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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-001832-MR

PAUL LOVELACE

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 11-CR-00030

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON, LAMBERT, AND VANMETER, JUDGES.

CAPERTON, JUDGE: The Appellant, Paul Lovelace, appeals the May 19, 2011, order of the Campbell Circuit Court, ordering him to pay restitution in the amount of \$5,700. On appeal, Lovelace argues that he was denied his statutory right under KRS 431.200 to have a jury impaneled to try the facts of the Commonwealth's restitution claim against him, and that the trial court lacked jurisdiction to impose

restitution against him because the Commonwealth's motion to impose restitution was not verified. The Commonwealth disagrees, and urges this Court to affirm the court below. Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

The crimes at issue below occurred when Lovelace took an old receipt into a Wal-Mart, removed one of the items from the shelf which was listed on the receipt and attempted to "return" the item. Lovelace was caught, and a subsequent pat-down revealed a crack pipe. Lovelace was arrested. When the arresting officer later returned to Wal-Mart to obtain a copy of the surveillance video, he was notified by the store's loss prevention department that Lovelace was seen on the video driving a Ford F350 onto the lot. The officer located the vehicle, ran its tags, and discovered that it was stolen. Below, the officer testified that while inspecting the vehicle, Lovelace's wallet containing his social security card was located on the front seat. The officer testified that the vehicle also contained a large number of concrete tools, and that the rear driver-side window had been broken out and a piece of plastic was taped over the hole.

Lovelace was indicted by the Campbell County Grand Jury of one count of receiving stolen property under \$10,000, one count of theft by unlawful taking less than \$500, and one count of possession of drug paraphernalia. On April 19, 2011, Lovelace filed a motion to enter a guilty plea. The Commonwealth's offer on a plea of guilty to all charges as indicted was to recommend concurrent sentences of two years on the receiving stolen property count and 12 months on the

two misdemeanor counts. Lovelace, by order entered April 19, 2011, pled guilty to each of these charges.

At Lovelace's sentencing, the amount of restitution was discussed as follows:

Court: Is he required to pay any restitution, Mr. Schroeder?

Commonwealth: Your Honor, if I could submit that to the Court, or actually, I do have it. It's five thousand dollars.

Court: That sound right to the defense?

Defense Attorney: Restitution for what?

Lovelace: Yeah?

Defense Attorney: The truck was recovered. It was found in the Wal-Mart parking lot.

Commonwealth: If I could talk to my victim's advocate and submit that.

Court: Okay, fine. If you [Lovelace], have a problem with what he ... If you [Commonwealth] will, before you give it to the Court, um, ask, um, let Ms. Bronk see it, so she can come to an agreement on it if there is an amount, if there's not an amount then she'll know she can ask me for a hearing on the restitution figure before I just order him to pay it, okay?

Ma'am, I'm going to order him to pay restitution because that's part of the offer if there is any.

Defense Attorney: Correct.

Court: But if there's an amount in dispute, we can have a hearing on it. So you are required to pay restitution.

The Commonwealth then filed its formal motion for restitution on June 29, 2011.

The motion was heard on August 4, 2011. During the course of that hearing, the court asked Lovelace if he had come to an agreement on the amount of restitution.

Lovelace indicated that he had not come to an agreement, and he requested a

hearing on the amount. The trial court then proceeded with a bench hearing.

Lovelace did not object to that procedure. No jury was impaneled for that hearing.

Robert Salazar, the owner of the truck at issue, was the only witness to testify at the hearing. Salazar owns T&R Contracting. He testified that his Ford F350, which was used for the contracting business, was worth approximately \$13,000. Salazar testified that he kept tools used for his daily work inside the truck, including a compactor, a Hilti hammer (a jackhammer), concrete tools, circular saws, extension cords, and concrete stakes. Salazar testified that the total value of these items was approximately \$5,700. Salazar provided the Commonwealth with a list of those items and their values. Salazar testified that the tools were the same tools that were standard equipment in all of his construction trucks. Salazar testified that he did have receipts for the tools, though they were not introduced at the hearing. Salazar testified that the truck was never returned to him. He stated that his insurance company eventually gave him \$8,900 in compensation for the loss of the truck, but that he received nothing for the loss of the tools. Salazar stated that he did not know the location of the truck as of the date of the hearing. The truck was ultimately impounded, and Salazar was not allowed to retrieve the truck as it had been stolen. The impound lot informed the insurance company that it would cost \$3,500 for the insurance company to get the truck released.

Following this testimony, Lovelace argued that because Salazar did not agree to have his vehicle impounded, it was wrongly impounded, and that

Salazar should file a civil suit against the impound lot. Lovelace also argued that there was no proof that the tools were purchased for \$5,700, other than Salazar's testimony, and moreover, that because the tools were five years old, they were no longer worth the as-new value.

In response, the Commonwealth argued that police had the authority to impound the vehicle because it was evidence of Lovelace's crimes, and that Salazar's loss was a direct result of Lovelace's crimes and not police action. Furthermore, the Commonwealth argued that restitution under KRS 533.030 was for replacement value and that clearly the tools were taken as a result of the crime and were not recovered by the victim.

The trial court subsequently entered the aforementioned May 19, 2011, order directing Lovelace to pay \$5,700 in restitution. In issuing that order the court noted that following the hearing the impound lot had been contacted, that some tools were there, and the owner of the lot would not release the tools without payment of \$2,500. It was noted that Lovelace could not afford to pay that amount at that time. It is from the May 19, 2011, order of the court that Lovelace now appeals.

As his first basis for appeal, Lovelace argues that he was denied his statutory right pursuant to KRS 431.200 to have a jury impaneled to try the facts of the Commonwealth's restitution claim against him. He asserts that because the restitution claim was made after final sentencing, the trial court could only have jurisdiction to order restitution under KRS 431.200, which he argues clearly and

unequivocally required fact-finding by a jury in this case. Lovelace acknowledges that this alleged error was not preserved below, but argues that it is reviewable by this Court as a structural error requiring automatic reversal.

Lovelace argues that as a matter of law, the trial court did not have jurisdiction to impose restitution under KRS 532.032,¹ and that accordingly the order must have been entered pursuant to the court's jurisdiction under KRS 431.200. That provision provides that:

Any person convicted of a misdemeanor or felony for taking, injuring or destroying property shall restore the property or make reparation in damages if not ordered as a condition of probation. The court in which the conviction is had, if applied to by verified petition made within ninety (90) days of the date the sentence was pronounced, may order restitution or give judgment against the defendant for reparation in damages, and enforce collection by execution or other process. In a petition for restitution or reparation, the court shall cause the defendant, if in custody, to be brought into court, and demand of him if he has any defense to make to the petition. If he consents to the restitution or to reparation in damages in an agreed sum, the court shall give judgment accordingly. Otherwise a jury shall be impaneled to try the facts and ascertain the amount and the value of the property, or assess the damage, as the case may be. A failure to pursue this remedy shall not deprive the person aggrieved of his civil action for the injury sustained.

¹ Lovelace asserts that this is so because as held in *Rollins v. Commonwealth*, 294 S.W.3d 463, 466 (Ky.App. 2009), a court loses jurisdiction ten days after entry of the final judgment, and that such jurisdiction can only be renewed or extended by a statute or rule. Lovelace argues that as there is nothing in KRS 532.032 which allows for the court's jurisdiction to be renewed or extended beyond this 10-day period. Lovelace asserts that in this case, the final judgment was entered on May 19, 2011, and that accordingly, the court only retained jurisdiction to impose restitution under KRS 532.032 until May 29, 2012. He argues that as the Commonwealth did not move for an order imposing restitution until June 29, 2011, there was no valid order of restitution entered under KRS 532.032.

KRS 431.200.

While Lovelace concedes that the court could properly have had jurisdiction to order restitution pursuant to KRS 431.200, he asserts that the statute plainly requires the court to impanel a jury to serve as fact-finder unless the defendant agrees to an amount. Lovelace argues that because there was no agreement below and no jury was impaneled, the court failed to follow KRS 431.200. Thus, he argues that the restitution order is invalid, and must be vacated.

As his second basis for appeal, Lovelace argues that pursuant to KRS 431.200 and this Court's decision in *Rollins*, the court below did not have jurisdiction to impose restitution because the Commonwealth's motion to impose restitution was not verified. Lovelace acknowledges that this issue was also unpreserved, but requests palpable error review pursuant to RCr 10.26.

In making this argument, Lovelace notes that the trial court's restitution order was made pursuant to the Commonwealth's motion to order restitution which was entered on June 29, 2011, and was signed by an Assistant Commonwealth's Attorney. Lovelace notes that the motion was not verified or signed by Salazar himself, although there was a facsimile attached to the motion, apparently from an employee of "T&R Contractors, Inc." which was apparently sent to the Commonwealth Attorney's Office.

Lovelace now argues that pursuant to KRS 431.200, the petition must be verified and that this is a jurisdictional requirement. In this case, Lovelace argues that because the Commonwealth did not file a verified petition with the

Campbell Circuit Court, the court did not have jurisdiction to impose restitution pursuant to KRS 431.200 and the order must be vacated.

In response to the arguments made by Lovelace, the Commonwealth argues first that no structural error occurred. The Commonwealth asserts that structural errors are usually errors of constitutional magnitude and that an error, if it occurred, was statutory and not structural. The Commonwealth also argues that the unpreserved issues are not reviewable because they are not “jurisdictional sentencing” errors. It asserts that for an issue to be a “sentencing error,” and thus reviewable by appellate courts under their “inherent jurisdiction to correct an illegal sentence,” the sentence must be one that is unauthorized by statute. It argues that in the instant case, Lovelace’s claim is not that the trial court imposed an illegal sentence, that is, one that exceeds the statutory limits, but rather that the trial court lacked particular case jurisdiction. The Commonwealth asserts that this is not a sentencing error claim, and is reviewable only for palpable error if that has not been waived.

The Commonwealth also disagrees with Lovelace’s assertion that the trial court lost “temporal jurisdiction” to rule on the Commonwealth’s motion because more than 90 days had passed since the judgment and sentence was entered. The Commonwealth argues that Lovelace’s claim misreads the statute, and that it is the Commonwealth and not the trial court, that is under a deadline. The Commonwealth asserts that *sub judice* it filed its petition well within the 90 day period and that, accordingly, the court had jurisdiction.

Additionally, the Commonwealth asserts that the jurisdictional issue below is more correctly characterized as one of particular-case jurisdiction and not subject-matter jurisdiction and that, accordingly, the statutory requirements of KRS 431.200 may be waived. It argues that the *Rollins* opinion relied upon by Lovelace held that the mandates of 431.200 must be met in order for the trial court to have jurisdiction. However, the Commonwealth asserts that *Rollins* does not specify whether it was referring to personal, subject matter, or particular case jurisdiction. The Commonwealth argues that the *Rollins* opinion addresses particular case jurisdiction and that in such a case the statutory rights may be waived by a defendant. The Commonwealth also argues that to the extent *Rollins* interpreted any of KRS 431.200's statutory requirements as necessary for subject-matter jurisdiction, it should be overruled because trial courts have subject matter jurisdiction over restitution motions made within 90 days of a judgment and sentence, and any deficient statutory requirements are particular case jurisdiction issues subject to waiver.²

In making these arguments, the Commonwealth argues that Lovelace did in fact waive his rights concerning the issues of the non-verified petition and lack of an impaneled jury. Concerning the verified petition, the Commonwealth

² In making this argument, the Commonwealth relies upon the holding of our Kentucky Supreme Court in *Commonwealth v. Bailey*, 721 S.W.2d 706, 707 (Ky. 1986), wherein the Commonwealth's Attorney failed to precisely conform to the statute, by proceeding via a "Motion to Order Restitution," rather than by a verified petition as required by the cited statute. The court held that this error did not divest the circuit court of subject matter jurisdiction, as the defendant never objected to the form of the motion, and at the Supreme Court level, conceded the authority of the trial court.

argues that the issue of whether or not the petition was properly verified need not be addressed by this Court, as the Commonwealth filed the motion within the specified statutory timeframe and that Lovelace waived objection multiple times by agreeing to pay restitution, not objecting to the form of the motion, and by electing to have a hearing on the motion.

The Commonwealth asserts that Lovelace accepted the Commonwealth's offer on a guilty plea with the knowledge that it would seek restitution that may be owed to the victim both because he orally requested a hearing and because he lodged no objection to the Commonwealth's motion at the hearing. The Commonwealth argues that these actions constitute a waiver of any statutory right Lovelace may have had, and that because of the waiver he is not entitled to palpable error review. Alternatively, the Commonwealth argues that even if the alleged error were subject to review, no manifest injustice resulted because Lovelace failed to present any evidence in his own defense and, thus, either a judge or jury would have made the same findings.

Concerning the alleged error regarding the lack of an impaneled jury, the Commonwealth argues that Lovelace never objected to the bench hearing, elected to have the hearing, and presented no evidence when it was held. Thus, the Commonwealth argues that Lovelace's actions and failure to object constitute waiver of the statutory right. Alternatively, the Commonwealth asserts that it is questionable whether Lovelace was even entitled to a jury hearing, as KRS 431.200 permits the trial court to "give judgment accordingly," in two

circumstances: “If he consents to the restitution or to reparation in damages in an agreed sum ...”. It argues that Lovelace consented to restitution, and that his later disagreement with the amount does not change this fact. Essentially it argues that there must be an “agreed sum” insofar as reparation is concerned, but not with respect to restitution. Alternatively, it argues that even if an error occurred, no manifest injustice resulted because Lovelace failed to present any evidence in his own defense and, thus, either a judge or a jury would have made the same factual findings.

First, we note that all parties agree that the errors alleged to have occurred below were unpreserved. We disagree with Lovelace’s argument that the alleged jury error was structural, and thus did not need preservation. As our courts have previously held, structural errors are rare. *Crossland v. Commonwealth*, 291 S.W.3d 223, 232 (Ky. 2009). Indeed, non-constitutional error will rarely, if ever, rise to the level of being a structural error. *Id.* In so finding, we note that Lovelace asserts in his reply brief that the right to a “public jury trial” has previously been held to be a structural error. *See Moorman v. Commonwealth*, 325 S.W.3d 325, 330 (Ky. 2010) citing *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). We disagree with Lovelace’s attempted analogy and do not find the situation *sub judice*, in which the right to a jury was statutory, to rise to the level of the issue presented in *Waller* wherein the right to a public trial derived from the Constitution itself.

To that end, we note that Kentucky has a longstanding rule that any statutory right can be waived. *See Padgett v. Commonwealth*, 312 S.W.3d 336, 348 (Ky. 2010). Waiver may be implied through failing to object, or raise the statutory right. *Id.* Waiver may also occur when defense counsel elects to proceed without invoking the statutory right, or when defense counsel does not raise the issue of the statutory right. *See Padgett* at 349.

Insofar as Lovelace requests palpable error review, we note that to prevail on a claim of palpable error, one must show that the error resulted in “manifest injustice.” RCr 10.26 provides:

A palpable error which affects the substantial rights of a party may be considered ... 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.

This Court has previously stated that manifest injustice occurs only if, upon consideration of the whole case, a substantial possibility does not exist that the result would have been different, then the error will be deemed nonprejudicial. *See Graves v. Commonwealth*, 17 S.W.3d 858, 864 (Ky. 2000) (quoting *Jackson v. Commonwealth*, 717 S.W.2d 511, 513 (Ky.App. 1986)). We review this matter with these standards in mind.

Having reviewed the record, the arguments of the parties, and the applicable law, we are ultimately in agreement with Lovelace that the motion for restitution was not verified. Further, we believe that the law requires verification of the motion, as clearly set forth in *Rollins, supra*, and KRS 431.200. However,

we are also in agreement with the Commonwealth that a statutory deficiency of this nature is subject to waiver,³ and that in this case, any statutory deficiencies which occurred were ultimately waived by Lovelace. It is undisputed that Lovelace knew of the motion, responded to it by requesting that a hearing be held on its merits, and did not at any time object to its form. As set forth in *Padgett, supra*, these actions were sufficient to constitute waiver, and we affirm accordingly.

Concerning Lovelace's additional claim of error concerning the court's failure to impanel a jury, we are again in agreement with the Commonwealth that Lovelace waived his statutory right in this regard. The record below clearly reveals that Lovelace requested the hearing, did not object to the hearing, and presented no evidence at the hearing. Accordingly, we find that any statutory right which existed in this instance was waived. Alternatively, in light of the fact that Lovelace presented no evidence at the hearing on his own behalf, we are not persuaded that any manifest injustice occurred or that a substantial possibility exists that the result might have been different had a jury been impaneled. Accordingly, we affirm.

Wherefore, for the foregoing reasons, we hereby affirm the May 19, 2011, order of the Campbell Circuit Court, ordering Lovelace to pay restitution in the amount of \$5,700.

LAMBERT, JUDGE, CONCURS.

³ See e.g., *Commonwealth v. Bailey*, 721 S.W.2d 706, 707 (Ky. 1986), in which the "verified petition," requirement was found to be subject to waiver.

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