[Cite as *State v. Amburgey*, 2011-Ohio-748.]

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 2010 CA 14

v. : T.C. NO. 09CR540

MARK AMBURGEY : (Criminal appeal from Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 18th day of February, 2011.

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DONOVAN, J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Mark Amburgey, filed March 1, 2010. On August 21, 2009, Amburgey was indicted on one count of theft from an elderly person, in violation of R.C. 2913.02(A)(1), a felony of the fifth degree. The indictment specifies that the value of the property taken was less than $500.00. On November 18, 2009, Amburgey pled guilty.

{¶ 2} The trial court conducted Amburgey's plea hearing simultaneously with the plea hearing of Davina Peterangelo. After Amburgey stated his age of 42 years, that the highest level of school he attended was the tenth grade, and that he can read, write and understand the English language, the following exchange occurred at the beginning of the hearing:

{¶ 3} " * * *

{¶ 4} "THE COURT: In the past 24 hours have either one of you had any drugs, alcohol, medicine, pills or related type substances in the recent past?

{¶ 5} "DEFENDANT PETERANGELO: No, Your Honor.

{¶ 6} "DEFENDANT AMBURGEY: No, Your Honor.

{¶ 7} "THE COURT: Okay. Based on what you've told me here, can I draw the conclusion that as you sit here right now that you are alert, you are clear of mind and you are not under the influence of any substances and you are totally capable of understanding what we are doing here today?

{¶ 8} "DEFENDANT AMBURGEY: Yes, Your Honor.

{¶ 9} "MS. MILLER: Your Honor, I think my client, just so the record is clear, he has several prescription medications that he's on.

{¶ 10} "THE COURT*:* Okay. But none of those affect your ability to understand what's going on, is that correct?

{¶ 11} "DEFENDANT AMBURGEY*:* Yes, Your Honor."

{¶ 12} Later in the hearing, the following exchange occurred:

{¶ 13} "THE COURT: All right. Mr. Amburgey, this indicates that you are entering a plea to Theft From an Elderly Person, which is a felony of the fifth degree. Is that correct?

{¶ 14} "DEFENDANT AMBURGEY: Yes, Your Honor.

{¶ 15} "THE COURT: And do you understand and appreciate the maximum penalty you're facing is a one-year sentence of imprisonment, a $2500 fine, or both?

{¶ 16} "DEFENDANT AMBURGEY: Yes, Your Honor.

{¶ 17} "THE COURT: And I also have a plea agreement form from you with the State and I want to go over this with you, likewise, to make sure you have an understanding as to that agreement.

{¶ 18} "Has the State conferred with the victim or victims in this case?

{¶ 19} "MR. HUNTER: Yes, Your Honor.

{¶ 20} "THE COURT: This says the State recommends community control on condition that the elderly victim's ring is returned. Is that your understanding of the agreement?

{¶ 21} "DEFENDANT AMBURGEY: Yes, Your Honor."

{¶ 22} The court informed Amburgey that it was not bound to follow the State's recommendation. The plea form that Amburgey signed sets forth the maximum term of imprisonment, a fine, and includes "court costs, restitution or other financial sanctions."

{¶ 23} On December 4, 2009, prior to sentencing, Amburgey filed a motion to withdraw his plea. The supporting memorandum provides, "At the time of Defendant's plea of guilty, Defendant was under the influence of several prescription medications including Celexa, Hydrocone [sic], Omeprazoale and Tizanidine. Defendant called counsel on Wednesday, November 25, 2009 and stated that he was unaware of the consequences of his guilty plea. Counsel, while knowing that Defendant was taking several prescription medications, felt that Defendant understood the implications of his guilty plea. After speaking with Defendant on

November 25, 2009, Counsel submits that Defendant did not fully understand his rights when he entered a plea of guilty."

{¶ 24} A hearing was held on Amburgey's motion to withdraw on December 16, 2009. The following exchange occurred on direct examination:

{¶ 25} "Q. And on [November 18, 2009], can you tell us how you were feeling?

{¶ 26} "A. I wasn't feeling too good. I was sick. I couldn't hardly talk. I'd been having seizures. I'd been hospitalized two or three times before that. I've been on a lot of medication. I take 33 pills a day.

{¶ 27} "* * *

{¶ 28} "I take Hydrocodone for pain. They are 500 milligrams. I take one every four to six hours. I take Selexa for seizures. I take anywhere from one to six every eight hours a day. I take Zanaflex which is for my nerves and body, which I take two of them a day. I take Tramadol which is for pain. I take one every four to six hours. I take - - there's a bunch of them. There's a few more I can't even pronounce the names of them that I do take."

{¶ 29} When asked why he wanted to withdraw his plea, Amburgey stated:

{¶ 30} "A. I was in a real state of mind. I haven't been - - I've been going through a lot of problems at home with deaths, and I've been taking a lot of medicines. I've been sick. I'm having seizures. I just had a seizure the other day. The ambulance had to rush me to the hospital, Greene Memorial. I've got to go the 28th to my doctor to find out why I'm having seizures. I don't know if it's medications because I'm taking so much or what's going on. I've had one about every day, one to two seizures every day." Amburgey stated that he was hospitalized on "October 21st or 22nd" for seven to 10 days due to seizures, a "bad infection" and

the swine flu. In addition to the above medications, he stated that he takes Omprazole for pain and inflamation, which causes drowsiness, and also medication for kidney stones and a muscle relaxer for "muscle spasms in the back."

{¶ 31} The following exchange occurred on cross examination:

{¶ 32} "Q. The medicines that you were taking back on the 18th day of November, I assume you're still taking them, correct?

{¶ 33} "A. Yes, sir.

{¶ 34} "Q. Are you taking basically the same medication?

{¶ 35} "A. Yes.

{¶ 36} "Q. Are you clear today? Do you know what you are doing today?

{¶ 37} "A. Yes, sir, I do. I haven't had none in about three weeks.

{¶ 38} "* * *

{¶ 39} "Q. No. I just asked you, the medicine that you were taking back on the 18th are you taking today and you just said 'Yes.' Now, I'm going to ask you that again. The medicine that you were taking on the 18th, as you sit here today, under oath, testifying, are you taking that medicine today?

{¶ 40} "A. No, sir.

{¶ 41} "Q. Okay. So you're changing your answer?

{¶ 42} "A. Right.

{¶ 43} "Q. You're not on that medicine?

{¶ 44} "A. I'm not taking nothing right now.

{¶ 45} "Q. You just said on direct, you just said you were taking all these medicines

now because you had seizures. Like today, yesterday, you are not taking any medicine at all for the seizures?

{¶ 46} "A. No.

{¶ 47} "Q. When did you quit taking them?

{¶ 48} "A. I quit taking them about a month - - about three weeks ago."

{¶ 49} Amburgey was then asked about each of his responses during the Crim.R. 11 colloquy at his plea hearing, and he testified that he remembered some of them but not others. He testified that he was not being truthful when he stated that his medications were not affecting his ability to understand the plea process. Amburgey admitted that he previously entered a plea in another matter in the same courtroom. According to Amburgey, on the 18th of November, he "thought we were going through a not guilty plea from the whole thing - - from the beginning." Amburgey then stated, "I knew I was pleading guilty after she told me, but when I got here earlier that day I thought I was pleading not guilty." Amburgey remembered signing the plea form but he stated that he did not know what he was signing. He admitted that he partially completed a questionnaire for purposes of the presentence investigation. At the close of Amburgey's testimony, the State argued that Amburgey merely had a change of heart and that he was not entitled to withdraw his plea.

{¶ 50} In overruling Amburgey's motion, the trial court noted that it "presided over both the plea hearing and the motion to withdraw hearing and carefully observed the Defendant and listened to his answers at each proceeding," and it determined that Amburgey lacked credibility. According to the court, "First, recanted testimony is unreliable and should be subjected to closest scrutiny. * * * The Defendant was under oath and testified differently on the same topics. He

admitted he lied. Secondly, the Defendant claimed he was taking numerous medications at the time of the plea but somehow 1 week later stopped taking all of them and was not taking medication at the withdrawal hearing. Even this claim is perhaps questionable by his apparent confused answers on cross-examination about his current medication status. Thirdly, the Defendant answered 3 questions at the plea hearing which were not difficult or complex regarding usage of drugs and their effect on him. Despite his attorney indicating he was on medication the Defendant then said he was capable of understanding. Further no evidence was presented independently corroborating what drugs he alleged he was taking.

{¶ 51} "Finally, in making this determination the Court also relies on its recall of the Defendant at the plea hearing and the withdrawal hearing. His speech, demeanor, control, ability to listen and answer questions was the same at both hearings. The Court did not observe any degree of impairment whatsoever at either hearing.

{¶ 52} "It is also noted that in a recent case this Defendant had with this Court, he also claimed medical impairment which never was manifested despite his attempt to delay those proceedings.

{¶ 53} " * * * the Defendant was represented by competent counsel, the Criminal Rule 11 hearing was adequate, the withdrawal hearing was full and fair, the reasons the Defendant

{¶ 54} gave to withdraw are not credible and the Defendant knew the charges and penalties as advised despite his protestations. Most interesting, the Defendant testified he had * * * tendered to police the ring that was the subject of the indictment."

{¶ 55} The trial court sentenced Amburgey on February 4, 2009. At the start of the sentencing hearing, the prosecutor requested that restitution be ordered in the amount of

$1000.00. The following exchange then occurred:

{¶ 56} "MR. HUNTER: The evidence could be more than that. At a hearing, we expect it will be more than a thousand dollars.

{¶ 57} "THE COURT: Well, we're having the hearing right now. The law says the restitution hearing is at sentencing, and I intend to sentence today.

{¶ 58} "* * *

{¶ 59} "THE COURT: I'm ready to go forward. Do you need a break?

{¶ 60} "MR. HUNTER: Yes.

{¶ 61} "* * *

{¶ 62} "MR. HUNTER: We can't request a delay on the restitution hearing?

{¶ 63} "THE COURT: No, because we have to have it at sentencing. I'm not going to delay sentencing.

{¶ 64} " * * *

{¶ 65} "THE COURT: This is the law, Jeffrey.

{¶ 66} "* * *

{¶ 67} "THE COURT: It's been the law for years. If there's going to be an issue, it needs to be heard at the sentencing hearing. Do you need a break?

{¶ 68} "MR. HUNTER: Yes."

{¶ 69} After a brief recess, the victim herein, Herbert Morris, testified. According to Morris, he was 72 years old at the time of the theft and acquainted with Amburgey. Morris "lived at Jamestown, Ohio, and my home burnt down and we was recovering what stuff we could, and I took it home and put it in my garage and him and his buddy came back that night and

stole all of it." When asked about the specific property taken from him, Morris responded, "I know what property was taken. I don't know how much was taken because it was what we had dug up out of the ashes of the fire, and him and his buddy came that night and stole all of it that night and he's still got part of it probably, and the rest of it is scattered around town where he sold it, first one thing then another."

{¶ 70} The following exchange occurred:

{¶ 71} "Q. * * * Now, did you send in a report to Danielle Coleman telling her that you estimated the value to be at $10,000 of the jewelry and gold that was taken?

{¶ 72} "A. Yes, I did. That was a lenient estimate. It could have been 20 or 30. I don't know. I know he sold it all over town and different people there have bought it, you know.

{¶ 73} "Q. * * * So when you say lenient to the Court, are you saying it was a conservative estimate?

{¶ 74} "A. That was a conservative estimate."

{¶ 75} On cross examination, Morris stated that Amburgey stole "about 30 fifths of liquor and he stole gold and silver that was in boxes and pans." The property was not insured, and Morris did not have any receipts, having "bought them at this place and that place and flea markets and sales."

{¶ 76} The following exchange occurred:

{¶ 77} "Q. We have nothing but your testimony to tell us how much the items were worth?

{¶ 78} "A. I've got a lot of people that knows me, knows I have collected for 50 year (sic).

{¶ 79} "Q. So you've collected and you've bought items over the last 50 years?

{¶ 80} "A. Right.

{¶ 81} "Q. And do you remember how much you paid for them?

{¶ 82} "A. Yes. A lot of them I paid $50, a hundred, $500. I paid lots of money for that kind of stuff, but I intended to keep it as a collection.

{¶ 83} "Q. But you can't describe it to us in detail?

{¶ 84} "A. Yes, I can describe it to you. It was in coins. It was in gold coins and silver coins and rolls of coins and all kinds of coins.

{¶ 85} " * * *

{¶ 86} "A. No, I don't know the year of them. I never wrote them down, but there was a lot of gold coins in there worth a lot of money. * * *

{¶ 87} "Q. And do you have any expertise in the value of gold and silver?

{¶ 88} "A. Yes, I have a lot of expertise.

{¶ 89} "Q. What would that be?

{¶ 90} "A. I've dealt in it for 50 year (sic). I have bought and sold it for the last 50 year (sic). I have a pretty good idea of what silver - - silver is $20 now an ounce and gold is now about $1100 an ounce." The State presented no further evidence.

{¶ 91} The court noted that the indictment reflected that the value of the property taken was less than $500.00, and the following exchange occurred:

{¶ 92} "MS. MILLER: Your Honor, we have nothing but Mr. Morris' self-serving testimony that that was the value of the items.

{¶ 93} "THE COURT: Well, you understand the law specifically allows the victim to

provide self-serving testimony to the Court. * * *

{¶ 94} "* * *

{¶ 95} "MS. MILLER: There's no indication how much the items were worth. We have no receipts. We have no pictures. We have nothing. And then, as you stated, the Indictment was for property, the value [of] which was less than $500, and - -

{¶ 96} "MR. HUNTER: That's not true.

{¶ 97} "MS. MILLER: - - and now how he can ask Defendant to pay more than $500 for restitution - -

{¶ 98} "MR. HUNTER: That's not true. The Indictment was not for property less than $500. That's inaccurate.

{¶ 99} "THE COURT: Well, if the State chooses to charge the Defendant with an offense where they don't have to prove more than $500 being taken, that doesn't mean that more than that wasn't taken. I mean, the State could have indicted for a higher level offense. They can choose to indict for a lower level offense, but the restitution is what it is.

{¶ 100} "MS. MILLER: The prosecutor or the State could have indicted on a greater offense, but [chose] not to. He was indicted on and pled guilty to knowingly depriving the owner of property, the value of less than $500. So I don't see how he can be ordered to pay restitution of more than that.

{¶ 101} "THE COURT: Well, would you rather have your client face a higher level charge later?

{¶ 102} "MS. MILLER: If the State wants to dismiss and reindict.

{¶ 103} "THE COURT: Well, it's the State's prerogative as to what level - - they can

indict, if they choose, for an offense that is based upon a figure of property stolen that's less than the actual figure stolen if that's their choice to limit their, or not limit but not be required to prove more than that figure which is their prerogative.

{¶ 104} "The Court is not bound by that figure or the charge - - the level of the charge in order to make a determination.

{¶ 105} "The Court specifically is going to refer to Ohio Revised Code Section 2929.18(A)(1) which indicates the Court may base the amount of restitution ordered on an amount recommended by the victim.

{¶ 106} "* * *

{¶ 107} "The victim not only has the right to recommend the amount of restitution, but the Court specifically finds that Mr. Morris is well versed in the medium of valuing gold and silver coins and has done so for half a century, and he is, based upon his testimony, well versed in the value of property." The court ordered restitution in the amount of $10,000.00.

{¶ 108} The court then allowed Amburgey to speak. After apologizing to the court, Amburgey stated, " * * * I do have some friends in Jamestown that knows when I went home, I went to bed and Rob Ringer and his buddies went up to the house and stole what Herb Morris had.

{¶ 109} "And what I was getting charged for was a ring, not gold and coins and stuff. So that's not even in the plea here or anything, gold coins or nothing. It says I took a ring and I gave the ring back so let's go from there. You guys are charging me for coins. This right here says a ring. I'm getting charged for a ring and brought the ring back."

{¶ 110} We note that the presentence investigation report herein provides, in part, that

Amburgey returned his questionnaire "mostly blank" and "has a long history of non-compliance with the probation department and continues to display an unwillingness to abide by the rules and conditions." The report concludes that Amburgey was "not amenable to community control and prison is appropriate." We note that the record does not contain a bill of particulars.

{¶ 111} Amburgey asserts three assignments of error. His first assignment of error is as follows:

{¶ 112} "THE TRIAL COURT ERRED BY ACCEPTING APPELLANT'S GUILTY PLEA AND LATER DENYING APPELLANT'S MOTION TO WITHDRAW IT, BECAUSE APPELLANT'S GUILTY PLEA WAS NOT VOLUNTARILY, KNOWINGLY OR INTELLIGENTLY MADE."

{¶ 113} According to Amburgey, he did not understand the plea proceeding due to the prescription medications he was taking. Alternatively, Amburgey argues that, even if he understood the proceedings, he "understood restitution to be return of the 'ring,' nothing more, and [he] would not have plead guilty if he understood that additional restitution would have been awarded."

{¶ 114} "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." Crim. R. 32.1.

{¶ 115} "Under Crim. R. 32.1, a pre-sentence motion to withdraw a guilty plea 'should be freely and liberally granted.'" (Internal citations omitted). *State v. Fugate*, Montgomery App. No. 21574, 2007-Ohio-26. "However, a defendant does not have an absolute right to withdraw his plea prior to sentencing. (Internal citation omitted). A trial court must hold a hearing on the

motion to determine if a reasonable and legitimate basis exists for the withdrawal. * * * Yet, the decision to grant or deny the motion is within the court's discretion. * * * Generally, denials of pre-sentence motions to withdraw pleas have been upheld even if the accused was mistaken as to an aspect of the plea's consequences. (Internal citations omitted).

{¶ 116} "On appeal, a court will reverse a trial court's denial of a pre-sentence motion to withdraw a guilty plea only upon a finding of an abuse of discretion. (Internal citation omitted). An abuse of discretion occurs where the trial court's ruling is unreasonable, arbitrary, or unconscionable. (Citations omitted). In *State v. Barnett* (1991), 73 Ohio App.3d 244, 250 * * * quoting [*State v. Peterseim* (1980), 68 Ohio App.2d 211, 213 -214], we stated:

{¶ 117} "'A trial court does not abuse its discretion in overruling a motion to withdraw: (1) where the accused is represented by highly competent counsel, (2) where the accused was afforded a full hearing, pursuant to Crim. R. 11, before he entered the plea, (3) when, after the motion to withdraw is filed, the accused is given a complete and impartial hearing on the motion, and (4) where the record reveals that the court gave full and fair consideration to the plea withdrawal request.'" *State v. Askew*, Montgomery App. No. 20110, 2005-Ohio-4026, ¶ 6-8.

{¶ 118} "When conducting the hearing on the motion to withdraw, the trial court may consider: '(1) whether the state will be prejudiced by withdrawal; (2) the representation afforded to the defendant by counsel; (3) the extent of the Crim. R. 11 plea hearing; (4) the extent of the hearing on the motion to withdraw, * * * [5] whether the timing of the motion was reasonable; [6] the reasons for the motion; [7] whether the defendant understood the nature of the charges and potential sentences, and [8] whether the accused was perhaps not guilty or had a complete defense to the charge.'" Id., ¶ 10 -11.

{¶ 119} "In the course of our appellate review, we defer to the factfinder's assessment of credibility." *State v. Goney*, Montgomery App. No. 22753, 2009-Ohio-4326, ¶ 25, citing *State v. Hixon*, Montgomery App. No. 19868, 2004-Ohio-1308, ¶ 10.

{¶ 120} Having thoroughly reviewed the record, we find that a reasonable and legitimate basis does not exist for the withdrawal of Amburgey's plea, and that the trial court properly overruled his motion to withdraw. As the trial court noted, Amburgey was represented by highly competent counsel. Amburgey does not contest that the trial court afforded him a full hearing, pursuant to Crim.R. 11, before he entered his plea, and the record reflects that the trial court fully considered his motion to withdraw his plea. We defer to the trial court's assessment of credibility, and the court found that the reason for the motion, namely that Amburgey did not understand the plea proceeding due to his extensive use of prescription medications, was not credible. Amburgey responded appropriately to questions by the trial court. The court attentively observed Amburgey at both the plea and the withdrawal hearings and specifically found that Amburgey's demeanor and ability to answer questions were the same each time. While Amburgey asserts that he merely repeated the responses of Peterangelo at the hearing, the court addressed him specifically after being advised by his counsel that he was on medication. The court noted no signs of impairment, despite Amburgey's later protestations that he was "sick" and "couldn't hardly talk" while at the plea hearing. Amburgey provided no evidence, as the trial court noted, of any of the medications he was allegedly taking. Amburgey's assertion that he was impaired at the plea hearing but lied to the court that he was not defies logic. The trial court noted that Amburgey had previously alleged impairment when none was manifest in another matter in an attempt to delay the proceedings.

{¶ 121} We further reject Amburgey's alternative argument that he would not have entered his plea had he "understood that additional restitution would be ordered." This was not the basis upon which he sought to withdraw his plea. While the State agreed to recommend community control in exchange for the return of the ring, the court informed Amburgey that it was not bound by the State's recommendation, and the plea form provided that restitution could be ordered as part of his sentence.

{¶ 122} There being no abuse of discretion, Amburgey's first assigned error is overruled.

{¶ 123} We will consider Amburgey's second and third assigned errors together. They are as follows:

{¶ 124} "THE TRIAL COURT ERRED IN SETTING RESTITUTION AT $10,000, WITHOUT COMPETENT[,] CREDIBLE EVIDENCE," And,

{¶ 125} "THE TRIAL COURT ERRED IN SETTING RESTITUTION IN EXCESS OF LESS THAN $500 BECAUSE APPELLANT WAS CONVICTED OF THEFT IN AN AMOUNT LESS THAN $500."

{¶ 126} R.C. 2929.18 (A)(1) provides as follows:

{¶ 127} "(A) Except as otherwise provided in this division and in addition to imposing court costs pursuant to section 2947.23 of the Revised Code, the court imposing a sentence upon an offender for a felony may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section * * * . Financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

{¶ 128} "(1) Restitution by the offender to the victim of the offender's crime * * * in an amount based on the victim's economic loss. * * * If the court imposes restitution, the court may

base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount. * * * . "

{¶ 129} "'An order of restitution must be supported by competent, credible evidence in the record. *State v. Warner* (1990), 55 Ohio St.3d 31, * * * . "It is well settled that there must be a due process ascertainment that the amount of restitution bears some reasonable relationship to the loss suffered." *State v. Williams* (1986), 34 Ohio App.3d 33, 34 * * * . "A sentence of restitution must be limited to the actual economic loss caused by the illegal conduct for which the defendant was convicted." *State v. Banks* (Aug. 19, 2005), Montgomery App. No. 20711, 2005-Ohio-4488. "Implicit in this principle is that the amount claimed must be established to a reasonable degree of certainty before restitution can be ordered." *State v. Golar* (October 31, 2003), Lake App. No. 2002-L-092, 2003-Ohio-5861.'" (Citation omitted). *State v. Moore*, Montgomery App. No. 2010 CA 55, 2010-Ohio-6226, ¶ 12.

{¶ 130} "'A trial court abuses it discretion in ordering restitution in an amount that was not determined to bear a reasonable relationship to the actual loss suffered.' (Citations omitted). An appellate court reviews the trial court's decision pertaining to restitution under an abuse of discretion standard." *Moore*, ¶ 13.

{¶ 131} Amburgey was convicted of fifth degree theft from an elderly person, an offense which assumes a property value of less than five hundred dollars. R.C. 2913.02(B)(3). In *State*

v. Smith, Butler App. No. CA2004-11-275, 2005-Ohio-6551, ¶ 26, the Twelfth District reversed a restitution order in the amount of $20,300 where, although "Appellant was originally charged with a fourth-degree felony theft offense, * * * he was convicted and sentenced by the trial court for a fifth-degree felony theft offense, which assumes a property value between $500 and less than $5,000." According to the Twelfth District, "the trial court erred by ordering appellant to pay more than $5,000 in restitution * * * when he was convicted of a fifth-degree felony theft offense," citing *State v. Clifton* (Oct. 23, 1989), 65 Ohio App.3d 117 (finding that the trial court erred in ordering restitution in the amount of $7,176 for a fourth degree theft which assumes a property value from $300 to $5,000), and *State v. Rivera*, Cuyahoga App. No. 84379, 2004-Ohio-6648, ¶ 15 (holding that the trial court erred in ordering restitution in an amount exceeding $5,000 for a felony of the fifth degree).

{¶ 132} We note that, in *State v. Brumett*, Butler App. No. CA2003-05-135, the Twelfth District affirmed an order of restitution in the amount of $100,000 for a felony of the fourth degree. There, unlike the matter herein, the record contained evidence establishing to a reasonable degree of certainty that the victim "suffered an economic loss of at least $100,000, as a result of the crime for which appellant was convicted." Id., ¶ 9. While R.C. 2929.18 allows the victim to recommend the amount of restitution to be ordered, Morris' vague, "lenient" estimate of $10,000.00 does not provide the requisite degree of certainty required by law to establish an order of restitution. Morris testified, "It could have been 20 or 30. *I don't know*." (emphasis added). See *State v. Carson*, Greene App. No. 2002-CA-73, 2003-Ohio-5958 (finding the record did not support restitution order where trial court ordered Carson to pay $7500 in restitution "because 'It's the court's understanding that that's what the funeral bill

was.’”)

{¶ 133} Finally, we note that it is undisputed that Amburgey returned the victim’s ring as requested by the State to secure a recommendation of community control. The trial court erred and abused its discretion in ordering restitution in the amount of $10,000, as the indictment affirmatively stated the value of the property taken was less than $500.00. The trial court ordered restitution in an amount 20 times greater, and the evidence does not establish Morris’ claim of $10,000.00 to a reasonable degree of certainty. Amburgey’s second and third assignments of error are sustained, and the order of restitution is hereby vacated.

Judgment affirmed in part, and vacated in part.

. . . . . .

FAIN, J., concurs.

FROELICH, J., concurs separately:

{¶ 134} I concur concerning the decision by the court to deny the motion to withdraw the plea. However, I am concerned about the trial court’s reference that in another “recent case” he had with the court, the defendant “also claimed medical impairment which was never manifested despite his attempt to delay those proceedings.” *Askew*, supra, and numerous other cases require a “complete and impartial hearing on a presentence motion to withdraw a guilty plea.” The court’s consideration of its observations and conclusions from an unreferenced and unrelated proceeding was an improper consideration in the hearing on the motion to withdraw this plea. Nonetheless, even removing this remark, the record does not support a finding that the court abused its discretion in denying the motion.

{¶ 135} I also concur that, based on the record, any restitution ordered in this case could

not exceed $500. First, despite the prosecutor's in-court protestations to the contrary, the indictment explicitly was for $500 or less. Second, other than the victim's "recommendation," there is insufficient evidence in the record to support the court's finding that the loss sustained by the victim was $10,000.

{¶ 136} Further, pursuant to R.C. 2929.19(B)(6), a court cannot order a financial sanction set forth in R.C. 2929.18 (such as restitution) without considering "the offender's present and future ability to pay the amount of the sanction or fine." See, e.g. *State v. Heyman*, Sandusky App. No. S-04-016, 2005-Ohio-6244. In *State v. Ayers*, Greene App. No. 2004 CA 0034, 2005-Ohio-44, we held that a sentencing court was presumed to have failed to consider a defendant's present and future ability to pay financial sanctions, as a prerequisite to ordering restitution, when nothing in the transcript demonstrated that the court considered the defendant's ability to pay restitution. Id. at ¶s21-24. Although the trial court in its sentencing entry says that it has considered the defendant's past and present ability to pay, there is nothing in the record, including the presentence investigation, that makes any reference to the defendant's past or future abilities to pay.

{¶ 137} I also note that there may not be a problem with an order beyond the $500 if (1) that was discussed on the record as part of a negotiated plea[1] or (2) the defendant was placed on community control with the payment (determined after a hearing) "as a condition of community control, as opposed to its imposition as a financial sanction." *State v. Stewart*, Franklin App.

[1]As far as the record reflects, the appellant was advised at the time of his plea of the possibilities of prison, community control, and a fine; restitution was not mentioned except to the extent that the State recommended community control on condition that the victim's ring is returned.

No. 04AP-761, 2005-Ohio-987; *State v. Hubbell*, Darke App. No. 1617, 2004-Ohio-398.

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