

RENDERED: FEBRUARY 25, 2011; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001932-MR

SHAWN A. MORSEMAN

APPELLANT

v. APPEAL FROM WEBSTER CIRCUIT COURT
HONORABLE C. RENÉ WILLIAMS, JUDGE
ACTION NO. 06-CR-00023

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: CAPERTON AND COMBS, JUDGES; LAMBERT,¹ SENIOR
JUDGE.

CAPERTON, JUDGE: Shawn A. Morseman appeals from the Webster Circuit

Court order of restitution in the amount of \$48,597.02 to Amica Mutual Insurance

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.

Company. On appeal, Morseman argues that the trial court erred in its determination as to the amount of restitution, to which the Commonwealth disagrees. After a review of the parties' arguments, the record, and the applicable law, we reverse the order of restitution and remand this matter to the trial court for further proceedings.

Morseman was indicted along with his wife for Second Degree Arson by Complicity and Fraudulent Insurance Acts by Complicity in Webster Circuit Court on April 27, 2006. These charges resulted from the burning of Morseman's house around December 14, 2005, and the subsequent reporting of fraudulent oral and written statements to his insurer. A plea agreement was ultimately entered in which the Commonwealth dismissed the arson charge and recommended a five-year sentence to be probated with the conditions to include restitution in the amount of \$48,597.02 to Amica Mutual Insurance Company. In addition, if the conditions of the plea agreement were kept, the Commonwealth agreed to dismiss the charges (without prejudice) against Morseman's wife. The trial court accepted Morseman's plea of guilty and found that the plea was made knowingly, voluntarily, and intelligently.

Thereafter, on the date of his sentencing, Morseman moved to change his plea, which the trial court overruled.² Morseman was sentenced according to the Commonwealth's recommendation. When Morseman questioned the amount of restitution, the Commonwealth agreed to prove the amount of restitution at a

² The trial court allowed Morseman's counsel to withdraw on the same date.

hearing. The trial court then noted on the order of probation/conditional discharge that the “defendant reserves the right to contest the restitution amount upon review of the records.”

The hearing was held on March 18, 2009, via a telephone conference. The sole testimony was from a claims adjustor for Amica Insurance Company who confirmed that the amount paid to Morseman was \$48,597.02. This amount represented three types of payments:

Type A (dwelling):	\$34,108.87
Type C (contents/personal property):	\$5,638.15
Type D (additional living expenses):	\$8,850.00
Total:	\$48,597.02

Morseman offered no evidence regarding the amount of restitution owed but did submit a memorandum on April 3, 2009, arguing that he should only be required to pay restitution for payment Type C (\$5,638.15 for contents/personal property) since he only plead guilty to Fraudulent Insurance Acts. On May 21, 2009, the trial court ordered Morseman to pay restitution in the amount of \$48,597.02. Morseman then filed a motion to reconsider which was overruled. It is from this determination of restitution that Morseman now appeals.

On appeal, Morseman presents a single argument, namely, that the trial court abused its discretion in ordering restitution in an amount that represented losses sustained from a crime for which Morseman was not guilty. In response, the Commonwealth argues that the trial court did not abuse its discretion when setting the amount of restitution as the amount was a condition of the plea agreement and

conforms to the relevant restitution statutes. Additionally, the Commonwealth argues that the trial court's findings at the restitution hearing were not clearly erroneous as there was substantial evidence that Morseman's acts resulted in the full amount claimed by the insurance company/victim. With these arguments in mind, we now turn to the applicable law.

Restitution has been defined as compensation paid by a convicted person to a victim for property damage and other expenses sustained by that victim because of the convicted person's criminal conduct. KRS 532.350(1). In short, restitution is merely a system designed to restore property or the value thereof to the victim. Upon ordering restitution, the trial judge is required to set the amount of restitution to be paid. KRS 532.033(3).

The purpose of restitution, as explained in *Commonwealth v. Bailey*, 721 S.W.2d 706, 707 (Ky. 1986), is not an "additional punishment exacted by the criminal justice system It is merely a system designed to restore property or the value thereof to the victim." In addition, according to *Hearn v. Commonwealth*, 80 S.W.3d 432, 436 (Ky. 2002), the "trial court has the statutory authority to establish restitution and is in the best position to make the appropriate and well-informed decision in a fair and impartial manner."

Upon ordering restitution, the trial judge is required to set the amount of restitution to be paid. KRS 532.033(3). Further, the judge ordering restitution is required to monitor payment to assure that restitution is in fact paid. KRS

532.033(4). Thus, KRS Chapter 532 places the issue of restitution solely within the discretion of the trial judge.

The test for abuse of discretion is whether the trial court's decision was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted). Because KRS 532.033(3) charges the trial court with setting the amount of restitution, the statute contemplates that the trial court is the fact-finder in the matter. Accordingly, appellate review of the trial court's findings of fact is governed by the rule that such findings shall not be set aside unless clearly erroneous. CR 59.01. A factual finding is not clearly erroneous if it is supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is evidence which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. *Id.*

While the parties argue extensively about the evidence relating to the arson indictment, we find this to be immaterial to our determination. We believe the statutes concerning restitution provide no authority to impose restitution in an amount other than in the amount of actual loss incurred from appellant's illegal conduct for which he was convicted. KRS 533.030 speaks of monetary damages suffered “as a result of the crime.” Given that Morseman only pled guilty to Fraudulent Insurance Acts by Complicity and not Arson, the amount of restitution must have a nexus with the crime to which he pled guilty. Thus, we must reverse

the order of restitution and remand this to the trial court to make specific findings on the monetary damages suffered as a result of Morseman's complicity to the fraudulent insurance acts.

In light of the foregoing, we vacate the order of restitution and remand this matter to the trial court for further proceedings not inconsistent with this opinion.

COMBS, JUDGE, CONCURS.

LAMBERT, SENIOR JUDGE, DISSENTS AND FILES SEPARATE
OPINION.

LAMBERT, SENIOR JUDGE, DISSENTING: I respectfully dissent from the opinion of the majority.

The indictment against Morseman was for second degree arson by complicity and fraudulent insurance acts by complicity. A plea agreement between the Commonwealth and Morseman resulted in negotiated concessions and conditions as to disposition of the case.

The trial court was well within its discretion in the determination that Morseman should make restitution for the full amount of the sums he received as a result of the insurance fraud. The fact that he was able to negotiate a favorable outcome of the criminal case should not relieve him of the duty to restore sums fraudulently obtained. The plea agreement entirely undermines Morseman's claim herein.

I would affirm the trial court on grounds that its ruling was supported by substantial evidence and did not constitute any abuse of discretion.

BRIEF FOR APPELLANT:

Paul J. Dickman
Covington, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky