

STATE OF LOUISIANA

NO. 15-KA-151

VERSUS

FIFTH CIRCUIT

JON FAZENDE

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT  
PARISH OF JEFFERSON, STATE OF LOUISIANA  
NO. 05-3210, DIVISION "G"  
HONORABLE ROBERT A. PITRE, JR., JUDGE PRESIDING

COURT OF APPEAL  
FIFTH CIRCUIT

August 25, 2015

**ROBERT M. MURPHY**  
JUDGE

FILED AUG 25 2015

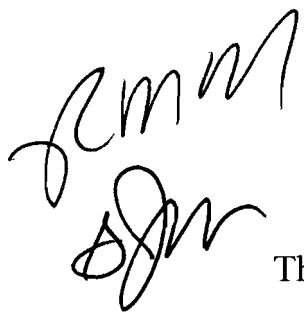
Panel composed of Judges Robert M. Murphy,  
Stephen J. Windhorst, and Hans J. Liljeberg

**LILJEBERG, J., CONCURS IN PART, DISSENTS IN PART**

PAUL D. CONNICK, JR.  
DISTRICT ATTORNEY  
Twenty-Fourth Judicial District  
Parish of Jefferson  
TERRY M. BOUDREAUX  
MATTHEW CAPLAN  
ANGEL G. VARNADO  
ASSISTANT DISTRICT ATTORNEYS  
200 Derbigny Street  
Gretna, Louisiana 70053  
COUNSEL FOR PLAINTIFF/APPELLANT

BRUCE G. WHITTAKER  
ATTORNEY AT LAW  
Louisiana Appellate Project  
1215 Prytania Street,  
Suite 332  
New Orleans, Louisiana 70130  
COUNSEL FOR DEFENDANT/ APPELLEE

**SENTENCE VACATED IN PART; AFFIRMED IN PART; CASE  
REMANDED FOR RESENTENCING**

Handwritten signature in black ink, appearing to be "RMM" with a flourish below it.

The State of Louisiana appeals defendant's sentence for theft of property having a value of \$500 or more, a violation of La. R.S. 14:67. For the reasons that follow, we affirm in part, vacate defendant's sentence in part, and remand the matter for re-sentencing.

#### **STATEMENT OF THE CASE**

On May 18, 2005, the Jefferson Parish District Attorney's Office filed a bill of information charging defendant, Jon Fazende, with theft of over \$1,000.00 belonging to Jack's Beverages, a violation of La. R.S. 14:67. On October 25, 2013, defendant was found guilty as charged following a jury trial. Defendant was originally sentenced to one year at hard labor, deferred, and inactive probation for a one-year period. Defendant was not ordered to pay restitution. After the trial court denied the State's motion to correct illegal sentence, the State sought writs,

which this Court granted upon finding that the trial court had failed to impose a statutorily mandated active probation upon defendant. 14-KH-533 (La. App. 5 Cir. 8/20/14) (unpublished writ disposition). On November 13, 2014, after remand, the trial court ordered defendant's probation to be active, but denied the State's motion to correct illegal sentence pertaining to restitution. This timely State's appeal follows.

## **FACTS**

Defendant, Jon Fazende, was found guilty by a jury of stealing over \$500.00 (Five Hundred Dollars) from Jack's Beverages No. 12 ("Jacks") convenience store by using her role as a bookkeeper to systematically falsify bank and financial statements from January 2003 through May 2004.<sup>1</sup>

On June 26, 2014, prior to sentencing, the State proceeded with a restitution hearing during which Mr. Stephen Orkus<sup>2</sup>, former CPA for Jack's Beverages No. 12, and Jack's co-owner, Mary Chawla<sup>3</sup>, testified regarding the monetary loss to Jack's due to defendant's acts of theft in 2003 and 2004. On that same date, at the time of sentencing, the trial court stated:

THE COURT:

...

And as far as restitution is concerned, I think the corporation has been satisfied through the income taxes and the under reporting of the sales. But I'm not going to order any restitution. I don't think it's warranted in this case.

---

<sup>1</sup> Defendant has not challenged her conviction on appeal.

<sup>2</sup> Mr. Orkus' testimony pertained to the tax consequences of the embezzled funds on the 2003 and 2004 tax returns for Jack's.

<sup>3</sup> Mary Chawla testified that by her calculations, defendant stole over \$144,121.36 from Jack's over the years 2003 and 2004.

The State challenged the court's ruling on restitution in a motion to correct illegal sentence. On November 13, 2014, following a hearing on the State's motion, the trial court once again declined to make restitution a part of defendant's sentence.

THE COURT:

...

And with regard to restitution, I don't believe that the victim was out of anything, so I'm not going to award restitution, but it should be awarded at a later date.

I order that it be converted to a money judgment.

### **ASSIGNMENT OF ERROR**

The trial court erred in failing to make restitution a part of probation, as required by La. C.Cr.P. art. 895.1(A)(1), because the victims in this case suffered monetary damages.

### **DISCUSSION**

In its sole assignment of error, the State contends that the trial court erred in failing to require that defendant pay restitution in this case, when monetary damages to the victims was clearly established. We agree. La. C.Cr.P. art. 895.1 provides, in relevant part:

- (1) When a court places the defendant on probation, it shall, as a condition of probation, order the payment of restitution in cases where the victim or his family has suffered any direct loss of actual cash, any monetary loss pursuant to damage to or loss of property, or medical expense. The court shall order restitution in a reasonable sum not to exceed the actual pecuniary loss to the victim in an amount certain.

Following this Court's order on remand, the trial court placed defendant on active probation, thereby triggering the mandatory restitution provision of La. C.Cr.P. art. 895.1. Evidence in the record demonstrates that the victims of defendant's crime did, in fact, suffer a direct monetary loss for which they had not

been made whole at the time of sentencing. Therefore, we find that the trial court erred in failing to order restitution as a part of defendant's probation.<sup>4</sup>

This Court has previously remanded matters to the trial court for calculation and imposition of restitution. Accordingly, we vacate defendant's sentence, in part, and remand the matter for re-sentencing to afford the court the opportunity to consider the earning capacity and assets of defendant to set a determinate amount of restitution and the manner in which it will be paid in accordance with La. C.Cr.P. art. 895.1(A).<sup>5</sup> Pursuant to La. C.Cr.P. art. 881.4(A), which permits this Court to "give direction to the trial court concerning the proper sentence to impose," we would note that the evidence in the record concerning the amount stolen from the victims totaled \$144, 121.26. We are of the opinion that no reduction in restitution should be considered on the basis of federal tax laws.

## **CONCLUSION**

For the foregoing reasons, we vacate the portion of defendant's sentence pertaining to restitution. Defendant's sentence to one year at hard labor, deferred, and active probation is affirmed. We remand the matter for re-sentencing in accordance with this opinion.

## **SENTENCE VACATED IN PART; AFFIRMED IN PART; CASE REMANDED FOR RESENTENCING**

---

<sup>4</sup> We note that the trial court made reference to the conversion of restitution into a civil money judgment; however, no such order, as required by La. C.Cr.P. art. 895.1(2)(A), appears in the record.

<sup>5</sup> See *State v. Echeverria*, 03-898, pp. 11-13 (La. App. 5 Cir. 11/25/03), 862 So.2d 163, 169-70; *State v. Alexander*, 91-1199, pp. 11-12 (La. App. 5 Cir. 9/29/98), 720 So.2d 82, 88, writ denied, 98-3109 (La. 4/9/99), 740 So.2d 628; *State v. Peters*, 611 So.2d 191, 191-93 (La. App. 5 Cir. 1992).

STATE OF LOUISIANA

NO. 15-KA-151

VERSUS

FIFTH CIRCUIT

JON FAZENDE

COURT OF APPEAL

STATE OF LOUISIANA

 **LILJEBERG, J., CONCURS IN PART, DISSENTS IN PART**

I have considered the opinion of the majority, and I agree that restitution should have been awarded in this matter, pursuant to La. C.Cr.P. art. 895.1. The record clearly establishes that the victim suffered monetary loss as a result of defendant's crime. Accordingly, I concur with the majority's finding that the trial court erred by failing to order defendant to pay restitution.

I cannot, however, agree with the majority's decision to remand the case for the trial court to set the amount of restitution to be paid by defendant. The majority finds that remand is necessary "to afford the court the opportunity to consider the earning capacity and assets of defendant to set a determinate amount of restitution." However, the trial court has already been afforded the opportunity to consider these factors and to make a determination of the amount of restitution due, because a restitution hearing was held before the trial court. At this hearing, the victim's CPA and the victim's representative testified regarding the losses incurred due to defendant's actions, and the victim's 2003 and 2004 tax returns were admitted. Defendant also testified at this hearing regarding her disability, heart issues, and inability to be gainfully employed. She stated that she lives with her mother, does not own any property, and her husband is unemployed as well.

After considering the testimony and evidence presented at the restitution hearing, the trial judge made the finding that the victim was not “out anything” and thus, no restitution would be awarded. In my view, because the parties were already given the opportunity to present evidence on the issue of restitution and the trial court made a finding that no restitution was due, it is now this Court’s duty to review the record and determine what amount of restitution is actually due in this matter. I cannot agree to remand the case for the trial court to have another opportunity to consider the same evidence, without any new information.<sup>1</sup>

Further, I disagree with the majority’s decision to advise the trial court that no reduction in restitution should be considered based on the federal tax credits received by the victim. La. C.Cr.P. art. 895.1 provides that the amount of restitution ordered shall not exceed the *actual pecuniary loss* to the victim. Accordingly, I believe that the restitution awarded should be reduced by the amount of the victim’s tax benefit, as the federal tax credits received have reduced the amount of actual pecuniary loss by the victim.<sup>2</sup>

Accordingly, I concur with the majority’s finding that restitution should have been awarded in this matter, but I dissent from the decision to remand for the trial court to reconsider its finding on the amount of restitution due based on the same evidence it already considered.

---

<sup>1</sup> Although this Court has previously remanded cases to the trial court for calculation and imposition of restitution, as stated by the majority, I am unaware of any cases in which this was done after a restitution hearing was held and a finding of the amount of the victim’s loss was made.

<sup>2</sup> See, by analogy, *State v. Devare*, 03-610 (La. App. 5 Cir. 10/28/03), 860 So.2d 191, in which this Court found that the trial court should have credited the restitution ordered by the amount that the victim’s insurance company reimbursed the victim.

SUSAN M. CHEHARDY  
CHIEF JUDGE

FREDERICKA H. WICKER  
JUDE G. GRAVOIS  
MARC E. JOHNSON  
ROBERT A. CHAISSON  
ROBERT M. MURPHY  
STEPHEN J. WINDHORST  
HANS J. LILJEBERG

JUDGES



FIFTH CIRCUIT  
101 DERBIGNY STREET (70053)  
POST OFFICE BOX 489  
GRETNA, LOUISIANA 70054  
[www.fifthcircuit.org](http://www.fifthcircuit.org)

CHERYL Q. LANDRIEU  
CLERK OF COURT

MARY E. LEGNON  
CHIEF DEPUTY CLERK

SUSAN BUCHHOLZ  
FIRST DEPUTY CLERK

MELISSA C. LEDET  
DIRECTOR OF CENTRAL STAFF

(504) 376-1400  
(504) 376-1498 FAX

### **NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY**

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **Uniform Rules - Court of Appeal, Rule 2-20** THIS DAY **AUGUST 25, 2015** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

A handwritten signature in cursive script, appearing to read "Cheryl Q. Landrieu", is written over a horizontal line.

CHERYL Q. LANDRIEU  
CLERK OF COURT

## **15-KA-151**

#### **E-NOTIFIED**

TERRY M. BOUDREAUX  
MATTHEW CAPLAN

#### **MAILED**

BRUCE G. WHITTAKER  
ATTORNEY AT LAW  
LOUISIANA APPELLATE PROJECT  
1215 PRYTANIA STREET  
SUITE 332  
NEW ORLEANS, LA 70130

HON. PAUL D. CONNICK, JR.  
DISTRICT ATTORNEY  
ANGEL G. VARNADO  
ASSISTANT DISTRICT ATTORNEYS  
TWENTY-FOURTH JUDICIAL  
DISTRICT  
200 DERBIGNY STREET  
GRETNA, LA 70053