STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs.) No. 11-1124 (Berkeley County 10-F-27)

David Light,
Defendant Below, Petitioner

FILED
September 7, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner's appeal, by counsel Christopher J. Prezioso, arises from the Circuit Court of Berkeley County's July 5, 2011, restitution order. The State, by counsel Christopher C. Quasebarth, has filed its response and also filed a supplemental appendix. Petitioner has additionally filed a reply in this matter.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioner was indicted in February of 2010 on a fifty count indictment charging him with the following crimes: fourteen counts of forgery of a credit card; one count of burglary; one count of conspiracy to commit burglary; one count of grand larceny; one count of transferring stolen property; twenty-three counts of unlawful possession of a firearm; eight counts of forgery; and, one count of uttering. On June 22, 2010, petitioner pled no contest to one count of burglary and one count of grand larceny. Petitioner was thereafter sentenced to a term of one to fifteen years for the burglary conviction and a term of one to ten years for the grand larceny conviction, said sentences to run consecutively. This sentence was the subject of a direct criminal appeal, and this Court unanimously affirmed petitioner's conviction by memorandum decision entered on April 18, 2011, in West Virginia Supreme Court of Appeals case number 101626. As part of the petitioner's sentence, he was ordered to pay restitution on all counts in the indictment.

According to the State in the proceedings below, petitioner and a co-defendant, David Sturms, stole numerous items of personal property from the home of Martin Blaylock's grandmother and then pawned the items. The circuit court held a restitution hearing in the co-defendant's case and ordered restitution in the amount of $66,700.00 with post-judgment interest at the rate of 7.00% per annum until paid. Mr. Sturms appealed the circuit court's restitution order to this Court, and this Court unanimously issued a refusal order on November 17, 2010, in West Virginia Supreme Court of Appeals case number 101323. During the restitution hearing in

Mr. Sturms' proceedings, the circuit court heard testimony from Mr. Blaylock, who provided detailed testimony concerning the items stolen and their value. The circuit court also heard testimony from Larry Peters, an investigator and insurance adjuster hired by Mr. Sturms. In relation to petitioner, an evidentiary hearing in regard to restitution was held on April 15, 2011. The record indicates that the parties agreed to admit the transcript from Mr. Sturms' restitution hearing and rely on the same as evidence in these proceedings. Additional testimony was heard from Mr. Blaylock and a witness for petitioner. After the hearing, the circuit court ordered petitioner to pay restitution in the amount of $66,700.00 with post-judgment interest at the rate of 7.00% per annum until paid. It is from this restitution order that petitioner appeals.

On appeal, petitioner alleges that the circuit court erred in ordering that he pay restitution in the amount of $66,700.00. Specifically, petitioner argues that the State did not meet its burden in establishing the requested value of the restitution, as it relied solely on Mr. Blaylock's valuations and he was not qualified to produce the same. Petitioner argues that all of the evidence and calculations presented prior to acceptance of his plea agreement valued the stolen items at $10,120.00, which is grossly disproportionate to the final restitution amount. Petitioner notes that the bulk of the final restitution amount comes from three items, a Morgan silver dollar collection, a first day of cover stamp collection, and proof sets from World War I through 1979. According to petitioner, these items were eventually valued at a total of $55,000.00, despite being valued in the criminal complaint and indictment at only $500.00. Petitioner also argues that Larry Peters, the only witness qualified to value the stolen items, testified that the total value of the stolen items was only $11,454.55.

Further, petitioner argues that he does not have the financial means to pay the amount of restitution ordered. According to petitioner, he is a high-school drop-out, though he did obtain his GED in 2004. Petitioner notes he is a father of one, and has no income because of his current incarceration. Simply put, petitioner argues that his dependents will suffer if he is immediately saddled with this non-dischargeable debt upon his release from incarceration. Petitioner argues that this amounts to a financial incarceration for the rest of his life as the insurmountable restitution sum looms overhead while accumulating interest each year. Citing *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997), petitioner argues that his ability to pay, his means and circumstances, and his financial resources and earning ability dictate that the order be set aside. Finally, in his reply, petitioner argues that any assertion that his argument is without merit because his co-defendant was subjected to identical restitution is incorrect. Petitioner argues that such an attack cannot be considered meritorious because petitioner was not jointly indicted with the co-defendant, and because Mr. Strums made completely different arguments on behalf of his position.

In response, the State argues that the circuit court did not commit error in ordering this specific restitution. According to the State, petitioner was not surprised that Mr. Blaylock was seeking restitution in a sum that exceeded the property listed in the indictment. The State argues that before entering his plea, the petitioner was aware that Mr. Blaylock was seeking restitution in excess of $66,000.00. Further, the State argues that prior to his own restitution hearing being scheduled, the petitioner knew that the circuit court had ordered his co-defendant to pay

restitution in the amount of $66,700.00, and that this Court had refused the appeal from that order. According to the State, the circuit court determined the amount of restitution by a preponderance of the evidence as required by West Virginia Code § 61-11A-5(d). The State argues that evidence of items stolen was presented through testimony and itemized lists of the property and their value. Further, the parties agreed to use the transcripts of Mr. Strums' restitution hearing as evidence in the petitioner's proceedings, and additional testimony was provided from Mr. Blaylock and a witness for petitioner. The State argues that the circuit court found Mr. Blaylock's testimony to be credible, and notes that the discrepancy between the values was resolved by the circuit court's finding that Mr. Blaylock did not know the true value of the coins, stamps, and proofs at the time they were reported stolen. Further, the State argues that the circuit court discounted the valuation from petitioner's witness since he testified that he never viewed any of the stolen property.

According to the State, petitioner failed to prove that the circuit court made improper findings based upon the evidence before it. The State argues that Mr. Blaylock testified from personal knowledge about the property that was stolen and the bases of his valuations. Further, the State argues that the main difference between the property valuations by Mr. Blaylock and petitioner's witness is that the witness for petitioner refused to recognize that Mr. Blaylock's coins, stamps, and proofs even existed. According to the State, the law does not penalize the victims of crimes for not being able to produce stolen property for valuation, nor does it reward convicted thieves for successfully disposing of stolen property. Citing Syllabus Point 3 of *Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997), the State argues that there is a presumption in favor of an award of full restitution to crime victims. Further, the State argues that the petitioner had the burden of demonstrating his financial needs, and those of his dependents, pursuant to West Virginia Code § 61-11A-5(d), and that he failed to present any evidence that he would be unemployable upon release or that he is otherwise mired in debt. For these reasons, the State argues that the circuit court's restitution order be affirmed.

"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). Applying this standard of review to the instant matter, the Court finds no merit in petitioner's argument. To begin, we have previously held that

> Under W.Va.Code, 61-11A-1 through -8 and the principles established in our criminal sentencing jurisprudence, 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 of the 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 such other factors as the court may consider.

Syl. Pt. 3, *Id*. As is stated in this holding, the law presumptively favors full restitution to victims. However, the defendant in such proceedings has the burden to establish any potential consequences that ordering such restitution may cause. West Virginia Code § 61-11A-5(d) states, in relevant part, that "[t]he burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant." In its restitution order, the circuit court found that "there is a reasonable possibility that the [petitioner] may be able to pay full restitution in this matter." The circuit court based this finding on the fact that "petitioner is 35 years old and has income earning potential," as well as the fact that petitioner would likely be paroled in one year and fully discharged in approximately eleven years. Based upon this finding, it is clear that the circuit court considered the appropriate impact of the restitution on petitioner before ordering the same.

Further, the record reflects that Mr. Blaylock provided detailed itemizations and valuations for the stolen items, and that the circuit court found "Mr. Blaylock's testimony regarding his lost items to be very credible." As the State noted in its response, the circuit court also accounted for the variance in value for the coins, stamps, and proofs due to the fact that "the victim was not aware as to the value of the coin and stamp collections and the proof sets" at the time the criminal complaint was filed. Based upon a review of the record, it is clear that the circuit court followed the applicable guidelines in determining what restitution was appropriate. As such, it is clear that the circuit court did not abuse its discretion in ordering the specific amount of restitution petitioner owes.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: September 7, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh