

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000419-MR

JEREMY ELLIS

APPELLANT

v. APPEAL FROM CARLISLE CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 09-CR-00007

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON, JUDGE; LAMBERT,¹
SENIOR JUDGE.

CLAYTON, JUDGE: This comes before our Court on appeal from an order of
restitution. Based upon the following, we reverse the decision of the trial court and
remand the action for entry of a new order.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

BACKGROUND INFORMATION

On December 26, 2007, the Carlisle County Courthouse was burned to the point of total destruction. Detective Frank Gresham, of the Kentucky State Police, investigated the fire and determined that it started in Sheriff Steve McChristian's personal office inside the courthouse. Detective Gresham found remnants of aerosol cans and two (2) chainsaws in Sheriff McChristian's office. The chainsaws were being stored in the office and had been recovered as evidence from a recent burglary. Appellant, Jeremy Ellis, had been indicted for the burglary nearly a week before the fire occurred.

The arson investigation focused on Ellis as the suspect. He had a jury trial on the charges in February of 2010 and was found guilty of Arson II, Tampering with Physical Evidence and Burglary III. A sentence of twelve (12) years was imposed for the arson charge, one (1) year for the tampering charge and five (5) years for the burglary charge, all to run concurrently with one another.

At sentencing, the trial court also ordered Ellis to pay restitution in the amount of \$2.4 million. The trial court based this figure upon the cost of the current courthouse to build (\$12 million), the fact that the courthouse was one-third the size of the burned courthouse (\$4 million) and the subtraction of the insurance proceeds received for the destroyed property (\$1.6 million). This left the \$2.4 million figure the trial court imposed as restitution. He was ordered to pay the

restitution within one (1) year. Ellis now appeals the decision regarding the amount of the restitution only.

STANDARD OF REVIEW

In determining whether the trial court erred in the amount of restitution it has ordered the defendant to pay, we employ an abuse of discretion standard. *Fields v. Commonwealth*, 123 S.W.3d 914, 917 (Ky. App. 2003).

DISCUSSION

KRS 532.032 allows the trial court to set restitution and provides that:

(1) Restitution 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.

The purpose of restitution is “to restore property or the value thereof to the victim.” *Hearn v. Commonwealth*, 80 S.W.3d 432, 435 (Ky. 2002). In *Fields*, 123 S.W.3d at 917, our Court held that:

The process due at sentencing is less, of course, than that due at the culpability trial, notwithstanding the sentencing court’s need for and use of additional information and the significance of its decisions. The due-process clauses of the federal constitution require that sentences not be imposed on the basis of material misinformation, and that facts relied on by the sentencing court “have some minimal indicium of reliability beyond mere allegation.” Specific procedures, however, such as discovery, cross-examination of adverse witnesses, and fact-finding by a jury, as are required at trial, “are simply not constitutionally mandated.” (Internal footnotes omitted).

In this action, the trial court arrived at the value of the courthouse, for restitution purposes, by looking at the new courthouse which was being built. As set forth above, the new courthouse cost \$12 million to build. The trial judge heard evidence that the old courthouse was one third the size of the new one, so he estimated the value of the old one at one third the cost, or \$4 million. The trial court then reduced the amount by the insurance proceeds of \$1.6 million. We find the trial court's valuation of the property to be an abuse of discretion.

In determining the value of the property, the trial court relied on conjecture. Property appraisals should be looked to in order to determine the value of the courthouse. The insurance policy and the amount therein would be one way of determining the value of the property. Clearly, at some point the insurance company determined the value of the courthouse and issued a policy based on that amount. There must be a factual basis for the amount of restitution. See *Fields*, 123 S.W.3d 917, 918. Thus, we will remand this case to the trial court for a new restitution order. We therefore reverse and remand this action to the trial court for findings consistent with this opinion.

TAYLOR, CHIEF JUDGE, CONCURS.

LAMBERT, SENIOR JUDGE, DISSENTS WITHOUT A
SEPARATE OPINION.

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