

RESTITUTION

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1. The sentencing judge *shall* determine whether the defendant will be required to pay restitution. G.S. 15A-1340.34.
2. Restitution can be ordered “in addition to any penalty authorized by law”—*this includes an active sentence*. S.L. 15A-1340.34(c); G.S. 1998-212, sec. 19.4(d).
3. Mandatory restitution for Crime Victims’ Rights Act (CVRA) cases:
 - a. For offenses covered under the Crime Victims’ Rights Act (CVRA) (G.S. 15A-830), restitution is *required*.
 - b. The following misdemeanors are covered under the CVRA if the defendant and the victim have a “personal relationship” as defined in G.S. 50B-1(b) (Current or former spouses; persons of opposite sex who live together or have lived together; persons related as parents and children, or as grandparents and grandchildren; persons with a child in common; current or former household members; persons of the opposite sex who are in a dating relationship or have been in a dating relationship):
 - i. Assault with a deadly weapon;
 - ii. Assault inflicting serious injury;
 - iii. Assault on a female;
 - iv. Simple assault;
 - v. Assault by pointing a gun;
 - vi. Domestic criminal trespass;
 - vii. Stalking.
4. Amount of restitution:
 - a. The exact dollar amount of restitution must be set in open court. *State v. Wilson*, 340 N.C. 720 (1995).
 - b. The amount of restitution must be supported by evidence adduced at trial or at sentencing.
 - i. When a \$12,850 order of restitution to a homicide victim’s father was based only on information from the prosecutor, the court of appeals reversed the order and remanded the case to the trial court to rehear the restitution issue. *State v. Replogle*, 181 N.C. App. 579 (2007).
 - c. The court may delegate to a probation officer the authority to determine a payment schedule for restitution, and may authorize the probation officer to transfer the person to unsupervised probation after all moneys are paid. G.S. 15A-1343(g).
 - d. To determine the amount of restitution, follow the formula in the statute (G.S. 15A-1340.35):
 - i. For offenses resulting in bodily injury to the victim:
 1. The cost of medical and related professional services, including physical, psychiatric, and psychological care;
 - a. It is not improper to include the cost of future treatment. *State v. Canady*, 153 N.C. App. 455 (2002).
 2. The cost of necessary physical and occupational therapy and rehabilitation;

3. Lost income.
 - ii. For offenses resulting in damage, loss, or destruction of property:
 1. Require return of the property; or
 2. The value of the property on the date of damage, loss or destruction, or the value of the property on the date of sentencing, less the value of any part returned to the victim.
 - iii. For offenses resulting in the victim's death, the cost of funeral expenses.
- e. Restitution may not be ordered for a victim's pain and suffering. *State v. Wilson*, 158 N.C. App. 235 (2003).
5. Defendant's ability to pay:
 - a. The court must take into consideration the resources of the defendant, including all real and personal property, ability to earn, and obligation to support dependants.
 - i. It was error to order the defendant (convicted of multiple counts of embezzlement) to pay \$208,900 in restitution (that's over \$3,000/month for 60 months); defendant had only \$800 in monthly income and paid about \$350 monthly in child support. *State v. Hayes*, 113 N.C. App. 172 (1993).
 - b. The court is not, however, required to make findings on these matters. G.S. 15A-1340.36.
 - i. The court of appeals upheld a \$40,588 order of restitution in a robbery and assault case, concluding that the proper standard of proof with respect to an award of restitution is the preponderance of the evidence, and the burden of demonstrating the financial resources of the defendant is on the defendant. Though the trial court did not make findings concerning the ability to pay, it was clear from the record that the court considered the defendant's financial situation—and consideration is all the statute requires. *State v. Tate*, 187 N.C. App. 593 (2007).
6. Partial restitution:
 - a. The court may order partial restitution to be paid by a certain date or in installments.
 - b. If it does order partial restitution, the court must state on the record its reasons for doing so. G.S. 15A-1340.36.
7. Restitution and work release—When an active sentence is imposed, the court must consider whether to recommend that restitution be made out of any earnings gained by the defendant if he or she is granted work release privileges. G.S. 148-33.2(b).
8. Restitution and civil judgments:
 - a. Restitution is not a legal obligation equivalent to a civil judgment. *Shew v. Southern Fire & Casualty Co.*, 307 N.C. 438 (1983).
 - i. Imposition of restitution does not affect, and is not affected by, the victim's right to institute a civil action against the defendant based on the same conduct. Civil liability need not be established as a prerequisite to restitution. *Id.*; *State v. Smith*, 392 N.C. App. 184 (1990).
 - ii. An order of restitution does not abridge the right of a victim to bring a civil action against the defendant for damages arising out of the defendant's offense. G.S. 15A-1340.37.

- iii. If the victim does succeed in a civil action against the defendant, any amount paid by the defendant as restitution must be credited against any judgment rendered in a civil action arising out of the criminal offense. *Id.*
- b. A court hearing a criminal case generally may not order the defendant to pay money to the victim as a “civil judgment.”
 - i. It was error for the court to require a defendant convicted of obtaining property by false pretenses to sign a confession of judgment in favor of the victims. *State v. Clemmons*, 111 N.C. App. 569 (1993).
 - ii. “A confession of judgment is a procedure in a civil action,” governed by procedures set out in the Rules of Civil Procedure (Rule 68.1). *Id.*
 - iii. “[N]o criminal court can compel any Defendant to do something which is within the realm of a civil forum, i.e., confess judgment.” *Id.*
- c. Limited exception for CVRA cases:
 - i. Restitution orders under G.S. 15A-1340.34(b)—which pertains *only* to crimes listed in the CVRA—exceeding \$250 may be “enforced in the same manner as a civil judgment.” G.S. 15A-1340.38.
 - ii. Such judgments may be collected in the same manner as a civil judgment, unless the restitution is ordered as a condition of probation.
 - iii. In probation cases, the judgment may not be executed upon the defendant’s property until the clerk is notified that the defendant’s probation has been terminated or revoked *and* the judge has made a finding that restitution in a sum certain remains owed. G.S. 15A-1340.38.
- d. When a defendant is convicted of a criminal offense and ordered to pay restitution or restitution is imposed as a condition of probation, special probation, work release, or parole, then all applicable statutes of limitation and statutes of repose are tolled for purposes of any civil action brought by the victim against the defendant for damages arising out of the offense for which the defendant was convicted. G.S. 1-15.1(a).
- e. In any civil action brought against a defendant arising out of the offense for which the defendant was convicted, the defendant has the right to contest the amount of damages, the amount of restitution ordered is not admissible into evidence, and all restitution paid shall be credited against any civil judgment rendered against the defendant. G.S. 1-15.1(b).

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