RENDERED: MARCH 2, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000249-MR

AMBER FIEDLER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 05-CR-001102

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: VANMETER, JUDGE; EMBERTON AND KNOPF, SENIOR JUDGES.[1]

VANMETER, JUDGE: Amber Fiedler appeals from the Jefferson Circuit Court's order holding her jointly and severally liable to Micro-Med, Inc. for restitution in the amount of $10,146.44. Fiedler argues on appeal that the circuit court erred by including in its restitution order the costs of certain security measures undertaken by Micro-Med. For the

[1] Senior Judges Thomas D. Emberton and William L. Knopf sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110 (5) (b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

following reasons, we vacate the circuit court's restitution order and remand this matter for further proceedings.

Micro-Med was burglarized both on February 27, 2005, and on March 2, 2005. Fiedler's co-defendants were involved in both of the burglaries while Fiedler was involved in only the March 2 burglary. Based on her participation in this burglary, Fiedler entered a guilty plea to third-degree burglary and third-degree criminal mischief. After accepting Fiedler's guilty plea, the circuit court sentenced her to two years' imprisonment, diverted for five years. In addition, the court conducted a hearing to determine the amount of restitution Fiedler and her co-defendants owed.

Micro-Med's vice-president testified at the restitution hearing that computer equipment valued at $5,000 - $10,000 was stolen on February 27 and computer equipment valued at $834 was stolen on March 2. As the burglars on both occasions entered the business through a window, Micro-Med had the window repaired on March 2 and hired on-site security from then until it had iron bars installed on the window on March 8. Additionally, pursuant to a security consultant's advice that once the windows were made more secure, the next weakest entry point was through the doors, Micro-Med had steel doors and new door locks installed some five months after the second burglary. In its restitution order, the circuit court itemized Micro-Med's expenditures as follows:

Repair window	$106.00
Iron bars on window	$2,149.00
On-site police security (until bars installed, 6 days)	$1,200.00
Steel security doors	$4,640.00

Deadbolts and locks and handles	$1,217.44
Insurance deductible (2-27)	$1,000.00
Insurance deductible (3-2)	$834.00
Total	$11,146.44

The court concluded

> that the expenses incurred were a sole and direct result of the Defendants' actions; that these would not have been incurred but for the burglaries; that the company incurred direct out-of-pocket losses and; that the value of the business was substantially decreased, albeit for a short period of time.
>
> These Defendants decided to burglarize this company twice in a one week period. It is reasonable to find that their actions mandated the company install measures to prevent this in the future.

The court ordered that Fiedler be held jointly and severally liable for all of Micro-Med's expenditures, with the exception of the February 27 insurance deductible, for a total of $10,146.44. This appeal followed.

Fiedler argues on appeal that the circuit court erred by requiring her to pay for the iron bars on the window, on-site police security, steel security doors, and deadbolts, locks and handles (security measures) as they were not direct, out-of-pocket losses. We agree.

KRS 533.030(3) provides in relevant part as follows:

> When imposing a sentence of probation or conditional discharge in a case where a victim of a crime has suffered monetary damage as a result of the crime due to his property having been converted, stolen, or unlawfully obtained, or its value substantially decreased as a result of the crime, or where the victim suffered actual medical expenses, direct out-of-pocket losses, or loss of earning as a direct result of the crime, or where the victim incurred expenses in relocating for

> the purpose of the victim's safety or the safety of a member of the victim's household, . . . the court shall order the defendant to make restitution in addition to any other penalty provided for the commission of the offense.

As explained in *Commonwealth v. Bailey*, 721 S.W.2d 706, 707 (Ky. 1986), restitution is not an "additional punishment exacted by the criminal justice system. . . . It is merely a system designed to restore property or the value thereof to the victim." Here, even if we accept that Micro-Med undertook the security measures as a result of the two burglaries, those measures do not represent losses for which Micro-Med is entitled to restitution under the statute. Since Micro-Med did not already have the security measures in place on March 2, their installation did not represent actions needed to make Micro-Med whole. Ordering Fiedler to pay for the window repair and the March 2 insurance deductible will restore the value of Micro-Med's property as affected by Fiedler's conduct. Requiring her to pay for the additional security measures, on the other hand, would indeed be an additional punishment not permitted by KRS 533.030(3).

A different result is not compelled by the circuit court's finding that the value of Micro-Med's business was substantially decreased for a short period of time due to Fiedler's actions as the circuit court's calculations do not include any amount by which Micro-Med's business decreased in value. We do not express an opinion as to whether it would have been appropriate for the circuit court to have done so.

Finally, Fiedler argues that the circuit court erred by failing to take into consideration the fact that although the combination of the two burglaries prompted Micro-Med to undertake the security measures, she participated in only one of the

burglaries. While we believe that our holding above renders this argument moot, we also agree with the Commonwealth that the circuit court demonstrated that it considered this factor by exempting Fiedler from responsibility for paying the February 27 insurance deductible.

The Jefferson Circuit Court's order is vacated, and this matter is remanded for additional proceedings consistent with the views expressed herein.

ALL CONCUR.

BRIEF FOR APPELLANT:

Bruce A. Brightwell
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky