

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

UNITED STATES OF AMERICA

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Case No. 1:00CR00077

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v.

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OPINION

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SHANNON JUSTICE,

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By: James P. Jones

)

United States District Judge

Defendant.

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Rick A. Mountcastle, Assistant United States Attorney, Abingdon, Virginia, for United States of America; Michael A. Bragg, Abingdon, Virginia, for Defendant.

In this opinion, I resolve the question of the amount of restitution to be paid by this criminal defendant.

I

Shannon Justice, the defendant, pleaded guilty in this court to a conspiracy involving a scheme by which he and his grandfather, an unindicted coconspirator,¹ defrauded a financial institution, Grundy National Bank (“Bank”).² The conspirators

¹ Justice’s grandfather died prior to the indictment.

² See 18 U.S.C.A. § 371 (West 2000). The defendant also pleaded guilty to two counts charging underlying offenses of corruptly giving something of value to a bank employee with intent to influence the employee. See 18 U.S.C.A. § 215(a)(1) (West 2000).

bribed a Bank loan officer, Albert N. Smith, to make improper automobile loans to customers of Big Y Auto Sales, a used car business in which Justice had an interest. Because many of the loans were made contrary to sound lending practices—such as to customers with poor credit histories or for amounts exceeding the values of the vehicles—the Bank suffered losses when the loans defaulted.

After the defendant's guilty plea, a probation officer of this court prepared a presentence investigation report ("PSR"). The defendant objected to the probation officer's finding in the PSR that the defendant was liable for restitution to the Bank. The defendant was sentenced on July 30, 2001, but pursuant to 18 U.S.C.A. § 3664(e) (West 2000) the issue of restitution was deferred for further hearing. The additional hearing was held on September 21, 2001, at which time I received testimony from a Bank auditor and the defendant. The question of restitution is now ripe for decision.

II

The criminal conduct by the defendant causing loss to the Bank ended prior to the adoption of the Mandatory Victims Restitution Act of 1996 ("MVRA"), 18 U.S.C.A. § 3663A (West 2000 & Supp. 2001), on April 24, 1996. *See* Pub. L. No. 104-132, 110 Stat. 1214 (1996). Accordingly, I must apply the provisions of the earlier Victim and Witness Protection Act of 1982 ("VWPA"), 18 U.S.C.A. §§ 3663, 3664

(West 2000 & Supp. 2001).³ As relevant here, the primary difference between the older VWPA and the more recent MVRA is that under the former the court “must make specific factual findings as to a defendant’s financial resources, financial needs, and earning abilities before ordering restitution.” *United States v. Bollin*, No. 00-4337, 2001 WL 630666, at *20 (4th Cir. June 7, 2001). The VWPA (unlike the MVRA) “implicitly requires the district judge to balance the victim’s interest in compensation against the financial resources and circumstances of the defendant. . . .” *United States v. Bruchey*, 810 F.2d 456, 458 (4th Cir. 1987).⁴

Under either version of the law, the initial question is whether a person has been “directly and proximately harmed as a result of the commission of an offense for which

³ As noted by the Fourth Circuit:

The MVRA provides that it “shall, to the extent constitutionally permissible, be effective for sentencing proceedings in cases in which the defendant is convicted on or after [April 24, 1996].” The circuits are split on whether applying the MVRA to criminal conduct committed before the MVRA’s enactment violates the Ex Post Facto Clause. This circuit has not yet decided the issue.

Id. n.19 (citations omitted.) I find those cases that hold the Ex Post Facto Clause to be violated by the retroactive application of the mandatory restitution provisions of the MVRA to be more persuasive. *See, e.g., United States v. Williams*, 128 F.3d 1239 (8th Cir. 1997). In addition, the current version of the sentencing guidelines requires the court to use the pre-1997 version of the restitution guideline in sentencing defendants convicted of offenses committed prior to November 1, 1997. *See* U.S. Sentencing Guidelines Manual § 5E1.1(g)(1) (2000). The earlier version incorporates the provisions of the VWPA. *See* U.S. Sentencing Guidelines Manual app. C, vol. 1, amend. 571.

⁴ Under the MVRA, the court must consider the defendant’s financial situation only in order to decide the manner in which the restitution is to be paid. *See United States v. Vinyard*, No. 00-4442, 2001 WL 1041811, at *10 (4th Cir. Sept. 11, 2001).

restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's conduct in the course of the scheme, conspiracy, or pattern." 18 U.S.C.A. §§ 3663(a)(2), 3663A(a)(2). The government has the burden of proving the amount of loss by a preponderance of the evidence. *See United States v. Savoie*, 985 F.2d 612, 617 (1st Cir. 1993).

The government presented the testimony of Gaye Landrith, a long-time Bank employee and auditor, who had examined the records of all of the automobile loans made by loan officer Smith to Big Y Auto Sales customers during the time period in question. She and other Bank employees considered each of these loans in light of the Bank's normal lending practices and determined which of them would have been granted even absent the conspiracy. The principal loss to the Bank of all of the remainder of the loans totaled \$298,163.70, even after credit for all repossession sales.

The defendant does not contest the method of determining the Bank's losses. He simply disputes the total figure, based on two general arguments: First, he contends that certain of the loans would have been granted even absent Smith's involvement; and second, he asserts that some of the loans were with recourse to Big Y Auto Sales and that he paid them off at the time he paid other financial obligations he owed to the Bank.

More specifically, as to the defendant's first general argument, he contends that certain of the loans were not made to Big Y Auto Sales customers, at least when he was involved with the business, and thus would have been made even without the bribery of Smith. He argues that certain of the loans were motivated not by Smith's bribery, but by the fact that the vehicles involved were ones taken in by the Bank in earlier repossession foreclosures, which the Bank needed to dispose of. Finally, he asserts that certain of the loan customers had prior loans with the Bank and thus would have qualified under the Bank's normal lending policies in any event.

Based on my opportunity to assess the credibility of the witnesses, and in accord with Federal Rule of Criminal Procedure 32(c)(1), I accept the government's evidence as to the amount of the victim's losses. The testimony of the Bank employee, together with the exhibit showing the written reasons for counting each loan as proper or not, convinces me that the Bank's evidence is superior to the uncorroborated and sometimes vague recollections by the defendant.

Accordingly, I find that the total amount of loss sustained by the victim of the defendant's offense conduct is \$298,163.70.

In addition to the amount of loss, the VWPA requires the court to consider the financial resources of the defendant and his dependents. *See* 18 U.S.C.A. § 3663(a)(1)(B)(i)(II). The defendant bears the burden of establishing by a

preponderance of the evidence his inability to make restitution. *See United States v. Castner*, 50 F.3d 1267, 1277 n.9 (4th Cir. 1995).

As shown by the PSR, the defendant has virtually no assets. He is employed presently as a truck driver on a contract basis, having borrowed the money to buy a truck used for timber hauling. When he is able to obtain work, he earns approximately \$800 per week. He and his current wife have two small children, and he is obligated for support of a child from a previous marriage.

On the other hand, even an indigent defendant may be ordered to pay restitution under the VWPA if he has future earning potential. *See United States v. Castner*, 50 F.3d at 1278. Here the defendant is young (age 30), has some college education, and prior business experience. While he is now burdened with felony convictions, he clearly has the opportunity for increased future earnings. Thus, he is able to pay some amount of restitution.

Considering all of the circumstances in the case, it is my determination that the proper amount of restitution to be paid to the Bank by the defendant is \$36,000. I will allow the defendant to pay this restitution for the time being in installments of \$500 per month.⁵ The probation officer will monitor the defendant's financial situation and

⁵ The VWPA limits installment payments to a specified period of not more than five years after the term of imprisonment imposed. *See* 18 U.S.C.A § 3663(f)(2) (West 1985 & 1996 Supp.); *United States v. Bruchey*, 810 F.2d at 459-60. This limit on the court's authority, and the

recommend any change in the installment payments. The court will retain authority to revise the installment schedule and amounts. *See United States v. Bollin*, No. 00-4337, 2001 WL 630666, at *21.

An amended judgment will be entered.

DATED: October 10, 2001

United States District Judge

requirement that the defendant's financial condition be taken into account in fixing the amount of restitution, means that under the VWPA a victim's losses may not be fully satisfied in a criminal restitution order. However, the victim is not precluded from seeking a civil judgment against the wrongdoer for the remainder of the loss. *See Bruchey*, 810 F.2d at 461.