

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-000935-MR

LASHAUNA SOUTHERN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE BRIAN C. EDWARDS, JUDGE  
ACTION NO. 07-CR-003881

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND TAYLOR, JUDGES.

ACREE, CHIEF JUDGE: At issue is whether a trial court may require, as a condition of probation, a criminal defendant to pay restitution to the Commonwealth of Kentucky for extradition fees sustained by the Commonwealth, and, if not, whether a criminal defendant may voluntarily agree, as part of a plea agreement, to remit payment via restitution for such fees. We answer both

questions in the negative. Accordingly, we vacate the Jefferson Circuit Court's April 27, 2011 Restitution Order and remand for additional proceedings consistent with this opinion.

On November 28, 2007, the Jefferson County Grand Jury indicted Appellant Lashauna Southern on first-degree trafficking in a controlled substance (cocaine), and illegal possession of a controlled substance (marijuana). Southern subsequently failed to appear for several pretrial conferences; a bench warrant was issued for her arrest.<sup>1</sup> In March 2010, law enforcement arrested Southern in San Antonio, Texas. Southern was extradited to Kentucky.

Thereafter, the Commonwealth extended, and Southern accepted, an "Offer on a Plea of Guilty." The pertinent part of the plea offer provided as follows: "[Southern] agrees to restitution to the Commonwealth of Kentucky in the amount of \$1,703.19 for extradition fees. [Southern] reserves right to a hearing regarding extradition fees." (Record at 86). On February 16, 2011, the circuit court held a plea hearing. At the hearing, prior to Southern entering a plea, defense counsel reiterated Southern's objection to the restitution language; the circuit court declared it would take up the restitution issue at the final sentencing hearing. The circuit court then accepted Southern's guilty plea.

During the final sentencing hearing on April 21, 2011, Southern again objected to extradition fees being included as part of restitution, claiming nothing in Kentucky Revised Statutes (KRS) allowed the Commonwealth to seek

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<sup>1</sup> The Jefferson Circuit Court had issued two prior bench warrants, both of which were quickly recalled.

extradition fees as part of probation. The circuit court rejected Southern's argument. On April 27, 2011, the circuit court entered an order requiring Southern to pay restitution for extradition fees incurred by the Commonwealth in the amount of \$1,703.19. The restitution order noted Southern "was present and objected to one or more of the terms and conditions of restitution; however, this Court finds a factual predicate for the amount of restitution and overrules the defendant's objection." (R. 99). This appeal followed.

Southern contends the circuit court lacked statutory authority and, in turn jurisdiction, to enter an order requiring Southern to pay restitution for extradition fees incurred by the Commonwealth as a condition of probation. In response, the Commonwealth advocates that KRS 533.030 statutorily authorizes the circuit court to impose restitution for extradition costs as a probationary condition.

Because the interpretation of a statute is a question of law, we review this matter *de novo*. *Harrison v. Parks Hills Bd. of Adjustment*, 330 S.W.3d 89, 94 (Ky. App. 2011).

This Court resolved this issue in *Vaughn v. Commonwealth*, --- S.W.3d --- (Ky. App. 2012) (finality on August 15, 2012). At issue in *Vaughn* was "whether a trial court may order a defendant to pay restitution to the Kentucky State Treasury for extradition expenses incurred by the Commonwealth." *Id.* at ---. In finding the trial court lacked statutory authority to order a defendant to reimburse the Commonwealth for extradition costs, this Court reasoned:

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.” KRS 532.032 and KRS 532.033 vest the trial court with the authority to establish and enforce an order of restitution. KRS 532.350(1)(a) defines restitution to include “any form of compensation paid by a convicted person to a victim for counseling, medical expenses, lost wages due to injury, or property damage and other expenses suffered by a victim because of a criminal act[.]”

Under the circumstances presented here, the Commonwealth simply was not a victim who suffered a loss as a result of criminal acts committed by the Appellants; consequently, the trial courts were without statutory authority to order the Appellants to pay restitution to the Kentucky State Treasury for extradition expenses. *See* KRS 532.350(1)(a).

*Id.*

Despite *Vaughn*, the Commonwealth maintains the circuit court’s April 27, 2011 restitution order is valid and enforceable. The Commonwealth asserts *Vaughn* is distinguishable in that, while it prohibits a trial court from imposing restitution as part of the *judgment of conviction*, it does not prohibit the trial court from imposing restitution as a *condition of probation*. The Commonwealth emphasizes that KRS 439.575 and KRS 533.030 authorize the trial court to impose those terms and conditions of probation the trial court deems “necessary,” KRS 439.575(3) and “reasonable.” KRS 533.030(2). We find this to be a distinction without significance.

While the trial court is, of course, free to order reasonable and necessary restitution, it cannot evade the purpose for which restitution is permitted by labeling it a condition of probation. Stated differently, despite whether restitution is ordered as part of a judgment of conviction or as a condition of prohibition, restitution only serves to compensate a “victim who suffered a loss as a result of criminal acts committed by” a defendant. *Vaughn*, --- S.W.3d at ---; KRS 532.350(1)(a). It is not designed to compensate the Commonwealth – a non-victim to the defendant’s crime – for extradition fees incurred. *Vaughn*, 2012 WL 246395 at \*1.

The Commonwealth also argues while *Vaughn* prohibits the circuit court from *requiring* a criminal defendant to pay restitution for extradition fees, it does not restrain a criminal defendant from *voluntarily agreeing* to such a condition. The Commonwealth asserts that, because Southern voluntarily agreed to pay restitution to the Commonwealth for extradition expenses incurred, *Vaughn* is distinguishable. We disagree.

First, Southern did not agree to pay restitution to the Commonwealth for extradition fees. As referenced above, Southern objected to the restitution provision at both the February 16, 2011 plea hearing and the April 21, 2011 sentencing hearing. In fact, the circuit court recognized Southern’s objection in the restitution order itself. To claim Southern voluntarily agreed to pay restitution for the extradition fees as a condition of probation is disingenuous.

Second, the Kentucky Supreme Court has recently emphasized that we may not “turn a blind eye to” a sentence that contravenes “the public policy embedded in our sentencing statutes.” *Machniak v. Commonwealth*, 351 S.W.3d 648, 657 (Ky. 2011); *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010).

A sentence that is contrary to the statutes is an improper sentence, the illegality of which is not neutralized by either a jury's recommendation ***or a defendant's consent***. It is the sole province of the Kentucky General Assembly to establish a comprehensive and cohesive system of sentencing laws for the Commonwealth of Kentucky. ***Trial courts may not impose a sentence that is contrary to the dictates of the legislature, regardless of who suggested or consented to the sentence.***

*Machniak*, 351 S.W.3d at 657 (emphasis added). As explained in *Vaughn*, the legislature did not intend for restitution to be used as a sword to inflict additional punishment upon a defendant but, instead, designed restitution to compensate a victim for property lost or expenses suffered as a result of the defendant's criminal act. 2012 WL 246395 at \*1. To now sanction a restitution order similar in all its relevant aspects to the restitution order we specifically condemned in *Vaughn* simply because the defendant allegedly consented to the restitution provision would thwart the very purpose of the restitution statutes and circumvent the legislature's clear directives. The cloak of consent does not render permissible a restitution order found to violate this Commonwealth's sentencing scheme.

In sum, we discern no meaningful distinction between *Vaughn* and the case before us. As the reasoning in *Vaughn* is equally applicable here, we find the

Jefferson Circuit Court lacked statutory authority to require Southern to remit restitution to the Commonwealth for extradition costs and expenses.

For the foregoing reasons, we vacate the Jefferson Circuit Court's April 27, 2011 Restitution Order and remand for entry of a sentence consistent with this opinion.

ALL CONCUR.

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