

RENDERED: FEBRUARY 14, 2014; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2012-CA-001827-MR

THOMAS JONES

APPELLANT

v. APPEAL FROM HICKMAN CIRCUIT COURT  
HONORABLE TIMOTHY A. LANGFORD, JUDGE  
ACTION NO. 09-CR-00028

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: CLAYTON, MAZE, AND NICKELL, JUDGES.

CLAYTON, JUDGE: This is an appeal from a decision of the Hickman Circuit Court which included a sentence of restitution against the appellant, Thomas Eugene Jones, Jr. Based upon the following, we reverse the decision of the trial court and remand the case for resentencing.

## BACKGROUND INFORMATION

Jones was convicted of having had sex with a fifteen year old girl multiple times when he was 37. The victim contracted herpes from Jones. Based upon a plea agreement, the trial court imposed a sentence of twenty years and ordered restitution in the amount of \$288,000.00. Jones appealed this decision and the Kentucky Supreme Court reversed and remanded the decision to the trial court. *Jones v. Commonwealth*, 382 S.W.3d 22 (Ky. 2011).

In *Jones*, the Court remanded the case for a new restitution hearing. A second hearing was held and the trial court held that the victim could petition the trial court for additional restitution after she is no longer eligible for insurance through her parents' insurance plan. Specifically, the trial court stated:

However, if said sexual transmitted disease is considered a pre-existing condition, and the victim is unable to acquire insurance, that is a remaining issue that will have to be addressed at a later time, and the Court will specifically allow the victim and her family to re-petition the Court when that issue becomes clearer.

Jones then brought this appeal.

## STANDARD OF REVIEW

We review issues of law *de novo*. *Nash v. Campbell County Fiscal Court*, 345 S.W.3d 811, 816 (Ky. 2011). With this standard in mind, we review the trial court's decision.

## DISCUSSION

Jones argues that the trial court's restitution order lacked specificity as required by Kentucky law. Pursuant to KRS 532.033:

When a judge orders restitution, the judge shall:

- (1) Order the restitution to be paid to a specific person or organization through the circuit clerk, who shall disburse the moneys as ordered by the court;
- (2) Be responsible for overseeing the collection of restitution;
- (3) Set the amount of restitution to be paid;
- (4) Set the amount and frequency of each restitution payment or require the payment to be made in a lump sum;
- (5) Monitor the payment of the restitution to assure that payment is being made;
- (6) If restitution is not being paid as ordered, hold a hearing to determine why the restitution is not being paid;
- (7) If the restitution is not being paid and no good reason exists therefor, institute sanctions against the defendant; and
- (8) Not release the defendant from probation supervision until restitution has been paid in full and all other aspects of the probation order have been successfully completed.

Jones contends that the trial court violated section 3 of the above by failing to set a specific monetary amount to be paid after May 6, 2019. Jones argues that the trial court would lose jurisdiction ten (10) days after entry of the judgment and would not be able to entertain a petition for additional restitution seven (7) years later.

In *Wiley v. Commonwealth*, 348 S.W.3d 570, 575 (Ky. 2010), the Kentucky Supreme Court affirmed the decision of a panel of our Court in *Fields v. Commonwealth*, 123 S.W.3d 914 (Ky. App. 2003):

When ordering restitution, a trial court must base an award on reliable facts. *United States v. Silverman*, 976 F. 2d 1502, 1504 (6<sup>th</sup> Cir. 1992). Our Court of Appeals considered a situation similar to the present case, wherein the defendant contested the amount of restitution, yet the trial court denied him a chance to controvert the Commonwealth's evidence. *Fields v. Commonwealth*, 123 S.W.3d 914, 915-16 (Ky. App. 2003). The court held that the trial court had deprived the defendant of an opportunity to be heard and adopted the due process standard articulated by the Sixth Circuit in *Silverman*; although a lower standard of due process applies at sentencing, the facts relied on by the court must "have some minimal indicium of reliability beyond mere allegation." *Id.* at 917 (citing *Silverman*, 976 F.2d at 1504). The *Fields* court thus determined that in order to satisfy this standard, the defendant must have some meaningful opportunity to be heard and the record must establish a factual predicate for the restitution order. *Fields*, 123 S.W.3d at 918.

The Commonwealth argues that this is not a justiciable issue. It asserts that the claim is not a "controversy in which a present and fixed claim of right is asserted against one who has an interest in contesting it..." *West v. Commonwealth*, 887 S.W.2d 338, 341(Ky. 1994). The issue, however, is justiciable because the restitution order has been entered. Nothing in KRS 532.033 allows the addition of future restitution, should the need arise. Case law within our Commonwealth interprets KRS 532.033 to mean that restitution must be a set and definite amount. *See, Brown v. Commonwealth*, 326 S.W.3d 469 (Ky. App. 2010).

Thus, we remand this case to the trial court with instructions to enter the restitution with a set amount.

MAZE, JUDGE, CONCURS.

NICKELL, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

NICKELL, JUDGE, CONCURRING IN RESULT ONLY: I write to concur in result only. The Supreme Court of Kentucky remanded this case originally for an evidentiary hearing to consider the propriety of restitution, because the original order imposed \$600.00 in monthly restitution payments for forty years without supporting evidence. On remand, the trial court held the required hearing, but entered an order imposing \$100.00 in monthly restitution payments until May 6, 2019, but further ordered “the victim may re-petition this Court” if she cannot obtain insurance or her insurance carrier excludes herpes as a pre-existing condition. I see this language as an attempt to retain continuing jurisdiction over the case when the trial court would have lost jurisdiction ten days after entry of judgment. *Rollins v. Commonwealth*, 294 S.W.3d 463, 466 (Ky. App. 2009).

I believe remand is again necessary, this time with direction that the trial court enter an order of restitution for a finite period of time and a specified amount, without reference to a potential reopening of the case. The current order opens the door for the victim to ask the trial court to reopen the case in the future if the amount of restitution is later deemed inadequate, but I am unaware of any

mechanism by which the victim could file such a request. Any opinion we might give today on such a request would be purely advisory.

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