

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2473

September Term, 2015

ERIC THOMAS ANDERSON

v.

STATE OF MARYLAND

Meredith,
Beachley,
Raker, Irma S.
(Senior Judge, specially assigned),

JJ.

Opinion by Raker, J.

Filed: April 6, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

Eric Thomas Anderson, appellant, was convicted in the Circuit Court for Montgomery County, of theft and exploitation of an adult over 68 years of age. He presents one question for our review in this appeal:

“Did the trial court err by imposing restitution under the theft statute, without regard to Appellant’s ability to pay restitution?”

Based upon the reported opinions of this Court holding that under the theft statute, ability to pay restitution is not a mandatory consideration of the trial court in considering restitution, we shall affirm.

I.

Following a guilty verdict returned by a Montgomery County jury, for theft and exploitation of an adult over 68 years of age, the trial court held a sentencing hearing. Defense counsel asked the court to impose a suspended sentence, to permit appellant to receive mental health evaluation and treatment, and to continue his employment to enable him to repay the victim. As to restitution, defense counsel argued that restitution is designed to be rehabilitative for the offender and not necessarily to make the victim whole. The State argued, and the court agreed, that under the theft statute, the trial court did not have discretion as to whether to order restitution and that restitution was mandatory, irrespective of an offender’s ability to pay. The trial court, in ordering restitution in the amount of \$24,582, explained as follows:

“And during the suspended period, the defendant will be placed on supervised probation and shall make restitution under the statute of \$24,583. My prediction is that the defendant never pays him a dime and my prediction is that the Court of Appeals will not allow trial judges to lock people up for not paying back restitution. *Since the statute requires it I will do it.*”

Appellant noted this timely appeal.

II.

Before this Court, appellant argues that the trial court erred in ruling that restitution is mandatory under the theft statute, irrespective of his or her ability to pay the restitution.

The State presents two arguments before this Court: (1) that the issue of appellant’s ability to pay restitution was not preserved for our review, and (2) that even if preserved, his claim fails because restitution is a mandatory component of his sentence for theft and ability to pay is not a court consideration.

III.

Whether our standard of review is an abuse of discretion or is an error of law is a question inextricably inter-related with the question presented for our review. Appellant maintains the standard is an abuse of discretion; the State maintains the standard is error of law. Because as we shall explain, restitution under the theft statute is mandatory and not discretionary, the standard of review is clear error and not abuse of discretion.

IV.

We address the State’s argument that the issue of appellant’s ability to pay is not preserved for our review. After reviewing the colloquy between the judge and defense counsel, we hold that the issue of whether appellant could pay the restitution was raised at the sentencing hearing, and hence, was preserved for appellate review. Counsel talked about whether a restitution order was “doable” and discussed his earning capacity.

V.

Appellant was convicted under Md. Code Ann., Crim. Law (“C.L.”) §§ 7-103(f) & 7-104, and § 8-801(b) (2002, 2012 Repl. Vol., 2016 Supp.).¹ The penalty sections for those crimes provide, in pertinent part, as follows:

“(g) Penalty. — (1) A person convicted of theft of property or services with a value of:

(ii) at least \$10,000 but less than \$100,000 is guilty of a felony and:

1. is subject to imprisonment not exceeding 15 years or a fine not exceeding \$15,000 or both; and

2. *shall restore the property taken to the owner or pay the owner the value of the property or services;*”

C.L. § 7-104(g)(1)(ii) (Emphasis added).

The issue presented to this Court in this appeal is identical to the issue presented in *Carlini v. State*, 215 Md. App. 415, 455 (2013). We held in that case that restitution under

¹ All subsequent statutory references herein shall be to the Criminal Law Article.

the theft statute “was required as a matter of law,” irrespective of the defendant’s ability to pay. *Id.* The same issue was resolved in *Wallace v. State*, 63 Md. App. 399, 411 (1985), *cert. denied*, 304 Md. 301(1985). There, holding that the issue of restitution is mandatory, and a defendant’s ability to pay is not a consideration, we explained as follows:

“With regard to appellant's claim that the court cannot order a defendant to make restitution without inquiring into his ability to do so, we need only note that under the penalty portion of the theft statute the court must sentence the offender to ‘restore the property taken . . . or pay [the owner] the value of the property. . . .’ Art. 27, § 342(f)(1). The statute does not require a preliminary financial inquiry. The general issue is currently pending before the Court of Appeals. *Brecker v. State*, No. 70, Sept. Term 1984. In any event, there is no way to determine a defendant's ability to make restitution when, as here, it will not be initiated until the end of a lengthy prison sentence.”

*Id.*²

The answer in this case is clear: the trial court did not err in declining to take into consideration appellant’s ability to pay restitution when the court imposed \$24,582 in restitution.

**JUDGMENT OF THE CIRCUIT
COURT FOR MONTGOMERY
COUNTY AFFIRMED. COSTS TO
BE PAID BY APPELLANT.**

² On January 23, 2017, the Court of Appeals denied certiorari in *Ashley Nicolle Gordon v. State of Maryland*, Petition Docket Number 475, September Term, 2016, presenting the ability to pay issue.