[Cite as *State v. Stiles*, 2011-Ohio-4173.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-01-003
	:	O P I N I O N
- vs -		8/22/2011
	:	
GLEN STILES,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM HAMILTON MUNICIPAL COURT
Case No. 10CRB04683-A

Mary K. Dudley, City of Hamilton Prosecuting Attorney, 345 High Street, 7th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Billy W. Guinigundo, 5331 South Gilmore Road, Fairfield, Ohio 45014, for defendant-appellant

HUTZEL, J.

{¶1} Defendant-appellant, Glen Stiles, appeals the decision of the Hamilton Municipal Court ordering him to pay $3,833 in restitution in a theft case. For the reasons set forth below, we reverse the trial court's restitution order.

{¶2} In the fall of 2010, appellant was charged with one count of breaking and entering and one count of theft, both felonies of the fifth degree. The state alleged that

appellant entered a property on Twelfth Street in Hamilton, Ohio and removed an outdoor air conditioning unit from the property. Appellant pled guilty to a reduced charge of theft, a misdemeanor of the first degree, in violation of R.C. 2913.02; was sentenced to jail; and following a restitution hearing, was ordered to pay $3,833 in restitution.

{¶3} Appellant appeals, raising one assignment of error:

{¶4} "THE TRIAL COURT ERRED WHEN IT ORDERED MR. STILES TO PAY RESTITUTION IN THE AMOUNT OF $3,833.00."

{¶5} Appellant argues that because he entered a guilty plea to a misdemeanor theft, and not to a fifth-degree felony theft offense, the amount of restitution to be paid to the victim of the offense cannot exceed $500. We agree.

{¶6} R.C. 2929.28 authorizes trial courts to impose financial sanctions on misdemeanor offenders. This includes ordering the offender to pay restitution to the victim, or the victim's survivor, "in an amount based on the victim's economic loss." R.C. 2929.28(A)(1). Following his misdemeanor theft conviction, appellant was ordered to pay $3,833 in restitution. However, for a person to be convicted of misdemeanor theft, the value of the property or services deprived must be less than $500. See R.C. 2913.02(B)(2); *State v. Henry*, Clermont App. No. CA2009-12-081, 2010-Ohio-4571, ¶21.

{¶7} As this court has previously recognized, "restitution can only be ordered for those acts that constitute the crime for which the defendant has been convicted and sentenced." Id. at ¶22, quoting *State v. Smith*, Butler App. No. CA2004-11-275, 2005-Ohio-6551, ¶25. Because appellant was convicted of misdemeanor theft, the amount of restitution to be paid to the victim of the offense must be less than $500. *Henry* at ¶22; *State v. Moore-Bennett*, Cuyahoga App. No. 95450, 2011-Ohio-1937, ¶17 (although defendant was originally charged with a fifth-degree felony theft offense, trial court erred in ordering defendant to pay over $2,000 in restitution when defendant was convicted of misdemeanor theft; upon

convicting defendant of misdemeanor theft, trial court was limited to ordering restitution in an amount consistent with misdemeanor theft, which is less than $500).

{¶8} As the dissent indicates, R.C. 2929.28 does not appear to limit a trial court's restitution award to the value of the property set forth in the definition of a particular theft offense. Nor does R.C. 2929.28 distinguish between misdemeanor theft cases from economic loss in other misdemeanor cases. Nonetheless, we find that R.C. 2929.28 must be read in conjunction with R.C. 2913.02(B)(2), which defines the degree of a theft offense with specific reference to the monetary value of the property at issue. *State v. Miller*, Butler App. No. CA2007-11-295, 2008-Ohio-5661, ¶9 (addressing a similar dissent with regard to R.C. 2929.18, the restitution statute for felony offenders).

{¶9} Accordingly, we vacate the restitution order and remand this matter to the trial court for further proceedings in accordance with this opinion.

{¶10} Judgment reversed and remanded for further proceedings.

POWELL P.J., concurs.

PIPER, J., dissents.

PIPER, J., dissenting.

{¶11} The majority follows *State v. Henry*, Clermont App. No. CA2009-12-081, 2010-Ohio-4571, which limits the amount of restitution a trial court may require a defendant pay the victim of a theft offense to $499.99. I respectfully dissent from the majority's holding today, and offer this explanation as to why we should depart from the interpretation created in *State v. Henry* and return to the plain meaning of R.C. 2929.28.

{¶12} A trial court is statutorily required to determine the amount of restitution owed to the victim of a particular offense. If the restitution amount tendered to the court is disputed,

the trial court is required to conduct a hearing wherein the victim bears the burden of proof by a preponderance of the evidence. R.C. 2929.28(A)(1) clearly grants broad discretion to the trial court to "base the amount of restitution it orders" on new information presented at the restitution hearing. This information can be from the victim, the offender, a presentence investigation report, estimates, receipts, or "any other information."

{¶13} There is clearly no wording in the restitution statute which limits the victim's economic loss to $499.99. Nor does any express wording in R.C. 2929.28 mandate that the trial court base the amount of the victim's economic loss on evidence produced at trial or representations contained in the theft complaint or police report. Naturally, the trial court is limited to restitution arising from the actual damages experienced by the victim for the particular offense.

{¶14} Statutory language prohibits restitution from exceeding the loss actually suffered as a direct and proximate result of the damages arising from the defendant's conduct in the case actually before the court. This insures fairness to the offender so that he cannot be ordered to pay restitution for other losses that are not the result of his conduct. If the victim's request for restitution is for economic loss that is remote, or indirect, the court is directed not to order such damages as economic loss attendant to the offense.

{¶15} Insuring that restitution does not exceed what the offender directly and proximately caused the victim renders the defendant fully accountable for his conduct, while not permitting restitution to become punitive. The statute does not expressly set a limit of $499.99 for a theft victim's economic loss. The allegation that a misdemeanor theft offense has occurred and the amount is under $500 may govern an element of the offense or the degree of the crime, but it does not vitiate or render meaningless the proceedings and purpose otherwise clearly expressed in R.C. 2929.28. The legislation's clear purpose is to make the victim whole.

{¶16} Courts regularly apply pertinent rules of construction in examining the operation of statutes. Even assuming arguendo that R.C. 2929.28 is ambiguous, the doctrine of in pari materia requires a reading of other statutes on the same subject matter, and even paragraphs within the statute itself, as a whole, for purposes of consistency in the law. See *McKenzie v. Bureau of Motor Vehicle* (July 10, 1995), Clermont App. No. CA95-01-005. Different parts of statutes on the same subject matter "should be read together to ascertain and effectuate if possible the legislative intent" seeking a reasonable construction of the wording involved. *Carrelli v. Dept. of Natural Resources*, Brown App. No. CA2009-11-041, 2010-Ohio-1516, ¶20.

{¶17} R.C. 2929.28(A)(2) lists specific caps for fines for each level of misdemeanor. Yet nothing in 2929.28(A)(1) expressly states a victim's economic loss has a cap in a theft case. Furthermore, nothing in R.C. 2929.28(A)(1) distinguishes misdemeanor theft cases from economic loss in other misdemeanor cases. *State v. Henry* and the majority's holding herein interprets an exception for theft cases where the statute itself does not. R.C. 2929.28(A) applies to all misdemeanor cases and makes no reference to the classification of theft offenses, nor does it differentiate the "economic loss" in theft offenses. The majority's decision grants the trial court discretion to determine the full economic loss in an assault case, a criminal damaging case, or any other misdemeanor case, but imposes a cap of $499.99 solely in misdemeanor theft offense cases. Using an element of a theft offense (i.e. property valued under $500) for purposes of the restitution statute is misplaced. If a victim initially thought his or her property was valued at $450 and at the conclusion of the proceedings discovered it was valued at $550, today's holding prevents the victim from receiving restitution for the offense committed by the offender, when the statute itself does not.

{¶18} R.C. 2913.61, which governs valuation of stolen property in theft cases, differs

from the valuation of economic loss in the restitution statute. For example, the valuation pursuant to R.C. 2913.61 must be established beyond a reasonable doubt, while the valuation of economic loss pursuant to R.C. 2929.28 is established by a preponderance of the admissible evidence offered at a trial on the charges. Moreover, R.C. 2929.28 contains no suggestion that the methodology of R.C. 2913.61 should be used for purposes of determining a victim's economic loss. Yet, our majority decision herein, as in *Henry*, binds the trial court's determination of restitution to the value of the property based on a valuation standard for criminal charges set forth in a completely different statute.

{¶19} The Ohio Supreme Court in *State v. Adams* (1988), 39 Ohio St.3d 186, unequivocally stated that sales tax attached to the replacement of a stolen item is not part of the valuation for purposes of 2913.61. However, nothing in R.C. 2913.61 precludes or prevents an independent, subsequent valuation of a victim's economic loss to include the amount of sales tax previously expended, or about to be spent, in replacing a stolen item. R.C. 2929.28 would clearly allow the expense of sales tax as part of a victim's economic loss and the valuation of economic loss is not limited to a determination pursuant to R.C. 2913.61.

{¶20} During the restitution hearing sub judice, the defendant did dispute the restitution amount but never argued, or even remotely suggested, that the victim's economic loss should be less than $500. The defendant knew that he would be paying significant restitution as a direct and proximate result of his offense. Thus, while the trial court properly fulfilled its mandatory duty to determine restitution and conduct a hearing, the defendant waived his current argument before this court by not tendering the same issue first for consideration by the trial court. *State v. Guzman-Martinez*, Warren App. No. CA2010-06-059, 2011-Ohio-1310.

{¶21} In the instant case, Stiles was originally charged with a felony theft offense of over $500. The defendant pled guilty to the lesser offense in municipal court immediately

prior to the trial court conducting a preliminary hearing. By doing so, the defendant not only received the benefit of a reduced charge but also avoided a grand jury indictment. In addition to these benefits of pleading to a lesser offense, Stiles is now awarded a significant windfall by not being required to pay the victim's economic loss. R.C. 2929.01(M) defines economic loss as "any economic detriment, suffered by the victim" so long as it is directly and proximately caused by the defendant's particular offense. There is no legislative intent to have less than full restitution in misdemeanor theft offenses. To imply such an intent is not a reasonable interpretation of the various statutes involved, and disregards the harmony and consistency within Ohio's statutory framework.

{¶22} The Ohio Supreme Court has directed that "[w]e must give effect to every term in a statute and avoid a construction that would render any provision meaningless, inoperative, or superfluous." *Rhodes v. City of Philadelphia*, 2011-Ohio-3279, slip opinion. The restitution statute clearly and unequivocally states that the restitution is to be "based on the victim's economic loss" as a direct and proximate result of the offenses committed by the offender. R.C. 2929.28(A)(1). To interject into the statute a limit of $499.99 vitiates, or renders meaningless, the purpose of conducting a restitution hearing, gathering information, and determining the victim's economic loss. We should not place trial courts in the awkward position of conducting a hearing as if it were going to rectify the victim's loss, only to tell the victim, "sorry, we are unable to make you whole even though you've proven your loss."

{¶23} Dissent on this issue is not a new concept to this court. Judge Walsh, now retired from the Twelfth District, also dissented when presented with a similar factual scenario, and stated that the majority's decision in his case interpreted "a restriction in determining restitution that is neither contained in nor authorized by the restitution statute." *State v. Miller*, Butler App. No. CA2007-11-295, 2008-Ohio-5661, ¶16, Walsh, J. dissenting. I share Judge Walsh's concern regarding the majority's application, which not only limits a

trial court's ability to make the victim whole, but also stands in contradiction to the plain language of the restitution statute.

{¶24} For these reasons, I would reverse our holding in *State v. Henry* and affirm the trial court herein, thus loosening our grip on the trial court's ability to rectify the harm caused to victims of crime in theft offenses.