



# THE SUPREME COURT *of* OHIO

OFFICE OF JUDICIAL SERVICES

## RESTITUTION IN ADULT COURTS

### **In General** [R.C. 2929.18, R.C. 2929.28]

- Imposition is discretionary with the trial court – restitution must be considered but court does not have to order it (except in mandatory circumstances).
- Amount must be a part of the sentencing order.<sup>1</sup>
- Must be made with the defendant present on the record.
- Court cannot modify the amount of restitution after a sentence is imposed.
- Court can modify the payment terms.
- Must be reasonably related to the offense.
- Must be based upon the amount of loss incurred by the victim.
- Can not order restitution on charges on which defendant found not guilty.<sup>2</sup>

Restitution can be ordered for: pretrial diversion program;<sup>3</sup> intervention in lieu of conviction;<sup>4</sup> and post-release control.<sup>5</sup>

### **Mandatory Restitution Orders**

R.C. 2941.1422 – Human Trafficking Specification

R.C. 2905.01 – Kidnapping

R.C. 2905.02 – Abduction

R.C. 2907.21 – Compelling Prostitution

R.C. 2907.22 – Promoting Prostitution

R.C. 2907.323 – Illegal Use of Minor in Nudity Oriented Material or Performance

R.C. 2919.22 – Endangering Children

R.C. 2923.32 – Engaging in Pattern of Corrupt Activity

R.C. 2921.41 – Theft in Office

1 *In re Zakov*, (1995), 107 Ohio App. 3d 716.

2 *State v. Guade*, 10th Dist., 2012-Ohio-1423; *State v. Rush*, 6th Dist., 2013-Ohio-727.

3 R.C. 2935.36.

4 R.C. 2951.041.

5 R.C. 2967.28.

## IMPOSITION

### ON THE RECORD, IN THE JOURNAL ENTRY, SPECIFIC AS TO AMOUNT AND WHEN DEFENDANT MUST PAY

Journal entry must be specific that restitution is a condition of probation or community control if the trial court intends such an outcome.

#### Amount of Restitution

- Limited to economic loss as defined under R.C. 2929.01(L).
- Must be supported by credible evidence.
- Not correlated to the degree of the offense<sup>6</sup> (degree of offense can be a factor).

#### Hearing on Amount of Restitution

- Evidentiary hearing not required unless amount is in dispute.<sup>7</sup>
- Do not consider ability to pay when determining the amount of loss.
- Determination of indigency for purposes of appointment of counsel does not prevent a restitution order.<sup>8</sup>
- Burden is on victim to establish both the type and amount of restitution. The defendant has the burden to establish any offset.
- Court may consider:<sup>5</sup>
  - Stipulation of parties;
  - Recommendation of victim or defendant;
  - Presentence report;
  - Estimates or receipts for cost of replacement or repair;
  - Victim impact statement;<sup>6</sup> and
  - Other information.

- Value of stolen item may be based on victim's (as owner) testimony [owner opinion rule].<sup>7</sup>

#### Restitution Recipient

- Felony [2929.18]: Victim or survivor of victim; adult probation department that serves the county on behalf of the victim; clerk of courts; or another agency designated by the court, except third-party restitution cannot be ordered to:<sup>8</sup>
  - Insurance company;<sup>9</sup>
  - Fire department;<sup>10</sup>
  - Employer of victim;<sup>11</sup>
  - Police department;<sup>12</sup> or
  - Animal care shelter.<sup>13</sup>
  - Exception: Banks in fraud cases.<sup>14</sup>
- Misdemeanor [R.C. 2929.28]: Victim or survivor of victim.
- Notice of restitution to victim:
  - If a hearing is held, victim must be notified.<sup>15</sup>
  - Failure to notify the victim is NOT grounds to vacate the plea, for dismissal, or for a new trial.<sup>16</sup>

<sup>7</sup> *State v. Walls*, 8th Dist., 2014-Ohio-3502.

<sup>8</sup> Some appellate courts have upheld restitution made expressly on the record as part of a plea agreement, even to the entities listed; however, the Supreme Court of Ohio has not reached the specific question of whether a restitution agreement by the defendant is valid. *State v. Lalain, supra*.

<sup>9</sup> *State v. Colon* (2010), 185 Ohio App.3d 671.

<sup>10</sup> *State v. Hunter*, 2nd Dist., 2013-Ohio-3751; *State v. Christian*, 2nd Dist., 2014-Ohio-2672.

<sup>11</sup> *State v. Moyer*, 2nd Dist., 2011-Ohio-5206.

<sup>12</sup> *State v. Collins*, 6th Dist., H-09-005, 2009-Ohio-6346.

<sup>13</sup> *State v. Angus*, 10th Dist., 2006-Ohio-4455.

<sup>14</sup> A bank may be included as a crime victim to recover restitution when the bank is the target of the offense due to the defendant's fraudulent conduct. *State v. Allen*, — Ohio St. 3d \_\_\_, 2019-Ohio-4757.

<sup>15</sup> R.C. 2929.18(A)(1) and R.C. 2929.28(A)(1).

<sup>16</sup> R.C. 2930.06(A) and 2930.19(C).

<sup>6</sup> *State v. Lalain* (2013), 136 Ohio St.3d 248.

<sup>7</sup> *State v. Graupmann*, 2nd Dist., 2014-Ohio-3637.

<sup>8</sup> *State v. Jones*, 11th Dist., 2013-Ohio-2616.

<sup>5</sup> R.C. 2929.18(A)(1) and R.C. 2929.28(A)(1).

<sup>6</sup> R.C. 2947.051 and R.C. 2930.13(C)(2).

- Victim has no standing to seek restitution in a criminal case. The prosecutor is the proper party to seek restitution on behalf of the victim.<sup>17</sup>

### Type of Restitution by Offense

- Theft of rented property or rental services:<sup>18</sup>
  - Cost of repair or replacement.
  - Cost of repair and loss of revenue resulting from deprivation of the property that is less than or equal to the actual value of the property when stolen.
- Arson:<sup>19</sup>
  - Costs of investigation and prosecution.
- Medicaid eligibility fraud:<sup>20</sup>
  - Full amount of any Medicaid services paid on behalf of an applicant for, or recipient of, Medicaid for which the applicant was not eligible, plus interest.
- False report of school employee misconduct (misdemeanors).<sup>21</sup>

### Community Control Sanction

- Restitution order may be enforced as a condition of community control. Court must be specific on the record and in the journal entry.
- Restitution obligation can extend beyond community control supervision. Restitution is not dependent upon there being a community control element to the sentence.
- If enforcing a restitution order as a violation of community control, a hearing must occur.<sup>24</sup>
  - Defendant has a right to counsel at the revocation hearing,<sup>25</sup> even if counsel was waived on the underlying criminal offense.
- Revocation hearing shall include a determination of the defendant's ability to pay.
  - Defendant cannot be incarcerated for failure to pay restitution as part of the sentence or condition of community control if the defendant is financially unable to do so.<sup>26</sup>

### Civil Collection

- Restitution may be ordered as a civil judgment in favor of the victim.<sup>27</sup>
- Civil judgment does not extinguish order of restitution in the criminal case.
- The imposition of a financial sanction does not preclude the victim from bringing a civil suit against the offender.<sup>28</sup>
- Restitution payments shall be credited against the amount of recovery in a civil action.<sup>29</sup>

## **ENFORCEMENT OF RESTITUTION ORDER**

### **CONTEMPT CANNOT BE USED UNDER ANY CIRCUMSTANCES**

#### Ability to Pay

- When enforcing a restitution order, the court is required to consider defendant's present and future ability to pay the restitution,<sup>22</sup> even though a formal hearing was not required when the restitution amount was ordered.<sup>23</sup>

<sup>17</sup> *State v. Stechschulte*, 11th Dist., 2014-Ohio-4291

<sup>18</sup> R.C. 2913.02(B)(11)

<sup>19</sup> R.C. 2929.71

<sup>20</sup> R.C. 2913.401

<sup>21</sup> R.C. 3319.311, R.C. 3319.317, R.C. 3326.243, R.C. 3328.193

<sup>22</sup> R.C. 2929.19(B)(5) and 2929.28(B)

<sup>23</sup> *State v. Andrews*, 1st Dist., 2012-Ohio-4664; *State v. Brown*, 3rd Dist., 2015-Ohio-3402

<sup>24</sup> Crim.R. 32.3(A).

<sup>25</sup> Crim.R. 32.3(B).

<sup>26</sup> *State v. Harris*, 8th Dist., 9660-61, 2012-Ohio-802, but see, *State v. Thomas*, 10th Dist., 2014-Ohio-2912.

<sup>27</sup> R.C. 2929.18(D)(1) and R.C. 2929.28(D)(1).

<sup>28</sup> R.C. 2929.18(H) and R.C. 2929.28(G).

<sup>29</sup> R.C. 2929.18(A) and R.C. 2929.28(A)(1).

- Execution of judgment by civil remedies includes:
  - Execution against property of the judgment debtor;
  - Garnishment of wages;
  - Debtor’s examination;
  - Attachment of property;
  - Creditor’s suit; or
  - Other civil remedies.
- Can permit payment of restitution from a public retirement system or government deferred compensation program for convictions involving:<sup>30</sup>
  - Theft in office;
  - Rape;
  - Sexual battery;
  - Unlawful sexual contact with a minor; and
  - Gross sexual imposition.
- Court may impose a surcharge up to 5 percent of the restitution amount for cost of collecting and processing restitution payments.<sup>31</sup>

### Other Collection Methods

- Deduction of damages award to defendant against a government entity or employees.<sup>32</sup>
- Sale of property ordered forfeited as contraband.<sup>33</sup>
- Attachment of prisoner’s account.<sup>34</sup>

### Sealing of Record<sup>35</sup>

- Not eligible to seal record of conviction if the defendant has not paid the full amount of restitution.
- Record sealing time does not start running until restitution fully paid (if after community supervision has ended).

### Limitation on Misdemeanors

- For various traffic offenses, restitution is limited in that court can only order restitution if there was no insurance covering the defendant’s vehicle at the time of the collision. The limitation amount is \$5,000.
  - OVI.
  - Failure to stop after an accident.
  - Driving under suspended license.
    - **Court may order restitution for certain unclassified driving-under-suspended-license charges.**
- Court not permitted to order restitution for minor misdemeanor or any traffic offense that could be disposed of by a traffic violations bureau.<sup>36</sup>

<sup>30</sup> R.C. 2907.15 and R.C. 2921.41.

<sup>31</sup> R.C. 2929.18(A)(1) and R.C. 2929.28(A)(1).

<sup>32</sup> R.C. 2969.27.

<sup>33</sup> R.C. 2981.13.

<sup>34</sup> R.C. 5120.133 and OAC 5120-5-03.

<sup>35</sup> *State v. Aguirre*, Slip Opinion No. 2014-Ohio-4603.

<sup>36</sup> R.C. 2929.28(A)(1).