IN THE SUPREME COURT OF THE STATE OF FLORIDA,

ERIC LEE GLABUIS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 88,413

****

ON APPEAL FROM THE FOURTH DISTRICT
COURT OF APPEAL OF THE STATE OF FLORIDA

****

RESPONDENT'S BRIEF ON THE MERITS

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STATE CASES

PRELIMINARY STATEMENT

Respondent was the prosecution in the Circuit Court of the Nineteenth Judicial Circuit of Florida and appellee in the Fourth District Court of Appeal; Petitioner was the defendant in the Circuit Court and the appellant in the appellate court.

In this brief, the parties will be referred to as they appear before this Court, except that the Respondent may also be referred to as "State" or "Prosecution."

The following symbols will be used;

AB = Appellant's Initial Brief

R = Record on Appeal

T = Transcript of Restitution Hearing

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts for purposes of this appeal in so far as they present an accurate, objective and non-argumentative recital of the procedural history and facts in the record, and subject to the additions and clarifications set forth below and in the argument portion of this brief which are necessary to resolve the legal issues presented upon appeal.

The additions, corrections or modifications on which Respondent relies are as follows:

(1) Petitioner admitted to Gregory Sherrel that he stole $360 in cash (T 22, 49), $300 in merchandise (T 49) and $3,000 in fraudulent refunds (T 27).

SUMMARY OF THE ARGUMENT

I

A trial court must award restitution to a victim for damage or loss "caused directly or indirectly by the defendant's offense." This Court has strictly construed the concept of "cause" which, by definition, includes the concept of foreseeability. The cases from the Second District which hold that damages must be foreseeable are therefore not in conflict with this Court or the instant decision of the Fourth District Court of Appeal. At bar, the cost of the victim store's internal investigation was both caused by Petitioner and foreseeable by him.

The cost of that investigation was proven by a preponderance of the evidence, and the trial court did not err in its finding.

II

A preponderance of the evidence supports the trial court's ruling that Petitioner stole $360 in cash from his employer. The trial court did not err in accepting that evidence.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN ORDERING PETITIONER TO PAY $1,600 FOR INTERNAL INVESTIGATIVE COSTS AS A CONDITION OF PROBATION.

In his first point on appeal, Petitioner asserts that the trial court erred when it ordered him to pay $1,600 restitution for internal investigative costs following his plea of nolo contendere to grand theft, and, further, that the Fourth District Court of Appeal's opinion which affirmed the order is in conflict with this Court's opinion in *State v. Williams,* 520 So. 2d 276 (Fla. 1988). Respondent strongly disagrees.

Section 775.089, Florida Statutes (1993) requires a trial court to order a defendant to make restitution to a victim for damage or loss 'caused directly or indirectly by the defendant's offense." In *J.S.H. v. State,* 472 So. 2d 737 (Fla. 1985) and again in *State v. Williams,* 520 So. 2d 276 (Fla. 1988), this Court discussed causation by applying a 'but for' test: in *J.S.H.* the Court held that damage to a boat would not have occurred "but for" the theft of certain equipment, and in *Williams* the Court said that damages arising out of an automobile accident would have occurred whether or not the defendant had left the scene of that accident. Thus, this Court has twice come down squarely on the side of causality, holding, particularly in *Williams,* that it would not ignore the statutory language which provided for restitution for damages caused by the offense. Therefore, Respondent submits, the question before this Court is not simply whether it is proper for a trial court to order restitution for investigative costs. The real issue is whether those costs were caused by the

defendant's action.

Although the Fourth District Court of Appeal has certified a conflict with the Second District's opinion in *Ahnen v. State,* 565 So. 2d 855 (Fla. 2d DCA 1990), there is no conflict when a causation analysis is applied. In *Ahnen,* Second District likened the element of causation to the proximate cause required in tort law between a tortious act and the resulting damage, and cited to its earlier opinion in *Arling v. State,* 559 So. 2d 1274 (Fla. 2d DCA 1990) where it approved restitution for attorney's fees incurred by a victim, finding it "reasonably foreseeable to a person dealing in stolen goods that legal action might be necessary to determine the lawful owner of the stolen goods." Similarly, in *Dickson v. State,* 622 So. 2d 179 (2d DCA 1993), the Second District approved a restitution award which included the cost of a private investigator, holding that it was "reasonably foreseeable that [a] mother would use any available method for locating her son, including hiring a private investigator."

The concept of foreseeability is a basic element of proximate cause. *See, e.g., McCain v. Florida Power Corp.,* 593 So. 2d 500 (Fla. 1992); *Coker v. Wal-Mart Stores, Inc.,* 692 So. 2d 774 (Fla. 1st DCA 1994). Black's Law Dictionary, Sixth Edition, says that the "proximate cause of an injury is the primary or moving cause, or that which, in a natural and continuous sequence . . . produces the injury . . . if the injury be one which might be reasonably anticipated or foreseen . . ." Respondent respectfully submits that the Second District's refusal in *Ahnen* to approve a restitution award which included the cost of a private investigator arose not because of a lack of causation but because of a lack of foreseeability. In *Ahnen,* as in *Dickson,* the victim hired a private investigator. However, in *Ahnen* the victim did so because he believed that the sheriff's department had been "suppressing evidence and concealing information" -- clearly a circumstance which no reasonable

person could foresee.

Respondent further submits that the First District Court of Appeal went too far in *Powell v. State,* 595 So. 2d 223, 225 (Fla. 1st DCA), *rev. denied,* 601 So. 2d 553 (Fla. 1992), when it reversed a restitution order which included the cost of an internal investigation, holding that such costs were "reimbursement for damages in excess of those caused by the convicted offense." In reaching that decision, the First District reasoned that "once the employer decided to hire a private investigator, he was obligated to pay the costs of the investigation -- and those costs would have attached even if appellant had not been discovered loading company materials in his own truck." However, Respondent suggests the court should have used the reasoning of this Court in *J.S.H., supra,* and followed by the Second District: that is, 'but for' losses from Powell's employer's store, there would have been no need to hire private investigators in the first place. As the Fifth District Court of Appeal said in *Mayer v. State,* 632 So. 2d 678, 679 (Fla. 5th DCA 1994), when it affirmed an order of restitution which included the expense of an company's internal audit: "Without [the defendant's] criminal act, there would have been no need for an audit of the books to determine the amount of the theft."

In the case at bar, Petitioner held a supervisory position at his employer's store. His theft caused an internal investigation and, especially in view of the fact that he was employed in such a position, that investigation was reasonably foreseeable by him. Thus, the Fourth District Court of Appeal properly concluded that the investigation was caused by Petitioner's action, and, while its opinion does not directly discuss foreseeability, it is completely in line with the decisions of this Court and the Second District Court of Appeal.

Petitioner raises two ancillary arguments with regard to the cost of the internal investigation.

In the first, he contends that it is improper to award the costs of an internal investigation as a component of restitution because the time spent in the investigation was expended to do exactly the work they did in this case (AB 14). The short answer, of course, is that 'but for' Petitioner's theft, the salaried employees could have been put to work doing other, more profitable jobs such as preventing external theft. The fact that an employer is forced to hire a person to protect his property and then must use that person to protect against internal theft, does not make that person's salary any less of a cost to the employer than if he had hired outside help.

Petitioner's second objection, that the witness who supplied the cost figure did not provide salary figures for the employees involved in the investigation, is equally groundless. It is well settled that the State bears the burden of proving the amount of a restitution award by a preponderance of the evidence. *Winborn v. State,* 625 So. 2d 277 (Fla. 2d DCA 1993). Once again, it is basic law that "preponderance of evidence" is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; evidence which is more credible and convincing to the mind; evidence which best accords with reason and probability. Black's Law Dictionary, Sixth Edition. In the case at bar, the 40 hour estimate of the length of the investigation and the $40 per hour cost given by the person who performed it (T 21) was the only evidence submitted on the subject. Therefore it was, by definition, a preponderance of evidence on the subject.

The decision of the Fourth District should be approved.

POINT II

THE TRIAL COURT PROPERLY ORDERED PETITIONER TO PAY $360 IN RESTITUTION FOR "CASH LOSS."

In his second point on appeal, Petitioner contends that the trial court erred in imposing restitution in the amount of $360 for cash loss. Once again, Respondent respectfully disagrees.

It is well settled that the State has the burden of showing the amount of loss a victim has sustained by a preponderance of the evidence. *Crosby v. State,* 637 So. 2d 341 (Fla. 2d DCA 1994); *Touchton v. State,* 616 So. 2d 1124 (Fla. 1st DCA 1993), and that acceptance of a victim's valuation of loss is a matter for the trial judge's discretion. *State v. Hawthorne,* 573 So. 2d 330 (Fla. 1991).

In the case at bar, Petitioner admitted to stealing $360 in cash from his employer (T 22, 49). Now he wishes to reargue whether, when and how that money was replaced, and, if it was, whether it was replaced with Petitioner's own cash or other stolen money. Respondent respectfully submits that these issues were heard in the trial court, and the trial judge properly exercised his discretion in finding that Petitioner had taken $360 in cash. That finding is supported by the evidence and it should not be disturbed. The decision of the Fourth District Court of Appeal should be approved.

CONCLUSION

WHEREFORE based on the foregoing arguments and the authorities cited herein, Respondent respectfully submits that this Court should decline to take jurisdiction over the cause as there is no legal conflict between the Fourth District Court of Appeal's ruling at bar and the decisions of the Second District Court of Appeal. However, should this Court decide to accept jurisdiction, then, in that event, Respondent submits that the decision of the Fourth District Court of Appeal should be approved.

Respectfully submitted,

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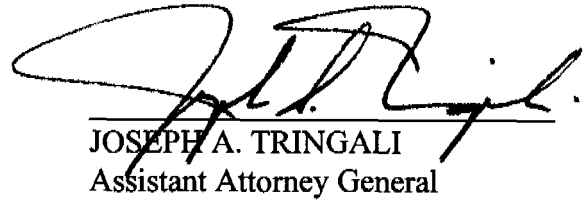
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief on the Merits" has been furnished to SUSAN D. CLINE, Esq., Assistant Public Defender, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, FL 33401 on August 26, 1996.



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