IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

NO. 13-0982

STATE OF WEST VIRGINIA,

Plaintiff Below,
Respondent,

v.

MARTY ATWELL,

Defendant Below,
Petitioner.

RESPONSE TO PETITIONER'S APPEAL BRIEF

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RESPONSE TO PETITIONER'S APPEAL BRIEF

Comes now the Respondent, the State of West Virginia, by Julie A. Warren, Assistant Attorney General, pursuant to the West Virginia Revised Rule of Appellate Procedure 10(d) and according to an Order of this Honorable Court, dated September 30, 2013, and responds to the petition for appeal as follows.

I. STATEMENT OF THE CASE

A. Kind of Proceeding and Nature of the Ruling Below.

On May 30, 2013, the Circuit Court of Kanawha County filed its Information charging the Petitioner with one count of Nighttime Burglary by way of Entering without Breaking, and a second count of Grand Larceny. (App. at 39-40.) The Information states that on or about January 1, 2013, the Petitioner unlawfully entered the home of the victim with intent to commit a crime, and stole a stainless steel stove and refrigerator. (*Id.*) The Petitioner signed an Amended Guilty Plea, which included an agreement to "pay restitution in an amount to be determined by the Adult Probation Department." (App. at 58.) During the Plea Hearing on May 30, 2013, the

Petitioner understood the ramification of his guilty plea to the charges identified in the Information. (App. at 102.) He was sentenced to a term of incarceration of 1 to 15 years for the Nighttime Burglary charge, 1 to 10 years for Grand Larceny, and ordered to pay restitution to the victim in the amount of $50,013.00. (App. 28-32.) The sentencing court ultimately held that Petitioner did not qualify for an alternative sentence because of his prior federal convictions, the revocation of supervised release in the federal drug convictions, and his commission of the present offenses while on supervised release from the federal drug conviction. (App. at 127-28.)

B. Facts.

The Adult Probation Department submitted a thorough Presentence Report to the court. (App. at 42-48.) According to the Report, the subject residence had been vacant because the homeowner-victim had previously sustained a traumatic brain injury while performing work on the residence. (App. at 43.) As a result of the accident, the victim was in a coma for 6 months, before undergoing rehabilitation, and then going to live with family in Delaware so they could see to his care. (*Id.*) Both the Presentence Report and the Police Report indicate that an eye witness informed investigators that the Petitioner, along with some co-conspirators, had used the witness's vehicle (and other vehicles) to steal items from the victim's house. (App. at 64.) The witness told police that he did not know his vehicle was being used for that purpose "until at some point when he saw a great deal of unexplained, high value items at his friend Marty's house." *Id.* The witness further stated that that Marty and co-conspirators "were at Marty's house trying to distribute or destroy property," and that "cars were coming to the house, loading with goods, then leaving as quickly as possible." (*Id.*) He further noted that "totes were being shuffled out of every room in Marty's house and taken to cars and outside." (*Id.*)

The Adult Probation Department contacted the victim's family requesting a Victim Statement that would help the court determine the amount of restitution applicable to this case, and a statement was submitted by victim's parents, who had been caring for him while he recovered from a "traumatic brain injury," that maintained the victim did not have insurance on the residence or personal property so he "took a total loss." (App. at 67-79.) The family included an itemized list of property stolen along with receipts and invoices showing a total loss to the victim of $50,013.00, and they requested this total amount be demanded from Petitioner for restitution. (*Id.*) The Police Report also indicates there were numerous items taken from the property, including military medals awarded to the victim's daughter who died serving in Iraq, a trailer, Harley Davidson and 2 Kawasaki 750 4-Wheelers, as well as damage to the home and vehicles. (App. at 62.)

During the sentencing hearing, the court listened to arguments from Petitioner's counsel related to the Presentence Report's recommendation of $50,013.00 in restitution, contending that he should only have to be responsible for the value of the stainless steel refrigerator, stove and door, since those where the only items he admitted to stealing. (App. 121-33.) He never raised an argument related to his inability to pay the amount of the restitution. (*Id.*) In response, the State noted that Petitioner had also taken the victim's deceased daughter's war medals that she had earned while serving in Iraq, which included the Purple Heart and the Bronze Star. (App. at 6, 26-27.) The State also asserted that there had been damage to the victim's home.

II. SUMMARY OF ARGUMENT

The sentencing court did not abuse its discretion when it determined that Petitioner must pay the full amount of restitution owed to the victim. As a part of his plea deal, Petitioner agreed to pay the amount recommended by the Adult Probation Department, which according to the

information submitted to the Department from the victim's family and included in the Presentence Report submitted to the court, the total value of the property stolen, which was $50,013.00. At his hearing, the Petitioner offered no evidence to rebut the value prescribed in the Report, nor did he present any argument related to his financial condition and his ability to pay the restitution.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State asserts that oral argument is not required in this case. The decisional process would not be assisted by oral argument. The facts and legal arguments are argued by and presented in the briefs and Appendix. This matter is appropriate for a memorandum decision.

IV. ARGUMENT

A. Standard of Review.

The standard of review applicable to the case at hand is found in Syl. Pt. 1 of *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997), which provides that "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."

B. The Restitution Ordered by the Court was Appropriate.

The sole issue before this Court is whether the sentencing judge abused his discretion in ordering full restitution to the victims. The State avers he did not. His order fully complies with existing case law. Further, that order is in agreement with the expressed purpose of the statute, the Victim Protection Act, W. Va. Code § 61-11A-4 (1984).

Although the circuit court has discretion when determining whether and how much restitution should be awarded a crime victim, that discretion should also be "guided by a presumption in favor of an award of full restitution to victims." Syl. Pt. 3, *Lucas*, 201 W. Va.

271, 496 S.E.2d 221 (1997). However, the presumption may be rebutted if the court "determines by a preponderance of the evidence that full restitution is impractical," and such determination should include "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." (*Id.*)

In *State v. Whetzel*, 200 W. Va. 45, 488 S.E.2d 45 (1997), this Court observed that the West Virginia restitution statute "predicates an award of restitution upon a defendant's conviction of a felony or misdemeanor and upon the 'physical, psychological or economic injury or loss to the victim.'" (*Id.* at 48, 488 S.E.2d at 48.) The *Whetzel* Court further explained that the clear intention of the Legislature in enacting W. Va. Code § 61-11A-4(a) was to enable trial courts to require convicted criminals to pay all losses sustained by victims in the commission of the crime giving rise to the conviction. Any other interpretation would run counter to the legislative intent that 'all that is possible' be done, an intent set forth in W. Va. Code § 61-11A-1(b). (*Id.*) (*emphasis added*). Accord, *State v. Cummings*, 214 W. Va. 317, 320, 589 S.E.2d 48, 51 (2003).

Though it may be a consideration, the "indigency of a defendant or the current ability or inability of a defendant to pay a given amount of restitution is not necessarily determinative or controlling as to the practicality of an award of restitution." Syl. Pt. 4, *Lucas*, 201 W. Va. 271, 496 S.E.2d 221. The court need only to "determine[] that there is a reasonable possibility that a defendant may be able to pay an amount of restitution," and after "consideration and weighing of all pertinent circumstances, is permitted but not required to determine that an award of restitution in such an amount is practical." (*Id.*)

There is no basis to argue that the Petitioner's restitution should be limited to the items identified in the Information, when his plea agreement expressly states that he agreed to "pay restitution in an amount to be *determined by the Adult Probation Department.*" (App. at 58.) The sentencing court was provided a copy of the Adult Probation Department's Presentence Report, that included a list of the property stolen totaling $50,013.00, along with receipts and invoices that were provided by the victim's family, and Petitioner's employment record and creditors. (App. at 121-30). Moreover, at no time during the hearing did Petitioner raise an objection and/or move for a continuance to challenge the value proffered by the victim's family and included in the Presentence Report. Therefore, the sentencing court was within its discretion to take into account the value of the property stolen as compiled by victim's parents on his behalf and submitted to the court by the Adult Probation Department.

The State was not required to prove that Petitioner was financially capable of paying the restitution. To the contrary, this Court has held that "at sentencing hearing, the court should invite the offender to comment upon the presentence report," and at this point "the offender then has the burden of advising the court of any inaccuracies in the presentence report or of any reason that he would be unable to make restitution, presenting such evidence as the court, in its discretion, may deem relevant." *Fox v. State*, 176 W.Va. 677, 684, 347 S.E.2d 197, 204 (1986).

At no time during the sentencing hearing did Petitioner inform the court of his inability to pay the $50,013.00 in restitution recommended by the Adult Probation Department. The only argument he raised to the court was his admission to only stealing the stove, refrigerator and a door. Now, on appeal, Petitioner contends that he is unable to pay restitution for his January 8, 2013 crimes because he had been incarcerated for 7 years prior for other criminal activity and

unable to work.[1] Petitioner presented no factual support for his alleged financial condition and inability to pay the restitution required by the court. As the circumstances about Petitioner's ability to pay are unknowable at this time, any argument that full restitution is "impractical" is rampant speculation.

The sentencing court was within its discretion when it ordered Petitioner to make the victim whole by requiring he pay the full amount of restitution in the amount of $50,013.00 to the victim.

V. CONCLUSION

For all the reasons set forth in this brief and apparent on the face of the record, this Court should affirm the amount of restitution ordered by the Circuit Court of Kanawha County.

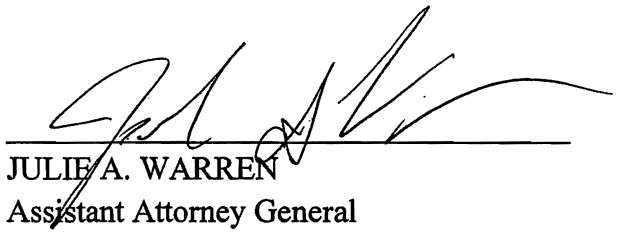
Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By Counsel,

1 The Presentence Report indicates that Petitioner committed this crime "within two and a half years" of being released from incarceration on a prior conviction. (App. at 47.)

PATRICK MORRISEY
ATTORNEY GENERAL



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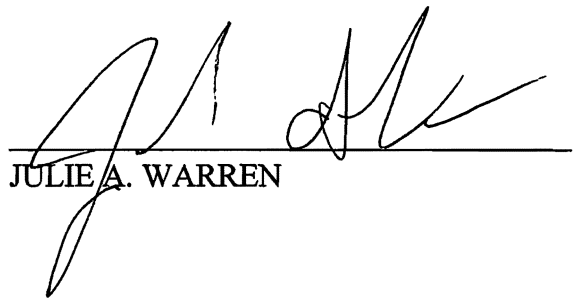
CERTIFICATE OF SERVICE

I, Julie A. Warren, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *Response to Petitioner's Appeal Brief* upon Petitioner by depositing said copy in the United State mail, with first-class postage prepaid, on the 30th day of January, 2014, addressed as follows:

Charles R. Hamilton
Hamilton Law Office
5130 MacCorkle Ave., SE
Charleston, WV 25304-2149



JULIE A. WARREN