

NO. 2012-0408

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 95857

STATE OF OHIO,

Plaintiff-Appellee

-vs-

DANIEL LALAIN,

Defendant-Appellant

STATE OF OHIO'S MEMORANDUM OPPOSING JURISDICTION

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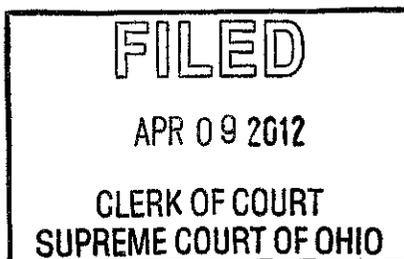
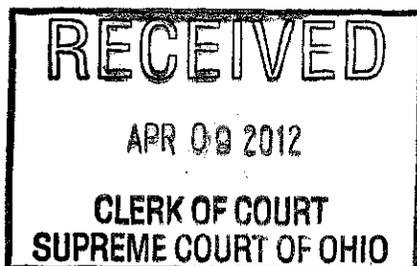


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**EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST.**

Ohio law relevant to this case is well established and was properly applied by the trial and appellate courts. Upon review of the trial court's order of restitution in the amount of \$63,121.00, the appellate court correctly reviewed the ruling for an abuse of discretion and found none. No substantial constitutional question and no matter of public or great general interest is presented, therefore, the State respectfully requests this Supreme Court decline jurisdiction.

STATEMENT OF THE CASE AND FACTS

The Eighth District Court of Appeals summarized the relevant facts and procedure of this case as follows:

In June 2009, Lalain was charged with one count of theft, a first-degree felony. The indictment provided that the value of the property or services stolen was \$1,000,000 or more. Pursuant to a plea agreement, Lalain pleaded guilty to an amended count of theft, a fifth-degree felony. As a fifth-degree felony, the value of the property or services stolen was amended to \$500 or more and less than \$5,000.

In September 2010, the trial court sentenced Lalain to four years of community-control sanction and ordered that he pay \$63,121 as restitution to the victim, who was Lalain's former employer, Aero-Instruments ("Aero"). At the sentencing hearing, the trial court stated that it has "a letter dated September 21st, 2010, from Mr. Ryan Mifsud from [Aero] relating to the loss in this case. And the court states that these documents plus any written or oral statements made to the court today shall be preserved as part of the record in this case."

The letter states:

We have been asked to provide information regarding the financial impact on the company regarding the theft of property and the subsequent process that was undertaken to identify and value the property that was recovered by Cleveland Police[.] We have calculated the cost to [Aero] for the time spent by its employees in support of this case to be \$55,456.00. This estimate does not include any costs for materials and supplies associated with the sorting, filing and copying of the more than 9,000 pages of documents and over 100 items recovered by the Cleveland Police from [Lalain's] possession.

In order to provide the County Prosecutor's Office with an accurate valuation of the property that was recovered, [Aero] contracted with Meaden and Moore and their Forensic Accounting department to determine a valuation of the property that was taken from the company. The cost associated with this activity was \$7,665.00. [Aero] is looking for restitution in the form of repayment by [Lalain] for these costs.

The trial court then asked defense counsel "if there is any reason [the court] should not go forward with the hearing this morning." Defense counsel replied, "No, your Honor. We can proceed." When discussing mitigation, defense counsel stated, "I don't think [Lalain] should be held responsible for any of [the Meaden and Moore] cost" because the report was generated in furtherance of a civil lawsuit Aero initially filed against Lalain and later dismissed, in order to proceed with the criminal prosecution. After Lalain addressed the court, the court asked defense counsel if there was anything further. Defense counsel replied, "No, your Honor."

The state then advised the court, "The reason * * * this case had to be prosecuted [was] because Aero has a national security clearance. They produce aerospace engineering products * * *." With respect to the Meaden and Moore accounting, the state indicated that the "accounting was taken on by Aero * * * so that they could discuss how this case could actually be * * * valued and evaluated. So that people could understand how much money this information, these prototypes, [and] data involved is actually worth to a company that's on the cutting edge of technology * * *. We find that there are special circumstances in this case which leads the State to allow a plea to a felony of the fifth degree and the victim has also agreed with that."

The trial court then sentenced Lalain to four years of community-control sanction and ordered \$63,121 as restitution. In determining the loss to Aero, the trial court calculated "the degree of damage done and * * * the accounting * * * necessary to do that." The trial court added \$55,456 for Aero's economic loss and \$7,665 for the Meaden and Moore accounting to obtain \$63,121. The court concluded the hearing by asking defense counsel whether "there are any other matters to be referenced on the record." Defense counsel replied, "Nothing further, your Honor."

State v. Lalain, Cuyahoga App. No. 95857, 2011-Ohio-4813, ¶ 2-7.

On September 22, 2011 the Eighth District issued its decision affirming the trial court's order of restitution in the amount of \$63,121.00. *Id.* Lalain requested en banc consideration by the appellate court, but his petition was denied. *State v. Lalain*, Cuyahoga App. No. 95857,

Motion No. 448227. His request for certification of a conflict, however, was granted. Id.,
Motion No. 448229.

Presently Lalain seeks review in this Honorable Court.

LAW AND ARGUMENT

Lalain has submitted the following three propositions of law for this Court's
consideration:

- I: In the absence of a specific plea agreement to the contrary, an order of restitution for a felony theft offense may not exceed the maximum statutory property value for that degree of the offense.
- II: When a defendant disputes the amount of restitution, a trial court abuses its discretion in ordering restitution without a hearing.
- III: Restitution is limited to those economic losses suffered by the victim as the direct and proximate result of a crime and does not include costs that the victim incurred to support the prosecution of the defendant or in connection with a civil suit filed by the victim against the defendant.

The State responds to each of the issues asserted in its single proposition of law:

State's Proposition of Law No. I: By failing to object at the time of sentencing, Defendant-Appellant Lalain waived all but plain error with regard to the trial court's order of restitution. Since Lalain failed to object to restitution, the trial court was not required to hold a separate restitution hearing. Assuming arguendo that waiver does not apply to Lalain's restitution claims, the trial court did not abuse its discretion in ordering restitution to the victim in the amount of \$63,121.00.

Despite the fact that Lalain was indicted with first-degree felony theft, the plea agreement that was negotiated on his behalf allowed him to enter a guilty plea to an amended charge of fifth-degree felony theft. Prior to accepting Lalain's guilty plea the trial court inquired, "You could be made to make restitution, pay court costs, and the costs of probation supervision. Understand that?" To which Lalain responded, "Yes." (Tr. 7.) At the August 16, 2010 plea hearing Lalain also stated on the record (1) that all of the information that he took from Aero

Instruments when his employment terminated was recovered by the State, (2) that he took the information both in self-defense and because he thought he was going to continue to consult with Aero Instruments, and (3) that he was not working with anyone else either inside or outside Aero Instruments. (Tr. 9.)

Lalain's sentencing hearing was held on September 24, 2010, at which time the State described his conduct: Lalain was employed as an engineer and he copied voluminous amounts of information from the company and took it home with him—and then quit with only a day's notice. Further, Lalain and his mother then engaged in bizarre behavior—such as contacting former and present Aero Instruments employees, showing up on their front porch at night asking questions about the company. Sometimes the people contacted did not even work for Aero—but, in Lalain's mind, they were somehow associated with the company. (Tr. 22-23.) Further, the prosecutor explained the significance of the case in that Aero Instruments produces aerospace engineering products and holds a national security clearance. (Tr. 24.) Fortunately it was determined that nothing involving national security or secrets was involved in that materials Lalain took, but Aero Instruments was required to report to the F.B.I. and the F.A.A. because their computer system had been compromised. (Tr. 24.)

With regard to restitution to the victim, the prosecutor explained that the accounting firm hired by Aero Instruments to determine value was done so at the State's behest in order to illuminate for all those involved in the case how much money the prototypes and information about sensors and probes is worth to a company like Aero Instruments that works with cutting edge technology. (Tr. 25-26.)

When ordering restitution, the court found the victim's loss to be \$63,121.00 based on both the representations of the victim as well as those of the prosecutor—\$7,665.00 for the

special accounting, and \$55,456.00 in company time, expenses and materials that were incurred as a direct result of Lalain's criminal conduct. (Tr. 28-30.) Despite opportunity to do so, *the defense made no objection to the amount of restitution.*

Upon review the Eighth District correctly found that Lalain's failure to object resulted in the waiver of all but plain error—and that no plain error occurred. *State v. Lalain*, Cuyahoga App. No. 95857, 2011-Ohio-4813, ¶ 11. Upon court found:

[A] review of the record reveals that Lalain stated that he understood that he could be ordered to pay restitution as part of his sentence. At the sentencing hearing, the trial court asked Lalain's counsel on three occasions whether he had any objections or anything to add. Each time, defense counsel replied, "No." The trial court then ordered Lalain to pay Aero the exact amount requested in its letter. At no time did Lalain or his counsel object to restitution or dispute the amounts requested by Aero. At oral argument, Lalain's counsel conceded that he did not place an objection on the record at the sentencing hearing.

* * *

Since Lalain and defense counsel failed to object to restitution or dispute the amounts requested by Aero, the trial court was not required to hold a separate hearing on restitution.

Id. at ¶ 15-16.

Moreover, even if the restitution issue were not waived, no abuse of discretion occurred. The order of restitution was supported by evidence and the amount did not exceed the indicted offense. By pleading guilty to the substantially reduced charge, Lalain received a great benefit in the bargain. As the appellate court stated, "Lalain agreed to pay restitution as part of his plea agreement in exchange for a reduced charge, and at the restitution hearing, he failed to object to the restitution award." *Id.* at ¶ 20.

Lalain has failed to demonstrate how this case presents a matter of great general importance. Further, no substantial constitutional question is presented. Accordingly, the State of Ohio asks this Court to decline jurisdiction and dismiss the appeal.

CONCLUSION

Defendant-Appellant Daniel Lalain has not presented propositions of law that merit consideration by this Court. No substantial constitutional question or matter of great significance is presented. Therefore the Court should decline jurisdiction and dismiss this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing memorandum opposing jurisdiction has been sent by regular United States Mail on this 6th day of April, 2012, to the following counsel for Defendant-Appellant Daniel Lalain:

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