

IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,
Petitioner,

v.

DENNIS HAWTHORNE,
Respondent.

1997 1 10
CASE NO. 75,747

ON REVIEW FROM THE FIRST
DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON THE MERITS

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SECOND JUDICIAL CIRCUIT

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BRIEF OF RESPONDENT ON THE MERITS

I PRELIMINARY STATEMENT

Respondent was the defendant in the trial court and the appellant in the lower tribunal. Attached hereto as an appendix is the opinion of the lower tribunal. Petitioner's brief will be referred to as "PB", followed by the appropriate page number. The record on appeal will be referred to as "R".

II STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's recitation at PB 2-3 with the following clarifications. The auto at issue was a 1979 Ford Fairmont (R 67). The victim purchased it on June 14, 1985, for \$1530 (R 68). It was stolen 14 months later in August of 1986 (R 69). The victim did not know how many miles were on the car (R 72).

The trial court set restitution in the amount of \$1500 for the car, plus \$250 for the victim's expenses for being without a car (R 70), for a total of \$1750, plus 12% interest (R 48; 74).

The lower tribunal reversed the restitution order because it failed to take into account the amount of depreciation the car suffered over that 14 month period. Appendix.

III SUMMARY OF THE ARGUMENT

Respondent will argue in this brief that the lower tribunal was entirely correct in reversing the instant restitution order. The burden to prove the amount of restitution is on the state. This Court, and the appellate courts of this state, have always held that fair market value is the correct method of determining the amount of restitution for property stolen. Fair market value must include consideration of the fact that property, especially domestic automobiles, lose part of their value over time, due to depreciation.

IV ARGUMENT

THE LOWER TRIBUNAL WAS CORRECT IN HOLDING THAT FAIR MARKET VALUE OF PROPERTY STOLEN MUST INCLUDE AN AMOUNT FOR DEPRECIATION.

(Issue restated by respondent).

The lower held that the state failed to establish market value of the stolen car because there was no evidence presented to show that the car had the same value when it was stolen 14 months after it was purchased by the victim. Petitioner's brief attempts to argue that the trial courts should be permitted to set any value on restitution, in their total discretion, and that value need not be related in any way to market value. This is not the law, has never been the law, and should not become the law of this state.

Sections 948.03(1)(e) and 948.032, Florida Statutes, permit the sentencing judge to order restitution as a condition of probation, but do not explain how restitution is to be calculated. The only other expression of legislative intent is found in Section 775.089(6), Florida Statutes, which became effective in 1984, and which provides:

The court, in determining whether to order restitution and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the present and potential future financial needs and earning ability of the defendant and his dependents, and such other factors which it deems appropriate.

Prior to the enactment of this statute, this Court, as well as the lower appellate courts, had held that fair market value is the appropriate method of measuring the value of

property stolen in a theft. In the seminal case of Negron v. State, 306 So.2d 104 (Fla. 1975), this Court held:

The original market cost of the property, the manner in which it has been used, its general condition and quality, the percentage of depreciation since its purchase or construction are elements of proof to be submitted to the jury to aid it in ascertaining value in such cases. 13 Fla. Jur, Evidence §172. Id. at 108, emphasis added.

The law in Florida is well settled that testimony as to the cost of stolen property is insufficient in and of itself to establish the value of [sic] the time of the theft. Hicks v. State (1937), 127 Fla. 669, 173 So. 815. Id., emphasis in original.

Likewise, this Court stated in Fresneda v. State, 347 So.2d 1021, 1022 (Fla. 1977):

[W]e glean no legislative intent to authorize trial courts to require probationers to pay over random sums of money. ... We hold that a condition of probation requiring a probationer to pay money to, and for the benefit of, the victim of his crime cannot require payment in excess of the amount of damage the criminal conduct caused the victim. Emphasis added.

In determining the value of a stolen item, it is clear that value must be based on the market value at the time of the offense. Taylor v. State, 425 So.2d 1191 (Fla. 1st DCA 1983) and Malloy v. State, 397 So.2d 1218 (Fla. 1st DCA 1981). The new cost of stolen property is insufficient to establish its market value at the time of the theft, especially where the chattel was in used condition. Beasley v. State, 305 So.2d 285 (Fla. 3rd DCA 1974) ; Spencer v. State, 217 So.2d 331 (Fla. 4th

DCA 1969); Gamble v. State, 210 So.2d 238 (Fla. 2nd DCA 1968); and Todd v. State, 187 So.2d 908 (Fla. 3rd DCA 1966).

It is common knowledge that a new automobile depreciates the minute a happy buyer drives it off of the dealer's lot, and that used autos also lose some of their value from year to year.¹ Generally-accepted accounting principles require that the value of personal property be reduced each year due to depreciation:

Depreciation in accounting is that portion of the cost of a fixed asset periodically charged to expense. Depreciation is caused by wear and tear, physical deterioration, inadequacy, obsolescence, the passage of time, and the action of the elements. Depreciation accounting aims to distribute in a systematic manner the cost (or other basic value) less salvage, if any, of the fixed asset over the estimated useful life of the asset.

Holmes, Elementary Accounting (3rd ed. 1962) at 601-602.

In Norman v. State, 468 So.2d 1063, 1065 (Fla. 1st DCA 1985), the lower tribunal properly stated that restitution:

may be adduced through direct testimony as the fair market value ... at the time of the theft, or through evidence on 1) the original market cost, 2) the manner in which they were used, 3) their general

¹To the extent that petitioner would place the burden on the defense to prove depreciation ("the evidence before the trial court supported the figures presented by the victim and respondent offered no evidence to controvert the figures", PB at 8) such would be contrary to Section 775.089(7), Florida Statutes:

The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense is on the state attorney.

condition and quality and 4) the percentage of depreciation.

Accord: Abbott v. State, 543 So.2d 411 (Fla. 1st DCA 1989):
D.L. v. State, 546 So.2d 454 (Fla. 3rd DCA 1989) (state did not establish grand theft where only evidence was market value one year prior to theft): and J.O. v. State, 552 So.2d 1167 (Fla. 3rd DCA 1989) (although victim said video equipment stolen was "practically brand new", there was insufficient evidence of value).

The case upon which the state relies, Dickens v. State, 556 So.2d 782 (Fla. 2nd DCA 1990), is an aberration from the established case law cited above, and must be disapproved. That court reasoned that because the legislature has not codified fair market value as the measure of restitution in the above-cited statutes, it left to the unbridled discretion of the court the manner in which to set restitution. Dickens made no mention of Negron, Fresneda, or any of the other cases cited above, which unanimously hold that fair market value has been judicially-grafted onto the restitution statute.

The converse logic is more compelling -- that the legislature saw no need to mention fair market value when it rewrote Section 775.089(6), Florida Statutes, in 1984, because it was aware that the courts had uniformly held it to be the proper measure of restitution. Dickens must be overruled because it is contrary to the line of cases emanating from Negron. It must also be overruled because it leaves the matter entirely to the discretion of the trial court, which would be free to fix

an amount of restitution, which may be in excess of the actual damage caused, and which would never be reversed on appeal.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests that this Court approve the decision of the lower tribunal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Gypsy Bailey, Assistant Attorney General, The Capitol, Tallahassee, Florida, this 1 day of May, 1990.


P. DOUGLAS BRINKMEYER