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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002052-MR

TIMOTHY BURNETT

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 07-CR-01435

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: COMBS, STUMBO, AND WINE, JUDGES.

COMBS, JUDGE: Timothy Burnett was convicted of one felony count of theft by unlawful taking after entering a plea of guilty. He appeals from the trial court's judgment sentencing him to one-year imprisonment, probated for five years, and ordering him to pay "approximately \$25,000" in restitution. Proceeding *pro se*,

Burnett argues that the restitution order is excessive and that his felony conviction should be amended to a misdemeanor conviction. The Commonwealth contends that Burnett is precluded by the terms of his unconditional guilty plea from appealing his conviction, including the terms of the restitution order. After a careful review of the record, we affirm in part, vacate in part, and remand.

In October 1996, Burnett went to work as a bus driver for LexTran, Lexington's public transportation authority. In August 2004, Burnett was elected president of the Amalgamated Transit Union, Local 639. In November 2007, he was indicted on three counts of theft by unlawful taking over \$300.00 (class D-felonies at that time)¹ for embezzling funds from the local union.

On the advice of counsel, Burnett entered into a negotiated plea agreement in September 2010. In exchange for Burnett's guilty plea, the Commonwealth agreed to drop two counts of theft by unlawful taking and promised to recommend a one-year sentence on the single remaining charge. Burnett also agreed to testify truthfully against his co-defendant. The written agreement was silent on the matter of restitution. When Burnett appeared before the trial court for entry of his plea, the Commonwealth noted that it would seek restitution in an amount ranging between \$25,000.00 and \$30,000.00. Burnett's attorney confirmed that he and the prosecutor were working to establish the correct amount of restitution to be ordered and that he expected the final figure to be between \$25,000.00 and \$30,000.00.

¹ Kentucky Revised Statute[s] (KRS) 514.030 was amended in 2009 to raise the amount from \$300 to \$500 to constitute a felony.

During an extensive plea colloquy, Burnett indicated to the court that he understood that full restitution was estimated to be between \$25,000.00 and \$30,000.00. The Conditions of Probation report prepared by a probation and parole officer and filed with the court on October 22, 2010, recommended that Burnett be ordered to pay restitution of \$25,000.00 if he were granted probation. No evidence concerning the union's monetary losses was presented to the court.²

On October 26, 2010, Burnett was sentenced to one year of imprisonment, probated for five years, and ordered to pay “approximately \$25,000” in restitution. This appeal followed.

Because he pled guilty to the charged offense and waived his right to appeal, Burnett cannot challenge his felony conviction of theft by unlawful taking on the basis of the sufficiency of evidence. However, in *Fields v. Commonwealth*, 123 S.W.3d 914, 918 (Ky.App. 2003), we held that “even where there is a guilty plea, the record must establish an adequate factual predicate for a restitution order.” In *Fields*, we allowed the appeal to proceed despite the defendant’s unconditional guilty plea and held that a defendant must be given a meaningful opportunity to controvert factual allegations concerning a victim’s monetary damages. *See also Windsor v. Commonwealth*, 250 S.W.3d 306 (Ky. 2008) (holding that some issues survive an express waiver of the right to appeal).

² While our review is limited to the record as it was presented to the trial court, numerous documents are attached to Burnett’s brief. Among these is correspondence (dated August 28, 2008) from Fidelity & Deposit Company of Maryland to Burnett advising that Local 639 had filed a proof of loss form claiming losses of \$19,433.19 directly attributable to Burnett’s “dishonesty.”

Relying on the court's discussion in *United States v. Silverman*, 976 F.2d 1502, 1504 (6th Cir.1992), we observed in *Fields* that the defendant's right to due process requires that sentences not be imposed on the basis of material misinformation and that facts relied upon by the sentencing court "have some minimal indicium of reliability beyond mere allegation." *Fields*, 123 S.W.3d at 917. The trial court had refused to permit the defendant in *Fields* to challenge allegations related to the amount of restitution to be ordered. Therefore, we held that the restitution order must be vacated. The matter was remanded for additional proceedings.

Unlike the defendant in *Fields*, Burnett was on notice prior to his entry of his guilty plea that the Commonwealth would seek a restitution order in an amount between \$25,000 and \$30,000.00. While Burnett was given an opportunity to controvert the amount of restitution proposed by the Commonwealth, both he and his attorney confirmed to the court their understanding that restitution in this amount was being sought and would be ordered at sentencing.

Burnett's decision not to controvert the evidence underlying the proposed restitution does not mean that the court failed to give him a meaningful opportunity to do so. Under these circumstances, we do not conclude that the trial court abused its discretion by ordering restitution within the range agreed to by the parties.

Nevertheless, it is necessary for the trial court to revisit the terms of the restitution order in this case since it did not provide for **an exact amount** of restitution. The trial court's order setting restitution at "approximately

\$25,000.00” leaves some doubt or discretion with another decision-maker at some point and is directly contrary to the provisions of KRS 532.033(3). That statute provides that where restitution is ordered, “the judge shall . . . [s]et the amount of restitution to be paid.” The court’s order setting restitution in an approximate sum in this case erroneously permits someone else in authority (very possibly someone other than the judge as mandated by statute) to determine the exact sum to be paid at a later date.

For the foregoing reasons, we vacate only that part of the Fayette Circuit Court’s judgment setting Burnett’s restitution at **approximately** \$25,000.00 and remand for further proceedings to set an exact amount of restitution. We affirm as to all other issues.

ALL CONCUR.

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