

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000388-MR

ROBERT LAFON

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 08-CR-00586

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

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

LAMBERT, SENIOR JUDGE: Robert Lafon appeals from a Christian Circuit

Court judgment ordering him to pay restitution of \$4,000 for some copper

telecommunications wire that was stolen from AT&T. Lafon argues that the trial

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 KRS 21.580.

court abused its discretion in setting restitution because the amount was unsupported by any evidence.

On two occasions, Lafon sold copper telecommunications wire that had been stolen from AT&T to a company called Green Earth Recycling. Receipts show that Lafon received a total of \$611 from Green Earth.

On November 4, 2009, Lafon entered a plea of guilty to receiving stolen property over \$300. The plea agreement which Lafon signed provided for restitution in the amount of \$9,000 to AT&T to be determined at final sentencing. At the plea hearing, the Commonwealth's Attorney explained that the amount to be paid by Lafon would be less than \$9,000, as an unindicted co-defendant, Jeremy Johnson, was responsible for some of the total. The prosecutor characterized the amount of wire sold by Lafon as a "handful," and stated that Johnson had sold significantly more. He also stated that he could not "come up with a figure today" for Lafon's share of the restitution and that he had no market price for the dates that the wire was sold. He could not explain why Johnson had not been charged but told the court that he would speak with the detective on the case about an indictment.

At Lafon's sentencing hearing, the prosecutor was still unable to provide a definite restitution amount, stating that he did not have a number except for the \$9,000 reported by AT&T. Defense counsel argued that the amount should be established by the receipts from Green Earth Recycling, or alternatively, that a

hearing should be conducted to determine the amount. The trial court ordered the hearing to be continued, stating that it wanted to know if any wire was salvaged and whether Lafon would get credit for that.

When the hearing resumed, the Commonwealth's Attorney stated that he had spoken with the local AT&T office where the theft occurred and with AT&T "loss prevention folks" in Nashville. He stated that the amount lost was actually worth \$8750 and that none of the wire had been recovered. The Commonwealth was unable to provide any written proof of AT&T's loss. Defense counsel argued that the amount of wire received by the recycling facility from Lafon was considerably less than the amount for which the Commonwealth was seeking restitution, and that the only evidence available to determine the correct amount of restitution was the documentation of the two sales to the recycling center which had paid Lafon a total of \$611. The Commonwealth Attorney stated that he had license identification for Jeremy Johnson but had not checked on his whereabouts. The trial court set restitution at \$4,000. This appeal followed.

The statute which governs restitution provides in pertinent part as follows:

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.

Kentucky Revised Statutes (KRS) 532.032(1).

Lafon argues that the imposition of the restitution failed to meet the due process requirements set forth in *Fields v. Commonwealth*, 123 S.W.3d 914 (Ky.App. 2003). The *Fields* court explained that “the General Assembly contemplated ordinary sentencing procedures as the foundation for restitutionary sentences[.]” *Fields*, 123 S.W.3d at 916. Thus, although the process due at sentencing is less than that due at a culpability trial, certain requirements must be met. Sentences may not be imposed on “the basis of material misinformation, and . . . facts relied on by the sentencing court must ‘have some minimal indicium of reliability beyond mere allegation.’” *Id.* at 917 (citation omitted). Furthermore, the defendant must be given notice and “afforded a meaningful opportunity to controvert the evidence against him at his sentencing hearing.” *Id.* (citation omitted). “What constitutes a ‘meaningful opportunity to controvert,’ . . . will vary with the circumstances, and the provision of such an opportunity is entrusted to the trial court’s discretion.” *Id.* (citation omitted).

In the *Fields* case, the Court determined that these requirements had not been met because the defendant was not provided with adequate notice of the claims against him nor any opportunity to controvert them. The record contained no factual basis but mere allegations regarding the amount of restitution he had been ordered to pay. The items were not specified and there was no indication of how any item was valued.

The facts of Lafon’s case are analogous. The only specific information regarding the value of the copper wire came from the Commonwealth

Attorney's account of his conversation with officials at AT&T, and no evidence whatsoever was presented to determine which portion of that amount was attributable to Lafon and which to Johnson. The Commonwealth argues that Lafon reneged on his agreement to provide information about his accomplice, Johnson, but the record indicates that the Commonwealth Attorney failed to contact the detective who handled the case or to track down Johnson's whereabouts from his license information. Lafon was unable to challenge the Commonwealth's allegations in a meaningful way through cross-examination of witnesses or through controverting documentary evidence. The evidence against Lafon did not have the "minimal indicium of reliability beyond mere allegation" required by due process and therefore the restitution order must be reversed and this case remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

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