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LARCENY CASES: DETERMINING VALUE OF STOLEN PROPERTY

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INTRODUCTION

In prosecutions for theft, whether by trick, trespassory taking, false pretense, false promise, embezzlement, extortion or by acquiring lost property (PL 155.05), the LEVEL OF LARCENY charged is sometimes determined by the NATURE of the property taken (e.g., credit card, firearms, motor vehicle), the MANNER of taking (e.g., from the person, by force), but more often than not, it is the VALUE of the property that determines whether the defendant is charged with a MISDEMEANOR (e.g., Petit Larceny, PL 155.25) or a FELONY from Grand Larceny 4th Degree, a class E felony, through Grand Larceny 1st degree, a class B felony.

CRIMES OF THEFT

PL 155.25 states that a person is guilty of PETIT LARCENY when he STEALS property. A person steals property and commits larceny, according to PL 155.05(1), when with INTENT to DEPRIVE another of PROPERTY (or to appropriate it to him/herself or another person), he WRONGFULLY TAKES, OBTAINS OR WITHHOLDS such property from an OWNER thereof.

Larceny includes a wrongful TAKING, OBTAINING or WITHOLDING of another's property with the unlawful intent described above committed by either: trespassory taking, trick embezzlement, false pretenses (PL 155.05[2][a]), or (b) by acquiring lost property (with knowledge of its nature and failing to return it to the owner), (c) by issuing a BAD CHECK, (d) by FALSE PROMISE or (e) by extortion.

SOME DEFINITIONS

PROPERTY is broadly defined in PL 155.00(1) to include any MONEY, PERSONAL PROPERTY, COMPUTER DATA OR PROGRAM, THING IN ACTION, EVIDENCE OF A DEBT OR CONTRACT, OR ANY ARTICLE, SUBSTANCE OR THING OF VALUE, INCLUDING ANY GAS, STEAM, WATER OR ELECTRICITY which is provided for a charge or compensation.

2. To OBTAIN property includes the bringing about of a TRANSFER (or purported transfer) of PROPERTY OR A LEGAL INTEREST THEREIN, whether to the OBTAINER or another person.

3. To DEPRIVE another of property means (a) to WITHOLD it (or cause it to be withheld from him/her) PERMANANENTLY or for so EXTENDED A PERIOD or under such circumstances that the MAJOR PORTION OF ITS ECONOMIC VALUE/BENEFIT IS LOST TO HIM/HER, or (b) to DISPOSE of the property in such a manner or under such circumstances as to make it UNLIKELY THAT AN OWNER WILL RECOVER SUCH PROPERTY.

4. To APPROPRIATE property of another to oneself or a third person means (a) to EXERCISE CONTROL OVER IT (or to help a third person do so) PERMANANENTLY or for so extended a period or under such circumstances as to ACQUIRE THE MAJOR PORTION OF ITS ECONIMOIC VALUE/BENEFIT or (b) to DISPOSE of the property for the benefit of oneself or a third party.

5. An OWNER of property (that has been taken, obtained, or withheld by another) is any person who has a SUPERIOR RIGHT TO POSSESSION to the property. (e.g., A person who has legally borrowed a friend's car which is stolen by another has a superior right to possession of the vehicle to that of the thief).

A FEW CASES:

People v Ramos, 162 AD3d 453 (1st Dep't 2018): Evidence that the defendant took the victim's purse and ran off with it constituted sufficient evidence of INTENT to deprive the victim permanently of her property. (In contrast, a prankster who takes and temporarily hides the victim's purse with the intent to reveal its location sooner than later cannot be said to have acted with larcenous intent).

In People v Terranova, 14 AD3d 1086 (2d Dep't 2017), the court held that evidence of intent to deprive the vehicle owner permanently of her car was absent when the defendant, who was injured and bleeding, grabbed the handle and entreated her to drive him to the hospital.

People v Marshall, 293 AD2d 629 (2d Dep't 2002): The evidence was sufficient to establish the defendant's guilt of larceny where an accountant, working in a client's office, was deemed to have a right to possession of the client's office equipment superior to that of the thief and therefore, qualified as an owner thereof.

FALSE PRETENSE

People v Hart, 100 NY2d 550 (2003): To support a conviction for larceny by FALSE PRETENSE, the evidence must establish that the defendant made a FALSE, MATERIAL STATEMENT ABOUT A PAST OR EXISTING FACT in reliance upon which the owner gives over his over his/her property.

In People v Abbott, 107 AD3d 152 (3d Dep't 2013), the defendant's grand larceny conviction was upheld upon evidence that the defendant swindled an elderly woman out of $1400.00 by falsely claiming that her car was leaking fluid (after he had spilled coffee underneath it) which he would repair. An actual repair person subsequently informed her that she had been hoodwinked. (See also People v Overton, 369 AD2d 571 [1st Dep't 2003]).

FALSE PROMISE

In the context of larceny by FALSE PROMISE, the People must meet a HIGH BURDEN of establishing guilty intent which is entirely inconsistent with innocent intent or belief, and which excludes to a moral certainty every hypothesis except that the defendant had no intention of ever making good on the promise (e.g., "I'll replace your roof if you pay me $5000.00 up front and five grand on completion"), and non-performance alone is insufficient to establish guilt. (See PL 155.05[2][d], People v Ryan, 41 NY2d 634 [1977]).

In People v Baffi, 119 AD3d 952 (2d Dep't 2014), the defendant's conviction of Larceny by False Promise was reversed because the defendant's failure to bring the victims' children to the U.S as promised, (for

$15,000.00), standing alone, was insufficient to establish his lack of intent to carry out the promise when he accepted their payment.

But in People v Rosado, 28 AD3d 215 (1st Dep't 2006), evidence that the defendant made certain promises to investors (when he was aware of certain facts that made performance of such promises impossible) was enough to support the defendant's conviction.

SHOPLIFTNG

In such cases, some advocates focus only on the element of ASPORTATION (i.e., movement of the item indicating an intent to leave the premises with it), thinking that the thief has to "get away with the goods" to be guilty, but the correct approach is to look at conduct that is inconsistent with the merchant's ownership interest and which manifests an intent to steal it such as concealment under clothing (or in a bag), (People v Olivo 52 NY2d 309 [1981]), furtive movements (e.g., looking both ways in the aisle), (People v Spatzier, 52 NY2d 309 [1981]), removal of the price tag and/or sensor device from merchandise, putting on the new item and walking past cashiers. (People v Gasparik, 102 Misc 2d [Sup Ct App Term 1st Dep't 1980]).

The NY CJI states in pertinent part that "a person wrongfully takes …property from an owner without …consent when (he/she) EXRERCISES DOMINION AND CONTROL over that property for a period of time, HOWEVER TMPORARY, in a manner wholly inconsistent with the owner's rights."

The concept of dominion and control requires that the property be INTENTIONALLY MOVED, AT LEAST SLIGHTLY, by the taker. So, the owner need not actually be deprived of the property permanently. Rather, the crime is complete when the defendant "HAS THE INTENT TO DEPRIVE OR APPROPRIATE THE PROPERTY PERMANENTLY, and …WRONGFULLY TAKES THE PROPERTY FOR ANY PERIOD OF TIME, HOWEVER TEMPORARY." (nycourts.gov/MODEL JURY INSTRUCTIONS).

But see People v Johnson, 167 AD3d 1512 (4th Dep't 2018): where the trial court was deemed to have erred in accepting the defendant's guilty plea to Grand Larceny 4th degree (on an Alford basis) where the proof was lacking that the defendant acted with the intent to commit the crime. (The defendant and others filled a shopping cart with $1100.00 worth of groceries but headed out the exit empty-handed.

In contrast, see People v Alamo, 34 NY2d 453 (1971) where evidence that the defendant entered a vehicle, turned on the ignition and started to move it was sufficient to establish the act of theft.

PRACTICE POINTER

In such cases, if the evidence of guilty intent is strong but the defendant got caught in act before getting out the door), trial counsel might be well advised to request an instruction on the LESSER INCLUDED OFFENSE of ATTEMPTED LARCENY of whatever degree has been charged. (See PL 110.00, CJI: Attempt to Commit a Crime).

HIGHER LEVELS OF LARCENY:

Depending on the VALUE of the property unlawfully taken, the defendant may be charged with:

GRAND LARCENY 4TH DEGREE (PL 155.30 [1]): value EXCEEDS $1000.00.

GRAND LACRCENY 3RD DEGREE (PL 155.35 [1]): value EXCEEDS $3000.00.

GRAND LARCENY 2ND DEGREE (PL 155.40 [1]): value EXCEEDS $50,000.

GRAND LARCENY 1ST DEGREE (PL 155.42): value EXCEEDS ONE MILLION DOLLARS.

DETERMINING VALUE

The value of property, according to PL 155.20 (1) means the MARKET VALUE of the property AT THE TIME AND PLACE OF THE CRIME, or if that value cannot be satisfactorily ascertained (for example, because there is no identifiable secondary market for a certain item of property), then the measure is the COST OF REPLACEMENT WITHIN A REASONABLE TIME AFTER THE CRIME.

If the value of the property CANNOT be satisfactorily ascertained, its value SHALL BE DEEMED TO BE AN AMOUNT LESS THAN $250.00. (PL 155.20 [4]).

See, PL 155.20 [2] [a-c], and [3] for valuation of: certain written instruments including checks, promissory notes, tickets, other instruments creating or discharging a legal right or obligation, gas, steam, water, or electricity provided for a charge or compensation.

While market value and replacement cost may appear to be straightforward, it is not entirely uncommon for prosecutors to present LEGALLY INSUFFICIENT EVIDENCE of value (in the grand jury and/or at trial) either because they apply an INCORRECT MEASURE OF VALUE or FAIL TO ESTABLISH A PROPER FACTUAL BASIS (i.e., foundation) for ESTIMATES OF VALUE (whether by a lay witness or an expert). For example, there may be little/no information as to the purchase price, age and current condition of the property alleged to have been stolen.

SOME CASES

In People v Lopez, 79 NY2d 402 (1992), the Court of Appeals held that a lay witness' sworn statement of value of (and damage to) his 1985 Pontiac vehicle which had been recovered with a broken window vent, luggage rack, trunk lock and steering column was INSUFFICIENT to sustain the value element of the charges of Grand Larceny (GL) 4th degree and Criminal Possession of Stolen Property (CPSP) 4th degree because there was NO FACTUAL BASIS provided for the valuation.

The form affidavit, (introduced to the grand jury per CPL 190.30 [3]) stated the facts of ownership, lack of permission, and that the damage to the vehicle exceeded $250.00. The alleged value of the car was also expressed in CONCLUSORY terms.

The trial court REDUCED the felony counts to misdemeanors (PL 155.25 and 165.40) and the Appellate Division and Court of Appeals AFFIRMED.

Noting that all four departments (including the Fourth in People v Stein, 172 AD2d 1060 [4th Dep't 1991]) require evidence of a BASIS OF KNOWLEDGE for a statement of value to be sufficient, the Court held that while CPL 190.30 provides a victim-friendly way of establishing value (by sworn affidavit in lieu of in-person testimony), it does not permit conclusory statements unsupported by facts to meet the test of legal sufficiency in the Grand Jury.

As the Court expressed it, “the People must ensure that any owner-affidavit contains a BASIS OF KNOWLEDGE for the witness’ statement of value so that the grand jury can REASONABLY INFER (rather than speculate that the property (or any damage to it) has the requisite value to meet the statutory threshold.” (Citing, inter alia, People v Bernard, 123 AD2d 324 [2d Dep’t 1986]).

LARCENY AND LANDSCAPING

In People v Markellos, 2020 NY Slip Op 51236 (Sup Ct Nassau County, 10/21/20), the court dismissed several counts of GL 3rd and 4th degrees (pertaining to landscaping trailers, tools and equipment alleged to have been stolen from different landscapers over a one-month period in the summer of 2019) because the People improperly relied on REPLACEMENT COST without first establishing that MARKET VALUE could not be SATISFACTORILY ASCERTAINED as required by PL 155.20, and the estimates of value, in most instances, were more SPECULATIVE than founded in facts.

Victim #1, a landscaper with nearly 30-years of experience, testified that he had bought his trailer (which was stolen in early August 2019) in 2003 for about $10.000.00. Also missing was a rider-lawnmower which had bought for about $5,000.00 on some unspecified date. Other undescribed tools had been taken. He said there was “no price” on the used trailer and equipment.

This victim did NOT describe the most-recent condition of the property, and when asked about the cost of everything he said “$10,000.00, at least.”

Victim #2, who had 12-years of experience, discovered that his trailer (that he’d bought in 2001 for an unstated price), lawn mower and related tools were all missing. He estimated the replacement cost of the trailer to be about $6000.00, $5000.00 for the lawn mower and $2000.00 for the tools. He did not describe the condition of any of these items.

Victim #3, (who had 7 years of landscaping experience), testified that he was missing: two leaf blowers (which he had since replaced at $1100.00 total), two chain saws (estimated $400.00 each), three weed whackers (estimated $450.00 apiece) and three hedge trimmers ($400.00 each). He did not describe the condition of the stolen items but said that he bought new tools every year (without specifying whether it was replacement or additional equipment).

Victim #4 (a landscaper for 23 years) noticed that seven pieces of equipment were missing from his truck including two back-mounted leaf blowers ($625.00 each), a press-gun ($1900.00) and a copper tube cutter ($189.00), some of which he had already replaced. With respect to other items, he said that he called someone to determine replacement cost and was told that a cordless drill would cost $140.00, a right-angle drill would be $200.00 and a Sawzall would cost $120.00. He did not say when he had purchased the items that were stolen, nor did he describe their condition at the time of the theft.

Victim # 5 (11 years of landscaping experience) described several items (three weed whackers, one chainsaw, two gas blowers, one power trimmer and a gas can) which he said would cost $2700.00 to replace in total. He testified that he “knows the prices from working in landscaping for so many years,” but he did not describe the condition of the items when they were stolen, nor did he state when he had purchased them or for how much.

Victim #6 (an 18-year landscaper) testified that the replacement cost of his missing equipment would be: $750.00 (leaf blower), $350.00 (weed whacker), $700.00 (for two trimmers), and $450.00 (chainsaw

replacement). He, too, was not asked about the condition of these items or when he had purchased them.

In dismissing the felony larceny counts, the court held that the People failed to establish that the MARKET VALUE of the stolen items exceeded the statutory minimum thresholds for GL 3rd or 4th degree, or that REPLACEMENT value was the proper measure (without first demonstrating that there was no market for used landscaping equipment).

While the People, in the court's view, correctly instructed the grand jurors on PL 155.20 (1), they improperly relied on replacement value without first establishing that market value could not be satisfactorily ascertained. (Citing, inter alia, People v Harold, 22 NY2d 442 [1986]: Market value is measured by what the thief would have had to pay had he bought instead of stolen the property; and People v Balyusik, 192 AD2d 1073 [4th Dep't 1993]: In determining value, the CONDITION of the item MUST be considered).

The court rejected the People's argument that the proper measure of value was a trial issue, stating that even the in the Grand Jury, the People must still put forth COMPETENT EVIDENCE which, if accepted as true, would establish every element of the offenses charged. (PL 190.65 [1], People v Goldstein, 73 AD3d 941 [2d Dep't 2010]). As the court noted, where the correct type of evidence is missing, no evidentiary standard will excuse its absence. (Citing People v Lopez, supra and People v DeLeon, 34 NY3d 965 [2019]).

Hence, in the court's view, conclusory evidence of replacement value absent a showing that there was no market for the items (the condition of which was not described) was INSUFFICIENT to establish the value of the stolen property.

Unlike People v Vandemortel, 122 AD3d 1333 (4th Dep't 2014), for example, where the purchase price of the vehicle was well above the statutory threshold and there was evidence of the vehicle's condition and regular maintenance; and, People v White, 167 AD2d 256 (1st Dep't 1990) which included testimony about the vehicle's model, age, purchase price, condition, warranty status and operability, here in MARKELLOS, there was little if any factual basis from which the jury would draw a reasonable inference of value. (Citing People v James, 67 NY2d 62 [1986]).

Accordingly, the felony counts were dismissed (and not reduced because the defendant had already been indicted on alternative misdemeanor counts).

By contrast, in People v Beauchamp, 148 AD2d 921 (4th Dep't 1989), the Fourth Department upheld the defendant's GL 3rd conviction (involving stolen tools) noting that while the ORIGINAL COST of an item constitutes relevant (but hardly conclusive) evidence of market value (at the time and place of the crime), where, as here, the purchase price is well above the statutory threshold, the items are relatively new , in good condition and without evidence of rapid depreciation, such evidence can be sufficient to establish value, (here, in excess of the $250.00 statutory minimum).

REPLACEMENT VALUE

In People v Vientos, 79 NY2d 771 (1991), the Court of Appeals rejected the defendant's argument that the People's proof as to the value of stolen copiers was insufficient as a matter of law where an expert who claimed to be familiar with the retail market for Commodore copy machines testified that the company did not sell them used nor authorize its dealers to do so and was aware of no secondary market for them. Hence, it was appropriate under PL 155.20 (1) to rely on RELACEMENT VALUE.

The Court also said that there was no need to consider whether there was a black market for such equipment since that only applies to stolen contraband. (Citing People v Irizarri, 5 NY2d 142 [1959]).

Moreover, the expert's acknowledgment that an individual owner could sell his/her used copier to a willing buyer does NOT establish the existence of a market for such equipment which contemplates sales that occur with some REGULARITY and UNIFORMITY.

Consequently, in the Court's view, replacement value may be used when market value cannot be ascertained satisfactorily and the expert testimony, if credited, permitted the People to rely on such value as the proper measure.

The Court deemed the defendant's argument with respect to the alleged failure of the expert to consider depreciation was NOT PRESERVED.

AN APPRECIATION FOR DEPRECIATION

In People v Bayusik, 192 AD2d 1073 (4th Dep't 1993), the Fourth Department REVERSED the defendant's conviction for GL 3d and 4th degrees stemming from his theft of two old (and deteriorated) gravestones from a cemetery in Rochester N.Y. The court found the People's evidence of VALUE to be insufficient to sustain the felony charges but REDUCED them to misdemeanors.

At a bench trial, the People's expert described the first marker as a slab of marble dating back to 1852 and the second was a Victorian era white marble cross with ivy-leaf carvings and an ornate base. Both stones were lying flat on the ground and the cross was broken into two pieces.

The expert testified that there was no market for used gravestones and estimated the replacement cost for the first one at $600.00 to $700.00 and the second one at $5,000.00. The trial court did not consider the cross' broken condition to have affected its replacement value.

The majority of the Fourth Department disagreed and said that the condition of the item must be considered in assessing its value. (Citing People v Harold, supra). And, while replacement cost was the proper standard (absent any market for old gravestones), the item's value must be adjusted to consider its ACTUAL CONDITION including any DAMAGE to it. (Citing People v Corbett, 129 AD2d 433 [1st Dep't 1987]).

Hence, since the People's proof of replacement cost did not factor in its damaged condition, it did not provide competent proof of value. And absent such proof, the value of the cross had to be valued at below $250.00. (CPL 155.20 [4]).

DOUBLE DISSENT

The dissenting justices (Hon. Elizabeth W. Pine and Hon. John H. Doerr) argued that the People's proof of value was legally sufficient to support the felony charges because depreciation does NOT affect the impact of the wrong upon the victim who can only turn to the current retail market to make good the loss which was $5600.00. (Citing People v Vientos, supra and People v Corbett, supra).

In their view, a thief should not be allowed to rely on the poor condition of a stolen item to mitigate his/her culpability for stealing it. If there is no market for an item, the thief must take it as he/she finds it with all the attendant risks, including the ultimate cost of replacement.

CARS AND GUITARS

Since property's deprecation and condition at the time of its theft are relevant (indeed necessary) factors to consider in determining value, it is worth noting that a brand-new car is deemed to lose 9% to 11% of its value as soon as it is driven off the lot. By this measure, a vehicle purchased for $20,000 will have lost about 40% of its value and be worth about $12,000.00 if sold three years later. This can be problematic for the buyer who financed the purchase and still owes much more than the vehicle's current value. (See Car Depreciation: How Much is Your Car Worth? Ramseysolutions.com).

Conversely, a collector's item such as Willie Nelson's beat-up, Martin N-20, acoustic, nylon-string guitar estimated to be worth somewhere between $800,000.00 and $900,000.00, (harmonycentral.com) would likely result in a much higher charge, if stolen, (e.g., Grand Larceny 2d degree) and cost the thief much more in restitution today than in 1969 when Nelson reportedly bought it for $750.00. (Misdemeanor value in New York State).

A FEW MORE CASES

In People v Slack, 137 AD3d 1568 (4th Dep't 2016), the Fourth Department modified the lower court's judgment convicting him of GL 3d degree by reducing it to Petit Larceny in the INTEREST OF JUSTICE (CPL 470.15 [6][a]) because the victim's testimony regarding the value of the stolen jewelry lacked a SUFFICIENT FACTUAL BASIS to support it. (Citing, People Lopez, supra and People v Loomis, 56 AD3d 1046 [3d Dep't 2008]).

Here, the only evidence of value was the victim's testimony with respect to the purchase price of some but not all the property taken and hearsay from a purported expert who appraised the property based only on the victim's description. Consequently, it could not be said that that the jury had a REASONABLE BASIS for inferring (rather than speculating) that the value of the property exceeded the statutory threshold. (Citing People v Sheehy, 274 AD2d 844 [3d Dep't 2000]).

In light of the court's decision to reduce the counts and remit for resentencing, the court deemed the defendant's claim of error in the lower court's ordering a particular restitution amount without a hearing to be MOOT. However, since the record below did not sufficiently support the amount of restitution ordered, the court directed that a hearing be conducted this time around should the court deem restitution to be appropriate.

Similarly, in People v Rivera, 2020 NY Slip Op 01192 (2d Dep't 2020), the Second Department held that the jury could not reasonably infer from the People's proof of value that it exceeded the statutory threshold of $3000.00 for GL 3d degree.

The victim testified that the two stolen guns (a .40 caliber Smith and Wesson bought four years before the burglary and a .380 Ruger purchased two years beforehand) cost $800.00 and $600.00, respectively. They were reportedly cleaned regularly and were in operable condition. A ballistics expert estimated their retail value at between $500.00 and $1000.00 apiece.

With respect to other items that were allegedly stolen, the victim provided a purchase price for some of them but did not give a date of purchase or describe their condition at the time of the theft.

The court said that while a victim may be competent to testify to purchase price (citing People v Stein, supra), such evidence, without more will not satisfy the People's burden with respect to value. (People v Jackson, 194 AD2d 691 [2d Dep't 1993]). While the value attributed to the handguns appeared to be on good footing, the proof regarding the other items was not. Hence, the court REDUCED the GL3d to GL 4th degree.

Also, in People v Box, 2020 NY Slip Op 01813 (4th Dep't 3/13/20), the Fourth Department, in this murder/assault/arson/reckless endangerment/weapon possession/evidence tampering and GL 4th degree and CPSP 4th degree case (stolen car), REDUCED the felony theft and stolen property convictions because there was an INSUFFICIENT FACTUAL BASIS to support the element of VALUE. In the court's assessment, the detective's statement that the vehicle was "definitely worth over probably $10,000.00" did not suffice because it was conclusory. (Citing, inter alia, People v Slack, supra).

But in People v Grant, 2020 NY Slip Op 07772 (4th Dep't 12/23/20), the Fourth Department deemed the defendant's argument regarding insufficient proof of value (of stolen gold and silver coins) to be UNPRESERVED and without merit in any event. (Hence, counsel could not be considered ineffective for not raising an issue that had no realistic chance of success. (Citing People v Caban, 5 NY3d 143 [2005]).

The court was satisfied that the evidence of the coins' value (in excess of $1,000.00) was properly established by testimony from a LAY WITNESS who had knowledge of the family (from whom the coins were stolen) and of the coins and their value such that it was more than just a rough estimate. (Citing People v Loomis, supra)

SALES TAX NOT INCLUDED

In People v Medjdoubi, 173 Misc2d 259 (Sup Ct NY County 1997), the defendant was charged with and convicted in absentia of GL 4th degree, CPSP 4th degree and Forgery 2d degree for using a stolen credit to "purchase" a leather jacket and two shirts from Saks 5th Ave. The total sticker price was an even $1000.00 (a class A misdemeanor) but with the 8.25% sales tax, the amount was $1,082.50. (Class E felony).

Upon review, however, the court reduced the felony theft and stolen property counts to misdemeanors because sales tax should not have been factored into the value of the property. Relying, inter alia, on People v Barbato, 106 Misc2d 542 (Sup Ct Suffolk County 1980), and rejecting People v Bazo, 139 Misc2d 1003 [Sup Ct Kings County 1988), the court reasoned that while sales tax may increase the cost to the buyer it does NOT increase the stolen property's VALUE which represents the freely negotiated pre-tax

selling price in the market. Sales tax, by contrast, represents a separate and distinct charge which the retail seller is required to collect for the benefit of the state and the relevant locality.

As the court saw it, absent legislative intent to the contrary, there is no basis for holding that a theft by fraudulent purchase from a retail store which charges sales tax constitutes a greater level of theft than stealing the same property by shoplifting it. In other words, the manner of theft should not alter the property's value and elevate the crime in a way that the Penal law did not intend. Nor is there any basis, in the court's view, for assessing a different market value to stolen property recently purchased by a consumer who paid sales tax imposed upon the transaction.

Long story short, in the court's view, imposing greater criminal liability based on sales tax has no rational relationship to the gravity of the larcenous act. And, while the amount of sales tax is based on the value of the property, the court concluded that it should NOT be used to ratchet up the level of the crime (here, from a misdemeanor to a felony) and its punishment. Consequently, the VALUE of the stolen property, in this context, is its RETAIL MARKET VALUE (in the wholesale context, that value would control), as reflected in the purchase price EXCLUSIVE OF ANY SALES TAX.

FINAL THOUGHT

Since proof of value is an essential element of any felony level larceny/possession of stolen property prosecution, counsel should be sure to scrutinize the evidence presented to the grand jury to make sure that any conclusions offered with respect thereto have a sound basis in fact rather than speculation. This is especially true where there are numerous counts charged based on a variety of items alleged to have been stolen or unlawfully possessed.

The condition of the property should be described, and testimony should be offered with respect to the date of purchase and the amount paid. If the item was a gift, the People should call a witness who is sufficiently familiar with the property to give a reasonable, fact-based assessment of its value based on other such items on the market.

Counsel should also make sure that the People have not relied on replacement value without first establishing that market value could not be satisfactorily ascertained. (PL 155.20 [1]). If the People have not provided competent evidence of value, then counsel should not hesitate to make a motion to dismiss the felony counts or, in the alternative, to have them reduced to misdemeanors. This can be especially valuable where the defendant is a predicate felon who would face mandatory state prison in the event of a new felony conviction.

Alternatively, counsel may, as a matter of strategy, forego a motion to dismiss/reduce on the grand jury minutes and move at the close of the People's case (long after jeopardy has attached) to dismiss under CPL 290.10 (1) but to succeed outright, it must be shown that the evidence is not legally sufficient to establish the offense charged or any lesser included offense.

Counsel should be vigilant at trial where the People must establish the defendant's guilt beyond a reasonable doubt. Where the proof of value is open to interpretation, counsel might consider calling an expert witness to counter the People's evidence with an eye toward providing a reasonable alternative conclusion that the property's value is below the statutory threshold for a felony level offense.