

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOVEMBER 28, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2101

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES E.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Taylor County:
GARY L. CARLSON, Judge. *Affirmed in part; reversed in part and cause remanded.*

CANE, P.J. Charles E. (d.o.b. 12/9/78) appeals that portion of a delinquency order requiring him to pay full restitution in the amount of \$7,448.80. This restitution order came as a result of a finding that Charles had committed two acts of criminal damage to property, contrary to § 943.01(1), STATS. Charles had dropped cement blocks from a building onto two new cars causing damage in the amount \$7,448.80. At Charles's dispositional hearing, it was also confirmed that he had been waived into adult court on other matters and remained incarcerated. Charles is sixteen years old, has no money, is unemployed and is ordered to attend school full time if he can get out of jail on the adult matters.

His challenge on appeal is not to the damage amount, but rather to the dispositional order requiring him to pay full restitution. Charles argues that because he does not have the financial ability to pay, the court erred by ordering him to pay the full restitution. Because there is no evidence to support a finding that Charles has the ability to pay the full restitution, that part of the dispositional order is reversed and the matter is remanded for further proceedings.

If a child is found to have committed a delinquent act which has resulted in damage to the property of another, the trial court may order the child to make reasonable restitution for the damage. Section 48.34(5)(a), STATS. However, the legislature has required that any such order must also include a finding that the child alone is financially able to pay the restitution. *Id.* Here, Charles argues that there is no evidence to support such a finding. This court agrees.

The record shows that Charles is sixteen years old and unemployed with no money or financial means. He remains incarcerated in the county jail on the adult matters, cannot make bond, and has no ability to pay any Huber fee. Additionally, part of the juvenile dispositional order requires him to attend school full time which would be as a tenth grader. Interestingly, the social worker who filed an agency report in this delinquency proceeding recommended restitution in the amount of \$1,938, which would provide a monthly obligation of \$162 during the one-year dispositional order.

While the legislature has encouraged the courts to order restitution in delinquency proceedings as beneficial to the well-being and needs of the victim and to the well-being and behavior of the delinquent child, it has also made it very clear that restitution orders can only be made where the child alone is financially able to pay the ordered restitution, § 48.34(5)(a), STATS. Here, the trial court was attempting to make Charles aware of, accountable and responsible for the property damage by ordering full restitution. However, there is simply no evidence to support a finding that Charles alone is or will be financially able to pay this full amount. As the court admonished Charles, "And you look at yourself now, you know, Charles, I'd have a tough time coming up with \$7,500 to pay for damages for this kind of a stupid act. And you, at age 16, may view that as an insurmountable hurdle. How are you ever going to do that? And I don't know how you're ever going to do that."

Although Charles's delinquent acts were apparently senseless and his need for accountability and responsibility must be met through the court's dispositional order, the courts are not permitted to ignore the legislature's statutory requirements. Although there is no evidence at this time to show that Charles is or will be able to make full restitution, the trial court is permitted to order reasonable restitution, which in this case can be an amount less than full restitution and in accordance with Charles's financial ability to pay. Therefore this court has no alternative but to reverse the restitution portion of the dispositional order and remand the matter for further proceedings for a determination of reasonable restitution.

By the Court. — Order affirmed in part; reversed in part and cause remanded.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.