

RENDERED: SEPTEMBER 9, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001860-MR

EBONY LATREECE DUBOISE

APPELLANT

APPEAL FROM MCCRACKEN CIRCUIT COURT
V. HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 03-CR-00400

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** **

BEFORE: DYCHE AND GUIDUGLI, JUDGES; PAISLEY, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: Ebony Latreece Duboise has appealed from the McCracken Circuit Court's Order as to Restitution entered August 18, 2004, in which the amount of restitution was determined to be \$39,504. Because we have determined that the Commonwealth did not produce sufficient evidence to establish that amount, we must reverse the order and remand.

¹ Senior Judge Lewis G. Paisley, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On November 7, 2003, the McCracken County Grand Jury indicted Duboise on one count of Complicity to Theft by Deception over \$300, a Class D Felony.² She was accused of taking property valued over \$300 from the Paducah area K-Mart store while she was employed there from March 1 through September 3, 2003. Duboise entered a guilty plea as charged in the indictment, which the circuit court accepted. The Final Judgment/Sentence of Imprisonment was entered on May 17, 2004, in which the circuit court followed the Commonwealth's recommendation and sentenced Duboise to 2 ½ years in prison and ordered her to pay restitution in an amount to be determined upon her release from prison.

The circuit court held a hearing on restitution in August. The Commonwealth relied upon the testimony of K-Mart store manager David Bender, who stated that his review of the business records, including the in-store videotapes and electronic journal, confirmed a theft amount of \$38,954. When added to Duboise's admitted theft of food in the amount of \$450, the total amount of loss was \$39,504. Bender based this amount on a three-year review of loss reports, and stated that although he could not pinpoint the exact amount of merchandise Duboise stole, the figure he came up with represented the spike in the various departments' losses from previous years. Bender

² KRS 514.040.

produced register tapes and a videotape for one day in September, which revealed three separate incidents of theft totaling \$903.30.³ Bender also testified that when she was confronted, Duboise confessed to stealing \$450 in food and a total of \$40,000 in other items. Detective Rob Estes, called by Duboise, testified that she recanted her confession that she had stolen \$40,000 in merchandise and stated that the amount was closer to \$25,000. Although they are not in the record, the Commonwealth produced and had admitted two signed statements from Duboise, in which she first admitted that she had stolen \$40,000, and then that she had stolen \$25,000 in merchandise.

Duboise testified that she had stolen approximately \$2,000 of items, including clothes, baby items, kitchen items and candles, while she was employed at K-Mart. She indicated that the investigators forced her to raise the amount and that she was told she would not be prosecuted if she cooperated. Duboise also provided the names of the other people involved with the thefts to the investigators.

Based upon this testimony, the circuit court determined that Duboise owed \$39,504 in restitution, which would

³ Neither the documents nor the videotape is contained in the certified record.

be paid on a monthly basis upon her release from incarceration in an amount to be determined later. This appeal followed.⁴

On appeal, Duboise argues that she is not precluded from seeking review of this order, even though she entered an unconditional guilty plea. She also argues that the Commonwealth did not meet its burden of proof in establishing the amount of restitution owed, that the restitution order violates her due process rights, that K-Mart is not a compensable victim under the statute, and that Bender was not qualified to testify as an expert. After stating that Duboise did not preserve any of her arguments for review, the Commonwealth simply argues that the circuit court did not abuse its discretion in ordering restitution. We disagree.

KRS 532.032(1), the criminal restitution statute, provides:

Restitution to a named victim, if there is a named victim, shall be ordered in a manner consistent, insofar as possible, with the provisions of this section and KRS 439.563, 532.033, 533.020, and 533.030 in addition to any other part of the penalty for any offense under this chapter. The provisions of this section shall not be subject to suspension or nonimposition.

KRS 532.350(1)(a) defines restitution as "any form of compensation paid by a convicted person to a victim for

⁴ We note that the circuit court granted Duboise shock probation on September 13, 2004, and that she appears to have been making monthly restitution payments.

counseling, medical expenses, lost wages due to injury, or property damage and other expenses suffered by a victim because of a criminal act." The restitution statute applies regardless of whether a person is sentenced to incarceration or is conditionally released.⁵

In Fields v. Commonwealth,⁶ this Court addressed the standard of proof necessary to establish restitution, and envisioned that restitution be considered at the sentencing hearing, where due process standards are less:

The due-process clauses of the federal constitution require that sentences not be imposed on the basis of material misinformation, . . . and that facts relied on by the sentencing court "have some minimal indicium of reliability beyond mere allegation."

The Fields court determined that the trial court must justify a restitution award: "[T]he record must establish an adequate factual predicate for a restitution order."⁷ Looking to our sister states, the Arizona courts have held that it is within the court's discretion to award a specific amount of restitution according to the facts, and that the amount of restitution claimed must bear a reasonable relationship to the loss incurred by the victim.⁸ In Florida, "the amount of restitution need be

⁵ See Commonwealth v. O'Bryan, 97 S.W.3d 454 (Ky.App. 2003).

⁶ 123 S.W.3d 914, 917 (Ky.App. 2003)(citations in footnotes omitted.)

⁷ Id. at 918.

⁸ State v. Fancher, 818 P.2d 251 (Ariz. 1991), citing State v. Scroggins, 810 P.2d 631 (Ariz. 1991).

established only by the greater weight of the evidence[,]" as opposed to beyond a reasonable doubt.⁹ We also note that under Kentucky's sentencing statutes, the determination as to whether a court should grant probation or a conditional discharge is within the trial court's discretion.¹⁰ Because restitution is left to the sentencing judge to decide, the amount of restitution, if it is awarded at all, is also within the trial court's sound discretion.

It is clear in the present case that the trial court abused its discretion, not in awarding restitution, but in awarding the amount of \$39,504. There is no actual factual predicate in the record to establish this amount, other than Bender's for the most part unsupported testimony. The Commonwealth did not present any documentary evidence to establish losses even close to this figure. Bender only produced one day's worth of documentation, establishing a loss of \$903.30. Bender's testimony, alone, that Duboise stole \$38,954 in items and an additional \$450 in food is not sufficient to establish this loss amount, especially in light of Bender's admission that he was unable to document it entirely. We note that the Commonwealth also relied upon Duboise's two written statements, in which she first admitted to stealing \$40,000 in merchandise, and then amended the figure to \$25,000.

⁹ J.O.S. v. State, 668 S.2d 1082 (Fla. 1996).

¹⁰ Turner v. Commonwealth, 914 S.W.2d 343, 347-48 (Ky. 1996).

At the hearing, although admitting that she had no idea how much she had stolen, Duboise testified that she thought the amount was in the \$2,000 range, that she was forced into the admission that she had stolen \$40,000, and that she never admitted that the amount was \$25,000. While we of course do not condone Duboise's conduct, we believe she is entitled to fair treatment in regard to restitution and that the Commonwealth must produce proof to establish the amount to be awarded.

The facts of this case also lead us to question whether the amount is an inflated one. It is undisputed that Duboise was one of eighteen people who participated in the scheme. Duboise was one of three K-Mart employees who would either not scan items or greatly discount or refund items that passed through their registers. The majority of people involved in the scheme were K-Mart customers. Bender testified that the other employees admitted to what they took, which equaled \$500 to \$1,000 in merchandise. The record does not reflect that amounts were repaid, or that any of the stolen merchandise was returned by any of the customers. The trial court should have at least considered this information before deciding upon the restitution amount.

To conclude, there is simply no evidence in the record to establish the full amount of restitution awarded. Had Duboise not admitted to stealing \$2,000 at the hearing, the

Commonwealth would be limited to a restitution award of \$903.30, representing the amount actually established in the record. The trial court clearly abused its discretion in awarding \$39,504 in restitution absent the necessary proof in the record to support that amount.

Having reached this conclusion, we need not address the other issues Duboise raised in her brief.

For the foregoing reasons, the restitution order is reversed, and this matter is remanded for the entry of a restitution award not to exceed \$2,000.

ALL CONCUR.

BRIEF FOR APPELLANT:

Patrick F. Graney
Assistant Public Advocate
Frankfort, KY

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, KY