

Restitution: What if the victim doesn't care?



Know Your Rights

by Atty.
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We all know about the concept of restitution. The crime victim is to be repaid for his loss. It's a concept that has existed in our American system of justice since its earliest days, well over 200 years ago. Since restitution itself is supposed to compensate the victim of the crime, what happens if the victim refuses to cooperate with the state in establishing the amount of the loss?

In a recent Miami case, the defendant, an employee of a CVS pharmacy, was arrested after the loss prevention specialist at CVS, a gentleman by the name of Fairly, found the defendant leaving the store with a container full of men's cologne. When the police arrived at CVS, the defendant consented to a search of his car after advising the police that the cologne was inside the vehicle. The cologne was returned to CVS and the defendant was arrested. Fairly inventoried the merchandise and signed a sworn complaint stating the value of the cologne was \$2,400. The defendant was charged with one count of third degree grand theft of property valued at \$300 or more, but less than \$5,000. This was a felony charge.

The defendant, through his attorney, agreed to plead guilty to the correct amount of restitution and the trial

judge told the parties to "figure out the amount." This issue was not so easily resolved. After a couple of court hearings, the state advised the trial judge that three phone calls had been made to Fairly, the loss manager, to obtain further documentation from him as to the amount of restitution, but Fairly failed to respond. In response, the trial court advised the parties that because Fairly "doesn't care, I'll accept probation and no restitution." The state objected, requested a restitution hearing, and argued that as the result of a subsequent investigation, the estimate for restitution was now \$9,700.

The trial court sentenced the defendant to two years of probation and, over the state's objection, waived restitution. Subsequently, the trial court entered an order denying restitution "since the allegation of loss was neither established, reasonable, or credible, but rather was inflated and probably perjurious." The state appealed.

The appeals court analyzed the purpose and fundamental nature of restitution, declaring that restitution, unlike civil damages, is a criminal sanction whose purpose is twofold - (1) to compensate the victim, and (2) to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system. Further, a restitution order pursuant to a plea is an agreement between the defendant and the state to which the victim is not a party. Accordingly, while the

victim's wishes concerning restitution are relevant, they are not dispositive - it is the judge, not the victim, who must weight society's competing needs.

Citing two separate Florida statutes, the appellate court declared that the trial court is required to order restitution for damage or loss caused by the defendant's offense, unless the trial court finds clear and compelling reasons not to do so. The trial court must state on the record its reasons for not ordering restitution.

The appeals court concluded that, in view of the requirements of the two statutes, the trial judge abused his discretion. The trial judge's reason for denying restitution was not a "clear and compelling" reason. First, the trial court stated at the hearing that the victim was not interested in restitution. The appellate court found this rationale not to be a "clear and compelling" reason, as the victim's wishes concerning restitution are not relevant. The trial judge's error was further compounded by the fact that the defendant specifically

agreed to restitution as a condition of his plea, and agreed to pay an amount of restitution higher than that charged by the state in the information.

The appellate court was of the opinion that the trial judge's statement that the restitution was not "established, reasonable or credible, but rather was inflated, and probably perjurious" was also not supported by the record because the trial judge did not conduct a restitution hearing, and no evidence was presented from which the trial court could have reached any of these conclusions. Accordingly, the appeals court reversed the trial court's order denying the restitution

and sent the matter back to the trial judge to conduct an evidentiary hearing on the proper amount of restitution. This decision reaffirms our long-held belief that too much cologne is a problem.

This case is *State v. Castro*, decided by the Third District Court of Appeal on September 7, 2007, and can be found in legal publications at 965 So.2d 216.

Jay Howell, a Jacksonville attorney, has been a State Prosecutor, a US Senate Investigator, and the founder of the National Center for Missing and Exploited Children. He represents crime victims in civil claims for damages and advocates for the legal rights of all victims.





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