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IN THE SUPREME COURT OF FLORIDA

CHRISTOPHER HEBERT AND
LAWRENCE BYRD,

Petitioners,

v. CASE NO. 80-229

STATE OF FLORIDA,

Respondent.

ON APPEAL FROM THE DISTRICT COURT OF APPEZU
FIRST DISTRICT OF FLORIDA
CERTIFIED QUESTION

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Respondent the State of Florida, the prosecuting authority in the trial court and appellee below, will be referred to in this brief as "the State." Petitioners, CHRISTOPHER HEBERT AND LAWRENCE BYRD, the defendants in the trial court and appellants below, will be referred to herein a3 "Petitioners." References to the record on appeal, including the transcripts of the proceedings below, will be by the use of the symbol "R" followed by the appropriate page number(s). For the record and the purpose of future application to the Florida Bar, the State notes that Petitioner Byrd was attending law school at the time of this offense.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioners' statement of the case and facts as reasonably accurate with the following additions.

(1) Petitioner Hebert worked at Rooster's Colorado Club for a period of two years. (R 128). Petitioner Byrd worked at the restaurant for a period of thirteen months. (R 111).

(2) Gary Pearce, the restaurant's general manager, conducted random checks of the three-part tickets during the period of time that the Petitioners were employed. (R 98).

(3) Gary Pearce, Sid Rayburn, and Mike Norman testified that, on the night they confronted the Petitioners about stealing, the Petitioners admitted to taking $150.00 per weekend and $50.00 during the week for a period of four months. (R 82, 99, 104).

(4) Petitioners agreed to plead nolo contendere to the offense of petit theft with the understanding that they would be required to pay restitution as determined by the trial court. (R 37-38, 41-42, 137, 150). Neither plea agreement capped restitution at $300.00. (R 37-38, 41-42, 137, 150). Petitioners stipulated that the facts contained in the probable cause affidavits were the factual basis for their pleas. (R 140, 152). The probable cause affidavits state that, for a period of four months, Petitioners engaged in a scheme where they would steal $150.00 to $200.00 per weekend and $50.00 on one night during the week. (R 3, 6-7).

SUMMARY OF ARGUMENT

ISSUE I:

This Court should answer the certified question in the negative. A defendant who agrees to plead nolo contendere to the offense of petit theft and does not condition his plea on the imposition of a certain amount of restitution cannot hide behind the agreement when the State proves a loss in an amount over $300.00 by a preponderance of the evidence. When a defendant's offense causes a loss, the trial court is required to order the defendant to pay restitution far the value of that loss. Petitioners' convicted offenses do not consist of a single taking totaling $300.00 or less. Rather, they consist of a continuing course of theft directly resulting in a series of losses to the victims in the amount of $2530.00 per Petitioner. The degree of theft does not cap the amount of restitution which the trial court has the discretion to impose.

ISSUE 11:

This Court should decline to address this issue because it lies beyond the scope of the certified question. Nevertheless, a trial court has wide latitude in determining the amount of restitution to be awarded to the victim of a crime. In the present case, three witnesses testified that Petitioners admitted taking **$150.00** to $200.00 per weekend and $50.00 during the week over the course of a four month period. The trial court determined that Petitioners took **$150.00** per week for 17.2 weeks and that the

victims were the better of $50.00 because they did not pay Petitioners for their last week of work. Thus, the trial court did not abuse its discretion in requiring Petitioners' to pay restitution in the amount of $2530.00 because the State proved that amount by a preponderance of the evidence.

ARGUMENT

ISSUE I

WHERE A DEFENDANT ENTERS INTO A PLEA AGREEMENT THAT IS NOT THEREAFTER CHALLENGED AND BY WHICH THE CHARGE OF FELONY GRAND THEFT IS REDUCED TO MISDEMEANOR PETIT THEFT, BUT WHICH AGREEMENT DOES NOT RESTRICT THE AMOUNT OF RESTITUTION THAT MAY BE IMPOSED, AND WHERE THE STATE IN FACT PROVES BY A PREPONDERANCE OF THE EVIDENCE AN AMOUNT CONSISTENT WITH THE ORIGINAL CHARGE, IS THE TRIAL COURT NONETHELESS RESTRAINED BY THE PLEA TO PETIT THEFT TO IMPOSE AN AMOUNT OF RESTITUTION NO GREATER THAN $300. (REPHRASED TO REFLECT TEXT OF QUESTION CERTIFIED BY THE FIRST DISTRICT COURT OF APPEAL).

The State charged Petitioners with committing the offense of grand theft for the period of time between May 1990 and September 1990. (R 1). After negotiations with the State, Petitioners agreed to plead nolo contendere to the offense of petit theft, in exchange for a six-month probationary term. (R 37-38, 41-42). Petitioners were fully informed that they would be required to pay restitution as determined by the trial court. (R 37-38, 41-42, 137, 150). Neither plea agreement capped restitution in the amount of $300.00. (R 37-38; 41-42). Petitioners stipulated that the facts contained in the probable cause affidavits were the factual basis for their pleas. (R 140, 152). The affidavits provide that, for a period of four months, Petitioners engaged in a continuous course of conduct resulting in a series of losses to the victims in the amount of $150.00 to $200.00 per weekend and $50.00 during the week. (R 3, 6-7). Petitioners contend that, because they pled to the offense of petit theft, the trial court was barred from imposing restitution in an amount over $300.00, regardless of the amount of loss suffered by the victims or proved by the State.

Victim restitution is authorized and governed by section 775,089, Florida Statutes (1989), which provides in pertinent part:

> (1)(a) In addition to any punishment, the court shall order the defendant to make restitution to the victim for damage or loss caused directly or indirectly by the defendant's offense, unless it finds clear and compelling reasons not to order such restitution . . . .
>
> * * *
>
> (6) 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.
>
> * * *
>
> (7) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense is on the state attorney. The burden of demonstrating the present financial resources and the absence of potential future financial resources of the defendant and the financial needs of the defendant and his dependents is on the defendant. (Emphasis supplied).

Where restitution is a condition of probation, Section 948.03(1)(e), Florida Statutes (1989), is also applicable. This section provides in part:

> (1) The court shall determine the terms and conditions of probation or community control and may include among them the following, that the probationer or offender in community control shall:

* * *

> (e) Make reparation or restitution to the aggrieved party for the damage or loss caused by his offense in an amount to be determined by the court. The court shall make such reparation or restitution a condition of probation, unless it determines that clear and compelling reasons exist to the contrary. . . . (Emphasis supplied).

In essence, the sections together provide that, when an offense causes a loss, the trial court must order the defendant to pay the victim of the offense for the value of that loss, unless there are clear and compelling reasons to the contrary. The offenses committed in the instant case do not consist of a single taking, but a continuing course of theft occurring between May 1990 and September 1990. Petitioners were charged with committing grand theft during this time period. They pled to petit theft, stipulating that the offense took place over the four-month period and that the offense resulted in a series of losses to the victims. Thus, any losses occurring during this time period not only bear a significant relationship to the convicted offense, they are directly related to that offense.

The offense of theft is defined by section 812.014(1). Section 812.014(2) "merely defines the degree" of the crime. Johnson v. State, 597 So.2d 798, 799 (Fla. 1992). Therefore, petit theft and grand theft are not separate offenses because the amount taken is not an element of these offenses. Instead, both constitute the offense of "theft" with different degrees of punishment. Section 775.089(6) provides that the court, in determining the amount of restitution, "shall consider the amount

of the loss sustained by the victim as a result of the offense," and that it shall consider "such factors which it deems appropriate." Under subsection (6), therefore, the degree of the theft does not control the maximum possible restitution amount. Rather, it is only a factor which the court must "consider". Had the legislature intended to limit restitution to the amount of loss relating to the degree of the offense, the legislature could easily have drafted the statute to state plainly that the sentencing court may not order restitution in any amount higher than the amount relating to the degree of the offense. The statute, however, does not cap the restitution amount.

A reading of the statutory provisions shows that the sentencing court has the discretion to order restitution in an amount that takes into account the victim's loss resulting from the offense itself. "It is not necessary that the offense charged describe the damage done in order to support a restitution order." J.S.H. v. State, 472 So.2d 737, 738 (Fla. 1985). The statute contemplates that, in cases where the value af the loss designates the degree of the offense, the value of loss for the purposes of the degree of the crime and the value of the loss for purposes of restitution will not always be the same amount. Section 775.089(7) provides that restitution is required to be proved only by a preponderance of the evidence. On the other hand, the amount designating the degree of a theft must be proved beyond a reasonable doubt. In State v. Hawthorne, 573 So.2d 330, 332 (Fla. 1991), this Court held that, where the value of the property taken designates the degree of the convicted offense, the amount of loss

for restitution purposes is not subjected to the same rigid standard of proof as the amount of loss for designation purposes. As the State's burden in proving restitution is lighter than the burden in proving the degree of theft, restitution often may be proved and ordered in an amount higher than the amount corresponding to the degree of the theft.

In Spivey v. State, 531 So.2d 965, 967 (Fla. 1988), this Court observed that the purpose of restitution is not only to punish or rehabilitate the defendant, but it is also imposed to compensate the victim. This concept of compensation established by the legislature is inconsistent with Petitioners' contention that the charge on which a defendant is convicted caps the maximum amount of restitution that may be ordered. Since plea bargains often allow a defendant to be convicted of a fraction of the charges leveled against him or of a reduced charge, a rule that the offense to which a plea is entered establishes the maximum restitution would in many cases minimize the restitution available to the victim of an offense. That would make the victim subject to the defendant's negotiated plea, leaving only resort to a separate civil action under sections 775.089(5) & (8), Florida Statutes. Also, such a rule would discourage prosecutors from entering into plea bargains in cases involving offenses such as theft, even where a plea bargain may be to the benefit of both parties and where neither party has an interest in having a full-fledged trial. Prosecutors may lament the public expense of an unwanted trial. However, in cases where the victim's loss is greater than the loss relating to the designation of the offense plead to by the defendant,

prosecutors may be unwilling to forego the possibility of making the victim whole through full restitution. Petitioners' position is also inconsistent with restitution for violent crimes where there is no element of monetary value. If this Court were to adopt the rule posited by Petitioners, defendants who have committed offenses where value is an element stand in a better position than defendants convicted of offenses where value is not an element. Petitioners' rule would not cap restitution for offenses where value is not an element. Sound social policy and legal considerations suggest, if not dictate, the propriety of requiring by sentence that a criminal redress the wrong caused by his conduct. Thus, the certified question should be answered in the negative.

ISSUE II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REQUIRING PETITIONERS TO PAY RESTITUTION IN THE AMOUNT OF $2530.00 EACH BECAUSE THE STATE PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT THE VICTIMS SUFFERED A LOSS IN SUCH AMOUNT.

In its opinion below, the First District Court of Appeal affirmed the trial court's order requiring Petitioners to pay restitution in the amount of $2530.00 each. In so doing, the First District certified a single question of great public importance to this Court. Such question was discussed under Issue I of this brief. Petitioners, however, have saddled the certified question with the additional issue set forth under Issue II of their merits brief, i.e., whether "this court should quash the district court's decision since it erroneously affirmed the trial court's restitution order which was based on Petitioners' speculative admissions." Petitioners' brief at 13. It should be noted that, in raising this issue, Petitioners usurp the certified question because the question presumes that the State met its burden of proving the amount of restitution by a preponderance of the evidence. This Court should decline to address the issue because it "lies beyond the scope of the certified question" and is not properly before this Court. Stephens v. State, 572 So.2d 1387 (Fla. 1991).

Nonetheless, the trial court did not abuse its discretion in requiring Petitioners to pay restitution in the amount of $2530.00 because the State proved by a preponderance of the evidence that the victims suffered such a loss. In Spivey v. State, 531 So.2d

965, 966 (Fla. 1988), this Court observed that a trial court has wide latitude in determining the amount of restitution, stating:

> The statutory provisions requiring the imposition of restitution recognize this discretion of the trial court in determining the amount of restitution. Section 775.089(1)(a), Florida Statutes (1985), states in pertinent part: "In addition to any punishment, the court shall order the defendant to make restitution to the victim for damage or loss cause directly or indirectly by the defendant's offense, unless it finds reasons not to order restitution" . . . Further, section 775.089(6), Florida Statutes (1985), reinforces the discretion of the trial court in ordering restitution:
>
> 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 financial needs and earning ability of the defendant and his dependents, and such other factors which it deems appropriate. (Emphasis in original).

In the present case, the trial court calculated the restitution amount by determining that the Petitioners engaged in their scheme for four months, which turns out to be 17.2 weeks because there are 4.3 weeks per month. (R 146). The trial court determined that Petitioners stole $150.00 per week, which was at the low end of the range admitted to by Petitioners. (R 146). The trial court then multiplied the 17.2 weeks by $150.00 per week, which resulted in the amount stolen being $2580.00 per Petitioner. (R 146). The trial court deducted $50.00 from the total loss because the victims withheld Petitioners' last paychecks. (R 146). Thus, the victims suffered a loss in the amount of $2530.00 at the hands of each Petitioner. (R 146).

The loss estimated by the trial court is supported by the evidence in the record. At the restitution hearing, Gary Pearce, Sid Rayburn, and Mike Norman testified that, on the night they confronted the Petitioners about stealing, the Petitioners admitted taking $150.00 to $200.00 per weekend and $50.00 during the week for a period of four months. (R 82, 99, 104). The State also presented physical evidence in the form of falsified food tickets documenting Petitioners scheme as to one weekend. A trial court's conclusions of fact are presumptively correct, and evidence must be viewed in the light most favorable to the trial judge's conclusion. Shapiro v. State, 390 So.2d 3434 (Fla. 1980), cert. denied, 450 U.S. 982, 67 L.Ed.2d 818 (1981). Viewing the evidence in the light most favorable to the State, the State mare than carried its burden of proving that the amount of loss suffered by the victims was $2530.00, which Petitioners originally admitted taking, rather than the discounted amount of $600.00, which Petitioners later suggested that they stole. Thus, this Court should affirm the amount of restitution ordered below.

Petitioners' reliance upon Morel v. State, 547 So.2d 341 (Fla. 2d DCA 1989), is misplaced. In Morel, supra, at 341, the defendant was order to pay restitution in the amount of $16,800.00 as a condition of her probation. However, the victim admitted taking only $1200.00. Id. at 342. In setting the restitution amount, the trial court calculated that the defendant stole $600.00 per week for a period of eight weeks, thereby arriving at the $16,800.00 amount. Id. There was no evidence tying the defendant to any shortages in the victim's cash register over $1200.00. Id. Thus,

the Second District Court of Appeal reversed and remanded with directions to lower the amount of restitution to $1200.00. Id. In the instant case, however, Petitioners admitted to three persons that they each stole $150.00 to $200.00 per week over a period of four months. Id. Thus, like the defendant in Morel, the Petitioners should be required to pay restitution up to the amount they admitted taking from the victims.

CONCLUSION

Based on the foregoing legal authorities and arguments, Respondent requests that this Honorable Court answer the certified question in the negative and affirm the decision of the First District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of **the** foregoing **has been furnished by U.S. Mail to** Mr. Abel Gomez, Assistant Public **Defender, Office of** the **Public Defender, Second** Judicial Circuit **of Florida,** Leon **County Courthouse,** Fourth Floor **North,** 301 **South** Monroe Street, **Tallahassee,** Florida 32301, **this** 28th **day of September,** 1992.

Wendy S. Morris
Attorney **General**