Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-528

OCTOBER TERM, 2005

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Orleans Circuit
Brian Coderre	}	
	}	DOCKET NO. 679-10-03 OsCr

Trial Judge: Dennis R. Pearson

In the above-entitled cause, the Clerk will enter:

Defendant appeals from a restitution order of the Orleans District Court. He contends the court erred by: (1) imposing an amount of restitution in excess of the statutory limit for the offense to which he pled no contest; and (2) failing to make the requisite findings concerning defendant=s ability to pay the restitution ordered. We reverse.

In October 2003, defendant was charged with burglary in violation of 13 V.S.A. ' 1201 and petit larceny in violation of 13 V.S.A. ' 2502. The charges stemmed from a report by defendant=s father that his trailer had been burglarized. The affidavit filed in support of the informations by the investigating officer recounted father=s statement that he had returned home one morning to find the door to his trailer damaged and a plastic safe missing. Defendant=s father reported that the safe contained four Susan B. Anthony dollars worth $150, and a set of eight plates worth fifty dollars. The affidavit indicated further that defendant=s father had called again several days later to report that a five-gallon water tank full of about twenty-two dollars in change had also been taken from the trailer, and the change removed.

In June 2004, defendant entered into a plea agreement in which he agreed to plead no contest to three misdemeanor offenses: unlawful trespass, in violation of 13 V.S.A. ' 3705(c); unlawful mischief in violation of 13 V.S.A. ' 3701(c); and petit larceny, in violation of 13 V.S.A. ' 2502. The plea-agreement form signed by defendant stated, under the probation conditions section, Arestitution in amount to be determined.@ At the change-of-plea hearing, the trial court reviewed the elements of the three charges with defendant, explaining with respect to petit larceny that it involved the taking of property from another Ain an amount less than $500.@ The court further explained that defendant would be subject to certain probation conditions if he pled no contest, including A[r]estitution in an amount to be determined,@ and that defendant would be Aadmitting the facts as set forth in the affidavit@ of the investigating officer. Thereafter, after the court had again summarized the petit larceny charge as involving the taking of Amoney and plates valued at less than $500 from [defendant=s father],@ defendant pled no contest and was sentenced in accordance with the plea agreement.

Prior to the restitution hearing in October 2004, defendant filed a motion in limine to exclude any evidence relating to defendant=s potential liability for restitution in excess of the $500 limit in the petit larceny charge. The court deferred ruling on the motion until the hearing, when it denied the motion. Thereafter, defendant=s father testified, over objection, that the safe had, in fact, contained $5000 in cash, in addition to the plate and coin collections mentioned in the investigating officer=s affidavit. The officer also testified, explaining that defendant=s father had originally reported

the missing $5000 cash, but that the officer had inadvertently left that information out of his affidavit. The prosecutor showed the officer a document from the police computer system that, according to the officer, referenced the missing $5000, but the document was not admitted into evidence. At the conclusion of the hearing, the court entered a restitution judgment order finding that defendant=s father had suffered a material loss totaling $5268.10, consisting of the missing $5000 in cash, twenty dollars in change from the water jar, and $248.10 in damage to the trailer door to which the parties had stipulated. This appeal followed.

Defendant first contends the court erred by awarding an amount of restitution in excess of the $500 statutory limit in the petit larceny charge to which defendant pled no contest. The trial court concluded that the issue is controlled by our decision in State v. VanDusen, 166 Vt. 240 (1997). There, the defendant had originally been charged with felony possession of stolen property valued in excess of $4500, but the court granted the defendant=s motion to reduce the charge and, following a bench trial, the defendant was found guilty of misdemeanor possession of stolen property not exceeding $500 in value. The trial court, nevertheless, ordered the defendant to pay restitution of $4000. On appeal, we rejected the defendant=s claim that restitution was limited to the amount in the charge for which defendant was found guilty, citing two considerations. First, we found Ano suggestion in the [restitution] statute that the Legislature intended to limit damages based on the dollar amount in the charge against a defendant.@ Id. at 244. The purpose of the restitution statute is to compensate the victim for his or her Amaterial loss,@ 13 V.S.A. ' 7043(a), and such loss may exceed the value limit in the charge for which the defendant is convicted where the State Aestablishe[s] both the amount of the victim=s loss and causation between the defendant=s acts and the victim=s loss.@ VanDusen, 166 Vt. at 244. Second, we noted that matters at sentencing need be proven only by a preponderance of the evidence, so there is nothing inconsistent in the State=s failing to prove the higher amount at the criminal trial, but establishing it during sentencing. Id. at 245.

Defendant argues that VanDusen is critically distinguishable from this case. We agree. In VanDusen, as noted, the defendant was originally charged with felony possession of property valued at $4500 (uncut stainless steel pipe), and the evidence at trial established that the defendant had been in possession of such property. Id. at 242 (stating that the trial court found that defendant had possessed the pipe before it was cut and the value reduced). Here, unlike in VanDusen, defendant was not originally charged with possession or theft of property in excess of $500. Indeed, the charging affidavit and information stated specifically that the theft covered property well below the $500 limit. Furthermore, defendant pled no contest to the charge. He was not tried, and thus, there was no evidence adduced at trial to establish that, although in excess of the statutory limit, the $5000 restitution award nevertheless related directly to the conduct for which defendant was convicted.

Nothing in the plea negotiated by the State provided that the restitution award might exceed the statutory limit. Nothing in the court=s statements at the change-of-plea hearing gave defendant notice that the award might exceed the amounts set forth in the affidavit and information to which the court repeatedly referred. Finally, nothing in any statements by defendant, who did not testify, contained any sort of admission to a theft in excess of the statutory limit. We conclude, therefore, that the restitution order must be reversed, and the matter remanded for further proceedings to establish a restitution award in accordance with the crime to which defendant pled.

Defendant also contends the court failed to make the necessary finding that he had the ability to pay the restitution award. Although our holding on the first issue renders it unnecessary to address this additional claim, we shall consider it for the purpose of providing guidance to the trial court on remand. The restitution statute specifically provides that, in awarding restitution, Athe court shall make findings with respect to: . . . [t]he defendant=s current ability to pay restitution, based on financial information which the defendant has filed with the court.@ 13 V.S.A. ' 7043(c)(2). Here, there was no evidence presented at the restitution hearing concerning defendant=s financial circumstances or ability to pay, and the court made no oral findings on the subject. The record reveals, however, that defendant had filed with the court an application for appointment of counsel, indicating an annual income of $12,000 and monthly expenses of $853, leaving a monthly balance of $147. Furthermore, the restitution order form signed by the court contains a pre-printed finding that defendant Ahas the current ability or reasonably foreseeable ability@ to make restitution payments, and a provision ordering defendant to pay $100 per month.

It might be possible to infer from these circumstances that the statutory requirements were satisfied, although

there is nothing in the record directly indicating that the court was aware of the financial information when ordering restitution. Therefore, on remand, the court is directed to address the ability-to-pay issue at the hearing, and to make the necessary findings concerning defendant=s ability to pay the restitution. See State v. Sausville,151 Vt. 120, 121-22 (1989) (holding that trial court has duty to make findings concerning defendant=s ability to pay restitution award, which cannot be inferred from defendant=s plea agreement to pay restitution).

Reversed and remanded.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice