

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

**COMMONWEALTH OF PA**

**vs.**

**DONOVAN POPKIN,  
Defendant**

**:**

**: No. CR-1997-2017**

**:**

**:**

**: Motion for a hearing on Amended Order**

**OPINION AND ORDER**

Before the Court is Defendant’s “Motion for a hearing on Amended Order.” Defendant requests the Court, after an appropriate hearing, to reinstate “the agreement between the defendant and the Commonwealth” as set forth in the Court’s December 11, 2017 Order and not the Court’s January 8, 2018 Order. A hearing was held on January 31, 2018.

By way of background, based on the affidavit of probable cause, the orders of record, and the testimony taken at the hearing on January 31, 2018, Defendant rented a power washer from Central Equipment Company (Central) for the period from July 7, 2017 to August 3, 2017. The total rental price, pursuant to the rental contract, was \$2,136.96.

The parties signed the written rental agreement on July 7, 2017. Defendant provided his credit card number as initial collateral and final payment as of August 3, 2017. On August 3, 2017, Central ran the card for final payment but said payment was declined.

Central contacted Defendant who indicated that at that time, he wanted to purchase the pressure washer. The parties met on August 11, 2017, and agreed to a purchase price of \$5,404. 09. Defendant wrote a check for \$5,000.00 and dated it for August 14, 2017 and provided it to Central. On August 17, 2017, Central deposited the check but it was returned on August 21, 2017 for insufficient funds.

Central attempted to contact Defendant for a few weeks without success. Central mailed a letter to Defendant asking him to “make good on the bad check” no later than August 31, 2017. Defendant did not do so, and Central was no longer willing to sell the pressure washer to Defendant. When the parties eventually spoke over the telephone, Central demanded that it be returned. Defendant returned the pressure washer on September 1, 2017, at which time he was given an additional “rental contract”, not signed by him, but which referenced an additional rental price for the equipment from August 4, 2017 to August 31, 2017 in the total amount of \$2,340.16.

A criminal complaint was filed against the defendant on September 18, 2017, charging him with bad checks, a misdemeanor one offense. A preliminary hearing was scheduled for November 20, 2017. Central’s representative was not subpoenaed to the hearing. The only notice she received was approximately one month prior via a message left on her cellphone. The day of the hearing the arresting state trooper called the representative at approximately 3:20 p.m. asking if she was going to attend the preliminary hearing. The representative indicated that she was not made aware of the hearing and was unable to attend because of her work commitments.

At the preliminary hearing, a tentative plea agreement was reached. Specifically, the Commonwealth agreed to dismiss the charges pursuant to Rule 586 of the Pennsylvania Rules of Criminal Procedure if Defendant made payment of \$1,000.00 by December 11, 2017 and the “remainder” of the restitution by January 11, 2018. The Commonwealth entered this agreement believing that the total restitution figure was the amount set forth on the initial rental contract of \$2,136.96.

On November 21, 2017, the trooper called the representative and indicated that an agreement had been reached for defendant to pay “whatever amount is due” and that the District Attorney would contact her at a later time. The trooper indicated that at that point his “job was done.”

On December 11, 2017, Defendant appeared before the court. The Commonwealth orally motioned the Court to dismiss the case pursuant to Rule 586 indicating that defendant had paid \$1,000.00 and would be required to make the remaining restitution payment of \$1,136. 96 by January 11, 2018.

Central had not been notified of the court hearing and had not spoken to any Commonwealth representative. On December 12, 2018, Central contacted the District Attorney and was informed of the Rule 586 dismissal. Central immediately forwarded the second “rental contract” to the District Attorney and asked for appropriate restitution.

Pursuant to the Rule 586 Court Order, Defendant had paid a total of \$1,000.00 on December 11, 2017, \$1,100.00 on January 11, 2018 and \$40.00 on January 12, 2018. Because the additional \$40.00 allegedly constituted costs, the Cost Clerk would not accept it on January 11, 2018. For some inexplicable reason, the amount was, however, accepted by the Cost Clerk on the next day.

On December 20, 2017, the Commonwealth wrote to defense counsel explaining the mix-up and requesting payment of the full amount with a proposed repayment schedule. Defense counsel refused the offer.

Despite the Commonwealth indicating in its December 20, 2017 letter that it would file a motion to amend the Order, the Commonwealth presented the Court with a

proposed order. Believing that the order was as stipulated order, the Court signed it on January 8, 2018. The Order amended the restitution amount to \$4,523.71.

At the hearing in this matter, the Court realized that the order was not stipulated and was not a proper order. Defendant was not given the opportunity to contest the amendment. No hearing was requested or held. Further, the order did not provide the reasons for the amendment as a matter of record. Therefore, the order was not valid. *See Commonwealth v. Dietrich*, 601 Pa. 58, 970 A.2d 1131 (2009). Accordingly, the Court vacated the January 8, 2018 Order.

Although the restitution statute permits the Court to alter or amend restitution at any time upon recommendation of the District Attorney, provided that the Court states its reasons and conclusions as a matter of record for any change or amendment to any previous order, *see* 18 Pa. C.S.A. § 1106 (c) (3), the restitution statute is not applicable to this case. By its own terms, the restitution statute applies only upon the conviction for any crime. 18 Pa. C.S.A. §1106(a). Here, Defendant has not been convicted of any crime. Rather, the parties reached an agreement pursuant to Rule 586 that the bad check charge would be dismissed if Defendant paid a total of \$2,136.96. The Court accepted that agreement and Defendant paid the agreed upon sum.

Rule 586 is specific in its terms. Because it is specific in its terms and results in the discharge of the defendant, its provisions must be followed with a great amount of exactitude.

The permission granted for the settlement of criminal case resulting in the discharge of arrested persons has been limited in nature and for that reason it has been held repeatedly that they must be made in the manner directed by the statute.

*Commonwealth v. Alvarez*, 216 Pa. Super. 394, 268 A.2d 192, 193 (1970).

The terms of Rule 586 require that not only the Commonwealth consent to the dismissal but that satisfaction has been made or there is an agreement that satisfaction will be made to the aggrieved person. Indeed, in the absence of a showing that the aggrieved party has received satisfaction, the Court cannot dismiss the charges pursuant to Rule 586. *Id.*

In this particular case, regardless of why, the Commonwealth represented to the Court two things. First, the total satisfaction amounted to \$2,136.96. Second, this total amount needed to be paid by a specified date. The Commonwealth cannot now claim a different satisfaction amount. *See Commonwealth v. Travaglia*, 611 Pa. 481, 28 A.3d 868, 893 (2011)(where an agreement is entered on the record and accepted by the court, the Commonwealth is required to abide by the terms of the agreement).

Even if, for the sake of argument, the Court could change the payment amount, it would only increase the amount to a total of \$2,340.16. The bad check charge against Defendant indicated that he gave a \$5,000.00 check which was returned for insufficient funds. The equipment, however, was returned. It appears to the Court that if the equipment was returned, the defendant should not be required to pay restitution amounting to the value of the equipment or the amount of the bad check. The restitution should be the amount of money lost by Central as a result of the issuance of the bad check. *See Commonwealth v. Harriott*, 919 A.2d 234, 237-238 (Pa. Super. 2007)(Restitution imposed as a direct sentence as opposed to a condition of probation or intermediate punishment is proper only if there is a direct causal connection between the crime and loss.). When Defendant entered the original rental contract, he attempted to pay the contract amount with his credit card, not a check. Therefore, the amount of \$2,136.96 was not a result of the issuance of the bad check, but rather a result of

Defendant's credit card being declined. Defendant was not charged with any criminal offense related to the use of his credit card. The loss incurred as a result of the issuance of the bad check was Defendant's retention of the power washer from August 4, 2017 to August 31, 2017. According to Central the rental value of the power washer for that time period was \$2,340.16.

**ORDER**

**AND NOW**, this \_\_\_\_ day of March 2018, the Court **VACATES** its January 8, 2018 Order, reinstates in full its December 11, 2017 Order and **DENIES** the Commonwealth's Motion to Amend said Order. This ruling is without prejudice to Central's right to pursue civil proceedings against Defendant for breach of contract or any other claims.

BY THE COURT,

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Marc F. Lovecchio, Judge

cc: Joseph Ruby, Esquire ADA  
Benjamin Green, Esquire, APD  
Gary Weber, Esquire (Lycoming Reporter)  
Work File