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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000257-MR

PAUL D. BOWSHIER

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 09-CR-00270

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND
REMANDING

** ** * * * * *

BEFORE: DIXON, LAMBERT AND VANMETER, JUDGES.

DIXON, JUDGE: Paul D. Bowshier appeals from a judgment of the Hardin Circuit Court ordering him to pay restitution to burglary victims totaling \$34,330.00. After careful review, we vacate the order of restitution, fines and costs, and we remand this case for additional proceedings.

In May 2009, several homes in Radcliff, Kentucky were burglarized. Thereafter, a grand jury indicted Appellant on one count of complicity to receiving a stolen firearm, pursuant to KRS 514.110. Two other individuals were separately indicted in relation to the Radcliff burglaries, Donovan Bowshier (Appellant's brother) and Dennison Lawrence.

In November 2009, the Commonwealth offered plea agreements to each of the co-defendants, which each of them accepted. Appellant pled guilty to complicity to receiving a stolen firearm in exchange for pretrial diversion and payment of restitution. During the plea colloquy, Appellant admitted he had possessed the gun in question and that he knew it had been stolen. The judge accepted Appellant's plea and set a joint restitution hearing for all three co-defendants prior to sentencing. At the hearing, the burglary victims testified regarding the value of the property stolen from their homes. One of the victims, Mr. Windsor, testified that a .380 automatic pistol was stolen from him, and he confirmed the gun was recovered by the police without its magazine. At the conclusion of the hearing, Appellant argued for apportionment of restitution relative to his offense of possessing a stolen firearm, emphasizing that he returned the gun to police. The trial court rejected Appellant's argument and determined that the restitution liability was joint and several among the three co-defendants for the total amount of \$34,330.00.

Appellant now appeals the restitution order, asserting several alternative theories to support his ultimate contention that the court abused its

discretion by ordering him to pay restitution relating to crimes for which he was not charged. The Commonwealth points out, pursuant to KRS 533.030(3) and the terms of Appellant's plea agreement, payment of full restitution was contemplated by the parties. The Commonwealth, like the trial court, asserts that charging Appellant with complicity indicated his involvement in a criminal enterprise and supported the court's restitution order.

After thoroughly reviewing the record, the arguments, and the applicable law, we agree with Appellant that the order constituted an abuse of discretion. In light of our conclusion, we find it unnecessary to address each of Appellant's individual arguments; instead, we focus our review on the discretion afforded the trial court in ordering restitution.

Under KRS 532.350(1) the definition of "restitution" includes "compensation paid by a convicted person to a victim . . . for property damage and other expenses suffered by a victim because of a criminal act." In *Commonwealth v. Bailey*, 721 S.W.2d 706, 707 (Ky. 1986), the court explained that the purpose of restitution 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."

If restitution is appropriate in a case, 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). Because the "trial court has the statutory authority to establish

restitution, [it] is in the best position to make the appropriate and well-informed decision in a fair and impartial manner.” *Hearn v. Commonwealth*, 80 S.W.3d 432, 436 (Ky. 2002). Thus, KRS Chapter 532 places the issue of restitution solely within the discretion of the trial court.

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.*

Appellant was indicted on one count of complicity to commit possession of a stolen firearm, for “possessing a stolen .380 caliber pistol, SN BH12638.” Our review reveals Appellant entered a valid guilty plea and fully participated in a colloquy with the trial court regarding his constitutional rights. The trial court granted Appellant pretrial diversion, which included the requirement to pay restitution. *See* KRS 532.032(2). Appellant did not admit involvement in the

burglaries, and he was not charged with any criminal offenses relating to the actual burglaries of the victims' homes. The trial court rejected Appellant's assertion that his restitution liability should be limited to the stolen pistol, which he gave to police. The victim, Mr. Windsor, acknowledged the gun was recovered, though it was missing its magazine. In ordering joint and several liability, the court reasoned that Appellant was just as guilty as the most guilty person because he was charged under a theory of complicity.

It is true that "one who is found guilty of complicity to a crime occupies the same status as one being guilty of the principal offense." *Wilson v. Commonwealth*, 601 S.W.2d 280, 286 (Ky. 1980). In this case, the principal offense was receiving a stolen firearm; consequently, there was no basis for holding Appellant liable for thousands of dollars worth of property taken during the burglaries. Furthermore, we are not persuaded by the Commonwealth's argument that the plea agreement and statutory language requiring payment of full restitution created liability in Appellant for damages resulting from uncharged offenses.

After careful consideration, we conclude the trial court abused its discretion by ordering Appellant to pay restitution for damages which resulted from crimes for which Appellant was neither charged nor convicted. We vacate the restitution order and remand for a determination of restitution consistent with this opinion. On remand, the court should ensure its order of restitution complies with the mandates of KRS 532.033 by setting forth the total amount of restitution and

frequency of payments. *Rollins v. Commonwealth*, 294 S.W.3d 463, 465 (Ky. App. 2009). Further, the record indicates that Appellant returned the stolen firearm to police. The court should consider what effect, if any, returning the firearm had on the amount of restitution owed pursuant to KRS 533.030(3)(a).

Finally, Appellant asserts, and the Commonwealth concedes, the trial court erroneously ordered payment of \$190.00 in fines and court costs despite Appellant's status as an indigent defendant. *Travis v. Commonwealth*, 327 S.W.3d 456, 459 (Ky. 2010). Accordingly, we vacate the order of fines and costs.

In sum, we vacate the order of restitution and the order assessing fines and costs, and we remand this case for further proceedings as outlined herein. In all other respects, Appellant's conviction is affirmed.

ALL CONCUR.

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