

Review of Recent Juvenile Cases (2007)

by
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

The value of stolen property may be shown by the fair market value, or, if that cannot be ascertained, by showing the cost of replacing the property.[In the Matter of D.L.](07-3-18)

On July 31, 2007, the Tyler Court of Appeals held that if the fair market value cannot be ascertained, the replacement cost of stolen property is the appropriate measure of it's value, not necessarily what the complainant actually paid to replace it.

¶ 07-3-18. **In the Matter of D.L.**, ___S.W.3d___, MEMORANDUM, No. 12-06-00431-CV, 2007 Tex.App.Lexis 6059, (Tex.App.— Tyler, 7/31/07).

Facts: Kenneth Carrell is a coach and teacher at John Tyler High School. He also supervises and manages the athletic department's information technology equipment including computers, servers, and camcorders. Part of the inventory he maintained in a locked storage room included two Sony mini-DVD camcorders. The camcorders were "top of the line" with special lenses of French manufacture, according to Carrell, as well as a number of input and output ports that were useful to him in his duties. The camcorders also had remote sensors that linked them to a tripod remote, which allowed them to be used together and synchronized to provide a wide angle as well as a tight angle view of the same sequence of events. One of Carrell's duties was to make recordings of the school's athletes to provide to college recruiters. Because of the flexible array of outputs available on the camcorders, Carrell used these devices to edit the final recordings to be sent out in support of the school's athletes.

Around the beginning of May 2006, Carrell noticed that the camcorders were missing from the locked storage room. A large number of students had been in an adjoining classroom immediately before for the screening of a movie. D.L. was one of the students present that day. Carrell engaged in some informal investigation in an attempt to recover the camcorders and eventually turned the matter over to the police affiliated with the school. D.L. was identified as a suspect, and juvenile proceedings were begun against him alleging that he stole the camcorders and that they were worth more than \$ 1,500. D.L. did not admit the allegations, and an adjudication hearing was held. The jury found the allegations to be true, and the trial court ordered that D.L. be committed to Texas Youth Commission. This appeal followed.

SUFFICIENCY OF THE EVIDENCE

D.L. contends that the evidence is factually insufficient to support the decision of the jury. Specifically, he contends that the evidence does not show that the value of the stolen camcorders was equal to or greater than \$ 1,500.

Held: Affirmed

Memorandum Opinion: The State may prove the value of stolen property by showing the fair market value of the property at the time and place of the offense, or, if that cannot be ascertained, by showing the cost of replacing the property within a reasonable time after the theft. *TEX. PENAL CODE ANN. § 31.08(a)(1), (2)* (Vernon 2006). D.L. argues that the State did not prove that the value of the stolen camcorders was more than \$ 1,500 because there was no testimony about the fair market value of the camcorders and the replacement cost was less than \$ 1,500.

From the evidence, the relevant data points regarding the value of these camcorders are as follows:

- 1) \$ 1,500 to 1,600 - original purchase price, four or five years prior to the theft
- 2) \$ 2,998 - replacement cost for new camcorders with the same features as those stolen
- 3) \$ 1,600 - replacement cost of the camcorders actually purchased including tax and accessories

Fair market value is "the dollar amount the property would sell for in cash, given a reasonable time for selling it." See *Simmons v. State*, 109 S.W.3d 469, 473 (Tex. Crim. App. 2003). There was no testimony about the fair market value of the stolen camcorders. The original purchase price can be an approximation of the fair market value if the item has been purchased recently. See *Nitcholas v. State*, 524 S.W.2d 689, 690-91 (Tex. Crim. App. 1975); *Anderson v. State*, 871 S.W.2d 900, 903 (Tex. App.-Houston [1st Dist.] 1994, no writ). However, as D.L. notes, these camcorders had not been purchased recently.

In cases where the fair market value cannot be ascertained,² section 31.08(a)(2) provides that the cost of replacing the property a reasonable time after the theft is the measure of value. There were two prices offered as a replacement cost. Carrell testified that exact replacements of the stolen camcorders cost \$ 1,499 each, for a total of \$ 2,998. Carrell also testified that he purchased inferior camcorders, without all of the features he needed, along with accessories to give the functionality he required, and that the total cost was \$ 1,600.

2 Other than Carrell's assertion that the camcorders were worth more than \$ 1,500 to him, the State did not establish the fair market value of the camcorders. D.L. does not argue that the fair market value can be ascertained.

As D.L. points out, there are arithmetic computations that can bring the second amount, \$ 1,600, under the \$ 1,500 threshold. Specifically, D.L. argues that accessories purchased with the camcorders, as well as the sales tax paid, should not be included. There is a basis for this argument. For example, the replacement value of a compact disc player does not include the cost of installation and "other intangibles necessary to compete replacement," *Drost v. State*, 47 S.W.3d 41, 46 (Tex. App.-El Paso 2001, pet. ref'd), and replacement value does not include the cost to replace other items that might have been stolen along with the item alleged to have been stolen. See *Ballinger v. State*, 481 S.W.2d 421, 422 (Tex. Crim. App. 1972).³

3 D.L. argues that sales tax cannot be included in the replacement cost, citing *Drost v. State*, *York v. State*, 721 S.W.2d 605, 607 (Tex. App.-Fort Worth 1986, pet. ref'd), and *Ballinger v. State*. Although in *Townsend v. State*, No. 06-05-00130-CR, 2006 Tex. App. LEXIS 8217, at *12 (Tex. App.-Texarkana 2006, pet. ref'd) (mem. op., not designated for publication), the Sixth Court of Appeals called the inclusion of tax "highly questionable," based on *Drost*, we are not convinced that sales tax must be excluded. None of these cases specifically hold that sales tax cannot be included in the replacement cost of a stolen item. *Ballinger* began with the unassailable proposition that the value of a stolen item could not include property not alleged to be stolen. *Ballinger*, 481 S.W.2d at 422. *York* and *Drost* expanded that to disallow the cost

of installation and "intangibles" when determining value. *York*, 721 S.W.2d at 607; *Drost*, 47 S.W.3d at 46. We are not persuaded that this line of cases establishes that sales tax is not part of the replacement cost. After all, it is part of what must be paid to purchase a replacement. Furthermore, unlike wholly different items, the cost associated with sales tax is fairly implied, we think, in the allegation of the theft of an item. *See also Robalin v. State*, 224 S.W.3d 470 (Tex. App.-Houston (1st Dist.) 2007, no pet.) (including sales tax in valuation of automobile).

We need not resolve this issue, however, because the jury was entitled to rely on Carrell's statement that direct, one for one, replacements of the two stolen camcorders would cost nearly \$3,000. The fact that Carrell elected to cobble together another replacement, the value of which was closer to the \$1,500 floor, is of no moment. The level of offense committed by a thief who takes a Rolex timepiece is not determined by the price of the replacement the victim purchases.

Conclusion: Even though he testified that he could not afford to purchase them, Carrell testified that the replacement cost of camcorders with the same functionality as those stolen was well in excess of \$1,500. Therefore, we hold that there was sufficient evidence that the replacement cost, the appropriate measure of the value of the stolen property, was more than \$1,500. Furthermore, the evidence supporting this conclusion is not so weak or so outweighed by contrary evidence that we conclude the verdict is clearly wrong or is a manifest injustice. We overrule D.L.'s sole issue.