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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000500-MR

KELLY JEAN WINKLE

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 11-CR-00184

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: CLAYTON, MOORE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Kelly Jean Winkle pled guilty to two counts of complicity to commit burglary in the third degree¹ and one count of complicity to commit

criminal mischief in the first degree.² By judgment entered December 14, 2011,

¹ Kentucky Revised Statutes (KRS) 511.040, a Class D felony; KRS 502.020 (complicity). Count one of the indictment alleged a burglary occurred between December 19 and 22, 2010; count two alleged another burglary occurred on or about December 28, 2010.

² KRS 512.020, a Class D felony. Count three of the indictment alleged criminal mischief occurred between December 19 and 28, 2010, and caused damage in excess of \$1,000.00.

she was pronounced guilty and sentenced to serve three years concurrently on each offense, with all time being probated. The judgment further ordered Winkle to remain on probation “until restitution has been paid in full[.]” Winkle now challenges the trial court’s post-judgment entry of a restitution order in the amount of \$29,681.00 on March 6, 2012. She argues the Commonwealth did not file a verified petition requesting restitution; the trial court lacked jurisdiction under KRS 431.200; and, the amount of restitution ordered had no factual basis, exceeded the scope of the indictment, should have been determined by a jury, and, was calculated in a way that denied her due process. The Commonwealth maintains that by accepting its offer on a guilty plea, Winkle agreed her probation would be governed by KRS 533.030(3)—with which the trial court’s restitution order fully complied. Having fully reviewed the briefs, the record and the law, we affirm.

FACTS AND HISTORICAL BACKGROUND

In December 2010, Winkle helped two juveniles remove and transport items from the Hamilton House and surrounding acreage in Hardin County.³ Many of the stolen items were sold for scrap. Some items were recovered, many were not. The property owner, Tim Heady, was collecting material on site to restore the historic home and use it as a residence.

³ Reportedly the oldest home in the county, this two-story Civil War-era home is listed on the National Register of Historic Places. At the time of these crimes, the home was unoccupied.

Heady checked the property every week or so and had noticed items had disappeared prior to December 28, 2010, although he did not specify when he first noticed anything was missing. On December 28, 2010, he was en route to the home to meet Kentucky State Police (KSP) Trooper Chris Berry to report the missing items. As Heady and Berry arrived, Winkle was leaving the scene with a truckload of Heady's property. Winkle was arrested on the spot.

In return for Winkle's guilty plea, the Commonwealth offered to recommend:

[t]hree (3) years, on each count of Complicity to Commit Third-Degree Burglary and Three (3) years, on the charge of Complicity to Commit First-Degree Criminal Mischief, all to run concurrently, one with the other, for a total of Three (3) years, with the Commonwealth recommending probation. **Said probation is conditioned upon** forfeiture of any and all seized items and/or assets; random drug screens; complete thirty-two (32) hours per week of employment, community service, or a combination of both; **make full restitution, plus interest at the rate of 12% per annum, under KRS 533.030(3)** and fine as set by the Hardin Circuit Court Judge.

(Emphasis added). On November 2, 2011, Winkle accepted the Commonwealth's offer and pled guilty.

During the guilty plea colloquy, the trial court read to Winkle the Commonwealth's offer which included the condition that she "make full restitution." When asked, Winkle confirmed she understood payment of restitution was a condition of probation and agreed to that term. During the guilty plea hearing, it came to light that Winkle had driven the two juveniles to Heady's

property and they had removed the items. It was also revealed that while the Heady charge was pending, Winkle had received a new charge for scrapping other stolen items. As a result of the new charge, the trial court prohibited Winkle from scrapping anything until all cases were resolved. A written order on the guilty plea was entered the same day.

Sentencing occurred December 6, 2011. The prosecutor stated the victim had not submitted a final tally of the items taken—that amount would be resolved later. The trial court then explained to Winkle that she had an outstanding restitution obligation, for which the exact amount due was unknown, but, “it will be what you all agree to, or I will conduct a hearing later to determine what the appropriate amount is.” After imposing sentence in conformity with the Commonwealth’s recommendation, the trial court told Winkle she would pay restitution according to a schedule established by her probation officer and again stated the amount she would be ordered to pay, “will be an amount that you and the Commonwealth agree to, or that I may determine at a later court hearing.” On December 14, 2011, a modified version of AOC-445, Judgment and Sentence on Plea of Guilty, was entered. Spaces for the amount of restitution to be paid and the schedule for payment were blank.

On January 26, 2012, the Commonwealth filed a “Notice/Motion” simply asking the trial court to schedule a restitution hearing. No figures for the amount of restitution being requested were mentioned. The certificate of service indicated a copy was served on Winkle’s attorney, but at a hearing on February 7,

2012, counsel stated she had not received the notice. A restitution hearing was set for February 21, 2012.

At the appointed date and time, both sides appeared in court. The Commonwealth sought a second continuance due to having subpoenaed a witness for the wrong date. Over defense counsel's objection, the trial court delayed the matter for one week. Defense counsel further stated, when Winkle accepted the Commonwealth's offer and pled guilty, discovery⁴ had indicated restitution would fall between \$22,182.75 and \$24,883.75. However, restitution in excess of \$34,700.00 was now being requested. Winkle acknowledged owing restitution; that the amount owed would be substantial; and, stated a willingness to pay the high end of the range—\$24,883.75. However, she opposed paying an amount in excess of that figure. Importantly, Winkle did not request a jury be impaneled; did not allege the trial court lacked jurisdiction to award restitution; did not challenge the lack of a verified petition having been filed; and, did not specifically allege the restitution award could not exceed the scope of the indictment.

The restitution hearing finally occurred on February 28, 2012. Heady was the only witness called by either party. He testified he created a list⁵ of missing items from memory and the list continued to grow as he looked for more articles. The current figure requested was \$34,720.00. To determine values, he

⁴ None of the discovery is included in the record.

⁵ Three lists were introduced as exhibits during the hearing; however, none of them was placed in the record on appeal provided to us.

consulted eBay and Fastline.⁶ Initially, he listed missing nuts and bolts worth \$4,875.00, but by the time of the hearing, he valued them at \$5,400.00.

On cross-examination, Heady testified the home has no security system and items had been missing before Winkle was caught with the truckload of stolen property. Within one or two days of Winkle's arrest, and after taking the opportunity to look through other buildings on the property, Heady provided an itemized list of missing items to KSP totaling \$22,183.75. Items recovered from Winkle's truck were inventoried separately.

Initially, Heady had counted eight broken windows (valued at \$2,400.00), but later discovered a ninth window had been broken. The front door had also been damaged. At the time of the hearing, the front door had been secured, but not restored, and the windows had not been repaired although he had a quote for the work.

On redirect, Heady testified he and Trooper Cherry went to Freedom Metals, a metal recycler in Elizabethtown, to identify an antique safe door⁷ that had been stolen from the home. Only a portion of the door was recovered.

When questioned by the trial court, Heady clarified two furnaces were missing, and a \$200.00 gas furnace should be added to the final list. Items used to maintain the property, such as a bush hog, were also missing. When asked how he could be certain Winkle had taken all the missing items—especially since the

⁶ Fastline is an online source for used farm machinery.

⁷ According to the uniform citation, the safe door was valued at \$10,000.00.

home was unsecure and others had access to the site—Heady explained the thefts and damage had occurred within a short period of time, the recycler had said Winkle brought items to scrap two to three times a day, and the recycler recalled several of the missing items Heady described.

In closing, defense counsel argued Winkle had pled guilty and did not dispute owing restitution, but at the time she pled, the amount requested in restitution was less. More than a year later, and even during the hearing, the list of missing items was still growing even though the property remained unsecured and others could be removing items. In its closing, the Commonwealth argued there was no indication anyone but Winkle had scrapped items from the home, and the articles taken would be difficult and expensive to replace due to the historic value of the home and the need to restore it to the rigorous standards of the National Register of Historic Places.

While the trial court found Heady's testimony to be credible, it did not award the full amount requested. Instead of the \$34,720.00 requested, \$29,681.00 plus interest at twelve percent per annum was awarded. This amount included sixty percent of the stated value of some items, and the addition of other items that had been omitted through oversight. The trial court recognized that in light of the nature of this crime, the extent of the damage and the items taken might not have been known immediately. Because the door and windows had not yet been repaired or replaced, the trial court awarded the lesser amount of \$3,600.00 or

actual cost for the windows, and \$475.00 or actual cost for the door. A written order summarizing the ruling was entered March 7, 2012.

A timely notice of appeal was filed. This appeal followed.

ANALYSIS

The pivotal question is whether this award of restitution was governed by KRS 431.200, as argued by Winkle, or KRS 532.032 (and more specifically, KRS 533.030(3)), as argued by the Commonwealth. Both statutes govern restitution, but KRS 532.032 is “the generally applicable criminal restitution statute.” *Fields v. Commonwealth*, 123 S.W.3d 914, 916 (Ky. App. 2003). KRS 431.200 describes “an alternative procedure for a post-sentencing restitution order” and requires impaneling a jury to determine the amount owed. *Id.*

KRS 431.200 may have applied in this scenario, but for Winkle having pled guilty pursuant to an agreement in which the Commonwealth specifically conditioned its recommendation of three three-year probated sentences on Winkle making full restitution under KRS 533.030(3). At sentencing, the trial court twice told Winkle her as yet undetermined restitution obligation would be either the amount she and the Commonwealth agreed upon, or the court would hold a hearing. The trial court said nothing about a jury and Winkle neither objected, nor requested a jury be impaneled. Winkle also did not ask that restitution be determined before sentence was imposed. Nor did she seek to withdraw her plea agreement and go to trial.

Winkle was sentenced in conformity with the plea agreement. The judgment stated “Defendant shall not be released from probation supervision until **restitution** has been paid in full and all other aspects of probation have been successfully completed.” (Emphasis in original). Thus, the Commonwealth argues Winkle was properly held to her bargain and KRS 533.030(3) was the only applicable statute.

When the parties did not agree on the amount of restitution to be paid, on January 26, 2012, the Commonwealth filed a “Notice/Motion” moving the trial court to set a restitution hearing. Winkle filed no response and, thus, no objection to the notice or the process used. Winkle claims her objections to the amount of restitution imposed preserved her claims for our review. We disagree. Objecting to an amount of restitution gives no hint to the trial court that the defendant is challenging its exercise of jurisdiction or alleging a denial of due process. The trial court must be apprised of the action desired by the party. *West v. Commonwealth*, 780 S.W.2d 600, 602 (Ky. 1989). That did not happen here, and a new theory of error cannot be raised for the first time on appeal. *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011).

Nevertheless, Winkle asserts a lack of jurisdiction—which may be raised at any time, *Duncan v. O’Nan*, 451 S.W.2d 626, 631 (Ky. 1970)—and requests palpable error review under RCr⁸ 10.26. While we conduct the requested review, we discern no error.

⁸ Kentucky Rules of Criminal Procedure.

Citing *Rollins v. Commonwealth*, 294 S.W.3d 463 (Ky. App. 2009), Winkle claims the trial court acted without jurisdiction and violated her right to due process. Because a challenge to jurisdiction is typically a question of law, our review is *de novo*. *Karem v. Bryant*, 370 S.W.3d 867, 869 (Ky. 2012).

Rollins is not dispositive of this case. Rollins had completed serving his sentence nearly seven years before the Commonwealth asked that restitution be set; thus, Rollins was outside the trial court's jurisdiction. *Silverburg v. Commonwealth*, 587 S.W.2d 241, 244 (Ky. 1979) (trial court loses jurisdiction ten days after entry of final judgment). In contrast, Winkle was granted probation.

Furthermore, *Rollins* specifically left the door open for a different result for a defendant placed on probation because "KRS 533.020 provides that a trial court can modify or enlarge the conditions of probation at any time prior to the expiration of the alternative sentence." *Rollins*, 294 S.W.3d at 466 n.5. Because Winkle was to remain on probation until full restitution had been paid, the trial court retained jurisdiction over Winkle and was not required to follow KRS 431.200. Furthermore, so long as probation remained in effect, the trial court was authorized to modify its terms. *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky. App. 1986).

Winkle knowingly, voluntarily and intelligently accepted the Commonwealth's offer and entered a guilty plea in reliance on it. The Commonwealth's offer specifically referenced KRS 533.030(3), a fact Winkle knew. Winkle also knew the amount of restitution she would be ordered to pay

would be calculated at a future time—either she and the Commonwealth would agree on the amount, or the trial court would convene a hearing and decide the amount.

KRS 533.030(3) requires payment of restitution “in the full amount of the damages.” As explained in *Hearn v. Commonwealth*, 80 S.W.3d 432, 436 (Ky. 2002),

[t]he statute clearly authorizes restitution for the full amount of the damages. Such restitution is intended to fully compensate for the loss incurred, serves to emphasize the seriousness of the crime and to deter similar offenses in the future by not only these defendants, but other potential criminals. The imposition of interest in the restitution award serves the legislative purpose of deterrence and rehabilitation as well as making the victim whole. Including interest on the amount taken in a financial crime clearly emphasizes the seriousness of the crime and highlights the full criminal responsibility.

Just because Heady could not immediately calculate his true loss does not mean his recovery should be limited to a date certain. By not requesting restitution be determined *before* sentence was imposed, Winkle accepted the risk that the amount determined by the trial court could exceed figures previously mentioned—by a little, or a lot—so long as the amount ultimately imposed was based on reliable facts. *Fields v. Commonwealth*, 123 S.W.3d 914, 917 (Ky. App. 2003). As previously detailed, the trial court’s award was based on credible testimony from Heady and we have no grounds on which to disagree. *Moore v. Asente*, 110

S.W.3d 336, 354 (Ky. 2003) (judging witness credibility and weighing evidence are exclusive province of trial court).

Winkle was afforded due process in setting the award of restitution. The Commonwealth's offer put her on notice restitution would be sought. She agreed to pay restitution as part of her guilty plea. She received notice of the restitution hearing and was given sufficient time to prepare before it convened. She appeared at the hearing with counsel, cross-examined the single witness against her, and offered no witnesses of her own. Heady's testimony, heard by a neutral judge, identified the missing articles and values.

Therefore, discerning no error in the application of KRS 533.030(3), we affirm the Hardin Circuit Court's order requiring Winkle to pay as restitution, \$29,861.00, plus interest at twelve percent per annum.

ALL CONCUR.

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