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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000563-DG

ARGIE L. DALE

APPELLANT

DISCRETIONARY REVIEW
FROM JEFFERSON CIRCUIT COURT
v. HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 17-XX-000028

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: GOODWINE, NICKELL, AND SPALDING, JUDGES.

GOODWINE, JUDGE: Argie L. Dale (“Dale”) entered a conditional guilty plea in the Jefferson District Court for failure to maintain required insurance in connection with a car accident. The Commonwealth sought restitution on behalf of the estate of a motorist who died from injuries sustained in the accident, and the district court ordered Dale to pay restitution following a separate hearing. Dale appealed, and

the Jefferson Circuit Court affirmed the district court's restitution order. After careful review of the record, we reverse and remand.

BACKGROUND

On December 13, 2015, Dale and the victim, Robin Whitaker (“Whitaker”), were involved in a car accident. Dale's vehicle collided with a motorcycle operated by Whitaker, and Whitaker died from the injuries sustained in the collision. When police arrived at the scene, Dale was cited for operating a motor vehicle with expired registration and failure to maintain insurance, first offense under KRS¹ 304.39-080. Dale was never charged with any crimes resulting from the accident.

On July 29, 2016, Dale pleaded guilty to failure to maintain insurance, first offense in the Jefferson District Court. The expired registration charge was dismissed, and the district court sentenced Dale to 90 days in custody, which was conditionally discharged for two years, and imposed a \$1,000 fine for the failure to maintain insurance charge under KRS 304.99-060. The district court also ordered Dale to pay \$145.00 in court costs and informed the parties that it was continuing the case for a restitution hearing.

Months after the plea, but before the restitution hearing, the Commonwealth informed Dale it sought restitution of approximately \$23,200 for

¹ Kentucky Revised Statutes.

the value of motorcycle, funeral expenses, and other unspecified expenses. On April 20, 2017, the district court held a restitution hearing. At the beginning of the hearing, the Commonwealth indicated it sought restitution for loss of future income, in addition to funeral expenses and the value of the motorcycle.

Before the district court heard evidence regarding restitution, an attorney representing Whitaker's estate in a civil action in the Jefferson Circuit Court appeared to inform the district court the civil action had been stayed because Dale filed for bankruptcy. The attorney indicated that "a restitution order isn't dischargeable [in bankruptcy], so it's a method by which the estate can recover some."

Following the bankruptcy discussion, the district court heard testimony regarding the amount and nature of restitution sought. The Commonwealth's only witness was Ms. Moore, Whitaker's mother and the administratrix of his estate. Through Ms. Moore, the Commonwealth entered into evidence the certificate of registration and the bank note on the motorcycle. Dale pointed out that the debt owed on the motorcycle exceeded its recorded value. The Commonwealth also introduced Whitaker's unfiled 2015 W-2 through Ms. Moore, to establish that Whitaker's income over the next four years would exceed \$100,000, which is the maximum amount of restitution permitted under KRS 533.030(3). Dale argued the tax document was not a "true and accurate reflection

of [Whitaker's] income" because Whitaker's 2015 tax return had not been filed with the federal government. Dale also argued that the Commonwealth failed to meet its burden of proving Whitaker would have lived another four years, had he not died in the accident.

The district court: (1) ordered Dale to pay \$5,567 "to the prosecuting witness through the means of the estate" for the value of the motorcycle; (2) took judicial notice that Whitaker would have lived at least four more years; and (3) found Whitaker's income would have exceeded \$120,000 over the next four years. We note the district court heard no evidence regarding funeral expenses. The district court ordered Dale to pay the statutory maximum of \$100,000 in restitution, as an express condition of Dale's conditional discharge under KRS 533.030(3).

Dale appealed to the Jefferson Circuit Court, arguing the district court abused its discretion in ordering restitution be paid to Whitaker's estate for the loss of future income because any loss of future income was not a "direct result of the crime" of failure to maintain insurance. Dale also argued the restitution hearing violated his right to due process. Following oral argument, the circuit court affirmed the judgment of the district court. This appeal followed.

On appeal, Dale argues the trial court improperly ordered him to pay restitution to Whitaker's estate for expenses arising out of the car accident. His

argument contains three sub arguments: (1) his plea agreement did not include agreement to pay any amount of restitution; (2) his right to due process was violated; and (3) KRS 304.99-060 does not provide for the imposition of restitution and the Commonwealth failed to prove the expenses sought in restitution arose as a direct result of the crime for which he was convicted.

STANDARD OF REVIEW

Although Dale argued he did not agree to pay any amount of restitution during the district court hearing, that argument is not dispositive of his appeal. His arguments that his right to due process was violated and the Commonwealth failed to prove the validity of its claim for restitution are dispositive of his appeal but were not raised at the district court's restitution hearing. Because Dale first raised these arguments when his case was on appeal to the circuit court, his arguments are unpreserved, and we review the issues "under the palpable error standard of RCr^[2] 10.26." *Jones v. Commonwealth*, 382 S.W.3d 22, 29 (Ky. 2011). When we review for palpable error, "reversal is warranted 'if a manifest injustice has resulted from the error,' which requires a showing of the 'probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law.'" *Ladriere v. Commonwealth*, 329 S.W.3d 278, 281 (Ky. 2010) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 3

² Kentucky Rules of Criminal Procedure.

(Ky. 2006)). Manifest injustice is found if the error seriously affected the “fairness, integrity, or public reputation of the proceeding.” *Jones*, 382 S.W.3d at 29 (quoting *Martin*, 207 S.W.3d at 4).

ANALYSIS

At the outset, we note that although Dale does not raise this argument on appeal, the district court maintained jurisdiction over this particular case, even though the restitution order was entered more than ten days after Dale entered his plea of guilty. Although it would be ideal for a trial court to “delay entering a final judgment until it decides the restitution question so that matter could be included in the final judgment[,]” courts are not required to include restitution “in the same order of judgment imposing the punitive aspect of the sentence[.]” *Commonwealth v. Steadman*, 411 S.W.3d 717, 725 (Ky. 2013). “[W]here a defendant effectively consents to the trial court’s holding the restitution hearing after entry of the final judgment or otherwise fails to object and raise the ‘jurisdictional’ question to the trial court,” particular case jurisdiction is deemed waived. *Id.* Here, Dale concedes he agreed to holding the restitution hearing more than ten days after he entered his guilty plea, effectively waiving any argument that the district court lost jurisdiction over his case.

First, Dale argues he did not agree to any amount of restitution. KRS 532.032(3) and KRS 533.030(1) require restitution be ordered when the trial court

grants a defendant conditional discharge. Furthermore, KRS 533.030(3) establishes the types of expenses that can be recovered through payment of restitution:

[W]here a victim of a crime has suffered monetary damage *as a result of the crime* due to his property having been converted, stolen, or unlawfully obtained, or its value substantially decreased *as a result of the crime*, or where the victim suffered actual medical expenses, direct out-of-pocket losses, or loss of earning as a direct result of the crime, . . . the court shall order the defendant to make restitution in addition to any other penalty provided for the commission of the offense.

(Emphasis added).

Here, the circuit court held Dale “freely and voluntarily” agreed to make restitution to Whitaker. Its opinion affirming the district court’s restitution order is based on the perception that pleading guilty to failure to maintain insurance imputed Dale a “reasonable expectation . . . that he would be responsible for at least some of the harm caused during the accident, namely lost income for the Decedent and property damage for the vehicle(s).” The circuit court’s opinion relied on *Commonwealth v. Morseman*, 379 S.W.3d 144, 152 (Ky. 2012).

In *Morseman*, the defendant pleaded guilty to insurance fraud and agreed to pay a specified amount of restitution in exchange for dismissal of a charge for arson and a recommendation of a five-year probated sentence. *Id.* at 146. On appeal, the appellant argued the trial court abused its discretion in

ordering him to pay restitution for “damages not incurred as a result of Appellee’s fraudulent insurance acts—the only crime for which he pled guilty.” *Id.* at 147-48 (footnote omitted). Because the defendant bargained for the amount of restitution as part of his plea agreement, our Supreme Court held “that a trial court is authorized to order restitution for damages not suffered as a direct result of the criminal act(s) for which the defendant has been convicted when, as part of a plea agreement, the defendant freely and voluntarily agrees to the restitution condition.” *Id.* at 152.

Here, the circuit court’s opinion concedes the restitution ordered by the district court was not compensation for losses that occurred as a “direct result” of failure to maintain insurance. Instead, it assumes Dale’s plea constituted a free and voluntary agreement to pay any amount and type of restitution sought by the Commonwealth. We disagree. Dale did not freely and voluntarily agree to pay a specific amount of restitution as part of his plea agreement. The Commonwealth did not inform him that it sought restitution for funeral expenses and the cost of Whitaker’s motorcycle until months after Dale entered his plea and, more importantly, did not inform him that it sought restitution for loss of future income until the restitution hearing had begun. As such, the facts at hand are clearly distinguishable from *Morseman*, as Dale was unaware of the final amount of

restitution sought and did not agree at any time to pay a specific amount of restitution.

In *Jones*, 382 S.W.3d at 25, there was no discussion of restitution until the victim’s mother testified at the restitution hearing that the victim would incur \$600 per month in medical expenses for the rest of her life. The trial court ordered the defendant to pay restitution for “medical expenses for herpes at \$600 a month for forty years.” *Id.* at 26. The Supreme Court of Kentucky held that the “order for restitution must be vacated” because the appellant had no advance notice of the amount and nature of restitution sought, had no opportunity to rebut the Commonwealth’s evidence, and the facts relied upon did not “have some minimal indicium of reliability beyond mere allegation.” *Id.* at 30 (quoting *Fields v. Commonwealth*, 123 S.W.3d 914, 917 (Ky. App. 2003)).

Our Supreme Court adopted due process protections required for the imposition of restitution in *Jones*. When the defendant and the Commonwealth fail to agree to a restitution amount,

constitutional due process requires an adversarial hearing that includes the following protections:

- reasonable notice to the defendant in advance of the sentencing hearing of the amount of restitution claimed and of the nature of the expenses for which restitution is claimed; and
- a hearing before a disinterested and impartial judge that includes a reasonable opportunity for the

defendant, with assistance of counsel, to examine the evidence or other information presented in support of an order of restitution; and

- a reasonable opportunity for the defendant with assistance of counsel to present evidence or other information to rebut the claim of restitution and the amount thereof; and
- the burden shall be upon the Commonwealth to establish the validity of the claim for restitution and the amount of restitution by a preponderance of the evidence, and findings with regard to the imposition of restitution must be supported by substantial evidence.

Jones, 382 S.W.3d at 32.

Here, Dale’s right to due process was clearly violated. The Commonwealth argues the trial court followed the basic due process requirements espoused in *Jones*. However, the Commonwealth conveniently omits any discussion of advance notice. As discussed above, the Commonwealth did not notify Dale it sought restitution for Whitaker’s lost wages until the beginning of the restitution hearing. Furthermore, the Commonwealth failed to satisfy its burden of establishing “the validity of the claim for restitution and the amount of restitution by a preponderance of the evidence[.]” *Id.*

Dale argues KRS 304.99-060 does not provide for the imposition of restitution, and the Commonwealth failed to meet its burden because it failed to prove the expenses sought in restitution arose as a direct result of his failure to

maintain insurance. KRS 304.99-060 sets the penalty for failure to maintain insurance, but it does not provide that the district court may impose restitution for the offense. Because the statute does not explicitly permit restitution for certain types of expenses, the Commonwealth must prove causation before a district court can find the types of expenses in this case can be recovered through an order of restitution.

In *Dillard v. Commonwealth*, 475 S.W.3d 594 (Ky. 2015), the appellant “was involved in a multi-vehicle collision in Jefferson County” and was charged with failure to maintain required insurance. *Id.* at 595. Before the appellant pleaded guilty, “the district court heard oral arguments on the issue of whether restitution would be available under the facts of the case and, having concluded that restitution was possible, indicated the intent to conduct a hearing. The restitution hearing was stayed, however, when Dillard appealed to the Jefferson Circuit Court.” *Id.* The appellant sought guidance from our Supreme Court as to whether restitution was “available to a person whose vehicle is damaged by a defendant operating a vehicle in violation of KRS 304.39-080.” *Id.* Because the district court had not ordered restitution before the case was appealed, the judgment was not final and appealable. *Id.* at 599. As such, our Supreme Court declined to address this substantive issue and dismissed the appeal. *Id.*

Because Kentucky courts have not addressed the issue of what types of losses arise “as a direct result of the crime,” we turn to federal case law for guidance. KRS 533.030(3). In *In re Bex*, 143 B.R. 835 (Bankr. E.D. Ky. 1992), a minor was involved in a motor vehicle accident while operating a vehicle owned by his parents. *Id.* at 836. Because the driver was a minor, his parents were “financially responsible for any damages [he] caused as a result of his driving” pursuant to KRS 186.590. *Id.* The minor’s father “pled guilty to failure to maintain insurance required by KRS 304.39-080(5) which requires owners of motor vehicles operated in Kentucky to maintain certain levels of liability insurance. KRS 304.99-060 provides criminal penalties for failure to maintain such required insurance.” *Id.* The issue before the bankruptcy court was whether the combination of the two statutes rendered the parents “liable for the tort of their son.” *Id.* For the parents to be financially responsible, their conduct must have been both willful and malicious. *Id.* The court found that there was “no allegation that the parents intended that the child should have an automobile wreck or, alternatively, that they deliberately allowed the required insurance to lapse with the knowledge or belief that [the child] would be involved in a collision.” *Id.* Thus, the court held that the debtors were not liable for the injuries the plaintiffs sustained in the motor vehicle accident merely because the debtors failed to maintain insurance. *Id.* at 636-37.

Although factually dissimilar, *United States v. Burger*, 739 F.2d 805 (2d Cir. 1984), provides an in-depth discussion of when criminal conduct does not directly cause a victim monetary loss. In *Burger*, the defendant purchased counterfeit bills and took them to Yonker's Raceway. *Id.* at 807. The opinion indicates the defendant did not spend any of the money at the raceway. *Id.* at 811. The defendant "was convicted of possessing and concealing counterfeit money." *Id.* The trial court ordered the defendant to pay restitution to the victim "as a condition of probation." *Id.* The Second Circuit opined: "It is difficult to see how the possession and concealment of the bogus bills caused the loss incurred by [the business]. The statute provides for the reparation of losses suffered by the victim of a criminal act." *Id.* And, it held the "offense did not 'cause' the loss for which he now is required to make restitution[.]" Had the defendant spent the counterfeit money, it would have been the passing of the counterfeit bills that harmed the business, not "the mere possession and concealment of the bogus money[.]" *Id.*

Here, Dale's failure to maintain insurance did not directly cause the financial loss incurred by Whitaker. Dale argues that the Commonwealth "ignores the damages were caused by an automobile accident, which could have occurred regardless of whether [he] had been insured at the time." Our Supreme Court has held that "the manner in which [the defendant] operated his vehicle was a substantial factor in causing the accident. His status as a licensed or unlicensed

driver would not tend to prove or disprove that fact.” *Rentschler v. Lewis*, 33 S.W.3d 518, 519 (Ky. 2000). Similarly, Dale’s failure to maintain insurance does not prove whether his actions caused the accident.

The Commonwealth did not prove Dale intentionally caused the collision or that he purposely allowed his insurance to lapse with the belief that he would be in a car accident. Furthermore, the Commonwealth failed to prove Dale’s failure to maintain insurance directly caused Whitaker’s death or damage to his motorcycle. Because Dale was not charged with any crime in connection with the nature of restitution sought, and because causation was not addressed, the district court improperly imposed restitution on Dale.

The Commonwealth clearly sought an avenue of financial recovery for the victim’s estate when the related civil action was stayed because Dale filed for bankruptcy. Although the facts of this case are tragic, the Commonwealth and Whitaker’s estate cannot circumvent our justice system to provide relief to one party to the detriment of another. Without a finding of Dale’s liability in tort, the district court was without authority to hold Dale financially responsible for the damages incurred by Whitaker’s estate.

The Commonwealth further argues Dale implicitly conceded he was at fault for Whitaker’s death when he agreed to a restitution hearing. We disagree. The Commonwealth failed to provide Dale with advance notice that it sought

restitution for Whitaker's lost wages, so Dale could not have conceded that he was at fault. He agreed to a restitution hearing for damages that directly resulted from his failure to maintain insurance and nothing more. No damages directly resulted from his failure to maintain insurance. Dale's right to due process was violated when the district court ordered him to pay restitution because the Commonwealth failed to provide advanced notice of the amount and nature of restitution sought and failed to satisfy its burden of proof. As such, we hold the circuit court palpably erred in affirming the district court's judgment, which resulted in manifest injustice to Dale.

CONCLUSION

For the foregoing reasons, we reverse the opinion and order of the Jefferson Circuit Court and remand with instructions to vacate the order of restitution entered by the Jefferson District Court.

NICKELL, JUDGE, CONCURS.

SPALDING, JUDGE, DISSENTS AND FILES A SEPARATE
OPINION.

SPALDING, JUDGE, DISSENTING: I respectfully dissent. I agree that, pursuant to *Jones v. Commonwealth*, 382 S.W.3d 22 (Ky. 2011), the appellant was entitled to reasonable notice in advance of the hearing of the amount and nature of the restitution claimed which he did not receive. I also agree that the burden was on

the Commonwealth to establish the validity of the claim for restitution, including causation at the hearing. However, I would hold the matter be reversed and the matter remanded for a new restitution hearing. KRS 533.030(3) provides, in pertinent part,

[w]hen imposing a sentence of probation or conditional discharge in a case where a victim of a crime has suffered monetary damage as a result of the crime where the victim suffered actual medical expenses, direct out of pocket losses, or loss of earning as a direct result of the crime . . . the court shall order the defendant to make restitution[.]

It is my opinion that that the appellant's failure to maintain insurance on his motor vehicle could result in a direct out-of-pocket loss and/or loss of earnings for Mr. Whitaker, by and through his estate, thereby triggering operation of KRS 533.030(3) and requiring a court to order restitution. Had the appellant had insurance, the estate herein could have been entitled to the benefits mandated under KRS 304.39-110(a)(1),³ which sets forth the minimum coverage requirements of any automobile operating on the roadways of the Commonwealth.

³ KRS 304.39-110(a)(1) provides as follows: “[t]he requirement of security for payment of tort liabilities is fulfilled by providing . . . [s]plit limits liability coverage of not less than twenty-five thousand dollars (\$25,000) for all damages arising out of bodily injury sustained by any one (1) person, and not less than fifty thousand dollars (\$50,000) for all damages arising out of bodily injury sustained by all persons injured as a result of any one (1) accident, plus liability coverage of not less than twenty-five thousand dollars (\$25,000) for all damages arising out of damage to or destruction of property, including the loss of use thereof, as a result of any one (1) accident arising out of ownership, maintenance, use, loading, or unloading, of the secured vehicle[.]”

However, I do believe that any potential loss would be limited to the actual liability insurance coverage required by KRS 304.39-110.

The requirement to carry liability insurance is for the benefit of the public at large and not the operator. The failure to maintain insurance can create a direct loss to an identifiable person. The person who cannot recover a loss recognized by statute solely because the operator of a motor vehicle did not comply with the law is a victim of a crime pursuant to KRS 533.030(3). Causation of the accident is a question the court must determine to decide if the crime directly resulted in a loss. However, when an individual is unlawfully operating a motor vehicle without the required liability insurance is at fault for an accident, the person injured but not compensated has a direct loss from the crime committed. I would hold that whether damage directly resulted and the amount of any damage are questions the court below must resolve based on the evidence presented at a new hearing.

Thus, because I am of the opinion that the appellant's noncompliance with KRS 304.39-110 could have resulted in a direct loss to a victim, I would vacate the restitution order and remand this matter for a new restitution hearing in the Jefferson District Court that complies with the dictates of *Jones* to determine the amount of the loss.

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