IN THE OHIO SUPREME COURT
COLUMBUS, OHIO

JAMES DANIEL MOORE,	:	Case No. 09-0205
	:	
Defendant-Appellant,	:	On appeal from the Butler Co.
	:	Court of Appeals, 12th Appel-
vs.	:	late District
	:	
STATE OF OHIO	:	
	:	
Plaintiff-Appellee.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT JAMES DANIEL MOORE

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EXPLANATION OF PUBLIC INTEREST IN THIS CASE AND INVOLVMENT OF A SUBSTANTIAL CONSTITUTIONAL ISSUE

This case presents two constitutional issues arising in criminal cases in which the defendant is charged with an offense for which the court awards restitution. The first is whether, in light of State v. Foster (2005), 109 Ohio St. 3d 1, 845 N.E.2d 470, 2006-Ohio-0856, a trial court may impose an award of restitution greater than the statutory limitation on damages associated with the degree of the offense of which the defendant is convicted, and whether the facts on which the court bases that award must be proven before a jury or admitted by the defendant. The second is whether, where a defendant has pled to two charges and the trial court has awarded restitution on the second charge, an appellate court may *sui sponte* transfer that award of restitution from the second charge to the first charge.

In this case, the defendant, James Daniel Moore ("Moore") was charged with two crimes: Breaking & Entering in violation of R.C. §2911.13(A) [Count One], and Vandalism in violation of R.C. §2909.05(B) (1) (a) [Count Two], both fifth degree felonies. (*See* Indictment, Transcript of docket ("T.d.") at 7.) In that Indictment, the charge for the former offense contained no statement as the amount of damages caused by the offense; the charge for the latter stated only that the amount was in excess of $500.00 in accordance with he cited statute. *Id.* Subsection (E), however asserts that where a person causes physical harm to a structure in excess of $5,000.00 but less than $100,000.00, that person is guilty of a fourth-degree felony. R.C. §2909.05(E). Consequently, the Indictment, together with the statute setting forth the charge on Count Two, put Moore on notice that he was charged with Vandalism causing no more than $5,000.00 in damage.

On April 30, 2007, Moore pled guilty to Count One, as charged, and to a reduced charge of Attempted Vandalism on Count Two. (*See* Transcript of Plea Hearing ("T.p. I") at 3, lines 16-21; *see*

also Written Plea, T.d. at 37.) Subsequently, on June 4, 2007, the trial court held a hearing on the amount of restitution owed. At that hearing, the state presented evidence that, on January 22, 2007, men working for the owner of a vacant, retail structure, found the defendant trespassing inside that structure. (*See* Transcript of Restitution/Sentencing Hearing ("T.p. II") at 33, lines 19-25.) He had apparently entered through a rear door, which had previously been pried off its hinges. (*Id.* at 10, lines 6-12.) In the area where Moore was caught, the men later found a duffel bag containing 3/4" copper piping cut into 18-24 in. lengths. (*Id.* at 38, lines 2-13.)

The state also presented evidence that three air conditioning units were located adjacent to the "balcony area" where Moore was found. These each contained two 4 × 8 ft. coils of copper piping, which had been removed. (*Id.* at 33, lines 3-9.) An HVAC contractor called by the state estimated that the cost of replacing these coils was $125,862.00. (*Id.* at 45, line 12, to 46, line 20.) Moore did not contest any of this testimony.

After hearing this testimony, the trial court ruled that the owner of the premises at issue had suffered damages in the amount of $125, 862.00; that such damages were covered by insurance; but that the insurance policy contained a $50,000.00 deductible clause. The trial court therefore ordered restitution on County Two, Attempted Vandalism, a first-degree misdemeanor, in the amount of $50,000.00. (*Id.* at 62, lines 13-18; *see also* Judgment of Conviction Entry, T.d. at 45.)

On appeal, Moore argued that the restitution ordered by the trial court, payment of the insurance deductible for repair of the air conditioning coils, was not related to the charge with which Moore was actually convicted, Attempted Vandalism in relation to the straight piping found in the duffle bag. Alternatively, Moore argued that should the damage to the air conditioning units be attributed to his criminal conduct, the amount of damages on the Attempted Vandalism charge was

limited by the $5,00.00 cap imposed by R.C. §2909.05(E) for a fifth-degree felony, the original charge set forth in the Indictment.

The Twelfth District Court of Appeals rejected the first argument, holding that the state, in order to establish the amount of restitution owed from the defendant's commission a criminal offense need only produce "competent, credible evidence from which the trial court can calculate the amount of restitution within a reason of certainty." State v. Moore (Butler 2008), 2008-Ohio-6567 at ¶10. Applying that standard, the court completely side-stepped Moore's second contention by holding that "[t]he evidence clearly indicates that theft was the controlling factor as appellant trespassed in the building to commit the theft of copper and the property was damaged while appellant was obtaining the copper." *Id.* at ¶14. Therefore, the state had introduced "competent, credible evidence" that the damage had resulted from the commission of the Breaking & Entering offense. *Id.* at ¶15. Thereupon, the court affirmed the amount of restitution owed, but modified the judgment below to reflect that restitution was owed for Count One, the Breaking & Entering charge, rather than Count Two, the Attempted Vandalism charge. *Id.* at ¶16.

The actions of the appellate court invoke constitutional concerns. Clearly, the Indictment put Moore on notice that he was charged with (*i*) by force, stealth or deception, trespassing in an unoccupied structure for the purpose of committing a theft offense; and (*ii*) that he caused damage to that structure in an amount greater than $500.00 but less than $5,000.00. (Indictment, T.d. at 7.) With his plea, Moore admitted to the trespass, and implicitly admitted to attempting to inflict up to $5,000.00 damage to the structure. RULE 11(B)(1), OHIO R. CRIM. PROC. He contested, however, "the extent and type of damage" alleged by the state. (T.p. I at 12, lines 16-18.) Thus, Moore did not admit that the amount of damage he attempted to cause was in excess of $5,000.00.

Since Foster, statutes that allow penalty enhancements based on judicial fact-finding greater than that allowed by a jury verdict or a defendant's admissions are unconstitutional. State v. Foster, *supra*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-0856. Here, the Twelfth District has held that restitution, even an amount above the $5,000.00, the maximum amount to which Moore could possibly have admitted, need only be proven by "competent, credible evidence" *ie.* by a judicial determination based upon a preponderance of the evidence. Allowing a judge, and not a jury, to determine the amount of damage caused by Moore's actions violates the restrictions imposed by the Confrontation Clause in the Sixth Amendment, and recognized and given effect by this Court in Foster. Consequently, the award of restitution in this case violates that same, constitutional restriction.

Further, the actions of the both the trial and appellate courts invoke constitutional notice. The Ohio Constitution mandates that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury." SEC. 10, ART. 1, OHIO CONST. This provision enforces the due process requirement of the Fourteenth Amendment that a criminal defendant must be give fair notice of the charge or charges against him in order to permit him to prepare a defense. AMEND. XIV, U.S. CONST. Here, the inclusion in the Indictment of a Vandalism charge under R.C. §2909.05(B)(1)(a), identified as a felony of the fifth degree, put Moore on notice that he was charged with causing no more than $5,000.00 in damages. R.C. §2909.05(E). Consequently, the actions of both the trial court and the appellate court thereby violate due process of law.

In short, this case addresses several constitutional issues arising from the awarding of restitution in cases where the degree of offense is tied to the level of damage suffered by the alleged

victim. Neither this Court, nor the General Assembly, has addressed these constitutional issues head-on. Without the guidance to be obtained from further review of actions of both the trial court and the appellate court in the proceedings below, Ohio courts may continue to impose awards of restitution in excess of any statutory limitation, and in excess of any fair notice to the defendant. This Court must grant jurisdiction to resolve these important, constitutional issues and clarify the interrelation of the "fair notice" provisions of the U.S. and Ohio Constitutions, statutes tying the degree of the offense to the level of damage caused by a criminal offense, and the awarding of restitution to the victim of that offense.

STATEMENT OF THE FACTS AND CASE

This case begins with an attempt by Moore to remove copper piping from a former Target Store, located at 1701 South University Boulevard, Middletown, Ohio. On March 14, 2007, the Butler County Grand Jury returned an Indictment against Moore for one count of Breaking & Entering in violation of R.C. §2911.13(A) [Count One], and one count Vandalism in violation of R.C. §2909.05(B)(1)(a), both fifth-degree felonies. (*See* Indictment, T.d. at 7.) On April 30, 2007, Moore pled guilty to Count One, as charged, and to a reduced charge of Attempted Vandalism on Count Two. (*See* T.p. I at 3, lines 16-21; *see also* Written Plea, T.d. at 37.)

On June 4, 2007, Judge Patricia Oney sentenced Moore to an 11-month term of imprisonment of Count One, a fifth-degree felony, and to a term of 6-months incarceration on Count Two, a first-degree misdemeanor. Count Two ran concurrent with Count One. Moore also received credit for 134 days already served. (*See* T.p. II at 66, lines 8-15; *see also* Judgment of Conviction Entry, T.d. at 45.) Moore, however, contested the state's calculation of any restitution owed, and set the matter for

a hearing.

At that hearing, held on June 4, 2007, the state presented three witnesses: (1) P.O. Tom Lawson ("Lawson")of the Middletown Police Department; (2) Dewey Kerr ("Kerr"), an employee of Thomas Logos, the owner of the Premises; and (3) Bradley West ("West"), the owner of West Heating & Cooling Mechanical Services, Inc., an HVAC contractor.

Lawson testified that on January 22, 2007, at approximately 10:00 am, he was on routine patrol within the City of Middletown, and checked on the Premises as part of that patrol. He observed that a set of doors at the back of the building appeared to have been pried open. (T.p. II at 5, line 20 to7, line 10.) He approached, but did not see or hear anyone inside the building. (*Id.* at 7, line 22 to 8, line 7.) Lawson then went to an adjacent business to ascertain the owner of the Premises. He was successful, and contacted someone in Springfield, Ohio. (*Id.* at 7, lines 12-17.) The owner, or his representative, indicated that he would send someone to investigate. (*Id.* at 9, lines 1-4.)

Later, at approximately 2:00 pm, another officer, P.O. James Bowling ("Bowling"), called Lawson back to the Premises. (*Id.* at 10, lines 6-12.) When the owner's men had arrived at the Premises, they first approached Bowling — who, by coincidence, was engaged in a traffic stop in front of the Premises — and then entered the building themselves. They discovered Moore inside. (T.p. II at 14, lines 3-12.) Lawson and Bowling then went inside themselves, where they discovered a duffle bag filled with pieces of copper pipe. These pieces were either cut or bent to fit into the bag. (*Id.* at 14, lines 13-25.) He also found several tools nearby. (*Id.* at 15, lines 10-23.) Lawson could not ascertain, however, whether the piping in the duffle bag corresponded with the missing and damages lines he observed inside the building. (*Id.* at 21, lines 3-8.)

Kerr next testified that he worked for Tom Logos, the owner of the Premises, as a property maintenance man. (*Id.* at 24, line 24 to 25, line 2.) On January 22, 2007, after being contacted by the Middletown Police, he reported to the premises, where, upon entering, he discovered Moore in the "balcony area," where he and Lawson later found a duffle bag filled with copper piping and various tools. (*Id.* at 33, lines 19-25, and 37, line 5 to 38, line 18.) Kerr stated that copper he discovered consisted of ¾-inch piping cut into 18"-24" lengths. (*Id.* at 38, lines 2-13.) After calling Moore down, Kerr escorted him to the police outside. (*Id.* at 37, lines 14-23.)

Kerr also testified that, upon further inspection, he discovered that copper coils had been removed from the air conditioning units. These coils were approximately four feet high and eight feet long. The removal of these coils completely disabled each unit. (T.p. II at 33, lines 3-9.)

Finally, West testified that to rebuild each of the damaged units, he would have to custom-order a new coil, due the age of the unit. There were 2 coils per unit, and 3 units in all, for a total of 6 coils. (*Id.* at 42, line 17 to 49, line 9.) He priced the cost of fabricated each coil at $14,333.00 per unit. (*Id.* at 45, lines 3-8.) Adding in the cost of additional piping needed to reconnect the compressors, the cost of freon and labor, West estimated that the total repair costs would be $125,862.00. (*Id.* at 45, line 12 to 46, line 20, and 55, lines 6-10.) The trial court ultimately accepted this figure as the total cost of repairing the six air conditioning units. (*Id.* at 62, lines 13-18.)

After hearing this testimony, the trial court ruled that the owner of the premises at issue had suffered damages in the amount of $125, 862.00; that such damages were covered by insurance; but that the insurance policy contained a $50,000.00 deductible clause. The trial court therefore ordered restitution in the amount of $50,000.00. (T.p. II at 62, lines 13-18; *see also* Judgment of Conviction Entry, T.d. at 45 [Appendix "A"].)

LAW AND ARGUMENT

PROPOSITION OF LAW No. 1:

Where the Degree of a Criminal Offense is Premised upon the Level of Damages Resulting from the Commission of that Offense, a Court Cannot Impose Restitution in an Amount Greater than that Statutory Amount.

Moore now asserts that, as a matter of law, the trial court erred in awarding restitution for alleged damages that bore no relationship to the Breaking & Entering and Attempted Vandalism charges for which he was convicted. The award of restitution entered by trial court far exceeds, and bears no actual relation to, the damages occasioned by Moore's actions.

Under Ohio law, a court may impose restitution in an amount equal to the "economic losses" suffered by the victim of the crime. R.C. §2929.18(A) (1). An "economic loss" is defined as "any economic detriment suffered by the victim as a direct and proximate result of the commission of an offense and includes ... any property loss ... incurred as a result of the commission of an offense." R.C. §2929.01(M). "Restitution can be ordered only for those acts that constitute the crime for which the defendant was convicted and sentenced ..." State v. Friend (Franklin 1990), 68 Ohio App.3d 241, 243, 587 N.E.2d 975, 976-77. A trial court abuses its discretion in ordering restitution in an amount that does not bear a reasonable relationship to the actual losses suffered. State v. Williams (Clark 1986), 34 Ohio App.3d 33, 34, 516 N.E.2d 1270, 1271.

Thus, in State v. Morris (Franklin 2001), 143 Ohio App.3d 817, 755 N.E.2d 394, the defendant was charged with embezzling money from his employer. At sentencing, the state admitted into evidence without objection 33 checks allegedly forged by defendant and paid into his bank account. Those checks totaled $54,352.54. *Id.* at 820, 755 N.E.2d at 396. The trial court, however, awarded an additional $54,343.70 in economic damages. The appellate court reversed that award, ordering that, on remand, restitution be limited to the total of the checks forming the basis of the

embezzling charge. *Id.*

More to the point, in State v. Hafer (Jackson 2001), 144 Ohio App.3d 345, 760 N.E.2d 56, the defendant was originally charged with both vandalism and receiving stolen property but, pursuant to a plea bargain, pled only to the receiving stolen property charge. The trial court entered an award of restitution including $1,742.10 for repairs to the victim's property caused by the alleged vandalism. State v. Hafer, *supra*, 144 Ohio App.3d at 347, 760 N.E.2d at 57. The court ruled, however, that

> ... the punishment imposed must be confined to those charges of which the accused is convicted. More specifically, a sentence of restitution must be limited to the actual economic loss caused by the illegal conduct for which the defendant was convicted.

Id. at [citations omitted]. Accordingly, the court reversed the order of $1,742.10 additional restitution. *Id.*

In this case, Moore was convicted of attempted vandalism. (*See* T.p. II at 66, lines 8-15; *see also* Judgment of Conviction Entry, T.d. at 45.) He was not convicted of causing damage to the Premises, only of attempting to do so. Indeed, Lawson testified at the restitution hearing that he could not connect the copper found in the duffle bag with any of the damage he observed to the Premises. (T.p. II at 20, line 25 to 24, line 8.) _Kerr, for his part, testified regarding to the damage to the air conditioning units caused by the removal of the copper coils. These coils were four feet four feet high and eight feet long, and necessarily composed of curved piping. (T.p. II at 33, lines 3-9.) In contrast, Kerr testified that the piping removed from the duffle bags was straight, and had been cut or bent into rough 1½ to 2 foot lengths. (*Id.* at 38, lines 2-13.) These pipes do not match the copper coils that were removed from inside the three air conditioning units.

As a result, the copper piping removed from the duffle bag — the only piping associated with Moore — could not have been removed from the air conditioning units. The theft of those coils

therefore constitutes an entirely separate crime, and one not related to the attempted vandalism of which Moore was convicted. The trial court thereby abused its discretion in awarding restitution for the damage to the air conditioning units. State v. Hafer, *supra*, 144 Ohio App.3d at 347, 760 N.E.2d at 57. On these grounds, alone, the award of $50,000.00 restitution in the proceedings below should be vacated.

But this case presents an additional conundrum in that the level of the Vandalism offense with which Moore was charged is keyed to the level of damages caused by that vandalism. Here, the Indictment charges Moore with a fifth-degree felony (*see* Indictment, T.d. at 7), placing the level of damages from that vandalism somewhere between $500.00 and $5,000.00. R.C. §2909.05(E). Presumably, then, the economic losses stemming from that alleged vandalism were no more than $5,000.00.

Since Foster, statutes that allow penalty enhancements based on judicial fact-finding greater than that allowed by a jury verdict or a defendant's admissions are unconstitutional. State v. Foster, *supra*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-0856. Here, Moore pled to the two offenses of which he was convicted, Breaking & Entering and Attempted vandalism, but objected to "the extent and type of damage" allegedly caused by those offenses. (T.p. I at 12, lines 16-18.) At most, then, Moore admitted that he caused $5,000.00 damage to the Premises.

Nonetheless, the trial court determined that the damage determined that the damage caused by Moore included, not just the removal of the straight copper piping found in the duffel bag, but the removal of the curved copper coils from the air conditioning units. Apparently, she applied a preponderance of the evidence standard in doing so. (T.p. II at 62, lines 13-18.) Moreover, the Twelfth District, on appeal, held that the state had introduced "competent, credible evidence" —

again a preponderance of the evidence standard — establishing the amount of damages caused by Moore, and hence the proper award of restitution. State v. Moore, *supra*, 2008-Ohio-6567 at ¶15. Because that amount exceeded the statutory limitation imposed by R.C. §2909.05(E) and the prohibition on judicial fact-finding established in State v. Foster , *supra*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-0856, the award of restitution in this case violates the Confrontation Clause in the Sixth Amendment.

PROPOSITION OF LAW No. 2:

Where a Criminal Defendant Pleads to Two, Separate Charges, and the Trial Court Enters an Award of Restitution on One Charge, an Appellate Court may not Sui Sponte *Modify a Judgment by Transferring that Award from One Charge to the Other Charge.*

Moore further asserts that the trial court improperly modified the Judgment of Conviction entered by the trial court to reflect an award of $50.000.00 restitution under Count One, the Breaking & Entering charge, rather than under Count Two, the Attempted Vandalism charge. *See* State v. Moore, *supra*, 2008-Ohio-6567 at ¶16. The former offense, as set forth in the Indictment, alleged that Moore with "by force, stealth, or deception, trespass[ing] in an unoccupied structure, with the purpose to commit therein any theft offense." (Indictment at Count One, T.d. at 7.) The latter, as originally charged, alleged that Moore knowingly caused damage to the Premises (*id.* at Count Two), and by charging a fifth-degree felony, implicitly stated that such damage was more than $500.00 but less than $50,000.00. *See* R.C. §2909.05(E). Clearly, the Grand Jury, as evidenced by the Indictment, considered the Breaking & Entering and Vandalism to be *separate* offenses.

Not so the Court of Appeals. Rather, that court fused these two offenses into one: "[t]he evidence clearly indicates that theft was the controlling factor as appellant trespassed in the building to commit the theft of copper and the property was damaged while appellant was obtaining the

copper." *See* State v. Moore, *supra*, 2008-Ohio-6567 at ¶14. Thereupon the court not only affirmed the judicial finding that Moore had committed $125,862.00 in damage, but modified the judgment below to reflect that restitution was owed for Count One, the Breaking & Entering charge, rather than Count Two, the Attempted Vandalism charge. *Id.* at ¶16. Apart from the complete disingenuousness of such a formula — an appellate court, nor any court, cannot mix and match the elements of various criminal statutes to suite its *ad hoc* needs — that formula still violates constitutional "fair notice" by awarding restitution in an amount greater than that permitted by the statute under which Moore was charged

The constitutional flaw in this argument is that, no matter how interrelated the underlying fact pattern, theft and vandalism are still separate offenses. Theft is the wrongful assertion of control over the property of another. R.C. §2913.02(A); while Vandalism is knowingly causing damage to a structure. R.C. §2909.05(A). They are not allied offenses. One can easily images situations in which a person may commit Theft without *necessarily* committing Vandalism, or *vice versa*. *See, e.g.* State v. Cabrales (2008), 118 Ohio St.3d 54, 62, 884 N.E.2d 181, 188, 2008-Ohio-1625 at ¶¶32-33. Therefore, where, as in this case, vandalism does occur during the commission of a theft offense, the two do not suddenly morph into a single offense. They remain separate offenses, as charged in the Indictment, subject to any statutory limitation on the amount of damages.

The Ohio Constitution mandates that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless upon presentment or indictment of a grand jury." SEC. 10, ART. I, OHIO CONST. This provision enforces the due process requirement of the Fourteenth Amendment that a criminal defendant must be given "fair notice" of the charge or charges against him in order to permit him to prepare a defense. AMEND. XIV, U.S. CONST.; In re Oliver (1948), 333 U.S. 257, 68

S.Ct. 499, 92 L.Ed.2d 682. The Grand Jury, by returning an Indictment charging Moore with vandalism, a fifth-degree felony, expressly charged him with , and thereby provided "fair notice" of, causing no more that $5,000.00 in damages to the Premises.

Therefore, the trial court's amendment of the Judgment to reflect that damages to the structure occurred in commission of Breaking & Entering rather than in the commission of Attempted Vandalism constitutes a *de facto* amendment of the Indictment to contemplate damages in excess of $5,000.00. While the criminal rules permit a trial court to amend an Indictment, they flatly prohibit an amendment that changes the substance or identity of the crime. RULE 7, OHIO R. CRIM. PROC.; State v. O'Brien (1987), 30 Ohio St.3d 122, 126, 508 N.E.2d 144. A court commits reversible error where it amends an indictment to change the substance or identity of the offense charged, regardless of whether the defendant is prejudiced by said amendment. State v. Plaster (Richland 2005), 164 Ohio ZSt.3d 750, 757, 843 N.E.2d 1261, 1266, 2005-Ohio-6770; State v. Jackson (Clark 1992), 78 Ohio App.3d 479, 605 N.E.2d 426.

> To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basis protection which the intervention of a grand jury was designed to secure. For a defendant to be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury who indicted him.

State v. Vitale (Cuyahoga 1994), 96 Ohio App.3d 695, 645 N.E.2d 1277. The actions of the appellate court invoke these constitutional concerns.

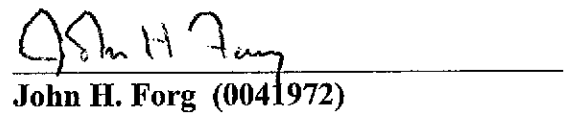
The level of damages is an essential element of the offense of Vandalism, and the amount of damages alleged is keyed to the level of the offense charged. R.C. §§2909.05(B)(1)(a) and 2909.05(E). Any deviation from that limitation, by a finding that a defendant caused damages in excess of that statutory limit, constitutes an improper amendment of that Indictment, and thereby

violates Due Process. The modification of the Judgment of Conviction by the Twelfth District Court of Appeals in this case was therefore unconstitutional and must be vacated.

CONCLUSION

For the reasons set forth above, this case involves matters of public and great general interest and a substantial constitutional question Appellant therefore requests that this Court grant jurisdiction and allow this case so that the important issues presented here may be reviewed on their merits.

Respectfully submitted,



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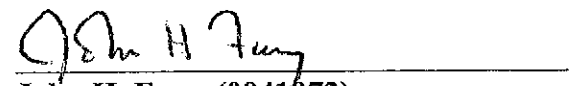
CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was served upon Robin Piper, Butler Co. Prosecuting Attorney, 315 High St., 11th Floor, Hamilton, Ohio 45012, by hand delivery, on this 28th day of January, 2009.



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[Cite as *State v. Moore*, 2008-Ohio-6567.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2007-07-160
	:	OPINION
- vs -		12/15/2008
	:	
JAMES DANIEL MOORE,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2007-02-0230

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Repper, Pagan, Cook, Ltd., John H. Forg III, 1501 First Avenue, Middletown, Ohio 45044, for defendant-appellant

WALSH, P.J.

{¶1} Defendant-appellant, James Daniel Moore, appeals the order of the Butler County Court of Common Pleas that he pay $50,000 in restitution in connection with damages sustained during his theft of copper.

{¶2} Appellant was charged with breaking and entering and vandalism after he was found in a vacant commercial building in Middletown, Ohio with a duffle bag containing copper tubing and wiring that had been removed from the building. Appellant pled guilty to

breaking and entering, a fifth-degree felony, and to the amended charge of attempted vandalism, a first-degree misdemeanor. A restitution hearing was held and the trial court ordered $50,000 in restitution be paid.

{¶3} Appellant now appeals the restitution order, setting forth a single assignment of error.

{¶4} Assignment of Error:

{¶5} "THE TRIAL COURT ERRED IN AWARDING RESTITUTION IN THE AMOUNT OF $50,000 FOR DAMAGES NOT DIRECTLY RELATED TO THE CHARGES AGAINST MOORE."

{¶6} Appellant argues the restitution "far exceeds" and "bears no actual relation to the damages occasioned" by his actions. Appellant asserts that he did not cause most of the damage found in the building from the removal of copper. Appellant did not testify at the restitution hearing, but reportedly told police that someone else was inside removing copper before he entered the building. Appellant further argues that even if restitution could be tied to his conviction, the amount cannot exceed $5,000 because he was originally charged with the fifth-degree felony offense of vandalism and the fifth-degree level of that offense involves harm to property of more than $500 but less than $5,000.

{¶7} The felony sentencing statute R.C. 2929.18 states that financial sanctions may be imposed and they include, but are not limited to, restitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss.

{¶8} "Economic loss" means any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense and includes any loss of income due to lost time at work because of any injury caused to the victim, and any property loss, medical cost, or funeral expense incurred as a result of the commission of the offense. R.C.

2929.01(M). "Economic loss" does not include noneconomic loss or any punitive or exemplary damages. Id.

{¶9} "If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense." R.C. 2929.18(A)(1). "If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount." Id.

{¶10} The state must prove the amount of this economic loss with competent, credible evidence from which the trial court can calculate the amount of restitution within a reasonable degree of certainty. *State v. Borders*, Clermont App. No. CA2004-12-101, 2005-Ohio-4339, ¶36.

{¶11} The breaking and entering offense under R.C. 2911.13(A) states that no person by force or stealth shall trespass in an unoccupied structure, with purpose to commit therein any theft offense or any felony. The attempted vandalism charge in the case at bar involves purposely or knowingly engaging in conduct that if successful would constitute or result in knowingly causing serious physical harm to property owned or possessed by another when the property is used by its owner or possessor in the owner's profession, business, trade, or occupation and the value of the property or the amount of physical harm involved is $500 or more. R.C. 2923.02; R.C. 2909.05(B)(1)(a).[1]

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1. The judgment of conviction entry, apparently due to a typographical error, mistakenly states that appellant pled guilty to the amended offense of attempted vandalism under R.C. 2909.05(B)(1)(b), when the plea of guilty form and transcript of the plea hearing indicates that appellant pled guilty to attempted vandalism under R.C. 2909.05(B)(1)(a). We will, therefore, amend the judgment of conviction entry to reflect the correct subsection.

{¶12} There was testimony at the restitution hearing that police patrolling the vicinity observed evidence of a forced entrance into the building. Appellant was subsequently discovered inside when the building owner's employee responded to the scene. A large, "heavy" duffle bag containing pieces of copper was located in the area of the building where appellant was found, along with a hacksaw, razor knife, hammer and a flashlight.

{¶13} At the conclusion of the restitution hearing, the trial court made a finding based upon the evidence that it would cost in excess of $125,000 to repair the "AC units" in the building [where some of the copper was removed]. Noting that the owner had a $50,000 insurance deductible, the trial court ordered $50,000 in restitution.

{¶14} After reviewing the record provided, we disagree with appellant's argument that the restitution was not related to the offenses for which he was convicted. Although the state emphasized the vandalism charge in this case, appellant was charged and convicted of the offense of breaking and entering for the purpose to commit vandalism and theft. The evidence clearly indicates that theft was the controlling factor as appellant trespassed in the building to commit the theft of copper and the property was damaged while appellant was obtaining this copper.

{¶15} The statutes dealing with felony sentencing orders of restitution justify the restitution award under the breaking and entering charge as there was competent, credible evidence of the victim's economic loss caused as a direct and proximate result of appellant's trespass into the building for the purpose of removing and stealing copper. Given our finding related to the breaking and entering charge, appellant's second argument in relation to the value of the property or amount of physical harm for the attempted vandalism offense is also not well taken, and his single assignment of error is overruled.

{¶16} Judgment is affirmed as modified. The judgment entry of conviction is modified for the attempted vandalism charge to reflect a conviction under R.C. 2909.05(B)(1)(a) rather

than R.C. 2909.05(B)(1)(b).

BRESSLER and POWELL, JJ., concur.

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

DEC 15
CINDY CARPENTER
BUTLER COUNTY
CLERK OF COURTS

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

JAMES DANIEL MOORE,

Defendant-Appellant.

CASE NO. CA2007-07-160

JUDGMENT ENTRY

FILED BUTLER CO.
COURT OF APPEALS
DEC 15 2008
CINDY CARPENTER
CLERK OF COURTS

The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed as modified. The judgment entry of conviction is hereby modified for the attempted vandalism charge to reflect a conviction under R.C. 2909.05(B)(1)(a), rather than R.C. 2909.05(B)(1)(b).

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

James E. Walsh, Presiding Judge

H.J. Bressler, Judge

Stephen W. Powell, Judge

Appendix "B"