

IN THE SUPREME COURT OF OHIO
Case Nos. 2012-0302 and 2012-0408
(Consolidated by Court order)

STATE OF OHIO	:	
Appellee	:	
-vs-	:	On Appeal from the
DANIEL LALAIN	:	Cuyahoga County Court
Appellant	:	of Appeals, Eighth
		Appellate District Court
		of Appeals
		CA: 95857

REPLY BRIEF OF APPELLANT DANIEL LALAIN

COUNSEL FOR APPELLEE:

WILLIAM D. MASON, ESQ.
Cuyahoga County Prosecutor
KRISTEN SOBIESKI, ESQ. (0071523)
Assistant Prosecuting Attorney/ Counsel of Record
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7730

COUNSEL FOR APPELLANT:

JOHN P. HILDEBRAND, SR. (0025124)
John P. Hildebrand, Co., L.P.A.
21430 Lorain Road
Fairview Park, Ohio 44126
(440) 333-3100
(440) 333-8922 (FAX)
legaljack@aol.com

FILED
DEC 03 2012
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>PAGES</u>
TABLE OF AUTHORITIES	POST
ARGUMENT	1
REPLY IN SUPPORT OF PROPOSITION OF LAW I:.....	1
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.	
REPLY IN SUPPORT OF PROPOSITION OF LAW II, REPLY IN RESPONSE TO CERTIFIED QUESTION, AND REPLY IN SUPPORT OF PROPOSITION OF LAW III.....	5
<i>Reply in Support of Proposition of Law II:</i> When a defendant disputes the amount of restitution, a trial court abuses its discretion in ordering restitution without a hearing.	
<i>Reply in Response to Certified Question:</i> 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?	
<i>Reply in Support of Proposition of Law III:</i> 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.	
CONCLUSION	6
SERVICE.....	7

TABLE OF AUTHORITIES

Cases

Santobello v. New York, 404 U.S. 257, 92 S.Ct.495, 30 L.Ed.2d 427 (1971)-----3
Southern Union Co. v. United States, 567 U.S. _____, 132 S.Ct. 2344, 183 L.Ed.2d 318 -----4
State v. Lalain, 8th Dist. No. 95857, 2011-Ohio-4813-----5, 6
State v. Warner (1990), 55 Ohio St.3d 31-----6
State v. Wickline, 3d Dist. App. No. 8-10-20, 2011-Ohio-3044, 2011 WL 2448969-----4

Statutes and Rules

R.C. 2913.02-----3
R.C. 2913.61-----1, 2, 4
R.C. 2929.01-----2, 6
R.C. 2929.18-----1

Constitutional Provisions

U.S. Const. Amend. VI -----4
U.S. Const. Amend. XIV -----3, 4

ARGUMENT

Reply in Support of 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 parties agree that an examination of restitution should begin with a review of the plain language of R.C. 2929.18. That section provides in pertinent part that financial sanctions can include:

(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). Thus, any statutory analysis must take into account two aspects of R.C. 2929.18: "the offender's crime" and the "victim's economic loss."

Mr. Lalain's Crime: Theft of Property Whose "Value" is Less than \$5,000.00.

By the express language of R.C. 2929.18, restitution is related to the "offender's crime." Here, the "crime" for which the State bargained was theft, where the "value of the property was less than \$5,000.00. (T. 3, 7).

"Value of property" in a theft case is defined by R.C. 2913.61(D):

(D) The following criteria shall be used in determining the value of property or services involved in a theft offense:

(1) The value of an heirloom, memento, collector's item, antique, museum piece, manuscript, document, record, or other thing that has intrinsic worth to its owner and that either is irreplaceable or is replaceable only on the expenditure of substantial time, effort, or money, is the amount that would compensate the owner for its loss.

(2) The value of personal effects and household goods, and of materials, supplies, equipment, and fixtures used in the profession, business, trade, occupation, or avocation of its owner, which property is not covered under division (D)(1) of this section and which retains substantial utility for its purpose regardless of its age or condition, is the cost of replacing the property with new property of like kind and quality.

(3) The value of any real or personal property that is not covered under division (D)(1) or (2) of this section, and the value of services, is the fair market value of the property or services. As used in this section, “fair market value” is the money consideration that a buyer would give and a seller would accept for property or services, assuming that the buyer is willing to buy and the seller is willing to sell, that both are fully informed as to all facts material to the transaction, and that neither is under any compulsion to act.

The statutory definition of “value” is expansive. Where, as the State argues here, a document has intrinsic worth and a high cost of replacement, the “value” is that needed to “compensate the owner for its [i.e., the property’s] loss.” R.C. 2913.61(D)(1).

Accordingly, when the State agreed to a plea bargain for fifth degree felony theft, the State agreed that the “value of the property,” *i.e.*, the replacement cost to the victim, was less than \$5,000.00.

Restitution Cannot Exceed the “Economic Loss,” which Cannot Exceed “Value”

By its express language, R.C. 2929.18 limits restitution to the victim’s “economic loss,” which, in turn, is defined 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) (emphasis added).

The question that then arises is whether “economic loss,” *i.e.*, the direct and proximate loss, could ever exceed the “value of the property,” *i.e.*, the amount needed to compensate the owner. The answer to this question is “no.” Whatever is necessary to fairly compensate the owner must at least be the amount that has been directly and proximately lost.

Restitution for Theft is Capped At the Statutory Maximum

Because restitution is limited to the “crime” committed, and because “economic loss” resulting from that crime is less than the “value of the property,” it follows that, theft in violation of R.C. 2913.02, which defines the “crime” by the “value of the property,” cannot have an economic loss greater than the statutory limit for the offense, *i.e.*, \$4,999.99 in the instant case.

The State contends that theft offenses should be treated similarly to assaults, where, the State argues, a defendant who is charged with felonious assault and then pleads guilty to simple assault can still be required to make restitution to the victim in the full amount of the medical damages. The State's analogy fails to appreciate that assault and other violent crimes are not gradated on the basis of the "value of the property" as defined by R.C. 2913.61. Accordingly, in an assault case a victim may have an "economic loss" that has nothing to do with the "value of property." But in a theft case, the "economic loss" has everything to do with the "value of property," because the "value of property" is defined as the amount of money needed to compensate the victim for the loss.

The State's Argument Violates the Plea Agreement

Plea bargains are contracts. In exchange for the certainty of a conviction for a fifth-degree felony, the State was willing to forego a prosecution for a more severe felony. When the plea was entered and the trial judge discussed "restitution" without mentioning an amount, the State did not speak of the possibility of restitution exceeding \$4,999.99. The first mention of a five-figure restitution payment came in the company's letter dated September 21, 2010, more than one month after the plea bargain was entered and just three days prior to sentencing.

Having entered into a bargain for a fifth degree felony theft where the value of the property was less than \$5,000.00, the State was precluded by its plea bargain from then turning around and attempting to obtain restitution for more than ten times the maximum amount of the theft. *See, Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). The trial court violated Mr. Lalain's due process rights under the Fourteenth Amendment when it failed to ensure that the contract into which Mr. Lalain entered was specifically performed according to its terms. Moreover, by imposing restitution in an amount that went beyond that admitted by Mr.

Lalain as part of the plea bargain, the trial court also imposed punishment on the basis of judicial findings in violation of the Sixth and Fourteenth Amendment. *Cf. Southern Union Co., v. United States*, 567 U.S. _____, 132 S.Ct. 2344, 183 L.Ed.2d 318 (2012) (fines must be imposed in accordance with the limitation on judicial fact-finding prescribed by *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct.2348, 147 L.Ed.2d 435 (2000)). The State cannot avoid these conclusions by arguing that Mr. Lalain was told that “restitution” could be part of his sentence (State’s Brief at 3, citing T. 7) – no one ever told Mr. Lalain that restitution was going to be imposed that went beyond that provided *for the crime to which he was pleading guilty*.

The State Has Remedies – So Long as the State is Up Front About Using Them

The State argues that limiting restitution to the value of the property stolen that corresponds with a charge reduction will thwart effective plea bargaining. This is incorrect. By limiting restitution in theft cases to the value of the property specified in the amended charge, everyone – victims, defendants, prosecutors, defense counsel and judges – knows the ground rules at the time the plea is entered. This promotes effective plea bargaining and guards against last-minute surprises that can cause defense motions to withdraw pleas and corresponding uncertainty for victims.

At the same time, there is nothing to prevent the State and a defendant, in the appropriate case, from reaching an agreement which includes as one of its terms that the defendant will make restitution in a greater amount than could otherwise be awarded. *E.g., State v. Wickline*, 3d Dist. App. No. 8-10-20, 2011-Ohio-3004, 2011 WL 2448968 (plea bargain includes added restitution). But, like every term of a plea agreement, it must be understood by both parties and presented to the trial judge at the time the plea is entered. Here, the State did not even seek to reach – and the defendant never suggested acquiescence to – an agreement regarding restitution.

Reply in Support of Proposition of Law II:

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

Reply 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?

Reply in Support of 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.

The State asks this Court to decide the issues presented in these propositions and certified question under the plain error standard. This Court should decline to consider this record as one that needs to be evaluated only for plain error. However, even under a plain error standard, Mr. Lalain should prevail.

First, the defense always objected to the \$63,121.00 restitution amount. An objection was posited at page 15 of the transcript, where counsel explained that it was objecting to costs that were undertaken in furtherance of the civil lawsuit. The State's argument that there was no objection posited after the sentence was imposed is irrelevant – once a sentence is imposed, the court has ruled. Further exceptions are unnecessary. Crim. R. 51. This explains why, when, after imposing sentence the trial court asked if there were “any other matters” to discuss, both counsel replied “[n]othing further.” (T. 30).

The Eighth District's characterization of defense counsel's oral argument in the Eighth District is similarly flawed. The Opinion Below states that counsel conceded that no objection was made. *State v. Lalain*, 8th Dist. No. 95857, 2011-Ohio-4813, ¶ 15 (“Opinion Below”). In fact, counsel acknowledged that he did not object after sentence was imposed, because the trial

court had ruled. This distinction explains why the Opinion Below could state at ¶ 15 that counsel made no objection but could also discuss defense counsel's objection earlier in the proceedings. Opinion Below, at ¶ 5.

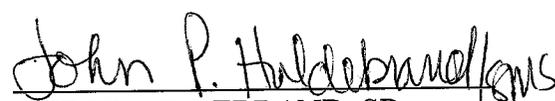
Moreover, having been placed on notice that the defense was objecting to costs related to the civil lawsuit (T. 15), the trial court erred when it awarded any restitution without a hearing. The combination of the Aero letter and the prosecutor's comments placed the trial court on notice that much of Aero's costs were undertaken to pursue either its civil litigation or to underwrite the prosecution of this case. As the prosecutor stated, "But the Meaden and Moore work cost a lot of money in order to establish this case. Aero undertook *a number of expenses* which the count could never have afforded to pay for in order to investigate this case." (T. 26).

None of Aero's costs to underwrite civil and criminal litigation qualify as the "direct and proximate" costs that are recoverable as restitution. R.C. 2929.01(M). *State v. Warner*, 55 Ohio St.3d 31, 69, 564 N.E.2d 18 (1990). Accordingly, even under a plain error analysis, the trial court erred when it awarded restitution in the amount of \$63,121.00 without conducting a hearing to determine what portion of Aero's costs were compensable as restitution and which were not. *Cf. Warner*.

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,


JOHN P. HILDEBRAND, SR. 0080932
John P. Hildebrand, Co. LPA

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 3rd day of December, 2012.


JOHN HILDEBRAND, SR. *10/28/12*