

RENDERED: JULY 25, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001647-MR

KIM JEFFERS

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 00-CR-00038

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BAKER, GUIDUGLI AND KNOPF, JUDGES.

BAKER, JUDGE: Kim Jeffers appeals from a judgment of the Whitley Circuit Court which convicted her of arson in the third degree and sentenced her to a period of two years' imprisonment. The trial court also ordered Jeffers to pay restitution in the amount of \$21,000.00 to the victim of her criminal conduct. On appeal, Jeffers argues that the trial court erred in ordering her to pay restitution without hearing proof concerning the value of the property destroyed during the arson. We affirm.

On June 12, 2000, the Whitley County Grand Jury issued an indictment charging Jeffers with the offense of arson in the second degree. This indictment stemmed from her conduct on May 21, 2000, wherein she set fire to a house owned by Carl Lyons. Although the record is not clear about this incident, it appears the house was completely destroyed as a result of this fire.

Pursuant to a plea agreement with the Commonwealth, Jeffers entered an unconditional guilty plea to an amended charge of third-degree arson. In exchange for her guilty plea, the Commonwealth recommended a two-year prison sentence with the condition that Jeffers pay full restitution to Lyons. Further, the Commonwealth agreed to take no position on probation. The parties also agreed to appear for a hearing concerning the amount of restitution. The trial court accepted Jeffers' guilty plea and continued this matter for sentencing.

The trial court conducted a sentencing hearing on June 3, 2002. During this hearing, the Commonwealth informed the court that Jeffers was contesting the amount of restitution, which the Commonwealth stated was \$20,000.00. Counsel for Jeffers disputed this amount and requested evidence concerning the value of the house at the time of the fire. The trial court agreed that some type of proof was needed before restitution was ordered. At this point, a Whitley County probation officer informed the court that his pre-sentence investigation report

valued the house at \$21,000.00 based upon information obtained from a local volunteer fire department. The Commonwealth also informed the court that Lyons provided a picture of the house and a list of items destroyed in the fire¹. Jeffers argued that the house was dilapidated, contained dirt floors and possessed no plumbing. After hearing from the parties, the court continued this matter for further review.

On July 1, 2002, the trial court conducted a final sentencing hearing. At this hearing, the Commonwealth requested that restitution be set at \$21,000.00, which was in keeping with the evidence previously referenced. Jeffers again objected to this amount, arguing that this value represented an assessment of both the house and the land involved. Jeffers asserted that the house was dilapidated, possessed no internal plumbing or heating, had faulty wiring, and was infested with termites. Jeffers then informed the court that the house was not inhabited at the time of the fire. Aside from her own assertions, Jeffers produced no evidence supporting her claims.

Ultimately, the trial judge denied Jeffers' motion for probation and sentenced her to two years' imprisonment as provided in the plea agreement. The circuit court further ordered restitution in the amount of \$21,000.00. This appeal follows.

¹ The picture of the house and the list of items destroyed are not included in the record.

On appeal, Jeffers argues that the trial court erred by ordering her to pay restitution without hearing evidence concerning the value of the destroyed property. We disagree.

Restitution has been defined as compensation paid by a convicted person to a victim for property damage and other expenses sustained by that victim because of the convicted person's criminal conduct. Kentucky Revised Statute (KRS) 532.350(1). Upon ordering restitution, the trial judge is required to set the amount of restitution to be paid. KRS 532.033(3). Further, the judge ordering restitution is required to monitor payment to assure that restitution is being made. KRS 532.033(4). Thus, KRS Chapter 532 places the issue of restitution solely within the discretion of the trial judge.

Jeffers argues that the trial court's discretion concerning restitution is not absolute. Jeffers asserts that KRS 431.200 supports her argument. KRS 431.200 provides:

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.

From the plain language of this statute, a jury must be impaneled to determine the amount and value of restitution after the defendant presents a defense to the restitution claim. Contrary to Jeffers' argument, we believe that KRS 431.200 is not applicable in this case because the record shows that Jeffers failed to present any viable defense to this restitution demand.

The record clearly indicates that Jeffers knew at the time she entered her guilty plea that the court would order payment of restitution to Lyons. Jeffers became aware of the full restitution amount of \$21,000.00 after being notified in the presentence report². The trial court is required to formally advise the defendant of the factual contents and conclusions of the presentence investigation and afford the defendant a fair

² The written presentence report, while discussed before the trial court during the first sentencing hearing, is not contained in the record before us. Kentucky law clearly places the burden on the appellant to ensure that the record on review includes so much of the trial record as is necessary for an adequate review. See Fanelli v. Commonwealth, Ky., 423 S.W.2d 255, 257-58 (1968). When the complete record is not before us, we must assume that the omitted record support the trial court's decision. Commonwealth v. Thompson, Ky., 697 S.W.2d 143, 145 (1985).

opportunity to controvert those conclusions. KRS 532.050(6). It is undisputed that the trial court advised Jeffers during the first sentencing hearing that a value of \$21,000.00 had been assigned to the house. After Jeffers objected to that value, the trial court afforded her an opportunity to contest the report and offer mitigating evidence. During the second sentencing hearing, Jeffers chose not to present any mitigating evidence other than her own bare assertions that the house was dilapidated. Hence, we believe that she is not entitled to a jury determination of the proper restitution amount because she did not adequately demonstrate the existence of any factual issue concerning the value of the destroyed house or present an adequate defense.

For the foregoing reasons, the judgment of the Whitley Circuit Court is affirmed.

KNOPF, JUDGE, CONCURS.

GUIDUGLI, JUDGE, DISSENTS.

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