J. A25002/13

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JACKANN WILLIAMS,	:	No. 980 WDA 2012
Appellant	:	

Appeal from the Judgment of Sentence, June 12, 2012,
in the Court of Common Pleas of Allegheny County
Criminal Division at No. CP-02-CR-0015351-2011

BEFORE: FORD ELLIOTT, P.J.E., ALLEN AND COLVILLE,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: FILED: December 6, 2013

Jackann Williams appeals from the judgment of sentence entered June 12, 2012, in the Court of Common Pleas of Allegheny County.

The facts, as aptly summarized by the trial court, are as follows.

> Joan Gunderson testified that on September 12, 2011, she went into a meeting at her church at approximately 7:00 p.m. When she returned to her car at 9:30 p.m., the bicycle, which was on a rack on her car, was missing. She stated that the bike was specially ordered, and estimated its value at $500-600. When the police recovered the bike, Gunderson identified it at the police station. She testified that the toe straps had been ripped off, and the computerized odometer and broadcast mechanism were gone. In addition, the back light had been ripped off, and the handle bar extensions and front handle bag had been removed. Gunderson testified that she did not give Appellant, Jackann Williams, or anyone else permission to use her bike.

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* Retired Senior Judge assigned to the Superior Court.

> Pittsburgh Police Officer Kevin Swimkosky testified that on September 27, 2011, he was investigating a report of an adult male in the company of an adult female and a juvenile male all on bicycles. The complaint indicated that the adult male was on a stolen bike. The victim who reported the male on a stolen bike arrived on the scene and identified his bike as the one being ridden by the adult male. The officer noticed that the bike on which Appellant sat was also expensive. Officer Swimkosky asked Appellant if the other bikes belonged to her. Appellant said that she wanted to turn in the bikes to the officer and said she did not own the bikes. She said the bikes were given to her by a twelve-year-old boy, but could not provide the name or address of this child. Officer Swimkosky subsequently informed Appellant that both the bike she was on and the bike her son was on were reported stolen from two separate locations by two different victims. The officer testified that when informed of these circumstances, Appellant stated that she couldn't get into any trouble for this incident, because her son was just arrested for stealing bikes from Target. In fact, Officer Swimkosky had been the arresting officer on that case.
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> Appellant testified that her son's friends came to her house on bikes to visit with her son, who was on house arrest. Appellant stated that she asked one of the children if they could take the bikes out for a spin. She said that she was actually helping the police find a stolen bike. She stated that she was aware that her son and two of his friends who had come to her house had recently been charged with stealing bikes. Appellant testified that she did not know that the bikes were stolen, but that if she had known any of them were stolen she would not have told the police. When she gave the bikes to the police officer, she said that they belonged to some kids in the neighborhood, but did not mention that those kids were in her house at that time.

Trial court opinion, 2/27/13 at 3-4 (citations omitted).

Following a non-jury trial on June 12, 2012, the Honorable Jill Rangos found appellant guilty of receiving stolen property. Immediately thereafter, appellant was sentenced to one year of probation and ordered to pay restitution in the amount of $125. No post-sentence motions were filed. Appellant filed a timely notice of appeal on June 21, 2012.

Appellant first argues that the evidence was insufficient to support her conviction for receiving stolen property. Our standard of review is well settled.

> A challenge to the sufficiency of the evidence is a question of law, subject to plenary review. When reviewing a sufficiency of the evidence claim, the appellate court must review all of the evidence and all reasonable inferences drawn therefrom in the light most favorable to the Commonwealth, as the verdict winner. Evidence will be deemed to support the verdict when it establishes each element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. The Commonwealth need not preclude every possibility of innocence or establish the defendant's guilt to a mathematical certainty. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced is free to believe all, part or none of the evidence.

Commonwealth v. Toland, 995 A.2d 1242, 1245 (Pa.Super. 2010), ***appeal denied***, 612 Pa. 691, 29 A.3d 797 (2011) (citations omitted).

To establish the offense of receiving stolen property, the Commonwealth was required to present evidence sufficient to prove beyond a reasonable doubt that (1) the property had been stolen, (2) the accused received the property, and (3) the accused knew or had reasonable cause to

know that it had been stolen. 18 Pa.C.S.A. § 3925; ***Commonwealth v. Worrell***, 419 A.2d 1199, 1201 (Pa.Super. 1980).

Appellant does not contest that the Commonwealth proved the first two elements of the crime, establishing that the bicycle was stolen and that she was in possession of it when stopped by the police. (Appellant's brief at 13.) Instead, she argues the Commonwealth failed to prove the third element of guilty knowledge. Specifically, she argues the evidence was insufficient to establish that she knew or had reason to know the bicycle she was riding was stolen.

"While there is seldom direct evidence of guilty knowledge, that element may be inferred when the underlying circumstantial evidence is sufficiently strong." ***Commonwealth v. Robinson***, 463 A.2d 1121, 1123 (Pa.Super. 1983). "If from the circumstantial evidence, it can be inferred that the appellant had reasonable cause to know, a final inference can reasonably be made that he in fact knew that the property was stolen." ***Commonwealth v. Henderson***, 451 Pa. 452, 455, 304 A.2d 154, 156 (1973). A permissible inference of guilty knowledge may be drawn from the unexplained possession of recently stolen goods as well as from the surrounding circumstances. ***Commonwealth v. Williams***, 468 Pa. 357, 365, 362 A.2d 244, 248 (1976). The trier of fact is charged with determining the credibility of the witnesses and the evidence. It may choose

which, if any, evidence to believe, and is permitted to make reasonable inferences based on the circumstantial evidence presented. ***Toland***, ***supra***.

In this case, the trial court, based on circumstantial evidence, found that appellant should have known that the bicycle was stolen. In its written opinion, the trial court noted that appellant knew that her son and a friend were arrested for stealing bikes approximately one month before this incident. (Trial court opinion, 2/27/13 at 5.) Appellant, her fiancé, and her son then borrowed three bicycles from her son's friend that individually cost between $500 to $2,000 each. In fact, the bike appellant borrowed was individually customized for an adult yet she purportedly borrowed it from her son's friend who was a 12-year-old child whose name she did not know.

Additionally, appellant's subsequent actions after taking the bicycle demonstrate that she knew that it was stolen. For instance, when appellant was stopped by an officer who inquired about the bicycles, she immediately asked to surrender her bicycle to the officer. (Notes of testimony, 6/12/12 at 21.) As the trial court stated,

> a person who believes they borrowed somebody else's property and that person is still at their house waiting for them to return would have at worst taken the officers to her home to discuss . . . or just simply driven home . . . instead she volunteered to give her son's friends' bikes to the police, not having been told that they were suspected to be stolen bikes. That belies her argument that she didn't know or didn't suspect that they were stolen.

Id. at 48.

Viewing all of the evidence introduced at trial in the light most favorable to the Commonwealth, as our standard of review requires, the fact-finder could properly conclude that appellant had reason to know that the bicycle was stolen. We have no difficulty in deciding that the circumstantial evidence was sufficient to permit the finder-of-fact to conclude that appellant knew either that the bike had been stolen or believed that it had probably been stolen.

Next, appellant alleges that the restitution order is improper and illegal. An appeal from an order of criminal restitution based upon a claim that a restitution order is unsupported by the record challenges the legality, rather than the discretionary aspects, of sentencing. ***Commonwealth v. Redman***, 864 A.2d 566, 569 (Pa.Super. 2004), ***appeal denied***, 583 Pa. 661, 875 A.2d 1074 (2005). "[T]he determination as to whether the trial court imposed an illegal sentence is a question of law; our standard of review in cases dealing with questions of law is plenary." ***Commonwealth v. Hughes***, 986 A.2d 159, 160 (Pa.Super. 2009) (citation omitted).

Appellant essentially argues that restitution was imposed as part of a direct sentence and avers "[t]he evidence established that [appellant] did not borrow the bicycle until two weeks after the theft had occurred, and she was in possession of the bicycle for probably less than an hour." (Appellant's brief at 20.) Appellant also argues that there was no evidence presented that she was in possession of any of the damaged items such as

the toe straps or back light. (***Id.***) Thus, appellant claims that the order of restitution must be vacated as the Commonwealth failed to establish a direct causal connection between appellant's conduct and the damage to the victim's bike as required by 18 Pa.C.S.A. § 1106(a).

Restitution is "a creature of statute, and, without express legislative direction, a court is powerless to direct a defendant to make restitution as part of a sentence." ***Commonwealth v. Harner***, 533 Pa. 14, 17, 617 A.2d 702, 704 (1992). Restitution may be imposed in several situations,[1] including, for the purposes of this discussion, as a part of a direct sentence, 18 Pa.C.S.A. § 1106(a), or as a condition of probation, 42 Pa.C.S.A. § 9754(c)(8).

As a part of a direct sentence, restitution is a form of punishment and is, therefore, subject to strict scrutiny. ***Harner***, ***supra***. Section 1106(a) provides as follows:

> **(a) General rule.--**Upon conviction for any crime wherein property has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime, or wherein the victim suffered personal injury directly resulting from the crime, the offender shall be sentenced to make restitution in addition to the punishment prescribed therefor.

[1] Other settings also permit the imposition of restitution, including as a condition of parole, 18 Pa.C.S.A. § 1105(b), as a condition of intermediate punishment, 42 Pa.C.S.A. § 9763(b)(1), or as an order by a magisterial district judge, 18 Pa.C.S.A. § 1106(d).

18 Pa.C.S.A. § 1106(a). Our supreme court has ruled that, "[t]his statute is clear on its face and applies only for those crimes to property or person where there has been a loss that flows from the conduct which forms the basis of the crime for which a defendant is held criminally accountable." ***Harner***, ***supra*** at 21, 617 A.2d at 706. As restitution under this section is a sentence, the amount ordered must be supported by the record. ***Commonwealth v. Pappas***, 845 A.2d 829, 842 (Pa.Super. 2004), ***appeal denied***, 580 Pa. 712, 862 A.2d 1254 (2004). "The payment of restitution ordered by the court cannot be in excess of the damage caused by the defendant." ***Id.*** Under Section 1106, restitution is mandatory and shall be imposed "[r]egardless of the current financial resources of the defendant, so as to provide the victim with the fullest compensation for the loss." 18 Pa.C.S.A. § 1106(c)(1). ***See Commonwealth v. Leber***, 802 A.2d 648, 652 (Pa.Super. 2002) (because restitution under Section 1106 is "mandatory and the defendant's ability to pay is irrelevant . . . the court was not obligated to inquire into the ability to pay when it entered the order").

Alternatively, a sentencing court may impose restitution as a condition of probation pursuant to 42 Pa.C.S.A. § 9754. When restitution is a condition of probation, the "nexus between the damage and the offense is relaxed, and restitution only requires some connection to the legal responsibility." ***Commonwealth v. Kelly***, 836 A.2d 931, 932 (Pa.Super. 2003).

> [W]hen restitution is a condition of probation under 42 Pa.C.S.A. § 9754(c)(8), rather than a direct sentence under the Crimes Code, there need not be a direct nexus between offense and loss. While restitution cannot be indiscriminate, an indirect connection between the criminal activity and the loss is sufficient.
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> . . . [E]ven without direct causation, a court may properly impose restitution as a probationary condition if the court is satisfied that the restitution is designed to rehabilitate the defendant and to make some measure of reimbursement to the victim. Such sentences afford courts latitude to order restitution so that offenders will understand the egregiousness of their conduct, be deterred from re-offending, and be encouraged to live responsibly. They also give sentencing courts flexibility to determine all direct and indirect damages caused by an offender.

Commonwealth v. Harriott, 919 A.2d 234, 238 (Pa.Super. 2007), ***appeal denied***, 594 Pa. 686, 934 A.2d 72 (2007) (internal citations omitted) (emphasis added). Under Section 9754, the sentencing court has an obligation "to determine what loss or damage has been caused, and what amount of restitution [the defendant] can afford to pay, and how it should be paid." ***Harner***, ***supra*** at 23, 617 A.2d at 707; ***Commonwealth v. Dinoia***, 801 A.2d 1254, 1257 n.1 (Pa.Super. 2002).

At the outset, we address appellant's argument concerning whether the court imposed restitution as a direct sentence or a condition of probation. As appellant notes, when orally imposing sentence, the court did not clarify on the record whether restitution was a part of appellant's direct sentence or was a condition of probation. The written sentencing order and

the trial court's Rule 1925(a) opinion, however, state that restitution was imposed as a condition of probation. (Docket #6; trial court opinion, 2/27/13 at 2.) Appellant argues any ambiguity between the oral imposition of sentence and the written judgment of sentence is not an obvious or "patent" mistake subject to a trial court's inherent power to correct under 42 Pa.C.S.A. § 5505 (modification of orders). Thus, appellant contends that the order of restitution was technically imposed as part of a sentence.

We disagree and find appellant's argument is disingenuous. While the court's oral sentence did not specify that restitution related to probation, the oral sentence certainly implied such; appellant was only sentenced to one year of probation and immediately thereafter the court stated the amount of restitution. (***See*** notes of testimony, 6/12/12 at 56.) The written sentencing order, filed that same date, specified that restitution be imposed as a condition of probation. (Docket #6.)

In any event, as the damage to the victim's bicycle did not flow from the conduct forming the basis of appellant's receiving stolen property conviction for which appellant was found criminally accountable, we could not sustain restitution as a direct sentence. ***See Harner***, ***supra***. However, the trial court's imposition of restitution as a condition of probation can be justified.

In ***Kelly***, ***supra***, the defendant was convicted of receiving stolen property. The trial court ordered appellant to pay restitution as part of his

probation related to damage done to a victim's truck as part of a break-in and theft of the victim's property inside the vehicle. Although appellant was not directly responsible for the break-in or any of the damage done to the victim's truck, a panel of this court affirmed the order of restitution and held that the appellant was indirectly tied to the theft by providing a market for stolen goods and encouraging others to steal. ***Kelly***, 836 A.2d at 932-934; ***See also Commonwealth v. Popow***, 844 A.2d 13 (Pa.Super. 2004) (holding defendant's illegal actions triggered encounter, therefore defendant indirectly caused victim's injuries when he accidently cut victim with box cutter while falling down stairs).

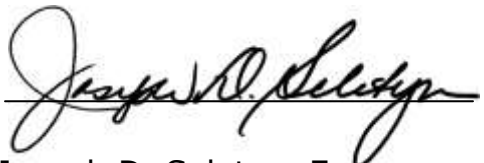
Here, as in ***Kelly***, appellant may not have directly damaged the victim's bicycle; she was indirectly tied to the damage done to the bicycle by benefitting from the circumstances of the theft. We find no error in the trial court's finding of an indirect link to support restitution as a condition of probation. The trial court was required to determine the cause and extent of the victim's property damage, assess appellant's ability to make restitution, and fashion a rational payment schedule. While the court determined the cause and extent of the victim's property damage to be $125, the court did not assess appellant's ability to make restitution and it did not fashion a rational payment schedule. Since these considerations are not a part of the record, we reverse the order, vacate the judgment of sentence, and remand

the matter to the trial court for resentencing consistent with this memorandum.

Accordingly, judgment of sentence is affirmed in part and vacated in part. Case remanded for resentencing in a manner consistent with this memorandum. Jurisdiction relinquished.

Allen, J. concurs in the result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/6/2013