

RENDERED: AUGUST 17, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-001419-MR

BRENDA K. LEICK

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT  
HONORABLE TIMOTHY C. STARK, JUDGE  
ACTION NO. 09-CR-00325

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: ACREE, CHIEF JUDGE; STUMBO AND VANMETER, JUDGES.

STUMBO, JUDGE: Brenda Leick appeals from an Order of Restitution rendered by the Graves Circuit Court in a criminal proceeding wherein Leick pled guilty to five counts of unlawful access to a computer, 1<sup>st</sup> degree, and five counts of theft by unlawful taking. Leick argues that the trial court erred when it ordered restitution based on alleged additional crimes for which Leick was neither charged nor

convicted. The Commonwealth accepts Leick's construction and application of the restitution statute, and acknowledges that the trial court erred in its Order of Restitution. Accordingly, we reverse the Order and remand the matter for additional proceedings.

The facts are not at issue. Leick was employed at Cigarettes for Less in Mayfield, Kentucky. Co-owner Kim Overby suspected that Leick was stealing lottery tickets and "pull-tab" tickets. Overby contacted the Kentucky Lottery Corporation and law enforcement, which conducted an investigation. When interviewed by law enforcement, Leick admitted stealing the lottery tickets. She stated that she had been stealing for approximately three months, but it could have been longer.

Thereafter, the Graves County grand jury indicted Leick on five counts each of unlawful access to a computer, 1<sup>st</sup> degree, and theft by unlawful taking. The indicted crimes allegedly occurred over a five-day period in October, 2009. Overby alleged that Leick committed numerous other offenses of theft for which Leick was not indicted.

After a status hearing, the Commonwealth tendered a plea offer conditioned on Leick paying \$75,000 in restitution, and/or whatever restitution amount was ordered by the court. Most of this sum was based on alleged crimes for which Leick was never charged or indicted. Several months later, Leick entered a guilty plea to the Commonwealth's offer. At a subsequent restitution hearing, defense counsel argued that restitution should be based solely on the 10 counts with which

Leick was charged, and not the numerous other alleged counts with which Leick was not charged and to which she had not pled guilty. Based on the court's apparent conclusion that judicial economy was best served if Leick was not indicted on every conceivable count for which the Commonwealth wanted restitution, the court calculated Leick's restitution at \$33,825. This amount included estimated losses to Cigarettes for Less based on the 10 counts with which Leick was charged and to which she pled guilty, plus numerous uncharged offenses representing the majority of the restitution amount, minus \$10,000 paid by an insurer to Cigarettes for Less. This appeal followed.

Leick now argues that the trial court erred in ordering restitution based on offenses with which she was not charged and to which she had not pled guilty. She directs our attention to KRS 533.030(3), which provides that upon sentencing restitution may be ordered for monetary damages suffered "as a result of the crime" and "for the commission of the offense." In Leick's view, since she was neither charged nor convicted of any crime or offense beyond the five counts each of unlawful access to a computer and theft by unlawful taking, the trial court was without authority to order restitution for damages allegedly resulting from the uncharged offenses. Citing *Fields v. Commonwealth*, 123 S.W.3d 914 (Ky. App. 2003), and *Bowshier v. Commonwealth*, 2011 WL 3628868 (Ky. App. 2011),<sup>1</sup> Leick contends that the court's entry of restitution for the uncharged offenses constituted an abuse of discretion. The Commonwealth accepts Leick's argument

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<sup>1</sup> *Bowshier* is cited pursuant to CR 76.28(4)(c).

as correct, and acknowledges that the matter should be reversed and remanded for a calculation of restitution based solely on the offenses to which Leick pled guilty.

We have closely examined KRS 533.030(3), and conclude that it establishes a trial court's authority to order restitution in cases "where a victim of a crime has suffered monetary damages as a result of the crime," and that such restitution shall be based on "the commission of the offense." Additionally, the unpublished opinion in *Bowshier, supra*, states that 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." *Bowshier*, 2011 WL 3628868 at page 2. *Bowshier* is directly on point and disposes of the issue before us.

Having determined that restitution must be based solely on the offenses with which Leick was charged and to which she pled guilty, and as the Commonwealth concedes that this conclusion is correct, we must reverse the Order of the Graves Circuit Court and remand the matter for further proceedings.

ALL CONCUR.

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