

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 29, 2021

FILED 11/03/2021 Clerk of the Appellate Courts
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STATE OF TENNESSEE v. JOHNNY SUMMERS CAVIN

**Appeal from the Criminal Court for Sullivan County
No. S72963 James F. Goodwin, Jr., Judge**

No. E2020-01333-CCA-R3-CD

JAMES CURWOOD WITT, JR., J., concurring.

I concur in Judge McMullen’s opinion and only write separately to respectfully address Judge Holloway’s view expressed in his dissenting opinion that the trial court need not establish installment terms for the payment of restitution for the judgment to be complete and final.

The statute requires the trial court to “specify . . . the amount *and time* of payment,” T.C.A. § 40-35-305(b), and to consider the defendant’s “financial resources and future ability . . . to pay,” *Id.* § 40-25-205(d). In my view, the requirement that the trial court must determine a defendant’s ability to pay restitution bespeaks a need to specify payment terms, usually terms of installment payments.

Although the legislature has amended the restitution statute to make the consideration of the defendant’s financial resources permissive rather than mandatory, the amended language is not effective until January 1, 2022. *See* 2021 Tenn. Pub. Acts, ch. 413, § 2. The version of the statute at play in the case before us says that the trial “court *shall* consider the financial resources and future ability of the defendant to pay.” T.C.A. § 40-35-305(d) (emphasis added).

Given this requirement, the ability to pay is generally tied to the periodic income a defendant may have. As such, the amount and terms of installment payments become a function of determining the defendant’s ability to pay. In *State v. Comer*, 278 S.W.3d 758 (Tenn. Crim., App. 2008), a published case, the issue was the trial court’s failure to set terms for the payment of restitution, deferring until after the appeal to do so. In holding that the putative judgment was not final, this court said, “We recognize that a defendant’s ability to pay may be determined as much by the terms as by the total amount

of restitution; yet, in the present case, the terms have yet to be established.” *Id.* at 762.

I note that, when a trial court does not set payment terms, it has provided no framework for assessing the defendant’s payment performance as a condition of probation. Without terms for periodic payment, non-payment cannot be an issue of breach of probation until the very end of the probation term.

Finally, in my view, the establishment of required terms of paying restitution is a judicial function and may not be delegated to administrative personnel.

JAMES CURWOOD WITT JR., JUDGE