IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1999 SESSION

FILED

February 15, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	C.C.A. No. 03C01-9904-CC-00144
Appellee,	)	
	)	Sevier County
v.	)	
	)	Honorable Rex Henry Ogle, Judge
THOMAS STEPHEN THRASHER and GINI DIANE BROWN,	)	(Order of Restitution)
	)	
Appellants.	)	

For Appellants:

Edward C. Miller
District Public Defender
P. O. Box 416
Dandridge, TN 37725

For Appellee:

Paul G. Summers
Attorney General & Reporter

Michael J. Fahey, II
Assistant Attorney General
425 Fifth Avenue North
Nashville, TN 37243-0493

Al C. Schmutzer, Jr.
District Attorney General

Charles Edward Atchley, Jr.
Assistant District Attorney General
125 Court Avenue, Room 301-E
Sevierville, TN 37862

OPINION FILED: _____

AFFIRMED IN PART AND REMANDED

ALAN E. GLENN, JUDGE

O P I N I O N

The defendants, Thomas Stephen Thrasher and Gini Diane Brown, each pled guilty in the Sevier County Circuit Court to one count of aggravated burglary and two counts of theft, and received a four-year sentence with confinement for fifteen days, with the remainder of the sentence to be served in the Community Corrections Program. They appeal as of right the order of the trial court that they pay restitution as a condition of their sentences to Community Corrections, presenting the following issues:

I. Whether the trial judge had statutory authority to order restitution as part of defendants' sentences to the Community Corrections Program.

II. Whether there was sufficient evidence to support the payment of restitution.

We affirm the authority of the trial judge to order restitution for a theft offense when a defendant is sentenced to a period of incarceration followed by Community Corrections. We remand to the trial court for additional findings consistent with this opinion.

BACKGROUND

On October 19, 1995, Officer Mark Holt was patrolling on Wiley Oakley Drive in Sevier County, an area of recent burglaries. He observed a pickup truck in front of one of the chalets on the street. The truck was loaded with property. Upon investigation, Officer Holt found a window had been broken to gain access. He found both defendants inside the residence. This break-in resulted in the arrest and indictment of both Brown and Thrasher for aggravated burglary.

Subsequently, on December 23, 1995, defendant Thrasher sold two refrigerators and a microwave oven which were the property of a person or persons not identified in the indictment[1] **to Johnny Johnson, the owner of a house where Brown was apparently living. Thrasher told Johnson that the property was stolen. On December 27, 1995, an officer received consent to search Johnson's residence and found property identified as stolen from twelve burglaries in Sevier County. The property was valued at approximately $10,000. According to the presentence report, Brown claimed that all the property belonged to her. As a result of this search, Brown was indicted for theft of property valued at more than $10,000, this "property" presumably being that recovered from the twelve burglaries.**

The defendants entered plea agreements with the State on January 15, 1998,

[1]We note that Indictment 6555, offense date December 23, 1995, refers to "three (3) refrigerator[s], valued in excess of $500.00," while the presentence report, Docket No. 6555, refers to "a Roper refrigerator, G.E. refrigerator, Magic Chef microwave oven." The State, in its brief, states that, "On December 23, 1995, Thrasher sold two refrigerators and a microwave oven to Johnny Johnson for $230."

and judgments were entered. Defendant Thrasher pled guilty to one count of aggravated burglary, a Class C felony (Indictment 6556) (offense date October 19, 1995); one count of theft over $1,000, a Class D felony (Indictment 6556) (offense date October 19, 1995); and one count of theft over $500, a Class E felony (Indictment 6555) (offense date December 23, 1995). Defendant Brown pled guilty to one count of aggravated burglary, a Class C felony (Indictment 6507) (offense date October 19, 1995); and two counts of theft over $1,000, a Class D felony (Indictments 6507 and 6506) (offense dates October 19, 1995, and December 27, 1995, respectively). The State recommended that both defendants receive concurrent four-year sentences as Range I standard offenders. The manner of service was to be determined by the trial court following a sentencing hearing. Judgments for Indictments 6506 and 6507 as to defendant Brown stated as a special condition: "Sentence to be served on community correction program after service of fifteen days in jail. Defendant to report on February 22, 1998 @ 7:00 p.m. Restitution upon verification being filed with the court." As to defendant Thrasher, the judgments for Indictments 6555 and 6556 had this same language.

The record does not include a transcript of the sentencing hearing, but sentence was imposed on February 17, 1998, requiring that both defendants serve fifteen days of their concurrent four-year sentences in the county jail with the balance to be served in the Community Corrections Program. On March 13, 1998, alternative sentencing orders were filed, which included the following order: "THE CLIENT SHALL: . . . 6. Make payment of all fines, court costs and victim restitution as ordered by the court[.]"

On November 24, 1998, the State filed a motion to amend the judgments in Nos. 6506, 6507, 6555, and 6556, seeking $5,608 in restitution from the defendants on behalf of Ray and Helen Valentine. The Valentines' rental properties, two cabins located in Sevierville, had been broken into on September 30, 1995. At that time, they reported a number of stolen items with estimated value to the investigating officer. Subsequently, some of their property was identified and recovered from among the items the police found as a result of the search of the Johnson residence on December 27, 1995. Apparently, items taken from the burglaries of the two Valentine cabins were among the property from the twelve burglaries lumped into the charges against defendant Brown set out in Indictment 6506. Attached to the

State's motion seeking to amend the judgment was a three-page, itemized list of all the property the Valentines reported to have been stolen on September 30, 1995. According to the State, this list was prepared by the Valentines from memory. The page totals add up to $5,608.

A hearing was held on March 29, 1999, regarding the issue of restitution to the Valentines. At that hearing, the trial court responded in the following way to the defendants' objection to the lack of proof of their commission of the specific burglary of the Valentines' two rental cabins:

> THE COURT: The Court thinks that in light of the fact that so much of these items were taken from the Valentines at the same time and that these co-defendants were found in possession of it, in fact to be honest with you, how long after the burglary was it that they found these items?
>
> GEN. ATCHLEY: Your Honor, September 29th, of '95 and they were . .
>
> THE COURT: Mr. Miller [defense counsel] is right, General, on the statute. The Court, under the statute in effect at that time of this offense, the Court could not order a restitution as a condition of probation. The Court could not do that, in fact we had some problems because of that. And because of that situation the legislature changed the statute to where we can now for offenses occurring after those dates, and I think it went into effect July 1st of '97. We can now order them as a condition of probation to do that, but for an offense occurring in 1995 I don't have the authority to do that. That is up to the Department of Corrections and a Probation Officer.

During this hearing, the assistant district attorney general advised the court why the defendants had not been indicted for the burglaries of the cabins belonging to the Valentines: "[A]nd the proof was such that we did not feel that we had adequate proof to try them for the aggravated burglaries but could clearly convict them of the theft by exercising control over these vast amounts of stolen property taken from these other places, and they were convicted." Counsel for the defendants advised the court that only Brown, and not Thrasher, was convicted of an offense involving the Valentines' property and argued that the proof was insufficient to show anything other than that some of the items taken from the Valentine burglaries were recovered from where Brown was living.

Patti Williams, a Community Corrections officer, stated the following at the hearing:

> MS. PATTI WILLIAMS: Certainly, you know, if the Court establishes that they owed restitution and these are specifically victims then, you know, I could investigate

and make a determination and present that to the Court and then the Court could rule that, yes, that is the amount and then we can, you know, uphold that and make him pay that.

THE COURT: Okay.

MS. PATTI WILLIAMS: But as far as . . .

THE COURT: Thank you. The Court finds the amount of restitution owed at $5608.00, and I order the Community Corrections Department to set up a schedule of repayment. Thank you.

ANALYSIS

A. Standard of Review

When an accused challenges the length, range, or manner of service of a sentence imposed by the trial court, this court conducts a *de novo* review of the record "with a presumption that the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d) (1997). However, this presumption is conditioned on an affirmative indication in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. See State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

The appellant bears the burden of showing that the sentence was not a proper one. See id. This court makes its determination as to whether the appellant has met that burden based on considerations including: (1) evidence adduced at trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing; (4) the arguments of counsel; (5) the nature and characteristics of the offense; and (6) the appellant's potential or lack of potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-103 and -210.

Additionally, when an appellant challenges the amount of restitution ordered by the trial court, this court conducts a *de novo* review on the record of the amount of restitution and how it was computed, with a presumption that the determination made by the trial court is correct. See id. § 40-35-401(d); State v. Johnson, 968 S.W.2d 883, 884 (Tenn. Crim. App. 1997); State v. Frank Stewart, No. 01C01-9007-CC-00161, 1991 WL 8520, at *1 (Tenn. Crim. App., Nashville, Jan. 31, 1991).

B. Statutory Authority to Order Restitution

Defendants argue first that because they were sentenced to periods of incarceration, the trial court lacked statutory authority to order restitution. Defendants base this argument on the holding in State v. Davis, 940 S.W.2d 558, 561-562 (Tenn. 1997). In Davis, our supreme court held that no statutory authority existed, prior to the 1996 amendment to the Sentencing Act, permitting a trial court to order restitution in connection

with a sentence of total confinement. Davis, 940 S.W.2d at 561-562. Additionally, the court acknowledged that the subject conviction, vandalism, was not encompassed within the legislative mandate of Tenn. Code Ann. § 40-20-116 (1990), which permits restitution in cases involving theft of property. Davis, 940 S.W.2d at 562, n. 7. Indeed, Tenn. Code Ann. § 40-20-116(a) provides:

> Whenever a felon is convicted of stealing or feloniously taking or receiving property. . . the jury shall ascertain the value of such property . . . and the court **shall** . . . order the restitution of the property, and, in case this cannot be done, that the party aggrieved recover the value assessed against the prisoner. . . .

By the plain language of this provision, restitution in cases involving theft is not only proper, it is mandatory.

In addition to the legislative directive of Tenn. Code Ann. § 40-20-116, our legislature determined that a viable sentencing alternative includes "[a] sentence to a community based alternative to incarceration in accordance with the provisions, including eligibility requirements, of chapter 36 of this title." Tenn. Code Ann. § 40-35-104(c)(8) (1990). "One goal of the community corrections program is to promote accountability of offenders to their communities by **requiring financial restitution** to victims of crimes." Tenn. Code Ann. § 40-36-104(2)(1990) (emphasis added). Indeed, based upon this rationale, a panel of this court, in State v. Johnson, determined that an order of restitution was permitted where a defendant was sentenced to a term of confinement followed by participation in a community corrections program.[2] **State v. Johnson, 968 S.W.2d 883, 885 (Tenn. Crim. App. 1997). Accordingly, for these reasons, we conclude that the trial court had statutory authority to order restitution in the present case.**

However, it is unclear whether the trial court retained jurisdiction to order restitution to the Valentines. Waivers for all of the charges were entered on January 15, 1998, as to both defendants. Judgments, as to all charges against both defendants, were executed on January 15, 1998, although each bears the March 13, 1998, seal of the Sevier County Circuit Court Clerk. Some of those judgments imposed the special condition, "restitution upon verification being filed with the court." The presentence reports as to both defendants are dated February 17, 1998, as the submission date to the trial court. Alternative sentence orders were signed by the trial court on March 13, 1998, as to both defendants. Both orders provide that each defendant is to "[m]ake payment of . . . victim restitution as ordered by the court. . . ." On November 24, 1998, the State then filed its motion to amend the judgments as to Indictments 6506, 6507, 6555, and 6556 to reflect that both

---

[2] The decision in **State v. Johnson** was filed on May 19, 1997, two months after the supreme court released its opinion in Davis (Davis was filed on March 10, 1997). No Rule 11 permission to appeal was sought in Johnson.

defendants owed restitution to the Valentines in the amount of $5,608. It appears that neither defendant had been ordered to pay specific restitution prior to that time and that the Valentines had not previously been identified as victims in the matter.

A judgment of a trial court becomes final after thirty days, the court then being able to correct only "[c]lerical mistakes . . . and errors in the record arising from oversight or omission. . . ." Tenn. R. Crim. P. 36; State v. Pendergrass, 937 S.W.2d 834, 837 (Tenn. 1996); Powers v. State, 942 S.W.2d 551, 557 (Tenn. Crim. App. 1996). The State's motion to amend was filed after the judgments, which did not provide for restitution to the Valentines, would have become final, absent a clerical mistake or error. Thus, upon remand, we direct the trial court to determine if it had authority to grant the State's motion to order that restitution be paid to the Valentines.

C. Sufficiency of Evidence

The defendants further argue that evidence was not sufficient to show that they owed restitution to the Valentines in the amount of $5,608.

The courts in this state follow the "generally approved rule that proof of possession of recently stolen goods gives rise to the inference that the possessor has stolen them." Bush v. State, 541 S.W.2d 391, 394 (Tenn. 1976) (citing Peek v. State, 375 S.W.2d 863 (Tenn. 1964)). Defendant Brown entered a plea of guilty in Indictment 6506, for being in possession of items stolen in a number of burglaries including that of the Valentines' chalets. However, it does not necessarily follow that Brown committed the burglary and stole all of the items just because three of approximately one hundred items taken in the two burglaries were found in her residence three months after the burglaries. In fact, during the sentencing hearing, the assistant district attorney general advised the court of the insufficiency to link the defendants with the burglaries, themselves, which were the source of the stolen property recovered on December 27, 1995. Thus, upon remand, the trial court should determine the factual basis for ordering that defendant Brown pay restitution to the Valentines, there not having been sufficient proof to seek an indictment against her for the two burglaries.

As to defendant Thrasher, the record is also insufficient to ascertain whether there is a legal basis for ordering that he make restitution to the Valentines. None of the indictments as to him name the victims of the thefts. Indictment 6506, charging Brown with being in possession of stolen property on December 27, 1995, relates to property found at the Johnson residence, a location where Brown was living. Three items of property stolen from the Valentines were subsequently recovered from among these items. Thrasher is not named in that indictment. However, he is charged in Indictment 6555 with being in possession on December 23, 1995,

of three refrigerators belonging to a person who is not identified in the indictment or otherwise in the record. Thus, it does not appear that defendant Thrasher was charged with an offense involving the thefts from the Valentines. Accordingly, the trial court should determine, upon remand, the basis for ordering that Thrasher pay restitution to them.

Further, upon remand, additional findings must be made as to the payment of restitution should the trial court determine that either or both defendants should pay restitution. Tennessee Code Annotated § 40-35-304 sets out the procedures the court must follow in ordering restitution. The section applies to restitution ordered both where probation has been ordered and where a defendant has been sentenced pursuant to § 40-35-104(c)(2), as Brown was. "Whenever the court believes that restitution may be proper or the victim of the offense or the district attorney general requests, the court shall order the presentence service officer to include in the presentence report documentation regarding the nature and amount of the victim's pecuniary loss." Tenn. Code Ann. § 40-35-304(b). The amount of restitution that the defendant may be directed to pay is limited to the victim's "pecuniary loss." "Pecuniary loss" includes:

> (1) All special damages, but not general damages, as substantiated by evidence in the record or as agreed to by the defendant; and
>
> (2) Reasonable out-of-pocket expenses incurred by the victim resulting from the filing of charges or cooperating in the investigation and prosecution of the offense; provided, that payment of special prosecutors shall not be considered an out-of-pocket expense.

Id. § 40-35-304(e). The amount ordered to be paid "does not have to equal or mirror the victim's precise pecuniary loss. Moreover, the sum must be reasonable." State v. Smith, 898 S.W.2d 742, 747 (Tenn. Crim. App. 1994), perm. app. denied (Tenn. 1995). Here, the trial court asked the defendants, "So now do you have any question about the amounts that they have submitted?" Counsel for the defense responded, "We're in no position, Your Honor, to contest what they say they lost." The trial court did not state for the record that it found the documentation submitted by the State to be sufficient and accurate. On remand, the trial court must determine the victims' actual loss based on realistic values, which may or may not be the amount set out in the State's motion to amend the judgments.

Additionally, in determining the amount and method of payment of restitution, the trial court must consider "the financial resources and future ability of the defendant to pay or perform." Tenn. Code Ann. § 40-35-304(d); see also State v. Johnson, 968 S.W.2d 883, 886 (Tenn. Crim. App. 1997) ("[T]he trial court, in determining restitution, must also consider what the appellant can reasonably pay. An order of restitution which obviously cannot be fulfilled serves no purpose for the appellant or the victim."); Smith, 898 S.W.2d at 747 ("The trial court must determine the actual loss, based on realistic values, the amount the appellant is paid, and the appellant's expenses that are reasonably incurred. The trial court must further set an amount of

restitution that the appellant can reasonably pay within the time that he will be within the jurisdiction of the trial court."). The presentence report of Brown said that she could pay "$50 per month on restitution or fines," while that of Thrasher said that he could pay "$50 monthly toward restitution or court costs." However, both of these were dated February 13, 1998, nine months before the State had sought restitution payments to the Valentines. Thus, because of the timing, no finding was made as to the reasonableness of these amounts. On remand, the trial court should make this determination as to the defendant or defendants ordered to pay restitution. We note that, according to Tenn. Code Ann. § 40-35-304(g)(2), court-ordered restitution payments cannot extend beyond January 15, 2002, the expiration date of the defendants' sentences.

CONCLUSION

We remand to the trial court for determinations as follows:

(1) Whether the trial court had authority to amend the judgment against defendants to order that each pay restitution to the Valentines;

(2) Whether there is a legal and factual basis for ordering each defendant to pay restitution to the Valentines;

(3) The actual loss sustained by the Valentines, as substantiated by appropriate documentation presented to the presentence service officer and included in a supplemental report of that officer or testimony adduced at a hearing;

(4) The ability of the defendant/defendants to pay such restitution as ordered; and

(5) The manner and time frame in which defendant/defendants will be required to make payments.

Upon remand, the trial court may receive such further testimony as the parties might wish to offer.

_____
ALAN E. GLENN, JUDGE

CONCUR:

_____
DAVID G. HAYES, JUDGE

_____
JOE H. WALKER, III, SPECIAL JUDGE