

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000355-MR

MARK RAMEY

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III., JUDGE
ACTION NO. 00-CR-00140

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: LAMBERT AND STUMBO, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

STUMBO, JUDGE: This is an appeal from an order amending a Judgment entered on a plea of guilty. On June 22, 2005, Appellant, who was represented by counsel, entered into a written plea agreement with the Commonwealth. The agreement provided for a five-year probated sentence and a one-thousand dollar probated fine. Also contained within the document is an agreement with the following language: "The Defendant shall pay restitution to Ricky Scott Rose through the Letcher Circuit Clerk's office in the

amount of \$75 per month for 60 months. Total restitution shall be \$4,500.00. Restitution

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

shall only be required if the complaining party is unsuccessful in recovering from the Kentucky Crime Victim's Fund.” On June 30, 2005, a judgment and sentence on a plea of guilty and an order of probation were both entered. Both of these documents contained the five-year probated sentence and one-thousand dollar probated fine. Neither document mentioned the \$4,500 conditional restitution.

It appears from the record that the Crime Victim's Compensation Fund denied the claim for compensation on November 1, 2005, because the victim failed to present supporting evidence. Upon receipt of the denial, the Commonwealth filed a copy of the order denying the claim with the court and requested a status conference. A hearing was held eventually and on February 7, 2006, an order which purported to amend the judgment and order of probation was entered. The new order required Appellant to begin payment of restitution in the amount of \$4,500 at the rate of \$75.00 per month. The instant appeal followed.

On appeal, Appellant's contention appears to be that the restitution was not part of the plea agreement and thus cannot be imposed at this late date without permitting Appellant the opportunity to withdraw his plea as it does not comply with the plea agreement. RCr 8.10. This argument fails, in part, because, as noted *infra*, restitution was clearly part of the *plea agreement*. The restitution provision was carefully spelled out and conditioned upon findings from the Crime Victim's Compensation Board. However, implicit in Appellant's argument is the issue of the trial court's authority to amend the judgment at this late date. Appellant seems to be conceding that an

amendment is permissible if the court grants the defendant the opportunity to withdraw his guilty plea. Oddly, Appellant does not question whether the passage of time, which generally would render a judgment final, would prohibit the alteration he complains of here. KRS 533.030(3), in providing for restitution states as follows: “when imposing a sentence of probation or conditional discharge in a case where . . . the victim suffered actual medical expenses, direct out-of-pocket losses, or loss of earning as a direct result of the crime . . . the court *shall* order the defendant to make restitution.” (Emphasis added). The standard rules for statutory construction provide that the use of the word “shall” renders actions prescribed mandatory. *Alexander v. S & M Motors, Inc.*, 28 S.W.3d 303, 305 (Ky. 2000); KRS 446.010(30). In the case at hand, the victim did suffer medical expenses and Appellant was given probation, therefore meeting the requirements of mandatory imposition of restitution.

Supporting this mandatory clause in the statute is KRS 532.032(1) which states that:

[r]estitution to a named victim, if there is a named victim, shall be ordered in a manner consistent, insofar as possible, with the provisions of this section and KRS 439.563, 532.033, 533.020, and 533.030 in addition to any other part of the penalty for any offense under this chapter. The provisions of this section shall not be subject to suspension or nonimposition.

Thus it appears that under the literal language of the statute, it is beyond the Court's power to fail to award restitution.

We have found no published cases addressing this factual situation precisely, but the unpublished Supreme Court opinion, *Craven v. Com.*, 2006 WL

1650968 (Ky. 2006), is instructive. In *Craven*, Defendant/Appellant plead guilty to complicity to murder. The final judgment and sentence required payment of court costs and attorney fees to the Office of the Public Advocate. Unlike the case at bar, the plea agreement in *Craven* did not actually provide for payment of the complained of assessment. She appealed this decision, arguing that because her plea agreement did not mention costs and fees, the court was not honoring the terms of the plea and that RCr 8.10 required the trial court to provide her with the opportunity to withdraw her guilty plea. *See also Matheny v. Commonwealth*, 37 S.W.3d 756 (Ky. 2001). The Supreme Court in *Craven* disagreed, citing KRS 23A.205(2), which provides that court costs are “mandatory and shall not be subject to . . . nonimposition in the terms of a plea bargain or otherwise.” In regard to the attorney fees that defendant contested, the court cited KRS 31.211(1), which requires when one who has been appointed a public defender can afford to pay for some fees, the “court shall order payment in an amount determined by the court and may order that the payment be made in a lump sum or by installment payments to recover money for representation provided under this chapter.” The Court in *Craven* found that the costs and fees were not waived if a plea agreement is silent on the matter and that “[i]mposing mandatory court costs and fees pursuant to statute did not amend or alter any conditions of the plea agreement.” The Court did remand the case to the trial court for a “nonadversarial hearing” on the ability of the appellant to pay the assessed costs as required by KRS 31.211(1). *Craven*, at 5.

A published decision from the Court of Appeals that discusses the imposition of restitution is *Fields v. Commonwealth*, 123 S.W.3d 914 (Ky.App. 2003), wherein the appellant objected to the imposition of \$140,000 in restitution pursuant to KRS 532.032. There the Court held that the appellant was entitled to adequate notice of the claim of restitution and the opportunity to controvert it. *Fields*, at 917. The case was remanded for a hearing on the issue before the trial court.

One could argue that mandatory restitution and mandatory costs and fees are indistinguishable, and perhaps they are. But neither the unpublished *Craven* nor the published *Fields* address the real problem with the trial court's actions herein. In point of fact, the judgment entered in June of 2005 became final thirty days after it was entered. RCr 12.04. Did the trial court lose jurisdiction over this case when the judgment became final or can the imposition of restitution be considered simply an additional term of the probation imposed by the trial court in accordance with the plea agreement as argued by the Commonwealth? KRS 533.030(3) does provide that restitution is “shall” be ordered and case law provides that the amount of restitution is left to the discretion of the court. *Hearn v. Commonwealth*, 80 S.W.3d 432, 436 (Ky. 2002). In the case at bar, the amount of restitution was agreed to, as were the conditions under which it would be payable. The Commonwealth argues that the manner in which the amendment to the judgment was entered, after notice of the denied Victim's Compensation Board claim and a hearing, satisfies the requirement of *Fields, supra*, and is in keeping with the terms of the plea agreement. Further, the Commonwealth states that since there is no transcript or

videotape of the hearing, this Court must assume that the record supports the authority of the trial court to enter the order. *See e.g. Copely v. Commonwealth*, 854 S.W.2d 748 (Ky. 1993); *Ford v. Commonwealth*, 472 S.W.2d 261 (Ky. 1971); *Davis v. Commonwealth*, 795 S.W.2d 942 (Ky. 1990).

KRS 533.020(2) states in relevant part:

“The court may *modify or enlarge the conditions* or, if the defendant commits an additional offense or violates a condition, revoke the sentence *at any time prior to the expiration or termination of the alternate sentence.*”

It appears that the probation statute permits the enlargement of the conditions at any time. Restitution shall be imposed by the Court under the restitution statutes. *Fields v. Commonwealth* establishes that a defendant must have notice of and the opportunity to contest the amount and imposition of an order of restitution. Here the Appellant had already agreed to the amount of the proposed restitution and the terms under which it would be imposed. He was given notice of the occurrence of the condition, to wit, the denial of the claim by the Crime Victim's Compensation Board. Therefore, the trial court did not err in imposing the restitution upon Appellant. For the reasons set forth herein, the judgment is affirmed.

ALL CONCUR.

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