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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001867-MR

JOHNNY ANDERSON

APPELLANT

v. APPEAL FROM HICKMAN CIRCUIT COURT
HON. TIMOTHY A. LANGFORD, JUDGE
INDICTMENT NO. 15-CR-00017

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, J. LAMBERT, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: Johnny Anderson appeals from the Hickman Circuit Court's restitution order entered October 21, 2015, following Anderson's entry of a guilty plea for receiving stolen property and his subsequent conviction. We affirm the circuit court.

On July 14, 2014, a large quantity of tools owned by Vaughn Electric Company (Vaughn), valued at \$44,383.88, was stolen from a warehouse in Union City, Tennessee. Vaughn's insurance company paid \$37,830.49 toward the cost of

replacement tools, which Vaughn purchased in order to continue business operations. Following an investigation, police officers executed a search warrant approximately six months later for Anderson's residence in Clinton, Kentucky. There, the officers recovered a small number of tools which they believed to have been part of the haul taken from the Union City warehouse. The Hickman County grand jury thereafter indicted Anderson on one count of receiving stolen property under \$10,000, a Class D felony.¹

Approximately seven months after indictment, Anderson entered an unconditional guilty plea on the morning of trial. The circuit court thereafter sentenced Anderson to a term of four years' imprisonment. Although he admitted to receiving stolen property in his guilty plea, Anderson and the Commonwealth were unable to agree upon restitution at his sentencing. As a result, the court set a restitution hearing for the following week.

At Anderson's restitution hearing, the only testifying witness was Phillip Harris, Vaughn's vice president. Harris testified regarding the warehouse theft, the value of the stolen tools, and the amount Vaughn's insurance paid to replace the tools. When shown the list of items recovered pursuant to the search warrant at Anderson's residence, Harris could not definitively state that the tools listed were among the ones taken from the warehouse. The circuit court inquired where the recovered tools were currently located, and the Commonwealth stated the tools were being held at the sheriff's office. The court followed up by asking if

¹ Kentucky Revised Statutes (KRS) 514.110.

the recovered tools were damaged. Harris explained to the court that returning the tools would not help Vaughn, because the company had purchased new tools in the meantime, and had no use for the old ones.

At the conclusion of the restitution hearing, the circuit court found as follows: the items on the search warrant return list were stolen; the items had an approximate value of \$2,553; and Anderson owed \$2,553 to Vaughn as restitution. Because Vaughn declined to take ownership of the tools, the court further ruled that the tools would be auctioned and the proceeds applied toward Anderson's owed restitution. The circuit court entered a written restitution order consistent with these findings on October 21, 2015. This appeal follows.

Anderson's issues on appeal stem from the type and amount of restitution assigned by the circuit court as a result of the October 20, 2015 hearing. For his first issue, Anderson argues he should not have been required to pay monetary restitution, because the tools had been recovered. For his second issue, Anderson argues the amount of court-ordered restitution was improper. We consider both arguments below.

“‘Restitution’ means any form of compensation paid by a convicted person to a victim for counseling, medical expenses, lost wages due to injury, or property damage and other expenses suffered by a victim because of a criminal act[.]” KRS 532.350(1)(a). Kentucky law requires restitution to named victims in all appropriate cases, “whether the convicted defendant is to be incarcerated or conditionally released.” *Fields v. Commonwealth*, 123 S.W.3d 914, 916 (Ky. App.

2003) (citing KRS 532.032 and *Commonwealth v. O'Bryan*, 97 S.W.3d 454 (Ky. App. 2003)). An appellate court reviews “a trial court’s findings with regard to restitution for an abuse of discretion.” *Bentley v. Commonwealth*, 497 S.W.3d 253, 255 (Ky. App. 2016) (citing *Commonwealth v. Morseman*, 379 S.W.3d 144, 148 (Ky. 2012)). “The test for abuse of discretion is ‘whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.’” *Id.* (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

For his first issue, Anderson contends no monetary restitution was required in his case, because the tools had been recovered from his home. He argues the tools should have been returned to Vaughn in lieu of monetary restitution, pursuant to KRS 533.030(3)(a): “Where property which is unlawfully in the possession of the defendant is in substantially undamaged condition from its condition at the time of the taking, return of the property shall be ordered in lieu of monetary restitution[.]” The Commonwealth asserts this statute specifically applies only “[w]hen imposing a sentence of probation or conditional discharge[.]” KRS 533.030(3). Anderson argues the provisions of this statute should be equally applicable to incarcerated individuals.

The Kentucky Supreme Court considered a portion of KRS 533.030(3) having a similar effect in *Jones v. Commonwealth*, 382 S.W.3d 22 (Ky. 2011). The Court found the General Assembly had, in passing KRS 533.030(3), “limit[ed] restitution to \$100,000.00 when a person is sentenced to probation or conditional discharge, but let it remain unlimited when a person is sentenced to

imprisonment[.]” *Id.* at 33. Pursuant to *Jones*, we find the statute effectively provides a different set of restitution terms for those under probation or conditional discharge than for those facing imprisonment. As in *Jones*, “when the meaning of the law is clear from the language of the statute, and its effects are not absurd, we need not attempt to explain why the General Assembly chose to legislate as it did.” *Id.*

We also must consider that the circuit court’s actions regarding the form of restitution were not unreasonable. The stolen tools had minimal value to Vaughn at the time of the restitution hearing, because they had already been replaced. Vaughn’s losses were *monetary* at that point, and the circuit court rationally decided to provide that form of restitution. “[T]he purpose of 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.” *Vaughn v. Commonwealth*, 371 S.W.3d 784, 785 (Ky. App. 2012) (emphasis added) (quoting *Commonwealth v. Bailey*, 721 S.W.2d 706, 707 (Ky. 1986)). “Because restitution provisions are remedial in nature, they should be liberally construed in favor of their remedial purpose.” *Commonwealth v. Morseman*, 379 S.W.3d 144, 148 (Ky. 2012) (citation and internal quotation marks omitted). Instead of returning the unwanted stolen tools to Vaughn, the circuit court elected to auction the tools and apply the proceeds toward Anderson’s restitution. The circuit court did not abuse its discretion in providing monetary restitution to Vaughn using this method.

For his second issue, Anderson contends the restitution order should be vacated and remanded for another hearing, and to this end, he presents two supporting arguments. First, he alleges the circuit court erroneously based its restitution order on dollar values added by an unknown party to the items on the search warrant return list. In the course of the restitution hearing, the parties stipulated to the items on the search warrant return list, acknowledging that the tools listed were recovered from Anderson's home pursuant to the search warrant. However, in the copy of the return list submitted as an exhibit by the Commonwealth, there are dollar values adjacent to the listed items. The parties explicitly did not stipulate to these figures, due to their unknown origin. At the hearing, the Commonwealth stated it did not know who placed these dollar amounts on the list, but assumed it was someone at the sheriff's office. Nonetheless, the Commonwealth acknowledged these values were consistent with what the prosecution would have attempted to prove during trial by witness testimony.

Anderson argues the circuit court erred by using the questionable dollar amounts on the return list to generate a restitution figure. Because the values were generated by an unknown party, based on unknown criteria, Anderson contends their use violated his due process right to a restitution figure based on reliable facts. In determining an appropriate sum for restitution, due process requires a court to rely on facts having a "minimal indicium of reliability beyond mere allegation." *Jones*, 382 S.W.3d at 30 (quoting *Fields v. Commonwealth*, 123

S.W.3d 914, 917 (Ky. App. 2003); *United States v. Silverman*, 976 F.2d 1502, 1504 (6th Cir. 1992)). “[I]n order to satisfy this standard, the defendant must have some meaningful opportunity to be heard and the record must establish a factual predicate for the restitution order.” *Id.* (citing *Fields*, 123 S.W.3d at 918).

Here, it appears the circuit court did indeed use the return list’s dollar values to determine its restitution sum of \$2,553.² Anderson correctly asserts that assigning restitution in such a way would ordinarily constitute error, due to being based upon “mere allegation.” *Id.* However, Anderson argued at the hearing that, at most, his restitution amount should be \$2,610.40. Anderson based this figure on Vaughn’s itemized theft report, indicating a total value of \$44,383.88 stolen, minus \$3,942.99 in sales tax, minus \$37,830.49 paid by Vaughn’s insurance. Despite the circuit court’s unsound basis for its decision, it arrived at a restitution figure which was remarkably close to that proffered by the defense using a wholly different method. The defense methodology, completely by accident, provided an independent “factual predicate for the restitution order.” *Id.* Indeed, the amount set by the circuit court was marginally *lower* than the amount for which Anderson argued. Because the circuit court’s erroneous valuation method did not affect Anderson’s substantial rights, we hold this to have been harmless error under Kentucky Rule of Criminal Procedure (RCr) 9.24. “Harmless error . . .

² On the return list, the item marked “Two Tool Belts” has a corresponding value of “\$59.00 each” adjacent to it, and so the actual total of the items on the return list is \$2,612. Therefore, it appears the circuit court arrived at its figure of \$2,553 by only counting the \$59.00 tool belt once.

presupposes preservation and an erroneous trial court ruling, but nevertheless permits a reviewing court to disregard it as non-prejudicial.” *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006).

Second, Anderson alleges the circuit court erred in finding all items on the search return list to have been stolen, despite Anderson’s assertion that some of the items on the list were actually his. Anderson lodged an impromptu protest to the court at the conclusion of the restitution hearing, stating “half that property that was taken off my property was mine already.” Anderson was urged to quiet down at this point by his defense counsel. The circuit court stated that if Anderson wished to dispute his finding as to the nature of the items on the list, he should have done so at this hearing. Furthermore, the record does not reflect that Anderson ever filed a motion to reconsider the restitution order.

Although Anderson claims some of the items on the return list were his personal property, he unfortunately did not actually testify to that effect at the restitution hearing. The only witness of record was Phillip Harris, the vice president of Vaughn. Anderson interjected an *unsworn* statement to the court after the court concluded its findings. “It is a well[-]established rule in Kentucky that all witnesses shall be administered an oath or affirmation as to the truthfulness of their testimony.” *Carpenter v. Schlomann*, 336 S.W.3d 129, 132 (Ky. App. 2011) (citing Kentucky Rule of Evidence (KRE) 603). The court provided Anderson with due process, including “a reasonable opportunity . . . with assistance of counsel to present evidence or other information to rebut the claim of restitution

and the amount thereof[.]” *Dillard v. Commonwealth*, 475 S.W.3d 594, 599 (Ky. 2015) (quoting *Jones*, 382 S.W.3d at 32). For unknown reasons, Anderson did not avail himself of that opportunity at the restitution hearing. We find no abuse of discretion, because the circuit court made findings in accord with the evidence presented.

For the foregoing reasons, we affirm the Hickman Circuit Court.

LAMBERT, J., JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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