

**IN THE SUPREME COURT**  
**STATE OF NORTH DAKOTA**  
**SUPREME COURT NO. 20190215**

State of North Dakota, )  
 )  
Plaintiff & Appellee, )  
vs. )  
 )  
Mark James Pagenkopf, )  
 )  
Defendant & Appellant. )

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**APPELLANT'S BRIEF**

**\* ORAL ARGUMENT REQUESTED \***

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State v. Mark James Pagenkopf, Appeal from the Order Determining  
Restitution and Amendment of Judgement entered on July 3, 2019,  
Honorable Steven E. McCullough, Presiding

Charles J. Sheeley, NDID #06383  
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**ATTORNEY FOR APPELLANT**

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[¶ 2] **TABLE OF AUTHORITIES**

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**[¶ 3] STATEMENT OF THE ISSUES**

- I. **The district court abused its discretion when it ordered restitution in an amount greater than allowed by statute.**

[¶ 4] **STATEMENT OF CASE**

[¶ 5] The case against Mark James Pagenkopf commenced with the State's filing of an Information charging Unlawful Entry into a Vehicle ('C' Felony) and Theft under \$500 ('B' Misdemeanor) on or about October 12, 2018. (Appx. 3). Mr. Pagenkopf entered guilty pleas on March 11, 2019. (Appx. 3). Restitution was held open for 60 days and the State timely noticed a restitution request on or about March 19, 2019. (Appx. 3). On July 1, 2019, prior to the restitution hearing, Mr. Pagenkopf's probation was revoked and he was resentenced to an additional term of probation. (Appx. 4). A restitution hearing was held later in the day on July 1, 2019. (Appx. 4). Following testimony from the victim, Mr. Pagenkopf was ordered to pay \$2,314.35 in restitution. (Appx. 7, 8, 11). A notice of appeal was filed on July 12, 2019. (Appx. 4, 17).

## **[¶ 6] STATEMENT OF FACTS**

[¶ 7] The facts in this case are not in dispute. Mr. Pagenkopf pled guilty to unlawful entry into a motor vehicle and theft on or about October 12, 2018. (Appx. 3). At the restitution hearing, the victim Aubrey Suero testified as to the general facts of the case. (Tr. p. 4). In summary, as a result of Mr. Pagenkopf's conduct, Ms. Suero testified the radio to her 2005 Chrysler Sebring was damaged, glass over the speedometer was damaged, and some property was taken from the vehicle. (Tr. p. 4, ll. 19-24; p. 5, l. 7). Two exhibits were introduced at the time of the hearing. (Appx. 8-9). The exhibits outlined the damage to the Ms. Suero's vehicle and included an estimate from a local dealership to repair the damage. (Appx. 8-9 & Tr. p. 7, l. 8). The total estimate to repair the damage was \$1,914.35. (Appx. 8-9). In addition, Ms. Suero testified that items taken from the vehicle were still missing. (Tr. pp. 8-11). In addition to her testimony, these items were listed on a restitution claim form filed with the request for restitution hearing. (Appx. 10). According to Ms. Suero, the estimated value of the missing items was \$400. (Tr. pp. 8-11). Therefore, Ms. Suero requested restitution of \$2,314.35.

[¶ 8] However, Ms. Suero no longer had the vehicle at the time of the hearing. (Tr. p. 5, l. 18). She no longer had the vehicle because she was in an accident and the vehicle was totaled. (Tr. p. 5, ll. 18-19). Ms. Suero received an insurance payment from the other driver's insurance as she was not at fault for the accident. (Tr. p. 13, l. 3). Prior to the accident, Ms. Suero paid nothing to repair the damage to the inside of her vehicle. (Tr. p. 13, l. 17). Further, the amount of the payout was not deducted due to the damage to the inside of the vehicle. (Tr. p. 13, ll. 4-11). She received "a little over \$2,000" in the insurance payout. (Tr. p. 13, l. 24). Despite the fact Ms. Suero never paid to fix the damage

and had no intention of doing so, the court included damage to the inside of the vehicle in its restitution award and ordered restitution of \$2,314.35.

[¶ 9] **STANDARD OF REVIEW**

[¶ 10] The North Dakota Supreme Court applies a standard of review “similar to an abuse of discretion” standard when reviewing a restitution award. State v. Kaseman, 2008 ND 196, ¶ 4, 756 N.W.2d 923. Restitution orders will be affirmed unless the district court acted outside the limits set by statute, which is similar to an abuse of discretion standard. State v. Tupa, 2005 ND 25, ¶ 3, 691 N.W.2d 579. “A district court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, if its decision is not the product of a rational mental process leading to a reasoned determination, or if it misinterprets or misapplies the law.” Id.



## **[¶ 11] LAW AND ARGUMENT**

### **I. The district court abused its discretion when it awarded Ms. Suero restitution in an amount greater than allowed by statute.**

[¶ 12] When determining whether to order restitution, a court must take into account “[t]he reasonable damages sustained by the victim ... of the criminal offense, which damages are limited to those directly related to the criminal offense and *expenses actually incurred as a direct result of the defendant’s criminal action.*” N.D.C.C. § 12.1-32-08(1)(a) (emphasis added). Here, the court’s restitution award included expenses which Ms. Suero will never incur. These expenses included \$1,914.35 for damage to the inside of Ms. Suero’s vehicle. However, Ms. Suero unequivocally testified she did not spend any money to fix this damage. Further, she unequivocally testified she will never incur any expense for this damage because her vehicle was totaled and thus she no longer possesses it. (Tr. p. 12-13). Ms. Suero received an insurance payout for the totaled vehicle and the sum of the payout was not deducted due to the damage. (Tr. p. 13, ll. 4-11). Therefore, she never incurred any expenses – nor will she incur any expenses – related to the damage to the inside of her vehicle. Restitution can only be imposed for expenses actually incurred. Nonetheless, the court included in its restitution award a sum for damages which will never be fixed. The court abused its discretion when it awarded restitution for damages for expenses which will never be incurred. The order awarding restitution must be vacated and the matter remanded.

[¶ 13] In its findings, the district court found Marsy’s Law prohibited it from limiting restitution to expenses that were actually incurred. (Appx. 11). Marsy’s Law, codified through the North Dakota Constitution at Article I, § 25, provides rights to victims in court

proceedings. Regarding restitution, Marsy's Law provides:

The right to full and timely restitution in every case and from each offender for all losses suffered by the victim as a result of the criminal or delinquent conduct. All monies and property collected from any person who has been ordered to make restitution shall be first applied to the restitution owed to the victim before paying any amounts owed to the government.

N.D.Const. Art. I, § 25(1)(n). Marsy's Law simply requires a victim be compensated for "all losses" suffered as a result of criminal conduct. "All losses" is equivalent to "expenses actually incurred" from the restitution statute. Here, Ms. Suero suffered no monetary loss related to the damage to the inside of her vehicle. She did not spend money to fix the damage and the vehicle in question was subsequently totaled. Neither statute nor Constitutional provision provides authority to the court to impose a restitution award in a monetary amount greater than a victim will ever incur. The court abused its discretion when it relied on Marsy's Law and the restitution award must be vacated.

[¶ 14] **CONCLUSION**

[¶ 15] The court misinterpreted the law and abused its discretion when it provided a restitution award for expenses which never were – and never will be – incurred. Neither the restitution statute nor the North Dakota Constitution provide authority for the restitution award of \$2,314.35. The restitution award should have been \$400 – the value of the property Ms. Suero testified was taken from her vehicle. The court's Order Determining Restitution and Amendment of Judgement must be reversed and the case remanded.

Dated this 17th day of September, 2019.

/s/ Charles Sheeley  
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**[¶ 16] STATEMENT REGARDING ORAL ARGUMENT**

[¶ 17] This is a case that asks the Court to interpret North Dakota's restitution statute with the Constitutional provision related to victim's rights. Specifically, the district court and State have interpreted the Constitutional provision to provide authority to a victim to obtain restitution in a monetary amount above what he or she will ever incur. Since there has been little litigation regarding the issue, oral argument is requested to address the Court's concerns with this interpretation.

/s Charles J. Sheeley  
Charles J. Sheeley

**[¶ 18] CERTIFICATE OF PAGE LIMITATION**

[¶ 19] Rule 32(a)(8)(A) limits a principal brief to 38 pages. This brief is 12 pages long. Therefore, this brief complies with N.D.R.App.P. 32.

/s Charles J. Sheeley  
Charles J. Sheeley

[¶ 20] **CERTIFICATE OF SERVICE**

[¶ 21] A true and correct copy of the foregoing document was sent by e-mail to the Attorney of Record for Cass County, Ryan Younggren, on the 17th day of September, 2019, to: [sa-defense-notices@casscountynd.gov](mailto:sa-defense-notices@casscountynd.gov) and to indigent defendant Mark Pagenkopf by depositing a copy in United States Mail at his last known address of 735 Center Ave #7, Dilworth, Minnesota 56529.

/s Charles J. Sheeley  
Charles J. Sheeley