

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 13-0982

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

Appeal from a final order

of the Circuit Court of Kanawha

County 13F-85(I)

v.

MARTY ATWELL,

Defendant Below, Petitioner

PETITIONER'S BRIEF

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I.

TABLE OF AUTHORITIES

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II.

ASSIGNMENT OF ERROR

A. THE COURT ABUSED ITS DISCRETION DENYING PETITIONER'S MOTION TO RECONSIDER ITS ORDER FOR PETITIONER TO PAY \$50,013 IN RESTITUTION WHEN THE STATE FAILED TO FULFILL THEIR PLEA AGREEMENT PRESENTING NO EVIDENCE AT SENTENCING REGARDING ADULT PROBATION'S DETERMINATION OF RESTITUTION OR THE DEFENDANT'S ABILITY TO PAY

III.

STATEMENT OF THE CASE

The Petitioner was arrested on January 8, 2013 for daytime burglary. App. pp. 2-25. He was on federal parole when this offense occurred. Petitioner burglarized an empty, partly built log cabin and stole a stove and refrigerator. App. pp. 2-25.

On May 28, 2013, the petitioner was sentenced by the Honorable Judge Thomas E. Johnston, United States District Judge to 24 months to the custody of the Federal Bureau of Prisons for his violation of supervised release. App. pp. 33-35.

On May 30, 2013, the Petitioner plead guilty by way of information 13F-85(I) to the felony offenses of Nighttime Burglary by Entering without Breaking, Count One and Grand Larceny, Count Two in Kanawha County Circuit Court. App. pp. 99-120. The information listed a stove and refrigerator. App. pp. 39-40. Petitioner testified, "I went on the property and I removed a refrigerator and a stove." App. pp. 112. The defendant agreed to pay restitution in an amount to be determined by Adult Probation. App. p. 103.

On July 23, 2013, the Petitioner was sentenced to a one (1) year to fifteen (15) years in the penitentiary and a one (1) to fifteen (10) year in the penitentiary, consecutive to the first

sentence, and consecutive to his federal sentence. The Petitioner was ordered to pay \$50,013 in restitution. App. 121-130. The State did argue or present any evidence of restitution. The State did not present evidence of the Petitioner's ability to pay. App. pp. 121-130. Adult Probation did not make a determination of the correct amount of restitution. Adult Probation simply included a letter from the victim's family listing all the property missing from the partially built log cabin. App. pp. 68-79. Counsel objected to the inclusion of the \$50,013 amount in the Petitioner's presentence report. App. p. 123.

The circuit court simply placed the entire amount of the stolen personal property, as valued by the letter in the presentence report, into the final order. The State did not perform the determination of restitution as agreed to in Petitioner's plea agreement. App. p. 103.

Petitioner filed a motion for reconsideration which was denied without hearing on August 4, 2013. App. pp. 26-41. This appeal followed with notice of appeal filed on September 4, 2013.

IV.

SUMMARY OF THE ARGUMENT

The Petitioner was erroneously ordered to pay \$50,013 restitution. At Petitioner's sentencing, the State presented no evidence or argument on restitution as agreed in the plea agreement. Petitioner's motion for reconsideration was denied without hearing.

V.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner contends that oral argument is necessary in this case. The Petitioner contends that the oral argument in this case should be subject to Rule 19 of the Rules of Appellate Procedure. The Petitioner contends that the case is appropriate for a Rule 19 argument

in that the Petitioner claims the Circuit Court engaged in an unsustainable exercise of discretion where the law governing discretion is settled. The petitioner contends that the case is appropriate for a memorandum decision.

VI.

ARGUMENT

A. THE COURT ABUSED ITS DISCRETION DENYING PETITIONER'S MOTION TO RECONSIDER ITS ORDER FOR PETITIONER TO PAY \$50,013 IN RESTITUTION WHEN THE STATE FAILED TO FULFILL THEIR PLEA AGREEMENT PRESENTING NO EVIDENCE AT SENTENCING REGARDING ADULT PROBATION'S DETERMINATION OF RESTITUTION OR DEFENDANT'S ABILITY TO PAY

“The Supreme Court of Appeals reviews sentencing orders, including orders of restitution made in connection with a defendant’s sentencing, under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syl. Pt. 1, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997).

“Read *in pari material*, the provisions of West Virginia Code, 61-11A-1 [1984], W.Va. Code 61-11A-4(a) [1984], W.Va. Code 61-11A-4(d) [1984], W.Va. Code, 61-11A-5(a) [1984] and W.Va. Code, 61-11A-5(d) [1984], establish that at the time of a convicted criminal defendant’s sentencing, a circuit court should ordinarily order the defendant to make full restitution to any victims of the crime who have suffered injuries, as defined and permitted by the statute, unless the court determines that ordering such full restitution is impractical.” *State v. Lucas*, 201 W.Va. 271, 496 S.E. 2d 221 (1997).

“Under W.Va. Code, 61-11A-1 through -8 and the principles established in our criminal sentencing jurisdiction, the circuit court’s discretion in addressing the issue of restitution to crime victims at the time of a criminal defendant’s sentencing is to be guided by a presumption

in favor of an award of full restitution to victims, unless the circuit court determines by a preponderance of the evidence that full restitution is impractical, after consideration of all pertinent circumstances, including the losses of any victims, the financial circumstances of the defendant and the defendant's family, the rehabilitative consequences to the defendant and any victims, and other factors as the court may consider." Syl. Pt. 3, *State v. Lucas*, 201 W.Va. 271, 496 S.E. 2d 221 (1997).

A review of the plea and sentencing transcripts reveal that the circuit court took none of the precautions stated in *State v. Lucas*, supra, when determining the \$50,013 restitution. The State presented no evidence regarding restitution. The defendant plead only to a stove and refrigerator information. Court documents reveal many other people stole from the partially built log cabin at various times and dates. The partially built log cabin was open and unprotected for months. The defendant had no ability to pay restitution having just served a 7 year federal prison sentence, two years supervised release, and the last year in South Central Regional Jail.

In *Fox v. State*, 176 W.Va. 677, 682, 347 S.E. 2d 197, 202 (1986), this court stated: "[I]t is generally held that even in the absence of statute, the sentencing court may not order restitution without first inquiring into and determining on the record the offender's ability to pay." It appears that the restitution award was an error by the circuit court, simply an afterthought to the harsh sentencing. The circuit court simply adopted the letter of the family of the victim's estimate of the entire log cabin's personal property in the defendant's presentence report without testimony of the Adult Probation. The plea agreement directed Adult Probation to determine restitution. Adult Probation did not present any testimony at the sentencing regarding the Petitioner's ability to pay or their determination of the proper amount of restitution.

In *State v. Cummings*, 214 W.Va. 317, 589 S.E. 2d 48 (2003), this Court reasoned that

on remand the issue of interest on the loan should be revisited to ascertain whether the victim's decision to allow this interest to be incurred were a necessary result of the appellant's criminal activity or a convenient but unnecessary decision by the victim. In *State v. Whetzel*, 200 W.Va. at 48, 488 S.E. 2d at 48, this Court reiterated the clear intention of the restitution statute is to require criminals to "pay all losses suffered by victims in the commission of the crime giving rise to the conviction."

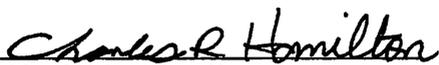
Marty Atwell's criminal activity only involved the theft of a stove, refrigerator and a door. These are the only items that should be in his restitution order. Additionally, he has no ability to pay any restitution having spent seven years in federal prison and two years on federal supervised release, then, the last year, at South Central Regional Jail.

VII.

CONCLUSION

The Petitioner asks that an order be entered vacating the final order in the case below, and that, this case be remanded to Kanawha County Circuit Court and a new hearing be ordered to determine the appropriate amount of restitution and other relief deemed proper by this Court.

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VIII.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief and Appendix Record were mailed by U.S. Mail this 17th day of December, 2013, to: Julie A. Warren, Assistant Attorney General, Office of the Attorney General, 812 Quarrier Street, 6th Floor, Charleston, West Virginia 25301.



Charles R. Hamilton