

STATEMENT OF THE CASE

Appellant-Defendant, Michael E. Cooper (Cooper), appeals his sentence for four Counts of fraud and one Count of theft, all Class D felonies, Ind. Code § 35-50-2-7.

We reverse and remand with instructions.

ISSUE

Cooper raises one issue on appeal, which we restate as follows: Whether the trial court's sentence subjected him to incarceration for his inability to pay restitution.

FACTS AND PROCEDURAL HISTORY

On August 24, 2010, a jury found Cooper guilty of four Counts of fraud and one Count of theft, all Class D felonies, I.C. § 35-50-2-7. On September 17, 2010, the trial court held a sentencing hearing. During the hearing, Cooper testified that he had a bank account at a Wells Fargo Bank in Monticello, Indiana, but that he did not know how much money was in the account. When the State asked Cooper if he had \$300 in the account, he replied, "Uh, maybe." (Transcript p. 10). Cooper also testified that he owned a 1958 Mack truck worth at least \$300.

At the end of the hearing, the State requested that the trial court reduce Cooper's executed sentence in exchange for Cooper's payment of restitution in the amount of \$316.00 to his victim, Barbara Thomas (Thomas), within thirty days of the sentence. This request was to encourage Cooper to pay restitution promptly because Thomas needed the money to pay

bills. Based on the State's request and the evidence presented at the hearing, the trial court sentenced Cooper to two and one-half years in the Indiana Department of Correction (IDOC) for each Count, with the five sentences to run concurrently. The trial court also provided that: (1) Cooper could execute the last six months of the sentences in the Clinton County Community Corrections Program if he paid restitution in full within sixty days; and (2) the sentences would be modified to one and one-half years executed in the IDOC, with one year suspended and one year of probation if Cooper paid restitution in the amount of \$316.00 to Thomas within thirty days of sentencing.

Cooper now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

On appeal, Cooper argues that the trial court's sentence punishes him for his inability to pay restitution because it imposes additional jail time if he does not pay \$316.00 to Thomas within thirty days. When reviewing a trial court's decision, we recognize that sentencing issues are left to the trial court's sound discretion, and we will reverse the trial court's decision only upon a showing of abuse of discretion. *Sanjari v. State*, 942 N.E.2d 134, 145 (Ind. Ct. App. 2011). An abuse of discretion occurs where the decision is "clearly against the logic and effects of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Id.* (quoting *Anglemeyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007)).

In Indiana, a trial court may require a defendant to pay restitution to the victim of his or her crime. I.C. § 35-50-5-3(a). The principal purpose of restitution is to vindicate the rights of society and to impress upon the defendant the magnitude of loss the crime has caused. *Pearson v. State*, 883 N.E.2d 770, 772 (Ind. 2008). Restitution also serves to compensate the offender's victim. *Id.*

In ordering restitution, a trial court may take two approaches. First, a trial court may order restitution as part of an executed sentence. I.C. § 35-50-5-3(a) (“[I]n addition to any sentence imposed under this article for a felony or misdemeanor, the court may, as a condition of probation or without placing the person on probation, order the person to make restitution...”). In such cases, it is “well-settled that restitution imposed upon a defendant with an executed sentence does not require the trial court to conduct an inquiry into the defendant’s ability to pay.” *Sanjari*, 942 N.E.2d at 145. Second, a trial court may order restitution as a condition of probation. I.C. § 35-38-2-2.3(a)(5). If a trial court takes this approach, however, the trial court must inquire into the defendant’s ability to pay in order to prevent an indigent defendant from being imprisoned for an inability to pay. *Pearson*, 883 N.E.2d at 773. Restitution as a condition of probation may not exceed the defendant’s ability to pay. I.C. § 35-38-2-2.3(a)(5). When making an inquiry into a defendant’s financial abilities, the trial court should consider factors such as the defendant’s current financial status, health, and employment history. *Laker v. State*, 869 N.E.2d 1216, 1221 (Ind. Ct. App. 2007).

In the instant case, the State argues that the trial court ordered restitution as part of Cooper's executed sentence rather than as a condition of probation. We cannot agree with this argument because we have previously held that restitution is part of an executed sentence when a defendant does not face longer imprisonment because of a failure to pay the restitution. *Bitner v. State*, 546 N.E.2d 117, 121 (Ind. Ct. App. 1989). In contrast, it is clear here that Cooper faces two and one-half years of incarceration for his failure to pay restitution, as opposed to one and one-half years of incarceration if he pays his restitution within thirty days. Accordingly, Cooper's restitution is not part of his executed sentence. Furthermore, we cannot conclude that the payment is a condition of probation because Cooper will not have even entered probation before the restitution is due, and Cooper does not risk revocation of his probation if he fails to pay the restitution.

Instead, we find that Cooper's sentence is erroneous. The Indiana Code does not provide for conditional sentences such as Cooper's unless the payment of restitution is a condition of probation. *See* I.C. §§ 35-50-1-1 to -9-1. If the trial court intended restitution to be a condition of probation, then it should have sentenced Cooper accordingly and conducted a hearing to determine whether Cooper had the ability to pay the \$316 restitution. *See* I.C. § 35-38-2-2.3(a)(5). The trial court did not do so. Therefore, we hold that the trial court

abused its discretion in sentencing Cooper and remand this case to the trial court with instructions that the trial court resentence Cooper in accordance with this opinion.¹

CONCLUSION

Based on the foregoing, we reverse and remand this case to the trial court with instructions to resentence Cooper in accordance with this opinion.

Reversed and remanded with instructions.

DARDEN, J., and BARNES, J., concur.

¹ Although we instruct the trial court to resentence Cooper, we caution the trial court that there is no evidence in the record that Cooper had the ability to pay the \$316 restitution originally set by the trial court. At trial, Cooper discussed his bank account, as well the \$300 or more value of his truck. The State established that Cooper could earn at least \$300 by selling his truck, but the State failed to prove that Cooper's truck was worth more than \$300, or that he had money in his bank account in Monticello. When the State asked Cooper how much money he had in his bank account, he replied: "I don't have any idea right now." (Tr. p. 10). Further, when the State asked Cooper if he had \$300 in the account, he replied, "Uh, maybe." (Tr. p. 10). The only evidence this line of questioning conclusively established was that Cooper could sell his truck for \$300, which is less than the \$316 the trial court ordered for restitution. Upon resentencing, the trial court must ensure that Cooper has the ability to pay the full amount of restitution ordered if it establishes restitution as a condition of probation. I.C. § 35-38-2-2.3(a)(5).