

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CRIMINAL): "AC"
CASE NO: 502012AP900078AXXXMB
L.T. NO: 502011CT030562AXXXNB

AUSTIN PHILLIPS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

Opinion filed: **NOV 20 2013**

Appeal from the County Court in and for Palm Beach County,
Judge August Bonavita.

For Appellant: Alan T. Lipson, Esq.
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For Appellee: Stephanie Dutko, Esq.
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PER CURIAM.

REVERSE AND REMAND. This appeal arises from Austin Phillips ("Appellant") conviction for reckless driving and a sentence ordering restitution. We hold that the trial court abused its discretion by awarding restitution based upon the replacement value of the victim's damaged vehicle rather than upon the fair market value of the vehicle at the time that it was damaged.

The victim's car in this case was declared a total loss as a result of the crash. At the restitution hearing, the victim was the only witness who testified. According to the victim's testimony, his 2006 Cadillac DTS was declared a total loss, and his insurance payout was \$15,918.48. The victim offered testimony that his vehicle was in excellent condition at the time of the accident and that it was "probably worth more" than the total insurance payout.

The victim also testified that he purchased a replacement 2006 Cadillac DTS for \$15,740.00 after upgrades were added and that the total purchase price (including tax, tag, title and fees) was \$17,850.61. The

victim also testified that the replacement vehicle was a similar model, and the same year, but it was a different color and had different features than his original vehicle. Finally, the victim testified that the appearance protection and theft protection added to the new vehicle had also been on his original vehicle.

At the conclusion of the hearing, the trial court entered a restitution award of \$1,931.68, the value that the victim and the court agreed was the difference between the insurance payout (\$15,918.48) and the vehicle replacement cost (\$17,850.61).¹ On Appeal, Appellant argued that the county court abused its discretion in calculating the amount of restitution owed to the victim as the victim was compensated the fair market value of his vehicle through his insurance company payout.

The standard of review applicable to a trial court's restitution order is an abuse of discretion standard. *Bennett v. State*, 944 So. 2d 524, 525 (Fla. 4th DCA 2006). This standard is deferential to the trial court's ruling, and it must be upheld unless the "judicial action is arbitrary, fanciful, or unreasonable [D]iscretion is abused only where no reasonable [person] would take the view adopted by the trial court." *Salazar v. State*, 991 So. 2d 364, 372 (Fla. 2008). The trial court is permitted to order restitution for damage or loss caused by or related to a defendant's offense or criminal episode absent compelling justification not to order such restitution. § 775.089, Fla. Stat. (2012). Nevertheless, the amount of restitution cannot exceed the amount of actual damages. *Soriano v. State*, 968 So. 2d 112, 115 (Fla. 4th DCA 2007).

The State has the burden to prove, by substantial competent evidence, the amount of damage or loss suffered by the victim seeking restitution. *Bennett v. State*, 944 So. 2d 524, 525 (Fla. 4th DCA 2006). Restitution is generally determined by the fair market value of the stolen or damaged items at the time of the theft or damage. *Thompson v. State*, 68 So. 3d 425, 426 (Fla. 4th DCA 2011). Specifically, courts should consider the following factors when determining a restitution amount: (1) original market cost, (2) use of the item, (3) condition and quality of the item, and (4) depreciation. *Id.* Courts are not strictly limited to relying on the fair market value of an item in awarding restitution as they have discretion in determining the amount to ensure that the award adequately compensates and serves the purpose of restitution. *Wolff v. State*, 981 So. 2d

¹ The difference between these two numbers is actually \$1,932.13, and accordingly, it is not entirely clear how the trial court arrived at the \$1,931.68 figure.

651, 653 (Fla. 4th DCA 2008). However, “‘absent circumstances tending to show that the fair market value does not adequately compensate the victim or otherwise serve the purpose of restitution,’ fair market value should be used.” *Thompson*, 68 So. 3d at 427. Testimony from the victim alone concerning the value of the property is not sufficient to establish a restitution amount unless it is supported by documentation. *Gonzalez v. State*, 40 So. 3d 86, 89 (Fla. 4th DCA 2010).

In the case at bar, Appellant was ordered to pay \$1,931.68 in restitution. The State, however, failed to present evidence of the vehicle’s fair market value; it only presented evidence of the replacement value. Unlike *Gonzalez*, on which the State relied in support, there is no evidence in the record that the trial court considered the factors mentioned, *supra*, to determine the fair market value of the vehicle (i.e. the original purchase price of the damaged vehicle, the manner the vehicle was used, or its depreciation). Further, the item for which the victim sought restitution in this case is an item with rapidly depreciating value (unlike gold). *See Hunter v. State*, 48 So. 3d 174, 175 (Fla. 4th DCA 2010) (recognizing that evidence of the original purchase price is not sufficient to sustain an award of restitution when the items were purchased years earlier because depreciation must be considered); *Fitzgerald v. State*, 952 So. 2d 1250 (Fla. 4th DCA 2007) (finding that awarding restitution based on the catalog price of an item is not sufficient and remanding to determine the fair market value.) Although the price of comparable items is relevant, evidence of the fair market value of the damaged item must be presented.

The State properly argued that courts are not bound to award restitution based solely on the fair market value of an item. However, absent evidence that the fair market value will not adequately compensate the victim or serve the purpose of restitution (as in the case of theft of a family heirloom) fair market value should be used. *Domaceti v. State*, 616 So. 2d 1148, 1149 (Fla. 4th DCA 1993) (*quoting Mansingh v. State*, 588 So. 2d 636 (Fla. 1st DCA 1991)). In this case, while the victim stated that he believed his original vehicle was worth more than the \$17,850.61 he paid for the replacement, he did not establish the fair market value of the vehicle in order for the court to determine if the fair market value would inadequately compensate him. The State offered no testimony that the car in this case was new, had recently been repaired, or held sentimental

value. *See Conway v. State*, 115 So. 3d 1058, 1059 (Fla. 4th DCA 2013) (reversing and remanding because restitution was awarded based on replacement value with no evidence that the fair market value would not properly compensate the victim or serve the purpose of restitution); *Wolff*, 981 So. 2d at 653 (reversing and remanding the portion of restitution based on replacement value rather than fair market value because there was no evidence presented to show that the fair market value would inadequately compensate the victim).

We hold that the trial court abused its discretion when it awarded restitution derived from the replacement value rather than the fair market value of the vehicle, and accordingly, the Order of Restitution is **REVERSED** and this case is **REMANDED** for a new hearing for the trial court to determine the proper award of restitution based upon the fair market value of the vehicle at the time it was damaged.

ROSENBERG, ALVAREZ, HAFELE, JJ. concur.