

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002240-MR

JAMES SUTTON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NOS. 02-CR-001192 AND 05-CR-002272

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

TAYLOR, JUDGE: James Sutton brings this appeal from a September 13, 2006, order of the Jefferson Circuit Court imposing restitution in the principal amount of \$46,970.00, plus interest. We affirm.

Sutton was indicted by the Jefferson County Grand Jury upon various felony charges relating to his failure to remit payment for motor vehicles obtained from Oxmoor Toyota and Star Ford Oxmoor in Louisville, Kentucky. Pursuant to a plea agreement with the Commonwealth, Sutton pleaded guilty to eight counts of theft by

deception over \$300.00, eight counts of theft by failure to make required disposition of property, and to being a first-degree persistent felony offender. Under the terms of the plea agreement, Sutton's sentence of imprisonment would be probated, and he would pay restitution for the motor vehicles. The plea agreement specifically stated that the total amount of restitution “is \$20,000.00 to \$49,000.00, to be determined at sentencing.” On April 17, 2006, the circuit court entered a judgment of conviction and sentence of probation. Therein, the court noted that Sutton pleaded guilty to eight counts of theft by deception, eight counts of theft by failure to make required disposition of property, and to being a persistent felony offender. In the judgment, the court stated that “[d]efendant will be placed on probation by the Division of Probation and Parole for a period of five (5) years” Also, the order provided that restitution would be determined at a later hearing.

Thereafter, the court conducted a hearing to determine the proper amount of restitution owed. By order entered September 13, 2006, the court concluded that Sutton owed restitution in the principal sum of \$46,970.00, together with prejudgment interest of 8% per annum from July 23, 2001, until entry of the order and post-judgment interest thereon at the rate of 12% per annum from the date of the order until paid in full.

Additionally, the court set Sutton's monthly restitution payments at \$200.00.¹ This appeal follows.

¹ Under the terms of the September 13, 2006, restitution order, James Sutton's monthly payment was \$200.00. According to our calculation, it will take Sutton well over twenty-five years to pay the restitution ordered in full, assuming this payment is made each month. Kentucky Revised Statutes 532.033(8) mandates that a defendant not be released from probationary supervision

Sutton contends the total amount of restitution set by the circuit court was in violation of the plea agreement with the Commonwealth. Under the plea agreement, Sutton maintains that the amount of restitution was capped at \$49,000.00. However, the circuit court imposed restitution in the principal amount of \$46,970.00 plus prejudgment interest and post-judgment interest. With the addition of prejudgment interest and post-judgment interest, Sutton points out that the total restitution amount increased to \$69,474.00. Sutton maintains that imposition of prejudgment interest and post-judgment interest violated the terms of the plea agreement and resulted in a restitution amount in excess of the maximum amount agreed to in the plea agreement. Conversely, the Commonwealth contends that the plea agreement only provided for the upper limit upon the principal amount of restitution and that interest is mandatory under Kentucky Revised Statutes (KRS) 533.030(3).

It is well-established that a plea agreement is contractual in nature and should be interpreted by the court utilizing contractual principles. *Com. v. Reyes*, 764 S.W.2d 62 (Ky. 1989). It is generally recognized that the law in effect when a contract is entered into is implicitly included in its terms, thus forming part of the contract. *Corbin Deposit Bank v. King*, 384 S.W.2d 302 (Ky. 1964); *Kentucky Utilities Co. v. Public Service Comm'n*, 252 S.W.2d 885 (Ky. 1952). Moreover, parties are presumed to be aware of existing law when drafting a contract.

until the restitution ordered has been paid in full. Although not raised in this appeal, we are troubled by the excessiveness of a twenty-five year supervised probationary period and observe that such an extended supervised probationary period may conflict with the April 17, 2006, judgment of conviction that specifically set the probation period at five years.

KRS 533.030(3) provides that “[r]estitution shall be ordered in the full amount of the damages” when imposing a sentence of probation. In *Hearn v. Commonwealth*, 80 S.W.3d 432 (Ky. 2002), the Supreme Court interpreted the phrase “full amount of damages” and held that post-judgment interest should be included in a restitution order:

In order to give the statute [KRS 533.030(3)] full legislative intent, this Court interprets the language of the statute to include interest as “monetary damage” which, because it resulted from the theft and conversion of the property of the victim, must be included in the full amount of damages provided by the restitution statute.

.....

It is the decision of this Court that KRS 533.030(3), requires that the Hearn, as a condition of their probation, pay full restitution to the Jefferson County Public Education Foundation. The statute clearly states that the Court shall order the defendant to make restitution and that such restitution shall be in the full amount of the damages. Thus, the circuit court shall add post-judgment interest to the principal amount of the restitution imposed.

Id. at 435-436.

In *Hearn*, the Supreme Court was called upon to determine the issue of post-judgment interest and not prejudgment interest. However, we see no distinction in the imposition of post-judgment interest and prejudgment interest upon the principal amount of restitution. The imposition of both post-judgment interest and prejudgment interest fulfill the mandate of KRS 533.030(3) that restitution be in the “full amount of damages.”

When Sutton entered into the plea agreement, we must presume that he was aware of KRS 533.030(3) and the Supreme Court's holding in *Hearn*. Considering this law and the legal maxim that existing law is implicitly incorporated into the terms of the contract, we believe it implicit under the terms of the plea agreement that prejudgment and post-judgment interest would be added to the principal amount of the restitution. Consequently, we are of the opinion that the circuit court did not err by ordering prejudgment and post-judgment interest.

Next, Sutton contends the circuit court incorrectly awarded restitution for a 1998 Dodge Ram pickup. Specifically, Sutton claims that the 1998 Dodge Ram had an active title and had been transferred to a person named Robert A. Young; thus, the circuit court erred by failing to reduce the restitution award by the value of the truck (\$11,500.00). Essentially, Sutton contends that the Commonwealth failed in its burden of proof beyond a reasonable doubt.²

The record demonstrates that Sutton pleaded guilty to theft by failing to make required disposition of the 1998 Dodge Ram. The title argument was not raised at the time he entered his plea. Moreover, Sutton failed to trace the title back to show who had transferred title of the truck to the current owner. Considering the evidence as a whole, and the lack of evidence to support Sutton's argument, we do not believe that the circuit court erred by including the value of the 1998 Dodge Ram in its restitution order.

² Sutton implies in this argument that a victim may have transferred the vehicle for consideration, thus effectively receiving a double recovery for the 1998 Dodge Ram. However, Sutton failed to present any evidence to the circuit court to support this argument.

Sutton also maintains that the rate of post-judgment interest is excessive and arbitrary. Sutton maintains that the 12% post-judgment interest rate was set in 1982 and no longer bears any relationship to the “actual loss suffered by a successful litigant.” KRS 360.040 sets the post-judgment interest rate at 12%. As the amount of post-judgment interest is statutorily imposed by KRS 360.040, we cannot say that the circuit court erred by imposing it.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

J. David Niehaus
Office of Louisville Metro Public
Defender
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky