

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA**

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, :  
 : No. 112581  
 v. :  
 :  
 KIM DAVIS, :  
 :  
 Defendant-Appellant. :

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JOURNAL ENTRY AND OPINION

**JUDGMENT: REVERSED AND REMANDED**  
**RELEASED AND JOURNALIZED: August 31, 2023**

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Criminal Appeal from the Cuyahoga County Court of Common Pleas  
Case No. CR-21-658188-A

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***Appearances:***

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Brandon Piteo, Assistant Prosecuting Attorney, *for appellee*.

Cullen Sweeney, Cuyahoga County Public Defender, and Noelle A. Powell, Assistant Public Defender, *for appellant*.

FRANK DANIEL CELEBREZZE, III, P.J.:

{¶ 1} Appellant Kim Davis (“Davis”) challenges the judgment of the Cuyahoga County Court of Common Pleas, ordering restitution without first holding a hearing when the amount of restitution was disputed. Under Loc.App.R. 16(B), the state

concedes that the trial court erred. After a thorough independent review of the record and applicable law, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

### **I. Factual and Procedural History**

{¶ 2} This case arose after Davis failed to return a rental car to Avis Rental Group (“Avis”) and continued to use the vehicle after the agreed rental period. Davis pled guilty to one count of unauthorized use of a motor vehicle, a felony of the fifth degree, in violation of R.C. 2913.03.

{¶ 3} At the sentencing hearing, the state asked the trial court to award restitution to Avis in the amount of \$20,403.92. A representative from Avis did not appear at the hearing, but the state relied upon documents provided by Avis in support of the figure.

{¶ 4} Davis’s counsel responded to the restitution request as follows:

As to the restitution, what I’ve been supplied with, Avis supposedly sold the car at an auction, but we have absolutely no figures as to what the repairs were. All we got is the sale amount was \$10,400, nothing more. And of course I think, your Honor, you’d have to take into consideration that the lost rental would only be speculation. I guess they’re feeling that it would be leased every[ ]day, and of course, that’s probably not the case.

They have down here loss of use, \$1,730.10 and administrative fee of \$250 and towing and storage — well, towing and storage, \$1,667.43. Again, they state that the fair market value of the car is \$20,402. I don’t know if they got that from Edmunds or Kelley Blue Book or whatever. But of course, what they’re wanting to get would exceed the fair market value of the car.

{¶ 5} The trial court sentenced Davis to 36 months of community control and ordered her to pay \$20,403.92 in restitution to Avis. Davis then filed the instant appeal, raising four assignments of error for our review:

I. The trial court erred when it failed to hold the statutorily mandated evidentiary restitution hearing when Davis's counsel disputed the state's restitution demand.

II. In the alternative to assignment of error I, Davis received ineffective assistance of counsel if this court finds that her counsel failed to dispute the state's restitution demand and, thus, failed to trigger an evidentiary hearing and/or for failing to object to the restitution order to preserve the issue for review.

III. Davis received ineffective assistance of counsel because counsel did not object to the trial court's failure to consider Davis's ability to pay \$20,403.92 in restitution.

IV. The trial court committed plain error by ordering restitution without having competent and credible evidence and for failing to consider Davis's ability to pay.

## **II. Law and Analysis**

{¶ 6} In her first assignment of error, Davis argues that the trial court erred by failing to hold a hearing on the restitution amount when her counsel disputed the amount requested.

{¶ 7} In response, in lieu of filing a brief, the state filed a notice of conceded error, stating that the trial court erred by failing to "engage in a due process ascertainment of whether the amount of restitution [bore] a reasonable relationship to the loss suffered by Avis." The state acknowledged that the restitution order was invalid and that the matter should be remanded for a proper restitution hearing.

**{¶ 8}** The restitution statute makes clear that “[i]f the court decides to impose restitution, the court *shall* hold a hearing on restitution if the offender, victim, or survivor disputes the amount.” (Emphasis added.) R.C. 2929.18(A)(1). Here, defense counsel pointed out discrepancies in the amount of restitution sought and cited a lack of evidence to support some of the figures. Although this was not a formal objection, it was sufficient to put the court on notice that the restitution amount was in dispute. Under the statute, it is the court’s duty to ensure the restitution amount is correct. R.C. 2929.18(A)(1). We therefore find that Davis’s first assignment of error has merit.

**{¶ 9}** Because Davis’s first assignment of error is dispositive of the appeal, we decline to consider the remaining assignments of error. For the foregoing reasons, we reverse the restitution order and remand for an evidentiary hearing to determine the appropriate amount of restitution that Davis should pay to Avis.

**{¶ 10}** This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27  
of the Rules of Appellate Procedure.

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FRANK DANIEL CELEBREZZE, III, PRESIDING JUDGE

KATHLEEN ANN KEOUGH, J., and  
SEAN C. GALLAGHER, J., CONCUR