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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001145-MR

HOWARD T. JEWELL, JR.

APPELLANT

v. APPEAL FROM SPENCER CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, SENIOR JUDGE
ACTION NO. 09-CR-00018

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND KELLER, JUDGES.

CLAYTON, JUDGE: Howard Jewell appeals from an order of restitution entered in the Spencer Circuit Court. He argues that the trial court abused its discretion in ordering restitution. For the foregoing reasons, we affirm in part, vacate in part, and remand.

BACKGROUND INFORMATION

On May 20, 2006, firefighters responded to a porch fire at a two-story vacant house located at 2857 Bloomfield Road in Taylorsville, Kentucky. From the evidence, Officer Kevin Dunn was able to deduce that the fire began when gasoline was ignited on the porch. Defendant Howard Jewell is the ex-husband of owner Roy Price's daughter and even though he was considered a suspect, given recent burns on his arms, his alibi prevented charges from being filed.

Nevertheless, in 2009 one of Jewell's witnesses changed the story he had originally told police. The witness said that he knew who had driven Jewell to the property. He also claimed to have seen the house on fire on the night of the incident. On April 23, 2009, Jewell was indicted for arson, second-degree, for starting a fire with intent to destroy a building. Jewell entered a guilty plea to the amended charge of arson, third-degree, and was sentenced to two years' imprisonment. A restitution hearing was subsequently held.

The police report stated that "[t]he fire caused moderate damage to the exterior siding along the front porch with some extension into the interior on both the first and second floor." Also, a newspaper article about the incident depicted the fire as a "small blaze," and Fire Chief Nathan Nation provided "that the damage was minor and extended through a wall and into the roof of the porch." There was also a document from American Modern Insurance Group titled "Claim Details," which stated the date of loss was May 20, 2006, it was reported on May 22, 2006, and the inspection was May 24, 2006. According to the insurance

company's report, the type of claim was "Fire - Including Fire Department Expense, Wood Burning In Fireplace, Smoke, Smudge & Additional Living Expense." "No" is listed by total loss. *Id.* At the time of the fire, the house was insured for 10% of its value, \$2,000, because it was used as a storage unit and not a dwelling.

Price owned the lot and the house, as well as a mobile home he had put behind the house on the property. Yet, the mobile home created a zoning issue with the property, since its presence, coupled with the presence of the vacant house, amounted to two dwellings on the lot. Before the fire occurred, the Taylorsville-Spencer County Planning and Zoning office sent four letters to Price between December 15, 2006, and March 29, 2006, informing him of the zoning issue. Initially, the letters required removal of the house but they eventually gave Price the option to tear down the house or to remove the mobile home. Price applied for and received a building permit for the mobile home on November 8, 2005. In the application, he included a handwritten description of his plans, which included "Tearing old house down and putting in a single wide mobile home."

On May 20, 2006, the date of the fire, Price had performed neither of these options. He testified that he received permission to use the house as a storage building so that it could remain on the property. Contrary to his statement, Price did not produce tangible evidence of this transaction. The trial record contains letters from the Zoning Enforcement Administrator that explicitly provide Price with two options: "[t]ear down the existing old house, eliminate the drainage

lines running to the highway ditch . . . [or] bring the old house up to code . . . then [Price] will be required to remove the Mobile Home from the property.” Price also stated that he had been planning to use the house as a residence for his daughter.

Price testified that the fire caused him to clean up the building, which consisted of “getting rid of all the old house and busting the concrete up and getting rid of all of it on the porch.” Nevertheless, the trial court appeared to be unsure about the extent of the fire damage. The trial judge asked Price whether the house had burned completely to the ground, he had to haul it away, or there was nothing on the property. Price responded by stating that there was “nothing there.” The trial judge did not appear to have possession of a picture of the property. Yet, the pictures offered in the record indicate that the fire did not burn the house to the ground. Price demolished the house during his clean-up efforts.

Before the trial, the Commonwealth informed Jewell that their proposed restitution amount would be \$30,000, but that they would settle for \$20,000. While testifying, Price made claims for restitution for numerous expenses incurred after the fire. Some of his claims appeared to contradict earlier testimony. Specifically, Price said the house was valued at \$40,000, and the prosecutor corrected him by stating that he had previously told her it was worth \$35,000. She asked how much the land was worth and Price said \$10,000, at which point the prosecutor explained that if he bought it for \$35,000, and the land was still there, he lost \$25,000 in property. Price responded with, “Right.”

The prosecutor then attempted to clarify issues that Price had with the mortgage. Price testified that he had a mortgage on the house but not on the trailer. The prosecutor asked Price if the trailer was secured against the property. Price appeared to misunderstand, saying this was correct, and that he bought the trailer for \$15,000 and acquired \$20,000 of insurance on it. At this point, the prosecutor reminded Price that he had earlier testified to tying in all the mortgages together. She explained that the house's demolition did not eliminate his mortgage on the house. Price agreed with this statement.

On cross-examination, defense counsel also addressed the issue of Price's mortgage. Defense counsel asked Price if what he was paying per month on the mortgage was for the land and Price told him that was correct. The Commonwealth produced a property loan pay-off document but did not produce any evidence of the current mortgage pay-off. Price's loan was originally \$57,000, and he had \$25,000 remaining to pay. Price was also unable to estimate the amount of the mortgage pay-off. Defense counsel then stated that the mortgage was not for the house; the house was securing the mortgage. Price stated that was correct. He also testified that he believed the mortgage was now secured against the trailer and land because the house no longer existed.

Price was unable to recall when he had purchased the house and he could not propose an estimate. He also testified that he was unaware of any zoning issues with the property at the time of the fire. Price claimed to have received notice once the fire had occurred, despite the letters in evidence having been dated

up to six months before the fire. Defense counsel asked if he was not allowed to have the house on the property because he had another building on the property, and Price responded that this was correct.

Price next testified that he had been storing furniture in the house and that it was lost as a result of the fire. He said they were unable to salvage any of the furniture and that this required him to have it “hailed off.” He was unable to offer any receipts and did not specify what furniture was lost. Price valued the furniture at \$5,000.

Lastly, Price claimed that he had to pay \$10,000 to clean up the house, which consisted of bringing in a tractor to push the house down, renting dumpsters, and hiring workers to haul away the rubble. He said he rented four dumpsters at \$500 each. Yet, he was unable to provide proof of these expenses other than his own recollection. In addition, he had no cancelled checks or receipts to show the trial court. Price explained that because the clean-up was “three or four years ago,” he had not retained any checks. He also claimed to have paid most of his laborers in cash. Price received help from his son, whose labor would have cost around \$500-\$600 had he chosen to pay him. Price did not produce any documented evidence of these expenses. Consequently, the Commonwealth sought only \$2,500 for the four dumpsters and paid laborers.

The Commonwealth requested \$30,500 in restitution. This amount was comprised of the \$25,000 house value, \$5,000 furniture value, \$2,500 clean-up cost, less the \$2,000 Price received in insurance. The trial judge ordered restitution

for the house value due to Price's consistent claim that the land was worth \$10,000, as well the clean-up cost, but acknowledged that Price's lack of itemization and receipts for the furniture did not provide for a reasonable estimation of the furniture's value. The trial judge stated that, had Price had a yard sale, that he did not believe Price would receive \$5,000 for the furniture. As a result, he valued the furniture at \$2,000. Given that Price and the Commonwealth failed to produce documentation of the house's value, the furniture's value, and clean-up expenses, the trial judge commented that he did not know how an appellate court would treat the case because he was unsure about how he could make fact-finding conclusions with no information.

Nevertheless, the trial court in its order on May 19, 2010, set the amount of restitution as \$27,000. The trial court did not set out the method that it had used to reach this restitution amount. The trial court then stated that the total amount would bear interest at the legal rate. It became Price's responsibility to collect the restitution because, normally, parole and probation would monitor payment but Jewell did not receive probation. Jewell now appeals from this order.

ANALYSIS

On appeal, Jewell has challenged the court's restitution order. First, Jewell argues that the trial court abused its discretion in setting the amount of restitution. He maintains that the restitution amount was based on false information that had no factual predicate and was based on minimally reliable evidence about the actual fire damage. Second, he claims that the trial court

exceeded its authority in entering a judgment with interest. Initially, we address the issue of the amount of restitution. Specifically, Jewell raises a question about whether the fire caused the loss of the entire house. Jewell also challenges findings about the value of the furniture and clean-up. Further, he argues that he did not receive adequate notice that allowed him the ability to controvert evidence of expenses paid by Price.

I. Determination of Restitution

Before we consider these issues, we must determine if Jewell adequately preserved them for appellate review. Jewell argues that his objection to the setting of restitution in the amount ordered constitutes adequate preservation. Given Jewell's arguments at trial, he effectively preserved challenges to the amount of restitution for the values of Price's home, his furniture, and clean-up costs. Price was unable to produce documentation of any these amounts, thus giving Jewell reason to challenge the trial court's imposition of restitution costs to cover Price's loss in value. With regard to the issue of whether adequate notice was provided to him to be able to question the evidence about the expenses for restitution, Jewell did not preserve this issue at trial. Nevertheless, under Kentucky Rules of Criminal Procedure (RCr) 10.26, a standard of review for alleged errors not sufficiently raised or preserved for appellate review exists:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

RCr 10.26.

Furthermore, a trial court must base its order of restitution on reliable facts. *U. S. v. Silverman*, 976 F.2d 1502, 1504 (6th Cir. 1992). In *Fields*, our Court addressed another case where the defendant contested the amount of restitution. *Fields v. Commonwealth*, 123 S.W.3d 914 (Ky. App. 2003). In that case, the trial court denied him a chance to controvert the Commonwealth's evidence. *Id.* at 915–916. The Court held that the trial court had deprived the defendant of an opportunity to be heard. It then adopted the due process standard articulated by the Sixth Circuit in *Silverman*, that is, although a lower standard of due process applies at sentencing, the facts relied on by the court must “have some minimal indicium of reliability beyond mere allegation.” *Id.* at 917 (quoting *Silverman*, 976 F.2d at 1504). In making this holding, the *Fields* Court thus determined that in order to satisfy the due process standard, the defendant must have some meaningful opportunity to be heard and “the record must establish [a] . . . factual predicate for [the] restitution order.” *Fields*, 123 S.W.3d at 918.

Palpable error may occur when a defendant is denied due process at sentencing. *Wiley v. Commonwealth*, 348 S.W.3d 570, 575 (Ky. 2010). Pursuant to Kentucky Revised Statutes (KRS) 532.050, a defendant must be “afforded a

meaningful opportunity to controvert the evidence against him [at his sentencing].” Therefore, even though Jewell did not preserve the issue of adequate notice at trial, based on the fact that palpable error occurs when a defendant is deprived of due process, we review whether adequate notice was provided to Jewell under the palpable error standard. We will now address the arguments that Price effectively preserved at trial.

A. Amount Awarded for the Value of the House

On appeal, Jewell argues that no causal link has been established between the fire and the demolition of the house. This nexus is essential to determining the value of the damage actually caused by Jewell’s criminal conduct. Ultimately, the question is whether it was clearly erroneous to order Jewell to pay restitution for the full value of the house. KRS 532.350(1)(a) defines restitution as “any form of compensation paid by a convicted person to a victim for . . . property damage and other expenses suffered by a victim because of a criminal act[.]” KRS 533.030(3) states that “[w]hen imposing a sentence of probation . . . where a victim . . . has suffered monetary damage as a result of the crime due to his property having . . . its value substantially decreased . . . the court shall order the defendant to make restitution[.]” Furthermore, even in cases where the defendant has not been sentenced to probation, the defendant may still be ordered to pay restitution. *Commonwealth v. O’Bryan*, 97 S.W.3d 454, 456-457 (Ky. App. 2003).

Essentially, restitution’s purpose is to ensure crime victims are fully compensated for their losses. *Hearn v. Commonwealth*, 80 S.W.3d 432, 435-436

(Ky. 2002). It has been recognized that the “[t]rial court . . . is in the best position [regarding restitution] to make the appropriate and well-informed decision in a fair and impartial manner.” *Id.* at 436. Because the trial court must set the amount of restitution owed, legislation provides that it will be the fact-finder. KRS 532.033. Moreover, statutory language charges the trial court with setting the amount of restitution. KRS 532.033(3). Here, the amount of restitution is based upon the record made in the trial court. In determining whether the trial court erred in the amount of restitution it has ordered the defendant to pay, we employ an abuse of discretion standard. *Fields*, 123 S.W.3d at 917. “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Evidence used to determine restitution costs need only satisfy a “minimal reliability standard.” *Fields*, 123 S.W.3d at 917. The evidence cannot be based on “material misinformation” and the facts relied upon by the sentencing court must have “some minimal indicium of reliability beyond mere allegation.” *Id.* (footnote omitted).

At trial, the court granted a judgment of restitution in order to compensate Price for the full value of the house. The trial court seemed to be uncertain about the extent of the damage, and appeared to be under the belief that the fire caused the house to burn completely to the ground. Hence, the trial court

ordered restitution costs while under the assumption that Jewell's action caused the entire house to burn down.

The record contains two pictures of the damage and these pictures show that the fire did not cause the entire house to burn to the ground. After the fire, the house remained structurally intact with what was deemed to be minor damage on the porch, on the porch's roof, and on the second story siding. The police report indicates that further moderate damage extended into the interiors of the first and second floors.

One factor to consider in reviewing the trial court's restitution order for the full value of the home is whether Price's complete demolition of his house was a result of Jewell's crime. Jewell argues that no evidence was presented in explanation of how a porch fire with minor damage caused total demolition of the structure. Not only did the Commonwealth fail to demonstrate the actual damage the fire caused, it also did not establish a causal link between the fire and the need for the house's total demolition. Moreover, Jewell maintains that Price was aware that zoning prohibited him from keeping both the house and the mobile home on the property. Indeed, he points to Price's 2005 building permit and the letters Price received from the Zoning Commission prior to the fire. Using this evidence, Jewell posits that Price used the fire as an opportunity to have the house removed as legally required and to recover the cost from Jewell.

To counter, the Commonwealth states that despite Price's legal obligation to remove the house, it cannot be said that this would have been his

ultimate decision. Price also had the option of removing the mobile home to comply with the zoning demands and may have chosen to do so had the fire not occurred. Regardless of Price's plans, the Commonwealth also believes that Jewell is legally liable for the full value of the home because they state that his criminal conduct was ultimately the cause of its destruction.

At trial, the Commonwealth asked Price whether he had to "raze the building or clean it up," to which Price responded, "I had to clean it up, yes." Price then testified that he had to knock down the house, bust up the concrete, and haul the debris away. The Commonwealth relies on the fact that Price knocked down the house as proof that the destruction of the house resulted directly from the fire. Yet, this argument does not address whether the house's demolition was necessary given the extent of the fire damage. Legally, Jewell must only be responsible for restitution costs that Price incurred as a result of Jewell's criminal act. We conclude that the evidence presented at trial is not dispositive of a finding that the fire caused the complete destruction of the house.

B. Amounts Awarded for Furniture Value and Clean-up Costs

Next, Jewell challenges the restitution amount awarded for Price's damaged furniture and the clean-up costs of the fire. He states that no evidence existed to support the claim that the fire damaged any of the house's contents. Jewell also believes that the trial court appeared to guess at \$2,000 in their assessment of Price's loss in furniture. Furthermore, Jewell objects to the \$2,500 in restitution costs ordered for the house's clean-up, not only because it was

undocumented and uncredited, but also because he believes there is no probative evidence that the house's full demolition was caused by damage from the fire.

In the instant case, the only evidence proffered was Price's testimony. It is recognized that the owner of stolen property's opinion constitutes legitimate evidence of its value. *Poteet v. Commonwealth*, 556 S.W.2d 893, 896 (Ky. 1977). Notwithstanding that Price's testimony regarding the value of the furniture and clean-up may be legitimate, it must still meet a certain standard of proof. In *Fields*, this Court addressed the standard of proof necessary to establish restitution. It envisioned that restitution be considered at the sentencing hearing, where due process standards are less strict and it observed that "[t]he due-process clauses of the federal constitution require that sentences not be imposed on the basis of material misinformation, and that facts relied on by the sentencing court 'have some minimal indicium of reliability beyond mere allegation.'" 123 S.W.3d at 917 (footnotes omitted.) The *Fields* Court went on to state that "the record must establish an adequate factual predicate for a restitution order." *Id.* at 918.

The house's clean-up costs are based on an apparent material misunderstanding because, from the record, it seems that the trial court's perception was the fire had totally destroyed the house. Since this perception is incorrect, the trial court's determination of restitution was not based on a minimum indicia of reliability. Besides the lack of any reliable evidence, we also believe that Jewell may not be held responsible for costs associated with damage that his

criminal conduct did not cause, that is, clean-up costs for hauling away the house.

Thus, we reverse the trial court on this issue.

C. Notice and Ability to Controvert

In this case, Jewell was not provided with a meaningful opportunity to challenge the Commonwealth's claims for restitution. Based upon our decision to remand for a new hearing, this argument is moot.

II. Inclusion of Interest in Judgment

Jewell's second main argument made in contesting the trial court's order was whether the trial court erred in its imposition of interest on the restitution amount. Jewell argues that the issue regarding interest is appropriate for judicial review regardless of preservation based on the factor that "since sentencing is jurisdictional it cannot be waived by failure to object." *Ware v. Commonwealth*, 34 S.W.3d 383, 385 (Ky. App. 2000) (quoting *Wellman v. Commonwealth*, 694 S.W.2d 696, 698 (Ky. 1985)). This statement was further clarified in *Grigsby v. Commonwealth*, 302 S.W.3d 52, 54 (Ky. 2010), where the Supreme Court stated that "sentencing issues" do not refer to any issue that arguably affected the ultimate sentence imposed, but rather refer to a claim that a sentencing decision is contrary to statute. In the case at hand, the efficacy of an award of interest is based on statutory interpretation and, hence, preserved for our review.

The determination of whether the [trial] court's order complies with KRS 532.033 "is a matter of statutory interpretation and consequently a question of law[.]" *Hardin County Schs. v. Foster*, 40 S.W.3d 865, 868 (Ky. 2001). As a

result, we apply a de novo standard of review. *Brown v. Commonwealth*, 326 S.W.3d 469, 472 (Ky. App. 2010).

Jewell contends that the absence of any mention in KRS 532.033 for the trial court to order interest demonstrates that the trial court exceeded its authority when it imposed interest as a condition of Jewell's restitution. While cognizant of the Commonwealth's contention that KRS 533.030 allows interest to be included as "monetary damage," he argues that this statute is inapplicable because it provides for interest as a condition of probation. Jewell was not probated in this case.

It is recognized that the "authority of the trial court to order interest on restitution . . . serves judicial economy and the traditional notions of fair play and substantial justice." *Hearn*, 80 S.W.3d at 436. By ordering interest payments with restitution judgments, victims are not forced to spend additional time and money while seeking a civil remedy that adequately compensates for lost or damaged property. *Id.* Furthermore, many federal and state courts, including Kentucky, do not require specific statutory language to validate an order of interest. *Id.* at 434. Interest as a condition of restitution is typically upheld because restitution's purpose is to "make the victim whole." *Dorris v. State*, 656 P.2d 578, 584 (Alaska App. 1982). In order for restitution to be considered full, it will often need to include post-judgment interest. *Hearn*, 80 S.W.3d at 434.

Accordingly, we hold that the purpose of restitution validates the trial court's imposition of interest as a condition of Jewell's sentencing. Even though

Jewell contends that there is no express statutory authority for the trial court to order interest, this does not mean that the trial court is forbidden from doing so. In this case, Jewell caused a substantial decrease in the value of the property damaged by his criminal conduct. As a result, he must be responsible for making Price whole. Therefore, the trial court did not err when it imposed an award of interest.

CONCLUSION

Thus, we affirm the judgment of the Spencer Circuit Court with regard to the imposition of interest but vacate its order of restitution and remand for proceedings consistent with this decision.

ACREE, JUDGE, CONCURS.

KELLER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

KELLER, JUDGE, DISSENTING: Respectfully, I dissent for three reasons. First, the majority states that “the trial court ordered restitution costs while under the assumption that Jewell’s action caused the entire house to burn down.” Certainly, the record is less than clear; however, I do not believe the record supports the assertion that the trial court did not know the condition of the house after the fire.

Second, I believe that the evidence does support a finding that the house was “completely destroyed” by the fire. While there was evidence that the fire was only “minor” there was also evidence that the fire penetrated the front wall of the house and damaged both the first and second floors. Whether that amount of

damage rendered the house so irreparable as to be essentially destroyed is a question of fact appropriately left to the trial court.

Third, while there was less than clear evidence regarding the value of the house and its contents, I do not believe the trial court abused its discretion by inferring from the evidence the amount subject to restitution. Although his testimony was less than consistent, Price ultimately testified that the house amounted to a \$25,000 loss. While the insurance on the house may have only been \$2,000, it was based on 10 percent of total value, which supports, at least in part, Price's statement regarding the value of the house. Furthermore, although Price did not have documentation to support the amount he paid for the demolition and removal of the house or of the contents of the house, his testimony was evidence on which the court could and did rely.

Based on the preceding, I would affirm the trial court.

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