hearing. She has never claimed that she was unaware of the hearing.

Neither the state nor D.H. asserted any rights under Marsy's Law. The state and D.H. failed to file a timely appeal of the judgment.

There is no evidence that Mr. Brasher personally knew of the writ D.H. filed, and he never waived his right to counsel at that critical stage.

The state is correct that the victim-intervenor filed and obtained a complaint for a writ of mandamus, but she did not make Mr. Brasher a respondent. And while the state and D.H.'s counsel are correct that Mr. Brasher's counsel for his criminal trial court case knew about the writ action, there is no evidence that Mr. Brasher was aware of the action or that he had counsel for the writ action. R.C.P. 14. And nowhere in the record did Mr. Brasher waive his right to counsel at all critical stages under the Sixth and Fourteenth Amendments to the United States Constitution.

Mr. Brasher served his complete period of incarceration, reduced by less than 8% for earned credit pursuant to R.C. 2967.193.

D.H. incorrectly alleges that Mr. Brasher "did not even serve half of his prison term." D.H. Brief at 6. This omits reference to two months of jailtime credit, and it confuses a treatment transfer program under R.C. 5120.035 with early release. A person remains a prisoner of the Department of Rehabilitation and Correction when transferred under such program, and is still referred to as such. *See, e.g.*, R.C.

5120.035(C)(1) (neither the placement nor the prisoner's participation in or completion of the program shall result in any reduction of the prisoner's prison term"). The Certificate of Incarceration attached to D.H.'s brief in the court of appeals shows a term of "1 year, 6 months," which is what remained of his prison term after the two months of jailtime credit awarded in his judgment entry of sentence. R.C.A. 20, Brief of Intervenor-Appellee, Exhibit A-1; R.C.P. 10, Judgment Entry of Sentence (Oct. 19, 2018)..

Further, a person on Treatment Transfer remains on the Ohio Department of Rehabilitation and Correction's website with the person's projected final release date. And while, it's true that Mr. Brasher's prison term was subject to an 8% reduction for earned credit pursuant to R.C. 2967.193(A)(3), that is a standard period of reduction, and it is reflected in the information provided on the Department of Rehabilitation and Correction's Offender Search, which provides the "Expected Release Date." *Id*.

After obtaining a writ without Mr. Brasher's participation, the victim-intervenor exercised the rights they could have exercised at Mr. Brasher's original sentencing hearing.

After the Twelfth District issued a writ in a case to which Mr. Brasher was not a party, the victim-intervenor exercised the right to participate in the resentencing hearing that she did not exercise during the original hearing. T.p. 3–45 (July 27, 2020). Unlike at the original sentencing hearing, the victim-intervenor argued that they had a right to restitution under Marsy's Law. *Id.* at 4. Based on D.H.'s constitutional argument, the trial court awarded $1,976.55 in restitution. R.C.P. 19, Decision Upon

Mandamus Regarding Restitution and Supplemental Sentencing Entry (Aug. 18, 2020). Apx. A-3. The entry did not include the fact of conviction as required by Crim.R. 32(C).

Mr. Brasher filed a notice of appeal, and upon D.H.'s motion and without objection, the court of appeals permitted D.H. to intervene. R.C.A. 16, Entry Granting Motion to Intervene.

ARGUMENT

Proposition of Law:

Victims of crimes may file direct appeals from sentencing judgments that they believe impose inadequate restitution.

I. This court should dismiss this case as improvidently allowed for want of a final appealable order.

The trial court's Decision Upon Mandamus Regarding Restitution and Supplemental Sentencing Entry, R.C.P. 19 (Aug. 18, 2020), Apx. A-3, appears not to be a final appealable order. As the state's brief correctly explains, a final order must include 1) the fact of conviction, 2) the sentence, 3) the judge's signature, and 4) the time stamp by the clerk. State's Brief at 13, citing *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, applying Crim.R. 32(C). The "Supplemental Sentencing Entry" includes only the restitution part of the sentence and does not include the fact of conviction. As a result, the entry is not final, and this court should dismiss this case as improvidently allowed.

II. Text of Article I, Section 10a of the Ohio Constitution, "Marsy's Law."

> (A) To secure for victims justice and due process throughout the criminal and juvenile justice systems, a victim shall have the following rights, which shall be protected in a manner no less vigorous than the rights afforded to the accused:
>
> (1) to be treated with fairness and respect for the victim's safety, dignity and privacy;

(2) upon request, to reasonable and timely notice of all public proceedings involving the criminal offense or delinquent act against the victim, and to be present at all such proceedings;

(3) to be heard in any public proceeding involving release, plea, sentencing, disposition, or parole, or in any public proceeding in which a right of the victim is implicated;

(4) to reasonable protection from the accused or any person acting on behalf of the accused;

(5) upon request, to reasonable notice of any release or escape of the accused;

(6) except as authorized by section 10 of Article I of this constitution, to refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused;

(7) to full and timely restitution from the person who committed the criminal offense or delinquent act against the victim;

(8) to proceedings free from unreasonable delay and a prompt conclusion of the case;

(9) upon request, to confer with the attorney for the government; and

(10) to be informed, in writing, of all rights enumerated in this section.

(B) The victim, the attorney for the government upon request of the victim, or the victim's other lawful representative, in any proceeding involving the criminal offense or delinquent act against the victim or in which the victim's rights are implicated, may assert the rights enumerated in this section and any other right afforded to the victim by law. If the relief sought is denied, the victim or the victim's lawful representative may petition the court of appeals for the applicable district, which shall promptly consider and decide the petition.

(C) This section does not create any cause of action for damages or compensation against the state, any political subdivision of the state, any officer, employee, or agent of the state or of any political subdivision, or any officer of the court.

(D) As used in this section, "victim" means a person against whom the criminal offense or delinquent act is committed or who is directly and proximately harmed by the commission of the offense or act. The term "victim" does not include the accused or a person whom the court finds would not act in the best interests of a deceased, incompetent, minor, or incapacitated victim.

(E) All provisions of this section shall be self-executing and severable, and shall supersede all conflicting state laws.

(F) This section shall take effect ninety days after the election at which it was approved.

III. The general rule: A judgment entry of sentence is final once journalized.

Once entered, a judgment in a criminal case, even one with constitutional error, is final, and "a trial court is generally not empowered to modify a criminal sentence by reconsidering its own final judgment." *State v. Carlisle*, 131 Ohio St.3d 127, 2011-Ohio-6553, 961 N.E.2d 671, ¶ 1. The rationale for this holding is to preserve a legitimate expectation of finality in sentencing.

Further, "when the entirety of a prison sanction has been served, the defendant's expectation in finality in his sentence becomes paramount, and his sentence for that crime may no longer be modified." *State v. Holdcroft,* 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶ 18. Also, when a trial court has personal and subject matter jurisdiction, the judgment is voidable, and not subject to attack by collateral motion. *State v. Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776, ¶ 36–40, citing *State v. Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248. Here, there is no dispute that Mr. Brasher had completed his sentence in full before he was resentenced

or before the Twelfth District issued a writ of mandamus. As a result, the trial court lacked jurisdiction to order restitution or issue its supplemental sentencing entry. *Holdcroft* at ¶ 19. Accordingly, applying this court's holdings in *Henderson*, *Harper*, and *Holdcroft*, the trial court lacked jurisdiction to issue the supplemental sentencing entry.

Also, as explained in the factual section, the state's assertion that Mr. Brasher was released "substantially early from prison" misunderstands the law. State's Brief at 10. *See also,* Intervenor's Brief at 7. Mr. Brasher's prison term was reduced by only 8% of the time he was in prison, as dictated by R.C. 2967.193. He had at least 59 days of jailtime credit, and he completed his commitment to the Department of Rehabilitation and Correction in a drug treatment center, where he remained a "prisoner" serving his prison term. R.C.P. 10, Judgment Entry of Sentence (Oct. 19, 2018). Apx. A-1.

IV. "Petition" includes appeal.

A. A direct appeal is a form of "petition" under Marsy's Law.

1. Marsy's Law permits a victim to simply file a notice of appeal from a judgment they believe imposes insufficient restitution.

The simplest solution consistent with the constitutional text is to acknowledge that "petition" in paragraph B of Marsy's Law includes "direct appeal," and to allow victims to file notices of appeal in their own name when dissatisfied with restitution awards. As this court has explained, the term "petition" includes "appeal." *State ex rel. Thomas v. McGinty*, 164 Ohio St.3d 167, 2020-Ohio-5452, 172 N.E.3d 824, ¶ 40–41, citing,

inter alia, Black's Law Dictionary 1384 (11th Ed.2019), and *Jones v. First Natl. Bank of Bellaire*, 123 Ohio St. 642, 176 N.E. 567 (1931), syllabus.

This solution honors the command of Marsy's Law to give victims a mechanism to protect their rights, but it does so in a way that allows a single appeals court to resolve all issues out of a judgment entry of sentence in one efficient and timely process.

2. Alternative: Victims can intervene for limited purpose.

If the text of Marsy's Law alone does not give victims the right to file a notice of appeal from a judgment entry of sentence, an only slightly more complicated solution is to permit a victim to intervene for the limited purpose of contesting, and then, if needed, appealing, restitution. Civ.R. 24, Crim.R. 57(B). And while this court has suggested that the denial of a motion for leave to intervene may be immediately appealable, several lower courts have held that where such a denial would prevent a party from obtaining relief, such a denial is final and immediately appealable. *State ex rel. Suwalski v. Peeler*, Slip Op. 2021-Ohio-4061, ¶ 52 (Kennedy, J. dissenting), citing *State ex rel. Schroeder v. Cleveland*, 150 Ohio St.3d 135, 2016-Ohio-8105, 80 N.E.3d 417, ¶ 18; and *Southside Community Dev. Corp. v. Levin*, 116 Ohio St.3d 1209, 2007-Ohio-6665, 878 N.E.2d 1048, ¶ 6. *See also*, *Greenman v. Greenman*, 5th Dist. Fairfield No. 04CA69, 2005-Ohio-4961, ¶ 15; *Krancevic v. McPherson*, 8th Dist. Cuyahoga No. 84511, 2004-Ohio-6915; *Myers v. Basobas*, 129 Ohio App.3d 692, 698, 718 N.E.2d 1001 (10th Dist.1998).

B. Other solutions cause significant problems.

1. Declaring sentences without restitution void or non-final would create confusing line-drawing issues.

The state and D.H. suggest declaring restitution errors void or non-final. But neither can explain how a reviewing court should decide when a trial court did not impose restitution because it found the evidence insufficient and when it illegally refused to impose restitution. As this court noted in *Marcum*, some sentences do not require trial courts to enunciate findings on the record. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 23. Nothing in R.C. 2929.18 or Marsy's Law requires a trial court to explain on the record why it imposes or does not impose restitution. Accordingly, an entry that does not impose restitution cannot be void or non-final on its face because a trial court has the authority to not impose restitution without explanation.

2. The collateral challenge to the judgment in this case is barred under R.C. 2953.21(K).

A writ of mandamus cannot be used to reopen a criminal case because the General Assembly has barred any *person* from challenging a sentence collaterally other than through R.C. 2953.21. R.C. 2953.21(K) ("the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case"). Further, the General Assembly expressly

limited the class of persons who can file under the section to people "convicted of a criminal offense or adjudicated a delinquent child…." R.C. 2953.21(A)(1)(a).

The General Assembly may not have contemplated actions by victims when drafting R.C.2953.21(K). But even when "the legislature did not consider a particular circumstance, the text plainly applies or does not apply by its very words." Scalia & Garner, Reading Law: *The Interpretation of Legal Texts* 350 (2012).

Further, as this court has explained, even new constitutional rights do not permit a trial court to bypass the restrictions of R.C. 2953.21(K). *State v. Parker*, 157 Ohio St.3d 460, 2019-Ohio-3848, 137 N.E.3d 1151, ¶ 22.

Here, the General Assembly has expressly stated that a judgment can only be challenged collaterally via a postconviction petition, and only criminal defendants can file postconviction petitions. A writ—or any other form of collateral challenge—cannot lie.

3. A writ is not an available remedy because the writ can have no preclusive effect on a criminal defendant absent an affirmative waiver of the right to counsel and to participate in the proceeding.

A writ in which a criminal defendant is not a party cannot require a trial court to increase a criminal sentence. Normally, the doctrine of claim preclusion, an aspect of res judicata, can preclude litigation of an issue only when 1) the same parties were involved in each action, 2) the parties in the second action are in privity with those in the first, or 3) a party could have entered the proceeding but did not avail themselves of the

opportunity. *Howell v. Richardson*, 45 Ohio St.3d 365, 367, 544 N.E.2d 878 (1989), citing *Wright* v. *Schick*, 134 Ohio St. 193, 16 N.E.2d 321 (1938) and *Hainbuchner* v. *Miner*, 31 Ohio St. 3d 133, 137, 509 N.E.2d 424, 427 (1987).

Here, Mr. Brasher was not a party to the writ and was not in privity with either party to the writ. Further, although his criminal trial counsel was aware of the writ, there is no evidence that Mr. Brasher knew that the writ had been filed. That leaves only the argument that he "could have entered the proceedings but did not avail [himself] of the opportunity." *Howell* at 367.

Unlike most civil litigation, a writ that seeks an order compelling the imposition of a criminal sanction is a constitutionally critical stage of the criminal proceeding, which means the right to counsel attaches, and that right can only be waived knowingly, intelligently, and voluntarily.

The United States Supreme Court has held that defendants do not have the right to counsel to pursue discretionary appeals only because in those circumstances, the "defendant needs an attorney on appeal not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt." *Ross v. Moffitt*, 417 U.S. 600, 610–611, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). But a proceeding that asks a court to impose an additional criminal sanction is seeking to force the defendant to be "haled into court," so the right to counsel attaches.

This court has explained that the Sixth and Fourteenth Amendment right to counsel attaches at sentencing proceedings:

> The Sixth Amendment right to counsel applies to critical stages of criminal proceedings. *United States v. Wade*, 388 U.S. 218, 224, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *see also Iowa v. Tovar*, 541 U.S. 77, 80, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004) ("The Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process"). In *Wade*, the court explained that "in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." (Footnotes omitted.) *Id*. at 226; *see also Rothgery v. Gillespie Cty., Texas*, 554 U.S. 191, 212, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008), fn. 16 (noting that "critical stages" include proceedings between an individual and agents of the [***1036] state that amount to trial-like confrontations at which counsel would help the accused in coping with legal problems or meeting the adversary).
>
> More specifically, in *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the Court explained that sentencing is a critical stage of the proceedings and stated [****7] that "[t]he defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if [*70] he may have no right to object to a particular result of the sentencing process." *See also Mempa v. Rhay*, 389 U.S. 128, 137, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967) (holding that a defendant must be afforded an attorney at a revocation of probation hearing).

State v. Schleiger, 141 Ohio St.3d 67, 2014-Ohio-3970, 21 N.E.3d 1033, ¶ 13-14. And the Fifth Circuit has, in the context of a restitution hearing, found that when counsel is absent for a proceeding used to increase restitution, "there is a presumption of prejudice and 'reversal is automatic.'" *United States v. Pleitez*, 876 F.3d 150, 157 (5th Cir.2017), citing *United States v. Hillsman*, 480 F.3d 333, 335 (5th Cir.2007), quoting

Holloway v. Arkansas, 435 U.S. 475, 489, 98 S. Ct. 1173, 55 L.Ed.2d 426 (1978), and citing *United States v. Cronic*, 466 U.S. 648, 659, n.25, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

Here, because Mr. Brasher did not have counsel to participate in the writ (or to file a timely appeal of the decision), he did not have the opportunity to challenge the validity of the proceedings or to argue that the trial court did not have a clear duty to accept D.H.'s unverified request. He also could not argue that both the state and D.H. forfeited any constitutional argument by not making it at the original sentencing hearing.

The State recognizes this concern, but in a different context. The state argues that it "finds it untenable that a non-party victim could be bound to the actions (or inactions) of the trial court, and consequently be foreclosed from the rights and remedies presumably afforded by statute and constitution." State's Brief at 14. But that's *exactly* what the state is asking this court to accept with extraordinary writs—a victim and prosecutor can take a case to an appeals court without any participation from the defendant.

C. A writ does not lie in this case because the trial court did not have a clear legal duty to impose restitution.

A writ of mandamus lies only when a trial court has a clear legal duty to grant the relief requested. *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452, ¶ 6. But here, there is no clear legal duty for a trial court to impose restitution based merely on the unsworn allegations of D.H. While a trial court "*may*

base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information," (emphasis added), no statute *requires* a trial court to impose restitution solely on unsworn statements. R.C. 2929.18(A)(1).

Further, R.C. 2929.18(E) expressly authorized the trial court to consider Mr. Brasher's ability to pay, and the state and the victim-intervenor forfeited the right to make a constitutional challenge to that statute or the trial court's decision not to impose restitution. *See State v. Awan*, 22 Ohio St.3d 120, 123, 489 N.E.2d 277 (1986) (failure to raise constitutional claim in the trial court waives that claim). And even if D.H.'s submission of documentation relating to restitution constituted a claim for that restitution a non-constitutional objection to a sentence does not preserve a constitutional claim. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 377. Here, because the trial court found that the victim could not precisely state the amount of economic losses, because the trial court suggested that Mr. Brasher lacked the ability to pay restitution, and because neither Intervenor nor the state objected at the sentencing hearing, the trial court had no duty, clear or otherwise, to impose restitution.

CONCLUSION

Like all litigants, victims must raise constitutional claims in the trial court and, if dissatisfied, file a timely appeal. Here, D.H. did neither. A writ to which Mr. Brasher was not a party and for which he did not waive his right to counsel cannot force a trial court to increase the criminal sanction against him. This court should either dismiss this case as improvidently allowed or affirm the decision of the Twelfth District Court of Appeals.

Respectfully submitted,

Office of the Ohio Public Defender

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CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2021, this document was sent by electronic mail to John Conrad Heinkel, heinkeljc@butlercountyohio.org and to Bobbie Yeager, byeager@ocvjc.org.

/s/: Stephen P. Hardwick
Stephen P. Hardwick (0062932)
Assistant Public Defender

Counsel for Appellee, Kyle Brasher

#1546275

No. 2021-1060

IN THE SUPREME COURT OF OHIO

DISCRETIONARY APPEAL FROM THE
BUTLER COUNTY COURT OF APPEALS,
TWELFTH APPELLATE DISTRICT,
CASE NO. CA2020-08-094

STATE OF OHIO,
Plaintiff-Appellant,

&

D.H.,
Intervenor-Appellant,

v.

KYLE BRASHER,
Defendant-Appellee.

APPENDIX TO
MERIT BRIEF OF APPELLEE KYLE BRASHER

DBJ

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

FILED
2018 OCT 19 AM 11:25
MARY L. SWAIN
BUTLER COUNTY
CLERK OF COURTS

IMAGED

STATE OF OHIO — **CASE NO. CR2018-05-0933**

Plaintiff — **POWERS, J.**

vs. — **JUDGMENT OF CONVICTION ENTRY**

KYLE BRASHER
a.k.a. KYLE BRASHEAR

Defendant

PRIORITY

On October 16, 2018 defendant's sentencing hearing was held pursuant to Ohio Revised Code Section 2929.19. Defense attorney, Jeremy Evans and the defendant were present and defendant was advised of and afforded all rights pursuant to Crim. R. 32. The Court has considered the record, the charges, the defendant's Guilty Plea, and findings as set forth on the record and herein, oral statements, any victim impact statement and pre-sentence report, as well as the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors of Ohio Revised Code Section 2929.12 and whether or not community control is appropriate pursuant to Ohio Revised Code Section 2929.13, and finds that the defendant is not amenable to an available community control sanction. Further, the Court has considered the defendant's present and future ability to pay the amount of any sanction, fine or attorney's fees and the court makes no finding at this time of the defendant's ability to pay attorney fees.

The Court finds that the defendant has been found guilty of:

GRAND THEFT OF A MOTOR VEHICLE as to Count One, a violation of Revised Code Section 2913.02(A)(1)~(B)(5) a fourth degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 18 months.

Credit for 59 days served is granted as of this date.

As to Count(s) One:

The Court has notified the defendant that post release control is optional in this case up to a maximum of three (3) years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code Section 2967.28. The Defendant is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of that post release control. **If the Defendant violates the conditions of supervision while under post release control, the Parole Board can return Defendant for up to nine months for each violation for up to a maximum of one half of Defendant's original sentence for a total of 9 months even though Defendant has already served the entire stated prison term by this Court. If the violation is a new felony, Defendant could receive a prison term of the greater of one year or the time remaining on post release control, in addition to any other prison term imposed for the new offense.**

Defendant is ORDERED to pay:

Costs of prosecution, supervision and any supervision fees permitted pursuant to Revised Code Section 2929.18(A)(4). Attorney fees are not to be assessed as court costs. The Court notifies the Defendant that, pursuant to R.C. Section 2947.23(A)(1), failure to pay court costs and/or costs of prosecution as imposed may result in an order to perform community service.

Any Temporary Protection Order(s) issued pursuant to O.R.C. §2903.213, §2903.214, or §2919.26 shall be terminated with this Judgment of Conviction Entry.

The Court further advised the defendant of all of his/her rights pursuant to Criminal Rule 32, including his/her right to appeal the judgment, his/her right to appointed counsel at no cost, his/her right to have court documents provided to him/her at no costs, and his / her right to have notice of appeal filed on his behalf.

APPROVED AS TO FORM:

MICHAEL T. GMOSER
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

ENTER

POWERS, J.

SDB/kch
October 17, 2018

IN THE COMMON PLEAS COURT
GENERAL DIVISION
BUTLER COUNTY, OHIO

STATE OF OHIO,	*	Case No.: CR 2018-05-0933
Plaintiff,	*	JUDGE: NOAH E. POWERS II
vs.	*	**DECISION UPON MANDAMUS REGARDING RESTITUTION AND SUPPLEMENTAL SENTENCING ENTRY**
KYLE BRASHER a.k.a KYLE BRASHEAR,	*	
Defendant.	*	

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This matter came before the Court upon a mandamus decision from the Twelfth District Court of Appeals, directing the court to reopen sentencing so as to allow Deborah Howery, the victim in the case, the opportunity to enforce her right to restitution. *State ex rel. Howery v. Powers*, 12th Dist. No. CA2019-03-045, 2020-Ohio-2767. On July 27, 2020, the Court reopened sentencing and conducted an evidentiary hearing concerning Howery's restitution. Present for the hearing were attorneys Morgan Keilholz, on behalf of Howery, Jeremy Evans, on behalf of Kyle Brasher, and Scott Bissell, on behalf of the State.

Sentencing originally took place in this matter on October 16, 2018. While restitution was discussed, no formal finding was entered, spawning the mandamus action. As the Court had not made a definite finding regarding restitution at the original sentencing hearing, the Court finds that any imposition of restitution found at this stage is not an imposition of additional or increase in restitution. See *State v. Stamper*, 12th Dist. No. CA2009-04-1115, 2010-Ohio-1939, ¶11. Under the new provisions contained in Marsy's Law, a victim is entitled "to full and timely restitution from the person who committed the criminal offense or delinquent act against the victim." Ohio Constitution, Article I, Section 10(a)(A)(7).

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R.C. 2929.18(A)(1) provides that the court may impose a financial sanction upon sentencing for restitution based on the victim's economic loss which is defined as "any economic determent suffered by a victim as a direct and proximate result of the commission of an offense and includes any loss of income due to lost time at work because of an injury caused to the victim, and any property loss…" R.C. 2929.01(L). It does not include "non-economic loss or any punitive or exemplary damages." *Id.*

The amount of restitution ordered must bear a reasonable relationship to the victim's actual loss to comport with due process. *Stamper* at ¶17. "Accordingly, a trial court must 'determine the amount of restitution to a reasonable degree of certainty, ensuring that the amount is support by competent, credible evidence.'" *Id.* citing, *State v. Foster*, 12th Dist. No. CA2005-09-415, 2006-Ohio-4830, ¶8.

A victim may support her loss through documentary evidence or testimony. *State v. Collins*, 12th Dist. No. CA2014-11-135, 2015-Ohio-3710, ¶33 (Citations Omitted). As a restitution hearing is part of sentencing, the Court is not restricted by the Rules of Evidence in making it determination. *Id.* In this case, the Court originally, without making a definite finding, considered the victim impact statement. When "the amount of loss reverenced in a victim impact statement appears doubtful or uncertain, 'documentary or other corroborating evidence may be required to verify the loss or expense.'" *Id.*

The Court, at the July 27, 2020 *Restitution Hearing*, took into evidence additional testimony and documentation that has allowed it to make a determination of the victim's loss. While Howery submitted a number of estimates and presented testimony regarding the repair of the vehicle at question in this matter, the vehicle was ultimately not repaired. Instead, she and her husband sold the vehicle for $200, and later purchased a vehicle for $2000.

The Court notes that testimony was offered by both Howery and her husband as to a $3021.00 value for of the damaged automobile, that value did not necessarily reflect the fair

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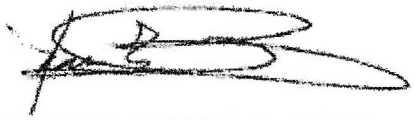
market value of the same as it included sentimental value of the vehicle, the automobile having been left to her by her deceased sister. But, the Court discounts that valuation because as mentioned above, it is limited to ordering restitution for economic losses only.

As such, the Court finds that the actual economic loss regarding the vehicle itself is $1800.00. This figure is the amount recovered after the sale of the returned vehicle subtracted from the cost of purchasing a new vehicle. The Court took into consideration the fact that the vehicle replaced, if not in disrepair, would have been comparable in price to the vehicle purchased as a replacement. In addition to the costs incurred for the replacement of the vehicle, Howery demonstrated that she incurred economic losses from towing the vehicle and making it available for inspection, so as to ultimately determine the cost for repair. That figure was $176.55 paid to Jake Sweeney Mazda West on January 25, 2018.

Based on the foregoing, the Court finds that Deborah Howery, as the victim in this case, is entitled to restitution in the amount of $1976.55.

SO ORDERED:



NOAH E. POWERS II, JUDGE

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