

VERIFIED MOTION TO STAY

[name], by Counsel, respectfully moves this Court, pursuant to Indiana Appellate Rule 39, to stay execution of judgment in this case – specifically, to stay the one thousand (\$1000.00) fine issued after a finding of contempt of court entered in this case and to prohibit the trial court clerk from reducing the restitution order to a civil judgment. As discussed in detail below, a stay is appropriate because the restitution order entered against [name] is likely to be reversed on appeal.

Factual and Procedural Background

1. On December 27, 2013, the State of Indiana filed an Information charging [name] with one count of Criminal Mischief as a Class A misdemeanor, in violation of Ind. Code § 35-43-2-1(a)(1)(A)(i).

2. Specifically, the State alleged, in relevant part, that:

On or about 11/17/13 . . . Majra Russell, did without the consent of Jackie Williams, recklessly or knowingly damage that person's property, to wit: door frame and/or light on vehicle by striking them with hands or feet and caused a pecuniary loss of at least two hundred and fifty dollars (\$250) but less than two thousand five hundred dollars (\$2500). . .

[See Exhibit A, attached hereto].

3. On June 6, 2014, at [name]'s bench trial, the trial court found [name] guilty of Criminal Mischief as a B misdemeanor and ordered [name] to pay \$575 restitution to Ms. Williams [See Ex. B, attached hereto].

4. On June 10, 2014, [name] filed her Motion for Stay of Restitution Order [See Ex. C, attached hereto].

5. On June 11, 2014, the trial court denied [name]’s motion, stating, “The restitution order is not a stay fine with a date for payment & automatic civil judgment entered. Restitution orders remain in effect until paid or otherwise ordered by court [See Ex. D, attached hereto].

6. On July 1, 2014, [name] filed her Notice of Appeal with this Court.

ARGUMENT

7. Appellate Rule 39 governs stays pending appeal. Before filing a Motion to Stay with this Court, the party seeking the stay must first move for a stay in the trial court and have that motion denied. *See* Ind. App. R. 39(B).

8. Although [name] seeks a stay and not an appeal bond, she believes the factors relevant to determining the appropriateness of a stay are the same three factors the Court considers in deciding whether an appeal bond is appropriate: “(1) the probability of reversible error at trial, (2) the risk of flight, and (3) the potential dangerousness of the defendant.” *Tyson v. State*, 593 N.E.2d 175, 178 (Ind. 1992). In this case, all three factors weigh heavily in favor of [name] and toward granting stay.

9. Here, the probability of reversal on appeal is high. Pursuant to Ind. Code § 35-50-5-3, a restitution order for property damage must be based on actual loss incurred. *See also Rich v. State*, 890 N.E.2d 44, 49 (Ind. Ct. App. 2008) (“A restitution order must be supported by sufficient evidence of actual loss sustained by the victim or victims of a crime.”).

10. The trial court’s restitution order of \$575 is based on an estimate for damages, purportedly the cost to repair [name’s] door [See Ex. E, attached hereto].

11. Exhibit E indicates, however, that the estimate was made prior to November 17, 2013 – the date [name] was alleged to have committed the offense charged. Specifically, the estimate was signed and dated by the contractor on November 3, 2013 – a full two weeks before [name]

was alleged to have damaged Ms. Williams' door.

12. In as much as the trial court appears to have ordered restitution in an amount to pay for damage that occurred before [name] was even have alleged to have committed the offense in question, the likelihood of [name] being successful on appeal is high.

13. As to the remaining factors – risk of flight and potential dangerousness – there is nothing in the record to indicate [name] is a flight risk or dangerous to the community. [name] was convicted of a B misdemeanor in this case. [name] is not presently in custody, so there is nothing from which to flee. In addition to this case, [name] has, to the best of counsel's knowledge, one prior conviction for misdemeanor marijuana possession from 2006.

14. It is counsel's understanding that because of the way the restitution order was entered – specifically, that no compliance date was set for payment of the restitution – that the trial court clerk may, at any time and at its discretion, reduce the restitution order to a civil judgment. [name] is moving for a stay because the entry of a civil judgment against her would negatively impact her credit before she has the opportunity to challenge what she believes to be an illegal restitution order.

15. In accordance with Indiana Appellate Rule 39(C)(5), counsel would hereby inform the Court that although she believes time is of the essence as to the need for this stay, she cannot find specific legal grounds that would justify denying the State an opportunity to respond to this motion.

WHEREFORE, [name], by Counsel, respectfully requests this Court grant a stay of the execution of judgment in this case and for all other just and proper relief.

Respectfully submitted,

VERIFICATION

I affirm under penalty for perjury that the foregoing factual representations are true to the best of my knowledge and belief and the attached documents are accurate copies from the Record on Appeal.
