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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001076-MR

TAMMY BURTON — APPELLANT

V.

APPEAL FROM FULTON CIRCUIT COURT
HONORABLE WILLIAM L. SHADOAN, JUDGE
INDICTMENT NO. 02-CR-00040

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: BARBER, BUCKINGHAM, AND MINTON, JUDGES.

MINTON, JUDGE: Tammy Burton entered a guilty plea in Fulton Circuit Court to one count of theft by deception under $300.00.[1] She appeals from the trial court's judgment sentencing her to twelve months' imprisonment, probated for two years, and ordering her to pay $15,217.51 in restitution. She asserts that the trial court erred by denying her a meaningful opportunity to challenge the victim's allegations of financial damages and then

[1] Kentucky Revised Statutes (KRS) 514.040.

refusing to let her withdraw her guilty plea. She further claims that she was entitled to have a jury set her restitution. Finally, she asserts that the trial court lacked the authority to order restitution greater than or equal to $300.00.

As a matter of statutory law, Burton was not entitled to have a jury determine her restitution. Setting her restitution was a matter within the discretion of the trial court. But we hold that the trial court did abuse its discretion by denying Burton a meaningful opportunity to controvert the allegations concerning the victim's monetary damages. It further erred by setting her restitution at $15,217.51 because there is not substantial evidence in the record supporting the fact that the victim suffered $15,217.51 in monetary damages. We find no abuse of discretion in the trial court's refusal to let Burton withdraw her guilty plea. So we vacate only that portion of Burton's sentence that deals with her restitution order and remand for additional proceedings consistent with this opinion.

THE RESTITUTION ORDER

Burton was indicted for theft by deception over $300.00[2] and unlawful transaction with a minor in the second

[2] KRS 514.040

degree,[3] both Class D felonies,[4] for stealing groceries from E.W. James and Sons Supermarket through a practice known in the grocery business as "sweethearting." Sweethearting occurs when a cashier, without authorization, charges certain customers less than full price for items or gives those customers items for free. Burton, her sister, Ashley Burton (Ashley), and an acquaintance, Nikki Noonan, were all accused of stealing from E.W. James in this manner on multiple occasions between March 2001 and October 2001 with the assistance of F.C., a minor who worked as a cashier. Burton and Noonan were tried together in a jury trial that ended in a mistrial when the jury failed to agree upon a verdict regarding either defendant.

After the mistrial, Burton entered into a plea agreement. The Commonwealth amended the theft charge to theft by deception under $300.00 and dropped the charge of second-degree unlawful transaction with a minor. The Commonwealth also promised to recommend a twelve-month sentence, probated for two years. The plea agreement was silent on the matter of restitution. And Burton does not assert that the Commonwealth promised her anything with regard to visitation. Burton then entered a guilty plea to the amended charge. Restitution was never mentioned during her plea colloquy, which was otherwise

[3] KRS 530.065.

[4] *See* KRS 514.040(8), KRS 530.065(2).

adequate. Restitution also was not mentioned in her presentence investigation report (PSI).

When the issue of restitution came up during the sentencing hearing, Burton's counsel advised the trial court that a representative of E.W. James had told Burton that she only needed to pay $71.00 in restitution, which she had paid. The trial court expressed skepticism that this $71.00 was payment in full, recalling testimony from the abortive trial that E.W. James lost around $15,000.00 due to the sweethearting. The victim's advocate could neither confirm nor deny whether this $71.00 payment was payment in full. The Commonwealth requested that Burton be ordered to pay $15,217.51, the total losses that E.W. James claimed at the abortive trial. The Commonwealth noted that Ashley and Noonan, who had already entered guilty pleas, each were sentenced to pay restitution in that amount. No evidence concerning E.W. James's monetary losses was presented at the sentencing hearing.

After the dispute over restitution arose, Burton repeatedly requested a restitution hearing or an opportunity to controvert the evidence of E.W. James's losses but her requests were denied. Her request to withdraw her guilty plea was similarly denied. She was sentenced to twelve months, probated for two years, and ordered to pay $15,217.51 in restitution. But the trial court informed her that if she could convince

probation and parole that this amount of restitution exceeded the actual damages that E.W. James suffered, then probation and parole could amend her restitution order accordingly. Burton then filed this timely appeal.

RECORD ON APPEAL

As a preliminary matter, we must address two issues concerning the record on appeal. Much of the Commonwealth's brief is premised on the belief that the record before this Court is incomplete because the videotape of the trial of Burton and Noonan is missing. This is incorrect. The videotape of the trial is included in the record on appeal.

Also, both parties' briefs rely on supplemental material that was filed with the trial court after the judgment and sentence on plea of guilty was entered on April 24, 2003. Burton refers to an email, dated April 26, 2003, from Carl Bowman, Security Coordinator at E.W. James, to her counsel, which purports to support her claim that her $71.00 payment to E.W. James is to be considered payment in full. The Commonwealth counters with a letter from Bowman, dated April 29, 2003, to the Commonwealth's Attorney, stating that this email was a mistake and reasserting that Burton, Ashley, Noonan, and F.C. stole $15,217.51 in groceries.

Both parties have missed the "fundamental rule of appellate practice that after a final judgment has been rendered in the circuit court no additions to the record can be made of matters which were not before the trial court when the judgment was rendered."[5] Appellate review must be conducted on the record as it was presented to the trial court.[6] Therefore, we may not consider either the April 26, 2003, email or the April 29, 2003, letter in deciding this appeal.

NO DENIAL OF RIGHT TO HAVE RESTITUTION SET BY JURY

Burton asserts that she was entitled to a have a jury determine her restitution amount, citing the provisions of KRS 431.200. We disagree with that assertion. In Kentucky, restitution is "a system designed to restore property or the value thereof to the victim" rather than an additional punishment.[7] It is required as part of a sentence granting probation.[8] The appropriate statute governing restitution imposed at the time of sentencing is KRS 532.032 (and the statutes incorporated therein, including KRS 532.033 and KRS 533.030), the "generally applicable criminal restitution

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[5] Fortney v. Elliott's Adm'r, 273 S.W.2d 51, 52 (Ky. 1954).

[6] *Id*.

[7] Commonwealth v. Bailey, 721 S.W.2d 706, 707 (Ky. 1986).

[8] *See* KRS 532.032(3).

statute."[9] This is in contrast to KRS 431.200, an older statute that establishes an alternative procedure for post-sentencing restitution orders.[10]

> KRS 533.030(3) states, in relevant part, as follows:
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> When imposing a sentence of probation . . . 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, . . . the court shall order the defendant to make restitution in addition to any other penalty provided for the commission of the offense. . . . Restitution shall be ordered in the full amount of the damages, unless the damages exceed one hundred thousand dollars ($100,000) or twice the amount of the gain from the commission of the offense, whichever is greater, in which case the higher of these two (2) amounts shall be awarded.

Within these statutory guidelines, establishing the amount of restitution is left to the discretion of the trial court.[11] This

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[9] Fields v. Commonwealth, 123 S.W.3d 914, 916 (Ky.App. 2003).

[10] *Id*.

[11] Hearn v. Commonwealth, 80 S.W.3d 432, 436 (Ky. 2002). *See* KRS 532.033, which states, in relevant part, as follows:

> When a judge orders restitution, the judge shall:
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> (1) Order the restitution to be paid to a specific person or organization through the circuit clerk, who shall disburse the moneys as ordered by the court;
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> (2) Be responsible for overseeing the collection of restitution;
>
> (3) Set the amount of restitution to be paid;

discretion is constrained by the dictates of due process, but less is required to satisfy due process at sentencing than during the guilt phase of a trial.[12] Specific procedures such as discovery, cross-examination of adverse witnesses, and fact-finding by a jury are not constitutionally required at sentencing.[13] Consistent with this, KRS 532.032 calls for "ordinary sentencing procedures as the foundation for restitutionary sentences."[14] This is in contrast to the jury procedure used to set the amount of restitution in post-sentencing restitution orders under KRS 431.200.[15]

Burton's restitution was imposed as part of sentencing and in conjunction with probation. According to Fields, the ordinary sentencing procedures of KRS 532.032 apply to such situations, rather than the jury procedures of KRS 431.200, which are reserved for post-sentencing restitution proceedings.[16] Thus, Burton's claim that she was entitled to have her restitution set by a jury is without merit.

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(4) Set the amount and frequency of each restitution payment or require the payment to be made in a lump sum.

[12] Fields, 123 S.W.3d at 917.

[13] *Id.*

[14] *Id*. at 916.

[15] *Id*.

[16] *Id*.

DENIAL OF MEANINGFUL OPPORTUNITY TO CONTROVERT EVIDENCE

Burton asserts that she was denied a meaningful opportunity to controvert the evidence against her concerning restitution. Both KRS 532.050 and RCr[17] 11.02 require that a defendant be given notice of a PSI report's factual contents and be "afforded a meaningful opportunity to controvert the evidence against him at his sentencing hearing."[18] But it is left to the discretion of the trial court to determine which procedures are required to provide the defendant in a particular case with this meaningful opportunity to controvert the evidence.[19] Specifically, a defendant must be given a meaningful opportunity to controvert factual allegations concerning a victim's monetary damages.[20] Often, a defendant is first placed on notice of a victim's specific claim of monetary damages in the PSI report.[21] A defendant has sufficient opportunity to controvert evidence concerning restitution if the PSI report gives the defendant notice of the property claimed to have been lost or damaged, as

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[17] Kentucky Rules of Criminal Procedure.

[18] Commonwealth v. Jeffries, Ky., 95 S.W.3d 60, 62 (Ky. 2002).

[19] *Id*. at 63.

[20] Fields, 123 S.W.3d at 917-18.

[21] *Id*. at 918.

well as notice of the method employed to value the property. [22] The defendant then must be permitted to challenge the assertions in the PSI in a meaningful way, as by being permitted to introduce countervailing evidence.[23]

Fields presents a situation in which a defendant was denied the opportunity to controvert evidence against him concerning restitution. The defendant was ordered to pay $140,000.00 in restitution after entering a guilty plea to burglary and receiving stolen property charges related to the theft of tools and merchandise from an auto parts store.[24] The total claim was far greater than he had expected and included claims by individual employees of the store, some for thousands of dollars, which had never been mentioned before.[25] This list of the alleged losses, which was not provided until shortly before his sentencing,[26] specifically identified only one of the many allegedly stolen or damaged items.[27] The defendant never received notice of the method used to value the items.[28] Despite

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[22] *Id*. at 917.

[23] *Id*. at 917-18.

[24] *Id*. at 915.

[25] *Id*. at 916.

[26] *Id*.

[27] *Id*. at 917.

[28] *Id*.

these problems, the trial court denied the defendant's request to cross-examine the claimant employees.[29]

A panel of this Court held that the trial court's refusal to permit the defendant to cross-examine the restitution claimants was probably not an abuse of discretion since cross-examination is not constitutionally mandated at the sentencing phase.[30] But the trial court's failure to give the defendant "adequate notice of the claims against him and any opportunity to controvert them plainly was an abuse of discretion."[31] These failures rendered the sentencing hearing, with its foregone conclusion on the issue of restitution, a sham.[32]

Like the defendant in the Fields case, Burton was not given a meaningful opportunity to controvert the evidence against her concerning restitution. No notice of the specific monetary damages was given in her PSI. Even if the evidence produced at her abortive trial put Burton on notice regarding the total amount of monetary damages claimed by E.W. James, Burton was hampered in her ability to challenge these losses because, as is discussed below, the supermarket never fully explained at trial how it reached this figure of $15,217.51.

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[29] *Id*. at 916.

[30] *Id.* at 917.

[31] *Id*.

[32] *Id*. at 917-18.

The fact that the victim's advocate could neither confirm nor deny that Burton had made restitution in full with her $71.00 payment should have informed the trial court that this $15,217.51 figure asserted by E.W. James might not be accurate. By stating that probation and parole could fix any error in the amount of restitution ordered, the trial court itself signaled uncertainty about the total monetary loss suffered by E.W. James. Nevertheless, the trial court denied Burton any meaningful opportunity to controvert the factual allegations concerning E.W. James's monetary damages, which formed the sole basis of the trial court's restitution order. This denial was an abuse of discretion.

WITHDRAWAL OF GUILTY PLEA

Having concluded that the trial court's failure to permit Burton a meaningful opportunity to controvert the evidence against her concerning restitution was an abuse of discretion, we must consider the appropriate remedy. In Fields, that portion of the judgment ordering restitution was vacated; and the case was remanded for further proceedings.[33] But the possibility of permitting the defendant to withdraw his guilty plea apparently was not raised in Fields, unlike the instant case. So we must determine whether Burton should have been

[33] *Id*. at 918.

permitted to withdraw her guilty plea or should now be permitted to do so as a remedy for the trial court's failure to provide her with a meaningful opportunity to controvert the evidence against her concerning restitution.

When a criminal defendant pleads guilty, RCr 8.10 requires the trial court receiving the guilty plea to determine on the record whether the defendant is voluntarily pleading guilty,[34] as determined from the totality of the circumstances surrounding the plea.[35] The trial court is in the best position to determine the totality of the circumstances surrounding a guilty plea.[36] A criminal defendant who has pleaded guilty may move the trial court to withdraw the guilty plea under RCr 8.10. If the plea was involuntary, the motion to withdraw it must be granted.[37] But if it was voluntary, the trial court may, within its discretion, either grant or deny the motion.[38] A trial court abuses its discretion when it renders a decision that is

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[34] Bronk v. Commonwealth, 58 S.W.3d 482, 486 (Ky. 2001).

[35] *Id*.

[36] *Id*.

[37] Rodriguez v. Commonwealth, 87 S.W.3d 8, 10 (Ky. 2002).

[38] *Id*.

arbitrary, unreasonable, unfair, or unsupported by legal principles.[39]

In the instant case, Burton has never claimed that her plea was entered involuntarily. She has not even asserted that if she had known that she was going to be ordered to pay $15,217.51, she would not have entered the guilty plea. Even with the disputed restitution order, Burton received a favorable sentence as a result of the plea agreement. She was facing a maximum of ten years' imprisonment but received a twelve-month sentence, probated for two years. Under these circumstances, it clearly was within the trial court's discretion to deny her motion to withdraw her guilty plea. While permitting a defendant to withdraw a guilty plea theoretically might be an appropriate remedy for errors in imposing restitution, it is not warranted in the instant case. Instead, we vacate only that portion of the judgment ordering restitution and remand for further proceedings to determine the appropriate amount of restitution.

RESTITUTION EXCEEDING FINANCIAL UPPER LIMIT OF CRIME

Burton asserts that the trial court could order restitution only in an amount less than $300.00, regardless of the amount of monetary damages suffered by E.W. James as a

[39] Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000).

result of her criminal actions, because she entered a guilty plea only to one count of theft by deception under $300.00. We question whether this issue was preserved at the trial court level. But because this case is being remanded for further proceedings concerning restitution, it is in the interest of judicial economy to address this issue regardless of preservation as it is likely to arise again.[40]

As noted, KRS 533.030(3) provides for restitution "in the full amount of the damages." This provision has been interpreted as demonstrating the legislative intent of insuring that crime victims suffering monetary damages are fully compensated for their losses.[41] Whether a defendant who has entered into a negotiated plea agreement may be ordered to pay restitution in an amount greater than the financial upper limit of the crime to which she is pleading guilty is a question of first impression in Kentucky.

The Kentucky Supreme Court has held that as part of a plea agreement a criminal defendant may waive rights provided by statute and accept sentences that would otherwise be unlawful.

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[40] *Cf.*, Springer v. Commonwealth, 998 S.W.2d 439, 446 (Ky. 1999) (holding that challenge to admissibility of confession that was not raised at trial was, nevertheless, ripe for determination on appeal where remand for new trial was ordered on other grounds).

[41] Hearn, 80 S.W.3d at 436.

In Myers v. Commonwealth,[42] the Supreme Court held that a defendant could waive the maximum aggregate sentence restriction imposed by KRS 532.110(1)(c) in exchange for the benefit of earlier eligibility for parole.[43] Likewise, in Commonwealth v. Griffin,[44] the Supreme Court held that a defendant could waive the five-year limitation on a sentence of probation to avoid revocation of probation and imprisonment.[45] In both instances, the fact that the criminal defendant received something valuable in exchange demonstrated the voluntariness of the waiver.[46]

As a Texas court observed, permitting restitution in excess of the upper financial limit of the theft charge to which a defendant pleads guilty serves the dual goals of facilitating and promoting plea bargain agreements and of ensuring that crime victims are fully compensated.[47] A blanket rule prohibiting a

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[42] 42 S.W.3d 594 (Ky. 2001).

[43] *Id*. at 596-98.

[44] 942 S.W.2d 289 (Ky. 1997).

[45] *Id*. at 291.

[46] Commonwealth v. Townsend, 87 S.W.3d 12, 15 (Ky. 2002).

[47] Campbell v. Texas, 5 S.W.3d 693, 700 (Tex. Crim. App. 1999) (*en banc*) (upholding restitution order of $100,000.00 despite fact that defendant entered a guilty plea to theft by deception of property valued more than $20,000.00 but less than $100,000.00). Other cases similarly holding that a defendant who pleads guilty as a result of a plea agreement may be ordered to pay restitution in excess of the financial upper limit of the charge to which he entered a guilty plea are as follows: Maine v. LaCasce, 512 A.2d 312 (Me. 1986) (upholding restitution order of $12,000.00, originally $36,000.00, for defendant who plead guilty to theft of property over $500.00 but

defendant from paying restitution greater than the upper dollar limit of the criminal charge to which the defendant pleads guilty would have the ultimate effect of limiting plea bargaining in multi-count indictments, which would have a detrimental effect on a defendant's ability to limit penal liability.[48] This rationale is persuasive given Kentucky's legislative intent that restitution is meant, at least in part, to fully compensate crime victims for monetary damages[49] and the Kentucky court's recognition of the established judicial practice of plea bargaining.[50]

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under $1,000.00 where defendant received a substantial reduction in her potential penal liability as a result of a plea bargain); Nix v. Arkansas, 54 Ark.App. 302, 303-304, 925 S.W.2d 802, 803-804 (Ark.Ct.App. 1996) (*en banc*) (holding that defendant who entered a plea of guilty as a result of a plea agreement to theft of property over $200.00 but less than $2,500.00 could be ordered to pay $19,500.00 in restitution where sufficient evidence supported that the victim lost property valued at the higher figure); Wisconsin v. Huntington, 132 Wis.2d 25, 26-28, 390 N.W.2d 74, 75-76 (Wis. Ct. App. 1986) (upholding restitution order of $4,800.00 despite fact that defendant entered guilty plea only to one count of theft of property having a value not exceeding $2,500.00); and Fee v. Alaska, 656 P.2d 1202, 1205 (Alaska Ct. App. 1982) (holding that a defendant who pled guilty to criminal mischief in the third degree, which involves intentionally inflicting between $50.00 and $500.00 of property damage to the property of another, could be ordered to pay $871.20 in restitution).

[48] LaCasce, 512 A.2d at 316.

[49] Hearn, 80 S.W.3d at 436.

[50] *See* Kennedy, 962 S.W.2d at 882 (noting that plea bargaining helps "expedite the disposition of heavy criminal dockets" and, in proper cases, serves both the interests of the Commonwealth and a criminal defendant by offering "a negotiated, certain sentence," rather than the risk and unpredictability of trial).

This issue is interrelated with joint and several liability. No published case in Kentucky appears to address whether liability for restitution is joint and several. However, KRS 533.030(3) states that "[w]here there is more than one (1) defendant or more than one (1) victim, restitution may be apportioned." The statute uses the permissive "may." To say that restitution may be apportioned among multiple defendants necessarily implies that apportionment is not mandatory. Joint and several liability is also consistent with the restitution statutes' legislative intent of ensuring that crime victims are fully compensated for their monetary losses because it increases the pool of available funds.

Based upon the plain meaning of the KRS 533.030(3) and the fact that imposing joint and several liability promotes the legislative intent of restitution, we hold that multiple defendants may be held jointly and severally liable for restitution. Yet, this statutory scheme of permitting joint and several liability would be frustrated if a defendant were able to escape joint and several liability merely by pleading guilty to a lesser charge that has a fixed-dollar upper limit less than the victim's total monetary damages.

The evidence offered at trial concerning the monetary damages of E.W. James consisted largely of computer copies of twenty-seven cash register transactions conducted by F.C. The

Commonwealth presented evidence linking Burton, at most, to only ten of these transactions showing unpaid-for merchandise totaling $706.77.[51] Therefore, although the trial court did not explicitly state this point, by sentencing Burton to pay restitution for the total amount allegedly lost by E.W. James through the sweethearting scheme, it was imposing joint and several liability upon her. Given that it was in the trial court's discretion to do so, it would be inconsistent to say that Burton's favorable plea bargain removed this discretion. Perversely, if her liability were restricted to the financial upper limits of the crime for which she was sentenced, which is less than $300.00, Burton could not even be liable for restitution to pay the full amount in groceries that the Commonwealth's trial proof showed she stole personally. We find such a restriction inconsistent with Kentucky's restitution statutory scheme. And it would be detrimental to the established practice of plea bargaining, ultimately harming defendants such as Burton who seek to minimize their penal

[51] The $706.77 figure is the Court's own calculation, based on all the cash register receipts identified by the Commonwealth at trial as ones Burton potentially was involved in. Burton actually admitted to participating in only one transaction, which she paid for by personal check. The Commonwealth presented testimony at trial linking her to all ten of the twenty-seven transactions that did not involve the use of an Electronic Benefit Transfer (EBT) card, a debit card used to access food stamp benefits. This Court takes no position as to how many sweethearting transactions Burton was actually involved in. As described below in Footnote 63, there were some obvious arithmetical errors in the calculations based on these receipts which were presented to the trial court.

liability. Moreover, even if there were otherwise a prohibition against sentencing Burton to pay restitution greater than the financial upper limit of the crime for which she is being sentenced, Burton waived this prohibition. The record shows that, in exchange for her guilty plea, Burton received a favorable sentencing recommendation which the trial court adopted. She went from facing a possible ten years of imprisonment to receiving twelve months, probated for two years. This quid pro quo is sufficient to show a valid waiver of any right otherwise prohibiting Burton from being sentenced to pay restitution greater than $299.99.[52]

INSUFFICIENCY OF EVIDENCE TO SUPPORT RESTITUION ORDER

Burton did not specifically question the sufficiency of the evidence to support the trial court's restitution order. But we find that the order is not supported by substantial evidence. Because this issue is likely to arise again on remand, we address it in the interest of judicial economy.

As noted, the trial court's discretion to set the amount of restitution to be paid is not without limits. Due process at sentencing requires that "sentences not be imposed on the basis of material misinformation and that facts relied on by

[52] *See* Myers, 42 S.W.3d at 596-98; Griffin, 942 S.W.2d at 291; and LaCasce, 512 A.2d. at 315-16.

the sentencing court 'have some minimal indicium of reliability beyond mere allegation.'"[53] There must be sufficient factual evidence in the record to support the trial court's order of restitution.[54] Even where a defendant enters a guilty plea, "the record must establish an adequate factual predicate for a restitution order."[55] In some instances, a guilty plea and plea agreement might satisfy this requirement, just as evidence presented in the guilt phase of a trial might satisfy this requirement in other instances.[56] But, if this is not the case, then this factual record must be established at the sentencing hearing or a separate restitution hearing.

Fields provides an example of a restitution order which "fail[ed] to satisfy even the Constitution's minimal reliability standard."[57] Though the defendant was ordered to pay $140,000.00 in restitution, only one of the many allegedly stolen or damaged items was even specifically identified.[58]

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[53] Fields, 123 S.W.3d at 917, *quoting* United States v. Silverman, 976 F.2d 1502, 1504 (6th Cir. 1992) (citation omitted).

[54] Fields at 917.

[55] *Id*. at 918.

[56] *Id*.

[57] *Id*. at 917.

[58] *Id*. at 915, 917.

Moreover, there was no evidence in the record concerning the valuation of the allegedly stolen or damaged items.[59]

The instant case poses similar problems. The only evidence regarding E.W. James's alleged monetary damages or how these damages were calculated was presented at the trial which ended in a hung jury. A summary of this evidence is as follows. On or about October 13, 2001, E.W. James's store manager, Robert McClure, was alerted by another cashier that she had observed F.C. a few days earlier behaving suspiciously while F.C. was ringing up Noonan's groceries. F.C. repeatedly scanned an item, used the "error correct" button[60] on the cash register to remove any charge for this item from the receipt, then placed the item with the other groceries to be bagged, as if Nikki had been charged for the item. This prompted a review of all the available computer records of F.C.'s cash register transactions. However, E.W. James's computer system stores a record of cash register transactions for only thirty days, after which they are automatically purged by the system. Consequently, no store records were available for cash register transactions older than thirty days. Twenty-seven of F.C.'s transactions[61] between

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[59] *Id*. at 917.

[60] The error correct button is used to remove a charge from a receipt where a cashier accidentally charges a customer twice for the same item. It is also used to remove a charge from a receipt when a customer decides not to purchase an item after it has been scanned.

September 20, 2001, and October 10, 2001, showed signs of sweethearting: a pattern of using the error correct button excessively[62] to remove items from the total to be charged the customer.[63] The cumulative value of uncharged groceries on the twenty-seven cash register transactions produced at trial is $2,128.38.[64]

When confronted, F.C. admitted to sweethearting since approximately March 2001 but only for Burton, Ashley, and Noonan, no one else. Bowman testified that the supermarket calculated the total amount stolen through this sweethearting scheme between March 2001 and when F.C. was caught in October

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[61] These transactions were introduced into evidence as Plaintiff's (Commonwealth's) Exhibits 1-28, respectively. The discrepancy in number is due to the fact that Exhibits 26 and 28 are duplicates of the same transaction, number 296898. These transactions were summarized on a chart introduced as Plaintiff's (Commonwealth's) Exhibit 29, apparently compiled by E.W. James's security coordinator, Bowman. It, too, mistakenly lists twenty-eight transactions because it lists transaction number 94867, introduced as Exhibit 12, twice.

[62] When the error correct button is used after ringing up an item, the record of the transaction first shows the price of the item being added to the total and then being subtracted from it.

[63] The chart (Exhibit 29) purports to list the dollar amount for each transaction of the groceries which the customer received, despite the fact that they were not paid for. The figures for the chart are based on handwritten figures written at the top of each cash register transaction, which purport to show the total value of uncharged merchandise on each receipt. It is unclear who performed the arithmetic; but the Court has recalculated the figures, based on the actual cash register receipts, as there were some obvious arithmetical errors. The trial court should take notice of this problem upon remand.

[64] McClure testified that the losses during this period were $2,244.21; but this figure was based on the previously described arithmetical errors and included counting one transaction twice.

2001 to be $15,217.51. He said that this figure was based on the evidence that E.W. James gathered and on what F.C. told him but he did not elaborate. At Burton's and Noonan's trial, F.C. admitted that she helped Burton, Ashley, and Noonan steal more than $300.00 in groceries combined. However, she doubted that the amount stolen could possibly have been as high as $15,000.00. She testified that her restitution had been set at only $5,000.00 in her juvenile disposition because that was all the losses that "they"[65] could prove. She also said that she had no idea how E.W. James proved any of the losses beyond the $2,128.38 for which computer records were available.

The trial court's restitution order is based on the factual premise that E.W. James lost $15,217.51 due to the sweethearting scheme. There is substantial evidence in the record, including the testimony of F.C. and McClure and the computer printouts of the cash register transactions introduced as exhibits, to support the fact that E.W. James lost $2,128.38 through the sweethearting scheme. But the only support for the remaining losses is the naked assertion of McClure, with no explanation of how this figure was reached. This is the type of unsupported allegation that was deemed insufficient to meet even the minimal requirements of reliability imposed by the

[65] It is unclear whether "they" refers to the Commonwealth, E.W. James, or the police, or to some combination of them.

constitutional provisions concerning due process at sentencing in Fields.[66] Because there was no substantial evidence in the record to support the factual premise that E.W. James suffered $15,217.51 in monetary damages, it was abuse of discretion for the trial court to order restitution in that amount.

IMPROPER DELEGATION OF AUTHORITY

Finally, we address another unpreserved error which might arise again on remand. Specifically, the error was the trial court's improper delegation of authority to set restitution to probation and parole. When questions were raised about the amount of E.W. James's losses, rather than conduct a sentencing hearing, the trial court said, "No, I don't want to fool with it all. I'm going to say it's $15,217.51." Yet, the trial court then stated that probation and parole could amend Burton's restitution order if the court set it too high by mistake. This pattern of events suggests that the trial court may not have not set Burton's restitution order at $15,217.51 because it made a factual finding that the E.W. James suffered $15,217.51 in monetary damages but, rather, arbitrarily picked that figure, leaving it to probation and parole to decide the issue. The trial court's attempt to delegate the power to set restitution to probation and parole is contrary to KRS 532.033.

[66] 123 S.W.3d at 917-918.

The statute plainly places the burden for making decisions about restitution on the trial court, stating, in relevant part, as follows: "When a judge orders restitution, the judge shall: . . . (3) Set the amount of restitution to be paid; (4) Set the amount and frequency of each restitution payment or require the payment to be made in a lump sum[.]" Based on the plain meaning of KRS 532.033(3)-(4) and its use of the mandatory "shall," the trial court may not delegate the judicial authority to set the amount of restitution owed or the timetable for repaying it to probation and parole or any other individual or entity. Therefore, the trial court erred in suggesting that probation and parole had any authority to alter Burton's restitution order.

For the foregoing reasons, we vacate that part of the Fulton Circuit Court's judgment setting Burton's restitution at $15,217.51 and remand for further proceedings consistent with this opinion.

ALL CONCUR.

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