

ORIGINAL

IN THE SUPREME COURT OF OHIO  
Case Nos. 2012-030, 2 and 2012-0408  
(Consolidated by Court order)

STATE OF OHIO

Appellee

-vs-

DANIEL LALAIN

Appellant

On Appeal from the  
Cuyahoga County Court  
of Appeals, Eighth  
Appellate District Court  
of Appeals  
CA: 95857

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**MERIT BRIEF OF APPELLANT DANIEL LALAIN**

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## INTRODUCTION

When Daniel Lalain left his job as an engineer with a Northeast Ohio company, he took with him some materials, mainly copies of documents, that related to the work he had done during his employment. Eventually, when the investigation of this case was complete, the State acknowledged that Daniel did not do this do for personal profit. Nonetheless, in the meantime, he found himself the subject of a civil lawsuit by his former employer as well as a criminal theft prosecution that, premised upon information as to the value of the property that was furnished by his former employer, alleged first-degree felony theft.

On the brink of the criminal trial, the State of Ohio decided that it would offer Daniel Lalain a plea agreement that amended the first-degree felony theft charge to a fifth-degree felony theft, *i.e.*, theft of property valued at between \$500.00 and \$5,000.00. No special provisions were insisted upon by the State regarding the amount of restitution that could be ordered. Daniel accepted the State's offer. As part of the plea colloquy, he acknowledged that he could be ordered to pay restitution in connection with his plea to the theft of an amount less than \$5,000.00.

But, at sentencing, the State of Ohio did not seek restitution that was in line with the fifth-degree felony theft charge to which they agreed. Instead, the State sought restitution in an amount that was more than ten times the maximum value of the property alleged in the amended indictment. This amount was not the value of the missing property (everything had been returned). Rather, it was for expenses that the employer maintained had been expended "in connection" with the case. The defense objected and maintained that the company was trying to pass on costs that the company incurred in support of its civil suit (which it had since dismissed)

and in the company's support of the State's criminal prosecution. Without holding a hearing, the trial court accepted the corporation's unsubstantiated claim.

As discussed in Proposition of Law I, the trial court erred in awarding any amount of restitution that exceeded \$4,999.99, the maximum value that corresponded to the fifth-degree felony theft (pre-HB 86). Absent a specific agreement to the contrary, a trial court can only order restitution that corresponds to the offense of conviction. Ordering restitution in a greater amount is punishment in excess of the offense conduct to which Mr. Lalain pled guilty.

As discussed in Proposition of Law II and in response to the certified question, the trial court erred in not conducting an evidentiary hearing regarding restitution. A hearing was required for two reasons.

- (1) On its face, the company's written explanation that its expenses were related to the time involved in the investigation of this case, and the prosecutor's statements at sentencing that he wanted the company to recoup money it expended to aid the State's investigation, revealed that evidence was needed to determine what, if any, amount of the requested restitution corresponded to the "economic loss" which could be awarded to the company as a direct and proximate result of the theft. A hearing was particularly necessary in light of the fact that all of the material that Mr. Lalain had taken home had been recovered.
- (2) The defense had specifically alerted the trial court that it did not believe the company's figures constituted a loss that could be the subject of an order of restitution.

As discussed in Proposition of Law III, the trial court erred in ordering restitution in the amount of \$63,121.00, a figure that the company's written explanation attributed at least in part

to costs associated with the investigation of this case, not the amount of loss that was the direct and proximate result of the offense conduct. Even without a hearing, the trial court should have concluded that not all of these costs were recoverable as criminal restitution.

### STATEMENT OF THE CASE AND FACTS

This is an appeal from a restitution order imposed as part of a sentence.

The defendant, Daniel Lalain, was 32 years old at the time of sentencing. He earned a bachelor's degree in engineering from Cleveland State University and had been pursuing graduate studies at Penn State. (T. 13). He left Penn State to become a design engineer at Aero Instruments, a producer of aerospace engineering products. (T. 24). He had no prior criminal record. (*See*, PSI, at 1-2).

Mr. Lalain eventually left Aero's employ. (T. 9, 16). At the time he left the employ of Aero, he took with him some materials that were the subject of his design work, including copies that he made of a large number of documents. (T. 14, 22).

Because Aero has a national security clearance, they contacted law enforcement authorities when they realized that Lalain had taken materials when he left the company. (T. 24). According to the prosecutor, "it turn[ed] out that nothing involving national security or secrets" was taken. (T. 24). The prosecution represented to the trial court that there was no evidence that Mr. Lalain "intended to profit from the things that he took from the company." *Id.*

As part of the investigation of this case, the Cleveland Police executed a search warrant for Mr. Lalain's home. (T. 14). All of the materials taken by Mr. Lalain were recovered by the police from Mr. Lalain; none of the materials that were taken were disseminated by Mr. Lalain. (T. 9).

The materials taken home by Mr. Lalain became the basis for a single count of theft in violation of R.C. 2913.02. *See*, Indictment. The indictment alleged that the value of the property that was the subject of the theft charge was in excess of one million dollars. However, the parties reached a plea agreement under which Mr. Lalain pled guilty to a fifth-degree felony theft charge, *i.e.* theft of property worth more than \$500 but less than \$5000. (T. 7). As part of the agreement, the trial judge had indicated in advance that community control sanctions would be imposed. (T. 4). The State, which stated at sentencing that it never had sought incarceration from the beginning, had no objection to community control sanctions. (T. 4, 26).

During the plea colloquy, Mr. Lalain acknowledged that restitution could be ordered. However, there was no mention of any particular amount of restitution that would be sought by the State or imposed by the court. (T. 7, *passim*).

Prior to sentencing, Aero advised the Probation Department, via an unsworn statement that Aero had “calculated the cost to Aero Instruments for the *time spent by its employees* in support of this case to be \$55,456.00,” which did not include any costs for materials and supplies associated with filing, sorting and copying evidence and items recovered by the Cleveland Police. Letter of September 21, 2010, at ¶ 1 (hereinafter, “Aero letter”), *emphasis added*.<sup>1</sup>

In a separate paragraph of the same letter, Aero stated that an outside forensic accounting firm had been contracted by Aero “to determine a valuation of the property that was taken.” Aero stated that it was “looking for restitution in the form of repayment by Mr. Lalain for these costs.” *Id.*, at ¶ 2. At sentencing, the trial judge made the Aero letter a part of the record. (T. 12).

The defense objected to the amount of restitution set forth in the Aero letter. The defense maintained that Aero’s expenses were related to their involvement in a civil lawsuit that Aero

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<sup>1</sup> The Aero letter is located in the trial court file, and should be found on the right side among the pleadings and other court documents.

brought in the Common Pleas Court against Mr. Lalain. This lawsuit was dismissed when the State brought criminal charges. (T. 15). The defense argued that Mr. Lalain should not be responsible for any of that cost. (T. 15).

The trial court did not order an evidentiary hearing. Instead, the trial court heard from the defendant and from the State of Ohio in allocution. The prosecutor stated that the Aero letter “was actually intended for the court regarding the costs incurred from this conduct.” (T. 22). The prosecution stated that the forensic accounting was “taken on by Aero at the expressed advice of” a supervising attorney in the Prosecutor’s Office “so that they could discuss how this case could actually be appreciated and valued and evaluated.” (T. 25). The prosecutor went on to say that “Aero undertook a number of expenses which the county could never have afforded to pay for *in order to investigate this case.*” (T. 26, emphasis added).

The trial court ordered restitution in the amount of \$63,121, which corresponded to “the numbers here from the [Aero letter] that indicate the company spent \$55,456 in company time, costs of material with respect to this matter and also that an amount of \$7,665 was paid for the accounting by [the accounting firm].” (T. 28-29).

On timely appeal, a panel of the Eighth District Court of Appeals, by a 2 to 1 margin, affirmed the restitution award. (Appendix, A-3 through A-15). The Eighth District denied re hearing en banc. (A-4 through A-5).

In addition, the panel of the Eighth District affirmed in part and denied in part a motion to certify a conflict, choosing to certify the following question to the Court:

Whether, despite the defendant’s failure to object, it is error for the trial court to order defendant to pay an amount of restitution in the absence of a specific plea agreement and without a hearing or evidence substantiating the economic loss claimed by the plaintiff?

Order of January 23, 2012 (A-21).

On May 23, 2012, in Case No. 12-0302, by a 5 to 2 margin, this Court approved the certification of conflict and ordered briefing on the certified question. (O'Donnell, Cupp, JJ., dissenting).

On the same day, this Court, in Case No. 12-0408, by a 4 to 3 margin (Pfeiffer, Lanzinger, McGee Brown, JJ., dissenting), declined to accept a discretionary appeal of Propositions of Law I through III. However, on July 25, 2012, this Court reconsidered: By a 5 to 2 margin, Proposition of Law I was accepted (O'Connor, C.J., Pfeiffer, J., dissenting); by a 4 to 3 margin, Propositions of Law II and III, respectively, were accepted (O'Connor, C.J., Pfeiffer, Cupp, JJ., dissenting).

## ARGUMENT

### *Proposition of Law 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.**

The maximum amount of restitution that the trial court could order in the instant case was \$4,999.99, which represents the maximum value that corresponds to fifth-degree felony theft. R.C. 2913.02 (pre-HB 86 version, appended at A-43-44).

Any examination of restitution should begin with a review of the plain language of R.C. 2929.18, which provides for restitution. That section provides in pertinent part that:

[T]he court imposing a sentence upon an offender for a felony may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section or, in the circumstances specified in section 2929.32 of the Revised Code, may impose upon the offender a fine in accordance with that section. Financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

- (1) 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.

R.C. 2929.18 (emphasis added). By its plain meaning, restitution is thus related to the offender's "crime." Here, the "crime" for which the State bargained was theft in an amount less than \$5,000.00. Accordingly, Mr. Lalain could not be responsible for restitution exceeding \$5000, which could only be attributable to *alleged* offense conduct that the State of Ohio voluntarily dismissed as part of its bargain. While the statute is unambiguous in this regard, even if there were ambiguity, R.C. 2929.18 would have to be interpreted in the light most favorable to Mr. Lalain's position. R.C. 2901.04 (rule of lenity). *Accord, United States v. Liparota*, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 854 (1985).

Any other interpretation of R.C. 2929.18 would cause the statute to unconstitutionally violated the presumption of innocence guarantee under the Fifth and Fourteenth Amendments and Article I, Section 10 of the Ohio Constitution. Requiring restitution in excess of \$5,000.00 is punishing Mr. Lalain for a crime for which he was not convicted. Restitution is a form of punishment – it is a financial sanction for a crime. R.C. 2929.18. Restituion that exceeds the economic loss corresponding to the offense is punishment for a crime for which there has been no conviction, and violates the presumption of innocence. *State v. Rohrbaugh*, 191 Ohio App.3d 117, 2010-Ohio-6375, ¶ 20, 944 N.E.2d 1230 (3d Dist.). In reaching this conclusion, *Rohrbaugh* surveyed other district courts of appeal throughout the State, and concluded:

{¶ 17} Many Ohio courts, including this court, have recognized that restitution must be limited to the offenses for which a defendant is charged and convicted. *State v. Williams*, 3d Dist. No. 8-03-25, 2004-Ohio-2801, ¶ 23; *State v. Miller*, 12th Dist. No. CA2007-11-295, 2008-Ohio-5661, ¶ 11; *State v. Hafer* (2001), 144 Ohio App.3d 345, 348; *State v. Hooks* (2000), 135 Ohio App.3d 746, 749; *State v. Brumback* (1996), 109 Ohio App.3d 65; *State v. Friend* (1990), 68 Ohio App.3d 241. See also *State v. Rosebrook*, 3d Dist. No. 8-05-07, 2006-Ohio-734, ¶ 30-33 (Rogers, J., dissenting). "[A]s a matter of law, an offender cannot be ordered to pay restitution for damage arising from a crime of which he was not convicted." *Williams* at ¶ 23. A trial court must limit its award of restitution to the actual economic loss caused by the crime for which he was convicted. *Id.*, citing *Hafer* at 348.

*Rohrbaugh. Accord, State v. Carosella* (June 25, 1999), 7<sup>th</sup> Dist. App. No. 97 CA 46, unreported, 1999 WL 439027; *State v. Ratliff*, 194 Ohio App.3d 202, 2011-Ohio-2313, 955 N.E.2d 425 (2<sup>nd</sup> Dist.).

There is one exception to capping restitution to reflect the offense of conviction. In those cases where a defendant specifically bargains for a charge reduction and includes within the plea agreement that the defendant will make restitution in a greater amount than could otherwise be awarded, the defendant is bound by the agreement. *E.g., State v. Wickline*, 3d Dist. App. No. 8-10-20, 2011-Ohio-3004, 2011 WL 2448968. But this exception is unavailable where, as here, the State did not even seek to reach – and the defendant never suggested acquiescence to – an agreement regarding restitution.

This Court, based on the language of R.C. 2929.18, and the presumption of innocence should thus hold that restitution in the instant case cannot exceed \$4,999.99.

***Proposition of Law II:***

**When a defendant disputes the amount of restitution, a trial court abuses its discretion in ordering restitution without a hearing.**

***In Response to Certified Question:***

**Whether, despite the defendant's failure to object, it is error for the trial court to order defendant to pay an amount of restitution in the absence of a specific plea agreement and without a hearing or evidence substantiating the economic loss claimed by the plaintiff?**

***Proposition of Law 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.**

Argument relating to these latter two propositions of law and the certified question have been combined because they are interrelated.

**The restitution requested by the corporate victim in this case exceeded that which is permissible as restitution in a criminal case (Proposition III)**

There was no basis for the trial court to order restitution in the amount of \$63,121. In fact, the State offered no basis for the trial court to award restitution in any amount in this case.

In sentencing a criminal defendant, a trial court is authorized to impose a restitution order to reimburse a victim of a crime. The amount of restitution is limited to 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). The term “economic loss” is similarly defined in the Revised Code as “any economic detriment suffered by a victim as a *direct and proximate* result of the commission of an offense.” R.C. 2929.01(M). *State v. Warner*, 55 Ohio St.3d 31, 69, 564 N.E.2d 18 (1990). “Economic loss” includes lost wages, property loss, medical costs and funeral expenses, but does not include non-economic loss, punitive damages or exemplary damages. R.C. 2929.01(M). Due process requires that the amount of restitution bear a reasonable relationship to the amount of loss. *State v. Lacey*, Richland App. No. 2005-CA-119, 2006 Ohio 4290, ¶¶ 38-45; *State v. Labghaly*, 8<sup>th</sup> Dist. App. No. 87759, 2007 Ohio 73, ¶ 9.

In the instant case, the expenditures described in the unsworn Aero letter were not the expenditures that were the direct and proximate result of Mr. Lalain’s theft. Rather, Aero discussed personnel costs attendant to their helping “in support of this case” and monies spent to retain the services of an outside auditor to “determine a valuation of the property.” Aero letter, at ¶¶ 1-2. On its face, the Aero letter demonstrates that these costs were not the direct result of the theft – this is money Aero chose to spend in order to develop a case against Mr. Lalain as opposed to the value of anything that was taken from Aero by Mr. Lalain.

The prosecution's own representations at sentencing confirm the investigatory and litigative nature of Aero's expenses. The prosecutor acknowledged that Aero's expenditures enabled the State to bring the prosecution against Mr. Lalain:

But that Meaden and Moore [*i.e.*, the accounting firm hired by Aero] work cost a lot of money in order to establish this case. *Aero undertook a number of expenses which the county could never have afforded to pay for in order to investigate this case.*

(T. 26) (emphasis added). Specifically as to the Meaden and Moore audit, the prosecutor particularly noted that the outside audit performed by Meaden and Moore was only undertaken by Aero after the County Prosecutor's Office asked them to do so in order to help prosecute this case. (T. 24-25).

In effect, Aero is trying to recover as criminal restitution the same types of costs of litigation that they could not have recovered had they continued in their civil litigation against Mr. Lalain.

In the end, the State failed to set forth even the mention of any loss to Aero that was both directly and proximately caused by Mr. Lalain's theft – which is the only loss countenanced by R.C. 2929.18's restitution provision. It is not surprising that the State could not provide even a mention of the type of loss that qualified for restitution – all of the property was recovered and had never been disseminated. (T. 9, 14, 24).

**Even in the absence of a specific objection, a hearing was required in light of the unsubstantiated and excessive nature of the amount of restitution requested (Response to Certified Question)**

The trial court erred in not conducting an evidentiary hearing to determine the restitution amount. As discussed above, not every expenditure by a victim is a loss for which criminal restitution is guaranteed. When a trial court cannot be certain as to the amount of restitution to which a victim is entitled under a statute, a hearing is required. *State v. Warner* (1990), 55 Ohio

St.3d 31, 69 (trial court erred in not conducting hearing where record left this Court “to guess what losses flowed directly” from the criminal conduct).

A trial court is not permitted, even with the agreement of the parties, to impose a sentence that is not in accordance with the law. *State v. Underwood*, 124 Ohio St.3d 365, 922 N.E.2d 923. When a trial court imposes a sentence of restitution that is not supported by the record, it imposes a sentence that exceeds its authority under R.C. 2929.18. Here, the Aero letter, on its face, did not set forth a restitution request that was colorable under R.C. 2929.18, especially in light of the fact that all of the stolen property had been recovered and none of it had been disseminated. (T. 9, 14, 24). Moreover, the prosecutor’s comments about how Aero’s expenditures were related to the investigation and prosecution of this case confirmed that the State was seeking restitution in excess of the court’s statutory authority under R.C. 2929.18. (T. 25-26).

In that the combined representations of Aero and the prosecutor specifically alerted the trial court to the fact that at least some of the restitution being requested fell outside of R.C. 2929.18, and, further, that none of the restitution being requested had been shown to fall inside the bounds of R.C. 2929.18, the trial court had no basis to award restitution unless it first conducted a hearing. *Warner*. In this regard, it should be remembered that it was the State’s burden to demonstrate that restitution was appropriate. *See, Warner*. Mr. Lalain had no duty to request a hearing and, as with any criminal sentencing, it was not his duty to ask the trial court to conduct a hearing so as to enable the State to punish him further via a restitution award. *See, State v. Waiters*, 8<sup>th</sup> Dist. App. No. 93897, 2010-Ohio- 5764 (even a jointly recommended restitution amount cannot be ordered without a hearing when “nothing in the record provides any guidance or evidence from which the trial court could have determined whether the amount of

restitution was reasonably related to the loss suffered by the victim.”). *See also, State v. Ratliff*, 194 Ohio App.3d 202, 2011-Ohio-2313, 955 N.E.2d 425 (2<sup>nd</sup> Dist.) (although defendant did not specifically object to restitution, his dispute of the amount required trial court to conduct a hearing).

Accordingly, even in the absence of an objection, a hearing was required.

Nonetheless, as discussed below, in this case, Mr. Lalain *did object*.

**The trial court’s error in not conducting a hearing was particularly egregious in light of defense counsel’s objections to the amount of restitution (Proposition of Law II).**

The Eighth District framed the certified question with the premise that there was no objection posited by the defense regarding the restitution. The Eighth District’s premise is unsupported by the record. The defense specifically objected to the amount of restitution set forth in the Aero letter. (T. 15). The defense explicitly posited that Aero’s claimed expenses included litigation costs attendant to its lawsuit against Mr. Lalain which had been previously dismissed. (T. 15). At one point, the defense stated that it did not believe Aero was deserving of “any” of these costs.

It is unclear how the Eighth District, in the face of the transcript, analyzed the issues as if no objection were posited. Opinion below, *passim*. The Eighth District even quoted defense counsel’s having made an objection, although it incorrectly characterized one of counsel’s objections as having related only to the Meade and Moore study. Opinion below, at ¶ 5. This also calls into question how the Eighth District could frame the certified question in the context of a complete absence of an objection. The only possible explanation is that the Eighth District believed a further objection – or exception – was required to be noted at the end of the entire

sentencing hearing. Such a procedure is not required in Ohio. Crim. R. 51 (exception not necessary where objection already posited).

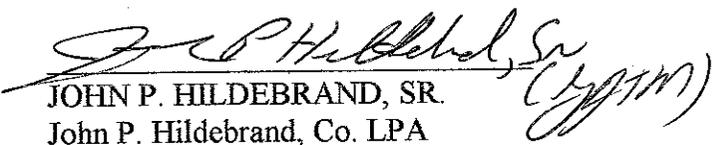
Thus, the defense counsel specifically placed into question the issue of whether Aero was entitled to any restitution, particularly in light of its having incurred litigation costs attendant to its civil lawsuit. This positing of an objection to the State's proposed restitution figure required the trial court to conduct an evidentiary hearing – whenever the defense calls into dispute the amount of restitution, a hearing is required. *State v. Ratliff*, 194 Ohio App.3d 202, 2011-Ohio-2313, 955 N.E.2d 425 (2<sup>nd</sup> Dist.); *see also, Waiters*, at ¶ 23 (hearing required merely because “defense counsel stated at the sentencing hearing that he was not sure the amount of restitution was correct”).

Accordingly, the trial court erred when it failed to conduct an evidentiary hearing. The restitution order must be reversed and the case remanded for an evidentiary hearing.

### CONCLUSION

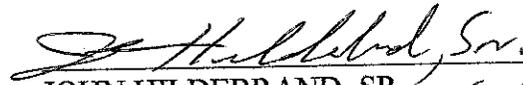
For these reasons, the judgment of the Eighth District Court of Appeals should be reversed. The case should be remanded to the Cuyahoga County Court of Common Pleas to conduct a hearing on the amount of restitution, not to exceed \$4,999.99.

Respectfully submitted,

  
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**SERVICE**

A copy of the foregoing was served via U.S. mail, postage pre-paid, on William D. Mason, Cuyahoga County Prosecutor, or his duly authorize representative, this 24<sup>th</sup> day of September, 2012.

  
JOHN HILDEBRAND, SR. (JHM)

ORIGINAL

IN THE SUPREME COURT OF OHIO

Case No. 12-0408

STATE OF OHIO :

Plaintiff-Appellee :

-vs- :

DANIEL LALAIN :

Defendant-Appellant :

On Appeal from Eighth District.  
Court of Appeals, Case No.  
CA 95857

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APPELLANT'S NOTICE OF APPEAL

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NOTICE OF APPEAL OF DANIEL LALAIN

Defendant-Appellant Daniel Lalain hereby gives notice of his appeal to the Ohio Supreme Court from the September 22, 2011, judgment of the Eighth District Court of Appeals in *State v. Lalain*, Cuyahoga App. No. 95857, from which the Eighth District Court of Appeals denied a motion for rehearing en banc on January 23, 2012.

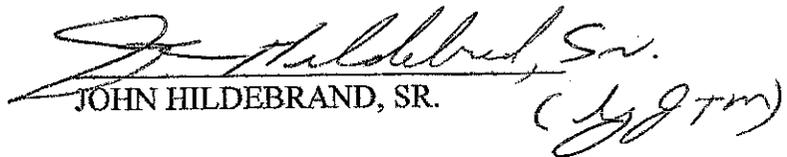
This felony case raises substantial constitutional questions and is a matter of great general and great public interest.

Respectfully submitted,

  
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Fairview Park, Ohio 44126  
Counsel for Defendant-Appellant

**SERVICE**

A copy of the foregoing Notice of Appeal was served via U.S. mail, postage pre-paid, on William D. Mason, Cuyahoga County Prosecutor, or his duly authorize representative, this 8th day of March, 2012.

  
JOHN HILDEBRAND, SR.

SEP 22 2011

**FILED** Court of Appeals of Ohio

2011 SEP 26 P 2:06

GERALD E. FUERST  
CLERK OF COURTS  
CUYAHOGA COUNTY

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION  
No. 95857

**FEE**  
**3**  
**TAXED**

**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**DANIEL LALAIN**

**DEFENDANT-APPELLANT**

**JUDGMENT:**  
**AFFIRMED**

Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-524732

**BEFORE:** Kilbane, A.J., Cooney, J., and S. Gallagher, J.

**RELEASED AND JOURNALIZED:** September 22, 2011

**VOL0738 PG0378**



**ATTORNEY FOR APPELLANT**

John P. Hildebrand, Sr.  
John P. Hildebrand Co., L.P.A.  
21430 Lorain Road  
Fairview Park, Ohio 44126

**ATTORNEYS FOR APPELLEE**

William D. Mason  
Cuyahoga County Prosecutor  
James D. May  
Assistant County Prosecutor  
The Justice Center - 9th Floor  
1200 Ontario Street  
Cleveland, Ohio 44113

COPIES MAILED TO COUNSEL FOR  
ALL PARTIES. COSTS TAXED

FILED AND JOURNALIZED  
PER APP.R. 22(G)

SEP 22 2011  
GERALD E. FLEIST  
CLERK OF THE COURT OF APPEALS  
BY \_\_\_\_\_ DEP.

VOLO738 260379

MARY EILEEN KILBANE, A.J.:

Defendant-appellant, Daniel Lalain (Lalain), appeals his restitution order. Finding no merit to the appeal, we affirm.

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 pled 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 in pertinent part:

**"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**

VOLO 738 PG0380

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 we 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 "[t]he 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 the "accounting was taken on by Aero \* \* \* so that they could discuss how this case could actually be \* \* \* valuated 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 if "there are any other matters to be referenced on the record." Defense counsel replied, "Nothing further, your Honor."

Lalain now appeals, raising the following three assignments of error for review.

#### ASSIGNMENT OF ERROR ONE

"The trial court erred when it ordered restitution in the amount of \$63,121 without any basis to conclude that this

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amount was the 'economic loss' suffered by [Aero] as the direct and proximate result of the theft."

#### ASSIGNMENT OF ERROR TWO

"The trial court erred in failing to hold an adequate restitution hearing when [Lalain] disputed the restitution amount."

#### ASSIGNMENT OF ERROR THREE

"The trial court erred in ordering restitution in an amount greater than \$4,999.99 because [Lalain] was only convicted of a fifth degree felony."

#### Standard of Review

On appeal, we review a lower court's order of restitution for an abuse of discretion. *State v. Marbury* (1995), 104 Ohio App.3d 179, 661 N.E.2d 271; see, also, *State v. Berman*, Cuyahoga App. No. 79542, 2002-Ohio-1277. An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 404 N.E.2d 144.

#### Restitution Award and Hearing

In the first assignment of error, Lalain argues the trial court erred when it ordered \$63,121 as restitution because the costs Aero claimed were not incurred as a direct and proximate result of the theft. Rather, he claims that Aero requested reimbursement for money it spent to develop a case against him.

In the second assignment of error, Lalain argues the trial court erred by not holding a hearing on the restitution amount. He claims he objected to the restitution amount set forth in Aero's letter. In the third assignment of error, Lalain argues the trial court erred when it ordered restitution in an amount greater than \$4,999.99 because he pled guilty to a fifth degree felony.

However, Lalain did not object at his sentencing hearing to the order of restitution or the amount ordered. Thus, he waived all but plain error. *State v. Jarrett*, Cuyahoga App. No. 90404, 2008-Ohio-4868, ¶13, citing *Marbury*.

Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.3d 91, 372 N.E.2d 804, paragraph three of the syllabus. For the reasons that follow, we do not find plain error.

R.C. 2929.18 governs restitution and provides that financial sanctions may include:

**"Restitution by the offender to the victim of the offender's crime \* \* \* in an amount based on the victim's economic loss. \* \* \* If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender. If the court imposes restitution, the court**

R.C. 2929.18(A)(1) states, "[i]f the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim or survivor disputes the amount." This court has held that a separate hearing is not required if the defendant or defense counsel fail to "object to restitution or dispute the amounts requested by the victims." *Jarrett* at ¶18. Since Lalain and defense counsel failed to object to restitution or dispute the amount requested by Aero, the trial court was not required to hold a separate hearing on restitution.

Furthermore, R.C. 2929.01(L) defines economic loss as any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense. Here, Aero had to complete an accounting to determine value because of the unique nature of the intellectual property involved. In addition, as stated above, Lalain understood as part of his plea agreement that he could be required to pay restitution and failed to dispute the amount. "Finally, justice and sensibility should prevent [Lalain] from prevailing on a error which he invited. By agreeing to the restitution award in exchange for pleading guilty, he received the benefit of his bargain: a reduced charge." *State v. Stewart*, Wyandot App. No. 16-08-11, 2008-Ohio-5823, ¶13 (where the Third District Court of Appeals affirmed the trial court's restitution award to a government agency when such award was made pursuant to an

express plea agreement between the State and the defendant). Therefore, the trial court's restitution order of \$63,121 was not an abuse of discretion.

The dissent relies on *State v. Moore-Bennett*, Cuyahoga App. No. 95450, 2011-Ohio-1987, and *State v. Wickline*, Logan App. No. 8-10-20, 2011-Ohio-3004, to support the argument that the trial court did not have the authority to impose any amount of restitution beyond \$4,999. Respectfully, our reading of these cases reveals differences that render their holdings distinguishable from the instant case.

In *Moore-Bennett*, this court found that "[a] trial court abuses its discretion in ordering restitution in an amount that exceeds the economic loss resulting from the defendant's crime." *Id.* at ¶18, citing *State v. Rivera*, Cuyahoga App. No. 84379, 2004-Ohio-6648. In *Wickline*, the Third District Court of Appeals found that under the express terms of the plea agreement, the defendant "could not be ordered to pay more restitution than he could have been ordered to pay if he had been convicted of the original offense[.]" which was a fifth degree felony (a theft offense involving property valued at \$500 or more, but less than \$5,000). *Id.* at ¶17.

In the instant case, 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. The issue of waiver was neither raised nor discussed in *Moore-Bennett* and *Wickline*.

Furthermore, the defendant in *Moore-Bennett* proceeded to a jury trial, whereas Lalain entered into a plea agreement. While Lalain did not execute an express plea agreement like the defendant in *Wickline*, under *Wickline's* rationale, the trial court in the instant case did not err because it ordered Lalain to pay restitution in an amount less than if he had been convicted of the original offense, which was a first degree felony (a theft offense involving property or services valued at \$1 million or more).

Thus, based on the foregoing, we find that the trial court's restitution order did not violate Lalain's substantial rights. Therefore, we do not find plain error.

Accordingly, the first, second, and third assignments of error are overruled.

Judgment is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

*Mary Eileen Kilbane*  
MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

COLLEEN CONWAY COONEY, J., CONCURS  
SEAN C. GALLAGHER, J., DISSENTS (SEE SEPARATE DISSENTING OPINION)

SEAN C. GALLAGHER, J., DISSENTING:

I respectfully dissent from the majority decision. I write separately to address concerns about awards of restitution at sentencing where the terms and amounts are unclear at the time of the plea.

In this instance, we have an initial allegation of theft with a value in excess of \$1,000,000. In the end, the plea is to a theft offense with a stated value of more than \$500, but less than \$5,000. While Lalain indicated that he understood he could be ordered to pay restitution as part of his sentence, no specific amount of restitution was agreed to as part of his plea agreement.

Ordinarily, the amount of restitution ordered by a trial court must bear a reasonable relationship to the loss suffered and is limited to the actual loss caused by the offender's criminal conduct for which he was convicted. As this court recognized in *State v. Moore-Bennett*, Cuyahoga App. No. 95450,

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2011-Ohio-1937, ¶ 18: "R.C. 2929.28(A)(1) requires that when restitution is imposed as part of a criminal sanction for misdemeanor offenses, '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.' Ohio courts have recognized that the amount of restitution ordered by a trial court must bear a reasonable relationship to the loss suffered and is limited to the actual loss caused by the offender's criminal conduct for which he was convicted. A trial court abuses its discretion in ordering restitution in an amount that exceeds the economic loss resulting from the defendant's crime. An appellate court may modify a sentence when it finds by clear and convincing evidence that the sentence is contrary to law. R.C. 2953.08(G)(2)." (Internal citations omitted.) See, also, *State v. Rivera*, Cuyahoga App. No. 84379, 2004-Ohio-6648.

It has been recognized that nothing in R.C. 2929.18(A)(1) prohibits an award of restitution greater than the maximum associated with the degree of offense when the defendant has agreed to pay more as part of a plea agreement. *State v. Wickline*, Logan App. No. 8-10-20, 2011-Ohio-3004, ¶ 14-15. However, as was the case in *Wickline*, the defendant herein never agreed to pay restitution in an amount exceeding the value for the offense of which he was convicted.

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Therefore, the trial court had no authority to impose any amount of restitution beyond \$4,999. See *id.* at ¶ 17.

I also note that the figure of \$63,121 appears for the first time on the date of sentencing or shortly before in a letter, dated September 21, 2010, from a representative of the victim. This letter does not contain a detailed accounting of these costs. The appellant at the hearing raised concerns that these were actually costs related to civil litigation the victim was pursuing against appellant contemporaneous with the criminal proceedings.

While it is not always possible to know of, or address all economic losses at the time of a plea or finding of guilt, it is the better practice to put a figure of restitution on the record and afford the parties an opportunity to address the merits of the figures at sentencing in a meaningful way. Too often, restitution is treated as an afterthought. In my view, the specific figures from the September 21, 2010 letter should have been available and incorporated into the plea agreement to avoid surprise or conflicts over what is expected in terms of making the victim whole.

In any event, because Lalain did not specifically agree to pay any amount of restitution greater than the value for the offense of which he was convicted, I would reduce the restitution order to \$4,999.

YOU 738 P00391

**Court of Appeals of Ohio, Eighth District**

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

State of Ohio

Appellee

COA NO.  
95857

LOWER COURT NO.  
CP CR-544519

-vs-

COMMON PLEAS COURT

Daniel Lalain

Appellant

MOTION NO. 448227

Date 01/23/2012

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Journal Entry

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This matter is before the court on appellant's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

We find no conflict between the panel's decision in the present case and *State v. Moore-Bennett*, Cuyahoga App. No. 95450, 2011-Ohio-1937 and *State v. Rivera*, Cuyahoga App. No. 84379, 2004-Ohio-6648. The economic loss suffered by a crime victim for purposes of determining the amount of restitution the defendant should pay is not

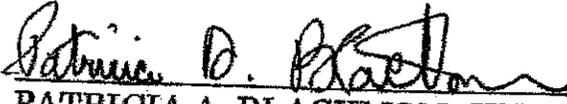
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VOL 0746 PG 0336

limited by the value of the stolen property used to establish the degree of the offense.

  
PATRICIA A. BLACKMON, JUDGE

Concurring:

MARY J. BOYLE, J.,  
FRANK D. CELEBREZZE, JR., J.,  
COLLEEN CONWAY COONEY, J.,  
EILEEN A. GALLAGHER, J.,  
LARRY A. JONES, J.,  
KATHLEEN ANN KEOUGH, J.,  
KENNETH A. ROCCO, J.,  
MELODY J. STEWART, J., and  
JAMES J. SWEENEY, J.

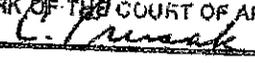
Dissenting:

MARY EILEEN KILBANE, A.J., and  
SEAN C. GALLAGHER, J.

COPIES MAILED TO COUNSEL FOR  
ALL PARTIES.-COSTS TAKEN

RECEIVED FOR FILING

JAN 23 2012

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY  DEP.

IN THE SUPREME COURT OF OHIO

Case No.

12-0302

STATE OF OHIO

Appellee

-vs-

DANIEL LALAIN

Appellant

On Appeal from the  
Cuyahoga County Court  
of Appeals, Eighth  
Appellate District Court  
of Appeals  
CA: 95857

**NOTICE OF APPELLANT DANIEL LALAIN OF CERTIFICATION OF CONFLICT  
BY THE EIGHTH DISTRICT COURT OF APPEALS**

COUNSEL FOR APPELLEE:

WILLIAM D. MASON, ESQ.  
Cuyahoga County Prosecutor  
Justice Center - 8th Floor  
1200 Ontario Street  
Cleveland, Ohio 44113  
(216) 443-7730

COUNSEL FOR APPELLANT:

JOHN HILDEBRAND, SR. (0025124)  
Attorney at Law  
21430 Lorain Road  
Fairview Park, Ohio 44126  
(440) 333-3100

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FEB 21 2012  
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SUPREME COURT OF OHIO

FILED  
FEB 21 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

Case No.

STATE OF OHIO

Appellee

-vs-

DANIEL LALAIN

Appellant

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On Appeal from the  
Cuyahoga County Court  
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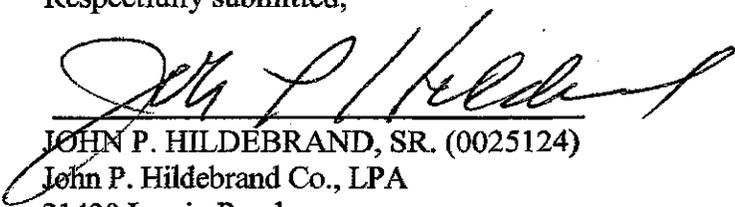
Appellant's Notice of Conflict Certification

Pursuant to Supreme Court Rule of Practice IV, Sec. 1, Appellant Daniel Lalain hereby gives notice that, on January 23, 2012, the Eight District (Cuyahoga County) Court of Appeals certified that its decision in the captioned matter, *State v. Lalain*, 8<sup>th</sup> Dist. No. 95857, 2011-Ohio-4813, is in conflict with the decision in Case No. 10-CA-61 of the Second District (Clark County) Court of Appeals in *State v. Ratliff*, 194 Ohio App.3d 202, 2011-Ohio-2313, 955 N.E.2d 425 (2<sup>nd</sup> Dist.), on the following question:

Whether, despite the defendant's failure to object, it is error for the trial court to order a defendant to pay an amount of restitution in the absence of a specific plea agreement and without a hearing or evidence substantiating the economic loss claimed by the plaintiff?

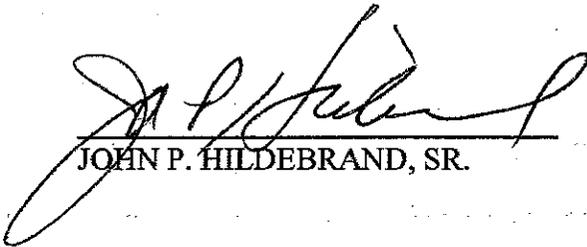
Copies of the Eighth District order of certification in the captioned matter, the opinion of the Eighth District Court of Appeals in the captioned matter, and the opinion of the Second District Court of Appeals in *Ratliff* are attached hereto.

Respectfully submitted,

  
JOHN P. HILDEBRAND, SR. (0025124)  
John P. Hildebrand Co., LPA  
21430 Lorain Road  
Fairview Park, Ohio 44126; (440) 333-3100

**SERVICE**

I hereby certify that one true copy of the foregoing NOTICE OF APPELLANT DANIEL LALAIN OF CERTIFICATION OF CONFLICT BY THE EIGHTH DISTRICT COURT OF APPEALS was served via U.S. mail, postage pre-paid, on William D. Mason, Cuyahoga County Prosecutor, or his duly authorize representative, 9<sup>th</sup> Floor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, on this 21st day of February, 2012.



JOHN P. HILDEBRAND, SR.

# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.  
95857

LOWER COURT NO.  
CP CR-524732

COMMON PLEAS COURT

-vs-

DANIEL LALAIN

Appellant

MOTION NO. 448229

Date 01/23/12

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## Journal Entry

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Motion by appellant to certify a conflict is granted. This court's decision in State v. Lalain, Cuyahoga App. No. 95857, 2011-Ohio-4813, is in conflict with the following decision from the Second District Court of Appeals: State v. Ratliff, Clark App. No. 10-CA-61, 2011-Ohio-2313.

This court hereby certifies the following question to the Ohio Supreme Court pursuant to App.R. 25(A) and Article IV, Section 3(B)(4) of the Ohio Constitution for resolution of the following issue:

Whether, despite the defendant's failure to object, it is error for the trial court to order defendant to pay an amount of restitution in the absence of a specific plea agreement and without a hearing or evidence substantiating the economic loss claimed by the plaintiff?

**RECEIVED FOR FILING**

JAN 23 2012

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY C. Prusak DEP.

Judge COLLEEN CONWAY COONEY,  
CONCURS IN JUDGMENT ONLY

---

Judge SEAN C. GALLAGHER, Concur

---

Mary Eileen Kilbane  
Presiding Judge  
MARY EILEEN KILBANE

COPIES MAILED TO COUNSEL FOR  
ALL PARTIES - CONFIDENTIAL

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 95857

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**DANIEL LALAIN**

DEFENDANT-APPELLANT

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**JUDGMENT:  
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**RELEASED AND JOURNALIZED:** September 22, 2011

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William D. Mason  
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James D. May  
Assistant County Prosecutor  
The Justice Center - 9th Floor  
1200 Ontario Street  
Cleveland, Ohio 44113

*[Faint, illegible text and a handwritten signature are visible in this area.]*

MARY EILEEN KILBANE, A.J.:

Defendant-appellant, Daniel Lalain (Lalain), appeals his restitution order. Finding no merit to the appeal, we affirm.

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 pled 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.

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Lalain now appeals, raising the following three assignments of error for review.

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**"The trial court erred when it ordered restitution in the amount of \$63,121 without any basis to conclude that this**

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In the second assignment of error, Lalain argues the trial court erred by not holding a hearing on the restitution amount. He claims he objected to the restitution amount set forth in Aero's letter. In the third assignment of error, Lalain argues the trial court erred when it ordered restitution in an amount greater than \$4,999.99 because he pled guilty to a fifth degree felony.

However, Lalain did not object at his sentencing hearing to the order of restitution or the amount ordered. Thus, he waived all but plain error. *State v. Jarrett*, Cuyahoga App. No. 90404, 2008-Ohio-4868, ¶13, citing *Marbury*.

Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.3d 91, 372 N.E.2d 804, paragraph three of the syllabus. For the reasons that follow, we do not find plain error.

R.C. 2929.18 governs restitution and provides that financial sanctions may include:

**"Restitution by the offender to the victim of the offender's crime \* \* \* in an amount based on the victim's economic loss. \* \* \* If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender. 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, \* \* \* 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. 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. at (A)(1).

"Economic loss" is defined as "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. 'Economic loss' does not include non-economic loss or any punitive or exemplary damages." R.C. 2929.01(L).

In the instant case, a review of the record reveals that Lalain stated 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 if 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 the Aero. At oral argument, Lalain's counsel conceded that he did not place an objection on the record at the sentencing hearing.

R.C. 2929.18(A)(1) states, “[i]f the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim or survivor disputes the amount.” This court has held that a separate hearing is not required if the defendant or defense counsel fail to “object to restitution or dispute the amounts requested by the victims.” *Jarrett* at ¶18. Since Lalain and defense counsel failed to object to restitution or dispute the amount requested by Aero, the trial court was not required to hold a separate hearing on restitution.

Furthermore, R.C. 2929.01(L) defines economic loss as any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense. Here, Aero had to complete an accounting to determine value because of the unique nature of the intellectual property involved. In addition, as stated above, Lalain understood as part of his plea agreement that he could be required to pay restitution and failed to dispute the amount. “Finally, justice and sensibility should prevent [Lalain] from prevailing on a error which he invited. By agreeing to the restitution award in exchange for pleading guilty, he received the benefit of his bargain: a reduced charge.” *State v. Stewart*, Wyandot App. No. 16-08-11, 2008-Ohio-5823, ¶13 (where the Third District Court of Appeals affirmed the trial court’s restitution award to a government agency when such award was made pursuant to an

express plea agreement between the State and the defendant). Therefore, the trial court's restitution order of \$63,121 was not an abuse of discretion.

The dissent relies on *State v. Moore-Bennett*, Cuyahoga App. No. 95450, 2011-Ohio-1937, and *State v. Wickline*, Logan App. No. 8-10-20, 2011-Ohio-3004, to support the argument that the trial court did not have the authority to impose any amount of restitution beyond \$4,999. Respectfully, our reading of these cases reveals differences that render their holdings distinguishable from the instant case.

In *Moore-Bennett*, this court found that “[a] trial court abuses its discretion in ordering restitution in an amount that exceeds the economic loss resulting from the defendant’s crime.” *Id.* at ¶18, citing *State v. Rivera*, Cuyahoga App. No. 84379, 2004-Ohio-6648. In *Wickline*, the Third District Court of Appeals found that under the express terms of the plea agreement, the defendant “could not be ordered to pay more restitution than he could have been ordered to pay if he had been convicted of the original offense[,]” which was a fifth degree felony (a theft offense involving property valued at \$500 or more, but less than \$5,000). *Id.* at ¶17.

In the instant case, 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. The issue of waiver was neither raised nor discussed in *Moore-Bennett* and *Wicklaine*.

Furthermore, the defendant in *Moore-Bennett* proceeded to a jury trial, whereas Lalain entered into a plea agreement. While Lalain did not execute an express plea agreement like the defendant in *Wicklaine*, under *Wicklaine's* rationale, the trial court in the instant case did not err because it ordered Lalain to pay restitution in an amount less than if he had been convicted of the original offense, which was a first degree felony (a theft offense involving property or services valued at \$1 million or more).

Thus, based on the foregoing, we find that the trial court's restitution order did not violate Lalain's substantial rights. Therefore, we do not find plain error.

Accordingly, the first, second, and third assignments of error are overruled.

Judgment is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

COLLEEN CONWAY COONEY, J., CONCURS  
SEAN C. GALLAGHER, J., DISSENTS (SEE SEPARATE DISSENTING  
OPINION)

SEAN C. GALLAGHER, J., DISSENTING:

I respectfully dissent from the majority decision. I write separately to address concerns about awards of restitution at sentencing where the terms and amounts are unclear at the time of the plea.

In this instance, we have an initial allegation of theft with a value in excess of \$1,000,000. In the end, the plea is to a theft offense with a stated value of more than \$500, but less than \$5,000. While Lalain indicated that he understood he could be ordered to pay restitution as part of his sentence, no specific amount of restitution was agreed to as part of his plea agreement.

Ordinarily, the amount of restitution ordered by a trial court must bear a reasonable relationship to the loss suffered and is limited to the actual loss caused by the offender's criminal conduct for which he was convicted. As this court recognized in *State v. Moore-Bennett*, Cuyahoga App. No. 95450,

2011-Ohio-1937, ¶ 18: “R.C. 2929.28(A)(1) requires that when restitution is imposed as part of a criminal sanction for misdemeanor offenses, ‘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.’ Ohio courts have recognized that the amount of restitution ordered by a trial court must bear a reasonable relationship to the loss suffered and is limited to the actual loss caused by the offender’s criminal conduct for which he was convicted. A trial court abuses its discretion in ordering restitution in an amount that exceeds the economic loss resulting from the defendant’s crime. An appellate court may modify a sentence when it finds by clear and convincing evidence that the sentence is contrary to law: R.C. 2953.08(G)(2).” (Internal citations omitted.) See, also, *State v. Rivera*, Cuyahoga App. No. 84379, 2004-Ohio-6648.

It has been recognized that nothing in R.C. 2929.18(A)(1) prohibits an award of restitution greater than the maximum associated with the degree of offense when the defendant has agreed to pay more as part of a plea agreement. *State v. Wickline*, Logan App. No. 8-10-20, 2011-Ohio-3004, ¶ 14-15. However, as was the case in *Wickline*, the defendant herein never agreed to pay restitution in an amount exceeding the value for the offense of which he was convicted.

Therefore, the trial court had no authority to impose any amount of restitution beyond \$4,999. See *id.* at ¶ 17.

I also note that the figure of \$63,121 appears for the first time on the date of sentencing or shortly before in a letter, dated September 21, 2010, from a representative of the victim. This letter does not contain a detailed accounting of these costs. The appellant at the hearing raised concerns that these were actually costs related to civil litigation the victim was pursuing against appellant contemporaneous with the criminal proceedings.

While it is not always possible to know of, or address all economic losses at the time of a plea or finding of guilt, it is the better practice to put a figure of restitution on the record and afford the parties an opportunity to address the merits of the figures at sentencing in a meaningful way. Too often, restitution is treated as an afterthought. In my view, the specific figures from the September 21, 2010 letter should have been available and incorporated into the plea agreement to avoid surprise or conflicts over what is expected in terms of making the victim whole.

In any event, because Lalain did not specifically agree to pay any amount of restitution greater than the value for the offense of which he was convicted, I would reduce the restitution order to \$4,999.

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
CLARK COUNTY**

THE STATE OF OHIO,	:	
	:	Appellate Case No. 10-CA-61
Appellee,	:	
	:	Trial Court Case No. 10-CR-0131(B)
v.	:	
	:	(Criminal Appeal from
RATLIFF,	:	Common Pleas Court)
	:	
Appellant.	:	

.....  
OPINION

Rendered on the 13th day of May, 2011.

.....  
D. Andrew Wilson, Clark County Prosecuting Attorney, and Amy M. Smith, Assistant Prosecuting Attorney, for appellee.

Flanagan, Lieberman, Hoffman & Swaim and Brock A. Schoenlein, for appellant.

.....  
FAIN, Judge.

{¶ 1} Defendant-appellant, Audrey Ratliff, appeals from her conviction and sentence for theft, following a guilty plea. Ratliff offers three challenges to the amount of restitution the trial court ordered. Ratliff contends that the trial court erred in ordering restitution of \$121,000, when she pleaded guilty to a theft of less than \$100,000. She also contends that the trial court abused its discretion in failing to hold a hearing regarding the amount of restitution and in failing to consider her ability to pay.

{¶ 2} We conclude that the trial court did consider Ratliff's ability to pay restitution. But because Ratliff disputed the amount of money she stole, we conclude that the trial court abused its discretion in ordering restitution without holding a hearing. Additionally, we conclude that in the absence of a specific plea agreement to the contrary, the amount of any order of restitution may not exceed the maximum amount that is an element of the theft offense for which the defendant was convicted. Accordingly, the trial court's order of restitution is reversed, and the cause is remanded to the trial court for a hearing on that issue.

## I

{¶ 3} In February 2010, Ratliff was indicted on two counts of theft, one count of extortion, and one count of impersonating a peace officer. The charges arose from events that occurred during the previous several months, when Ratliff repeatedly deceived her 78-year-old victim, causing him to loan her large sums of money that she promised to repay but did not.

{¶ 4} Pursuant to a plea agreement, Ratliff pleaded guilty to theft from an elderly person of \$25,000 or more, but less than \$100,000, in violation of R.C. 2913.02(B)(3). Ratliff was sentenced to serve seven years in prison and to pay \$121,000 in restitution to her victim. From her sentence, Ratliff appeals.

## II

{¶ 5} Ratliff's sole assignment of error is as follows:

{¶ 6} "The trial court erred in rendering its order of restitution."

{¶ 7} Ratliff first contends that because she pleaded guilty to a theft of less than

\$100,000, the trial court erred in ordering her to pay \$121,000 in restitution. She also argues that the trial court erred in ordering any restitution without holding a hearing, after she objected to the amount, and that the trial court failed to consider her ability to pay any restitution.

{¶ 8} The state argues that Ratliff waived any error by failing to object to the amount of restitution. The state also argues that there was no information in the presentence-investigation report that would have led the court to doubt Ratliff's expressed intent to repay her victim.

{¶ 9} A trial court abuses its discretion when it orders restitution that does not bear a reasonable relationship to the actual financial loss suffered. *State v. Williams* (1986), 34 Ohio App.3d 33. Therefore, we review a trial court's order of restitution under an abuse-of-discretion standard. See, e.g., *State v. Naylor*, Montgomery App. No. 24098, 2011-Ohio-960, ¶ 22. The abuse of discretion standard is defined as " '[a]n appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence.' " *State v. Boles*, Montgomery App. No. 23037, 2010-Ohio-278, ¶ 18, quoting Black's Law Dictionary (8th Ed.2004) 11.

{¶ 10} R.C. 2929.18(A)(1) allows a trial court to order, as a financial sanction, an amount of restitution to be paid by an offender to his victim "based on the victim's economic loss. \* \* \* 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. If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount.”

{¶ 11} We begin by addressing Ratliff’s claim that the trial court failed to consider her ability to repay her victim before ordering restitution. The record does not support her claim.

{¶ 12} R.C. 2929.19(B)(6) imposes a duty upon the trial court to “consider the offender’s present or future ability to pay” before imposing any financial sanctions under R.C. 2929.18. See, e.g., *State v. Martin* (2000), 140 Ohio App.3d 326, 338, citing *State v. Stevens* (Sept. 21, 1998), Clinton App. No. CA98-01-001. However, the statute establishes no particular factors for the court to take into consideration, nor is a hearing necessary before making this determination. *Id.* A trial court may comply with R.C. 2929.19(B)(6) by considering a presentence-investigation report, which includes information about the defendant’s age, health, education, and work history. *Id.*

{¶ 13} In this case, both the sentencing transcript and the judgment entry of conviction indicate that the trial court considered the presentence-investigation report prior to ordering Ratliff to pay restitution. Furthermore, Ratliff insisted at sentencing that she intended to repay her victim. Under these circumstances, we conclude that the trial court did not fail to consider Ratliff’s present or future ability to pay restitution.

{¶ 14} A defendant who does not dispute an amount of restitution, request a hearing, or otherwise object waives all but plain error in regards to the order of restitution. *State v. Cochran*, Champaign App. No. 09CA0024, 2010-Ohio-3444, ¶ 19, citing *State v. MacQuarrie*, Montgomery App. No. 22763, 2009-Ohio-2182. At the plea hearing, defense

counsel stated, "I don't know that we ever came to the conclusion, at least from our perspective, that the amount involved was more than \$100,000, but we do agree that it was between \$25,000 and \$100,000." Furthermore, at the sentencing hearing, counsel again explained, "Audrey has always contended that she never took over \$100,000 from Mr. Madison, and she said in her PSI that she believes it to be more in the neighborhood of \$86,000." Thus, despite the state's claim to the contrary, Ratliff did dispute the amount of restitution, and she has not waived any error in this regard.

{¶ 15} "For due process reasons, the amount of restitution must bear a reasonable relationship to the loss suffered. Accordingly, to ensure a lawful award, there must be competent, credible evidence in the record to support the trial court's order of restitution "to a reasonable degree of certainty." The amount of restitution requested should, if necessary, be substantiated through documentary or testimonial evidence.' *State v. Bender*, Champaign App. No. 2004 CA 11, 2005-Ohio-919, at ¶ 10." *State v. Summers*, Montgomery App. No. 21465, 2006-Ohio-3199, ¶ 44. See also *Naylor*, 2011-Ohio-960, ¶ 20-21, citing *State v. Warner* (1990), 55 Ohio St.3d 31, 69.

{¶ 16} The presentence-investigation report sets forth three significantly different amounts of financial loss to the victim: the victim estimated his loss at \$160,000, the prosecutor reviewed unspecified financial records of the victim and estimated the victim's loss to be \$126,000, and Ratliff's version of events estimated the amount she stole to be \$86,000. With no further evidence or testimony, the trial court accepted the prosecutor's estimate of \$126,000, as reported in the presentence-investigation report, reduced that amount by \$5,000, reflecting restitution ordered to be paid to the victim by one of Ratliff's codefendants, and

ordered Ratliff to pay \$121,000. But R.C. 2929.18(B)(1) requires the trial court to hold a hearing in order to determine the appropriate amount of restitution when, as in this case, the defendant disputes the amount.

{¶ 17} Finally, “the right to order restitution is limited to the actual damage or loss caused by the offense of which defendant is convicted.” (Emphasis added.) *State v. Clifton* (1989), 65 Ohio App.3d 117, 123. Orders of restitution may not include losses associated with dismissed counts. *State v. Radway*, Franklin App. No. 06AP-1003, 2007-Ohio-4273, ¶ 14. In *Clifton*, for example, because the defendant was convicted of theft of property valued between \$300 and \$5,000, the court held that the defendant could not be ordered to pay restitution of more than \$5,000. *Clifton* at 123-124. See also *State v. Rivera*, Cuyahoga App. No. 84379, 2004-Ohio-6648. By the same reasoning, since Ratliff pleaded guilty to stealing less than \$100,000, she cannot be ordered to pay more than \$100,000 in restitution.

{¶ 18} For the foregoing reasons, we conclude that the restitution order in the amount of \$121,000 is not supported by competent, credible evidence. Therefore, the trial court abused its discretion in ordering restitution without holding a hearing to determine the appropriate amount of that restitution.

{¶ 19} In this case, we need not decide, and we do not decide, whether a defendant who has, as an express part of a negotiated plea agreement or stipulation, agreed to restitution in an amount in excess of the elements of the offense for which the defendant has been convicted, or has agreed to restitution relating to additional counts that are being dismissed, may be ordered to pay restitution accordingly.

{¶ 20} Ratliff’s sole assignment of error is sustained.

III

{¶ 21} Ratliff's sole assignment of error having been sustained, the order of restitution is reversed, and this cause is remanded for a hearing on the issue of restitution.

Judgment reversed  
and cause remanded.

HALL and BROGAN, JJ., concur.

BROGAN, J., retired, of the Second District Court of Appeals, sitting by assignment.

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tronic publishing.

(2) "Information service" does not include any use of a  
capability of a type described in division (BB)(1) of this  
section for the management, control, or operation of a  
telecommunications system or the management of a tele-  
communications service.

(CC) "Elderly person" means a person who is sixty-five  
years of age or older.

(DD) "Disabled adult" means a person who is eighteen  
years of age or older and has some impairment of body or  
mind that makes the person unable to work at any  
substantially remunerative employment that the person  
otherwise would be able to perform and that will, with  
reasonable probability, continue for a period of at least  
twelve months without any present indication of recovery  
from the impairment, or who is eighteen years of age or  
older and has been certified as permanently and totally  
disabled by an agency of this state or the United States  
that has the function of so classifying persons.

(EE) "Firearm" and "dangerous ordnance" have the  
same meanings as in section 2923.11 of the Revised Code.

(FF) "Motor vehicle" has the same meaning as in  
section 4501.01 of the Revised Code.

(GG) "Dangerous drug" has the same meaning as in  
section 4729.01 of the Revised Code.

(HH) "Drug abuse offense" has the same meaning as in  
section 2925.01 of the Revised Code.

(I)(1) "Computer hacking" means any of the following:

(a) Gaining access or attempting to gain access to all or  
part of a computer, computer system, or a computer  
network without express or implied authorization with the  
intent to defraud or with intent to commit a crime;

(b) Misusing computer or network services including,  
but not limited to, mail transfer programs, file transfer  
programs, proxy servers, and web servers by performing  
functions not authorized by the owner of the computer,  
computer system, or computer network or other person  
authorized to give consent. As used in this division,  
"misuse of computer and network services" includes, but  
is not limited to, the unauthorized use of any of the  
following:

(i) Mail transfer programs to send mail to persons other  
than the authorized users of that computer or computer  
network;

(ii) File transfer program proxy services or proxy serv-  
ers to access other computers, computer systems, or  
computer networks;

(iii) Web servers to redirect users to other web pages or  
web servers.

(c)(i) Subject to division (II)(1)(c)(ii) of this section,  
using a group of computer programs commonly known as  
"port scanners" or "probes" to intentionally access any  
computer, computer system, or computer network without  
the permission of the owner of the computer, computer  
system, or computer network or other person authorized  
to give consent. The group of computer programs referred  
to in this division includes, but is not limited to, those  
computer programs that use a computer network to access  
a computer, computer system, or another computer net-  
work to determine any of the following: the presence or  
types of computers or computer systems on a network; the  
computer network's facilities and capabilities; the availabil-  
ity of computer or network services; the presence or  
versions of computer software including, but not limited  
to, operating systems, computer services, or computer

contaminants; the presence of a known computer software  
deficiency that can be used to gain unauthorized access to  
a computer, computer system, or computer network; or  
any other information about a computer, computer sys-  
tem, or computer network not necessary for the normal  
and lawful operation of the computer initiating the access.

(ii) The group of computer programs referred to in  
division (II)(1)(c)(i) of this section does not include stan-  
dard computer software used for the normal operation,  
administration, management, and test of a computer,  
computer system, or computer network including, but not  
limited to, domain name services, mail transfer services,  
and other operating system services, computer programs  
commonly called "ping," "tcpdump," and "traceroute" and  
other network monitoring and management computer  
software, and computer programs commonly known as  
"nslookup" and "whois" and other systems administration  
computer software.

(d) The intentional use of a computer, computer sys-  
tem, or a computer network in a manner that exceeds any  
right or permission granted by the owner of the computer,  
computer system, or computer network or other person  
authorized to give consent.

(2) "Computer hacking" does not include the introduc-  
tion of a computer contaminant, as defined in section  
2909.02 of the Revised Code, into a computer, computer  
system, computer program, or computer network.

(II) "Police dog or horse" and "service dog" have the  
same meanings as in section 2921.321 [2921.32.1] of the  
Revised Code.

**HISTORY:** 134 v H 511 (Eff 1-1-74); 139 v H 437 (Eff  
7-21-82); 140 v H 97 (Eff 3-20-84); 140 v S 183 (Eff 9-26-84);  
141 v H 340 (Eff 5-20-86); 141 v H 49 (Eff 6-26-86); 142 v H  
182 (Eff 7-7-87); 143 v H 347 (Eff 7-18-90); 146 v S 2 (Eff  
7-1-96); 146 v S 277 (Eff 3-31-97); 147 v H 565 (Eff 3-30-99);  
148 v H 2 (Eff 11-10-99); 149 v H 327, Eff 7-8-2002; 150 v S  
82, § 1, eff. 2-12-04; 150 v S 146, § 1, eff. 9-23-04; 150 v H  
369, § 1, eff. 11-26-04; 150 v H 536, § 1, eff. 4-15-05; 150 v  
H 361, § 1, eff. 5-6-05.

The provisions of § 3 of H.B. 536 (150 v —) read as follows:  
SECTION 3. Section 2913.01 of the Revised Code is presented  
in this act as a composite of the section as amended by both Am.  
Sub. H.B. 369 and Am. Sub. S.B. 146 of the 125th General  
Assembly. The General Assembly, applying the principle stated in  
division (B) of section 1.52 of the Revised Code that amendments  
are to be harmonized if reasonably capable of simultaneous  
operation, finds that the composite is the resulting version of the  
section in effect prior to the effective date of the section as  
presented in this act.

Not analogous to former RC § 2913.01 (RS § 7091; S&S  
264; S&C 409; 73 v 59; GC § 13083; 101 v 206; Bureau of  
Code Revision, 10-1-53), repealed 134 v H 511, § 2, eff.  
1-1-74.

#### Comment, Legislative Service Commission

Section 2913.01 of the Revised Code is amended by Am. Sub.  
H.B. 361, Sub. H.B. 536, Am. Sub. H.B. 369, and Am. Sub. S.B.  
146 of the 125th General Assembly. Comparison of these amend-  
ments in pursuance of section 1.52 of the Revised Code discloses  
that they are not irreconcilable so that they are required by that  
section to be harmonized to give effect to each amendment.

[THEFT]

### § 2913.02 Theft.

(A) No person, with purpose to deprive the owner of  
property or services, shall knowingly obtain or exert  
control over either the property or services in any of the  
following ways:

(1) Without the consent of the owner or person authorized to give consent;

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

(3) By deception;

(4) By threat;

(5) By intimidation.

(B)(1) Whoever violates this section is guilty of theft.

(2) Except as otherwise provided in this division or division (B)(3), (4), (5), (6), (7), or (8) of this section, a violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is five hundred dollars or more and is less than five thousand dollars or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, a violation of this section is theft, a felony of the fifth degree.

If the value of the property or services stolen is five thousand dollars or more and is less than one hundred thousand dollars, a violation of this section is grand theft, a felony of the fourth degree. If the value of the property or services stolen is one hundred thousand dollars or more and is less than five hundred thousand dollars, a violation of this section is aggravated theft, a felony of the third degree. If the value of the property or services is five hundred thousand dollars or more and is less than one million dollars, a violation of this section is aggravated theft, a felony of the second degree. If the value of the property or services stolen is one million dollars or more, a violation of this section is aggravated theft of one million dollars or more, a felony of the first degree.

(3) Except as otherwise provided in division (B)(4), (5), or (6), (7), or (8) of this section, if the victim of the offense is an elderly person or disabled adult, a violation of this section is theft from an elderly person or disabled adult, and division (B)(3) of this section applies. Except as otherwise provided in this division, theft from an elderly person or disabled adult is a felony of the fifth degree. If the value of the property or services stolen is five hundred dollars or more and is less than five thousand dollars, theft from an elderly person or disabled adult is a felony of the fourth degree. If the value of the property or services stolen is five thousand dollars or more and is less than twenty-five thousand dollars, theft from an elderly person or disabled adult is a felony of the third degree. If the value of the property or services stolen is twenty-five thousand dollars or more and is less than one hundred thousand dollars, theft from an elderly person or disabled adult is a felony of the second degree. If the value of the property or services stolen is one hundred thousand dollars or more, theft from an elderly person or disabled adult is a felony of the first degree.

(4) If the property stolen is a firearm or dangerous ordnance, a violation of this section is grand theft, a felony of the third degree, and there is a presumption in favor of the court imposing a prison term for the offense. The offender shall serve the prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(5) If the property stolen is a motor vehicle, a violation of this section is grand theft of a motor vehicle, a felony of the fourth degree.

(6) If the property stolen is any dangerous drug, a violation of this section is theft of drugs, a felony of the fourth degree, or, if the offender previously has been convicted of a felony drug abuse offense, a felony of the third degree.

(7) If the property stolen is a police dog or horse or a service dog and the offender knows or should know that the property stolen is a police dog or horse or service dog, a violation of this section is theft of a police dog or horse or service dog, a felony of the third degree.

(8) If the property stolen is anhydrous ammonia, a violation of this section is theft of anhydrous ammonia, a felony of the third degree.

(9) In addition to the penalties described in division (B)(2) of this section, if the offender committed the violation by causing a motor vehicle to leave the premises of an establishment at which gasoline is offered for retail sale without the offender making full payment for gasoline or into another container, the court may do one of the following:

(a) Unless division (B)(9)(b) of this section applies, suspend for not more than six months the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege;

(b) If the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege has previously been suspended pursuant to division (B)(9)(a) of this section, impose a class seven suspension of the offender's license, permit, or privilege from the range specified in division (A)(7) of section 4510.02 of the Revised Code, provided that the suspension shall be for at least six months.

(c) The sentencing court that suspends an offender's license, permit, or nonresident operating privilege under division (B)(9) of this section may grant the offender limited driving privileges during the period of the suspension in accordance with Chapter 4510. of the Revised Code.

**HISTORY:** 134 v H 511 (Eff 1-1-74); 138 v S 191 (Eff 6-20-80); 139 v S 199 (Eff 1-1-83); 140 v H 632 (Eff 3-28-85); 141 v H 49 (Eff 6-26-86); 143 v H 347 (Eff 7-18-90); 143 v S 258 (Eff 11-20-90); 146 v H 4 (Eff 11-9-95); 146 v S 2 (Eff 7-1-96); 147 v S 66 (Eff 7-22-98); 148 v H 2, Eff 11-10-99; 150 v H 7, § 1, eff. 9-16-03; 150 v H 179, § 1, eff. 3-9-04; 150 v H 12, § 1, eff. 4-8-04; 150 v H 369, § 1, eff. 11-26-04; 150 v H 536, § 1, eff. 4-15-05.

The provisions of § 3 of H.B. 369 (150 v —) read as follows:  
SECTION 3. Section 2913.02 of the Revised Code is presented in this act as a composite of the section as amended by Am. Sub. H.B. 7, Am. Sub. H.B. 12, and Sub. H.B. 179, all of the 125th General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act.

The provisions of § 10, H.B. 12 (150 v —), read as follows:  
SECTION 10. If any provision of sections 1547.69, 2911.21, 2913.02, 2921.13, 2923.12, 2923.121, 2923.123, 2923.16, 2929.14, 2953.32, and 4749.10 of the Revised Code, as amended by this act, any provision of sections 109.69, 109.731, 311.41, 311.42, 2923.124, 2923.125, 2923.126, 2923.127, 2923.128, 2923.129, 2923.1210, 2923.1211, 2923.1212, and 2923.1213 of the Revised Code, as enacted by this act, or the application of any provision of those sections to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the particular section or related sections that can be given effect without the invalid provision or application, and to this end the provisions of the particular section are severable.

The provisions of § 3, H.B. 179 (150 v —), read as follows:  
SECTION 3. The General Assembly declares that the sections of the Revised Code that regulate persons who leave the premises

of establishments at which the person making full payment for that establishment, including but not limited to, are general laws that constitute public nature. Any municipal ordinance which gasoline is offered for retail sale without the offender making full payment for gasoline is not analogous to former GC § 13084; Bureau of Criminal Justice, 134 v H 511, § 2, eff. 1-1-74.

**Not analogous to former GC § 13084; Bureau of Criminal Justice, 134 v H 511, § 2, eff. 1-1-74.**

## § 2913.03

(A) No person shall steal a motor vehicle, motor-propelled vehicle, or person authorized to operate a motor vehicle.

(B) No person shall steal a motor vehicle, motor-propelled vehicle, or person authorized to operate a motor vehicle without the owner's consent or keep possession of the vehicle for more than twenty-four hours.

(C) The following provisions apply under this section:

(1) At the time of the offense, the offender mistakenly, reasonably believed that the property was his or her own.

(2) At the time of the offense, the offender reasonably believed that the owner's consent would authorize the use of the property.

(D)(1) Whoever violates this section is guilty of theft of a motor vehicle.

(2) Except as otherwise provided in this section, a violation of this section is a misdemeanor of the first degree.

(3) Except as otherwise provided in this section, a violation of this section is a felony of the fifth degree.

(4) If the victim of the offense is a disabled adult and if the value of the property or services stolen is five hundred dollars or more, a violation of this section is whichever of the following:

(a) Except as otherwise provided in this section, a violation of this section is a felony of the fourth degree.

(b) If the loss to the owner is less than five hundred dollars, a violation of this section is a felony of the fourth degree.

(c) If the loss to the owner is five hundred dollars or more and is less than one thousand dollars, a violation of this section is a felony of the third degree.

(d) If the loss to the owner is one thousand dollars or more, a violation of this section is a felony of the second degree.

**HISTORY:** 134 v H 511 (Eff 1-1-74); 148 v H 2, Eff 11-1-95.

† So in enrolled bill (D)(4)(e).

**Not analogous to former GC § 13085; Bureau of Criminal Justice, 134 v H 511, § 2, eff. 1-1-74.**

## § 2913.04

computer, cable, or service.

(A) No person shall steal a computer, cable, or service, or person authorized to operate a computer, cable, or service.

## **2929.18 Financial sanctions - felony.**

(A) Except as otherwise provided in this division and in addition to imposing court costs pursuant to section 2947.23 of the Revised Code, the court imposing a sentence upon an offender for a felony may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section or, in the circumstances specified in section 2929.32 of the Revised Code, may impose upon the offender a fine in accordance with that section. Financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

(1) 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. If the court imposes restitution, the court shall order that the restitution be made to the victim in open court, to the adult probation department that serves the county on behalf of the victim, to the clerk of courts, or to another agency designated by the court. If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender. 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. If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount. All restitution payments shall be credited against any recovery of economic loss in a civil action brought by the victim or any survivor of the victim against the offender.

If the court imposes restitution, the court may order that the offender pay a surcharge of not more than five per cent of the amount of the restitution otherwise ordered to the entity responsible for collecting and processing restitution payments.