

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**WALTER SHAW,
Defendant**

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**No. CR-306-2013
CRIMINAL DIVISION**

OPINION AND ORDER

On September 17, 2013, the Defendant filed a Motion Requesting Hearing on Restitution. Following a continuance by the Commonwealth, a hearing on the Motion was held on December 10, 2013. After the presentation of evidence concluded, the parties requested to submit briefs to the Court, which were due January 3, 2013.

Background

Walter Shaw (Defendant) was charged with various theft related offenses, including Burglary,¹ Criminal Trespass,² and Theft by Unlawful Taking.³ The charges stemmed from various burglaries that the Defendant had participated with Bryan Giacomi (Giacomi). Specifically, the Defendant and Giacomi would steal metal/copper and sell the items as scrap metal.

On July 12, 2013, the Defendant pled guilty to a consolidated count of Burglary, which included counts 1 through 5 of the Criminal Information. The guilty plea was part of a negotiated guilty plea, which stated that the Defendant would plead guilty to a consolidated count of Burglary and “restitution as needed” in exchange for the Commonwealth to dismiss all the remaining counts. The Defendant was sentenced to thirty-five (35) to seventy (70) months in

¹ 18 Pa.C.S. § 2502(a).

² 18 Pa.C.S. § 3503(a)(1)(ii).

a State Correctional Institution with a consecutive period of five (5) years of probation. In addition, the Defendant was to “pay the costs of prosecution, [and] pay restitution in an amount to be determined by the District Attorney’s office within 60 days of today’s date”

The Commonwealth submitted a spreadsheet to the Court, which stated that the restitution owed to the victims was \$126,279.35. As a result, the Defendant filed the Motion Requesting Hearing on Restitution, which stated that the “amount of restitution is not supported by the evidence and is inconsistent with the statute governing the imposition of restitution” Following a conference before the restitution hearing, the parties resolved all the issues except for two (2): 1) whether restitution is owed to Gary McWilliams; and 2) whether the Defendant is liable for all the restitution to Charles Rogers. The restitution agreed upon by the parties is stated in the attached order.

Whether the Defendant is liable for restitution to Gary McWilliams

The first issue raised by the parties is whether the Defendant is liable for restitution to Gary McWilliams (McWilliams). The Defendant argues that he pled guilty to a consolidated count of Burglary (counts 1 through 5) and that the offenses relating to McWilliams were count 18, Theft by Unlawful Taking and count 26, Receiving Stolen Property. The parties are in agreement that the Defendant did not plead guilty to any offense relating to McWilliams, however, the Commonwealth argues that the Defendant is still liable for the restitution.

The first relevant issue is whether the restitution was imposed as part of the sentence. Restitution may be imposed either as a part of the direct sentence or as part of a condition of probation. 18 Pa.C.S. § 1106(a), 42 Pa.C.S. § 9754. When restitution is imposed as a part of the

³ 18 Pa.C.S. § 3921(a).

sentence, “the injury to property or person for which restitution is ordered must directly result from the crime.” In the Interest of M.W., 725 A.2d 729, 732 (Pa. 1999). When restitution is imposed as a part of probation, “the sentencing court is accorded the latitude to fashion probationary conditions designed to rehabilitate the defendant and provide some measure of redress to the victim.” Id.

In regards to restitution imposed as a part of a sentence, “[u]pon conviction for any crime wherein property has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime, or wherein the victim suffered personal injury *directly resulting from the crime*, the offender shall be sentenced to make restitution in addition to the punishment prescribed therefore.” 18 Pa.C.S. § 1106(a) (emphasis added). In addition, the Court shall consider “the extent of the injury suffered by the victim, the victim’s request for restitution as presented to the district attorney . . . and such other matters as it deems appropriate” when determining the amount and method of restitution. 18 Pa.C.S. § 1106(c)(2).

Here, the Defendant’s restitution was part of his sentence. The Sentencing Order states that the “[s]entence of the Court is that the Defendant pay the costs of prosecution, [and] pay restitution in an amount to be determined by the District Attorney’s office within 60 days of today’s date” Nor has any party argued that the restitution was a condition of probation. Thus, the restitution must be based directly from the crime being sentenced.

The Commonwealth, however, argues that the Supreme Court of Pennsylvania held “that a defendant must pay restitution for losses resulting from a criminal episode involving criminal mischief, even though the defendant only pled guilty to criminal trespass.” See In the Interest of M.W., 725 A.2d at 729. In that case, the defendant and many other individuals broke into a

residence and caused extensive damage over a few days. The defendant pled guilty to Criminal Trespass in exchange for the dismissal of the remaining offenses and an agreement to pay restitution. Importantly, the defendant was a juvenile and the Supreme Court applied the Juvenile Act's restitution provision, "which supports the imposition of restitution as a condition of probation in a criminal case." Id. at 732; 42 Pa.C.S. § 6352(a)(5). "Section 6352, unlike the provision of the Crimes Code providing for restitution as a condition of sentence, does not contain language specifically requiring that the loss or injury be a direct result of the juvenile's wrongful conduct." Id.

Moreover, the Supreme Court found that the defendant was to pay the restitution because he admitted to an offense against the property, he admitted to a criminal episode, he agreed to make reparations to resolve the matter, and the restitution was only a small amount of the damages. Here, the Defendant did not plead guilty to any offense relating to the property/restitution in question. The Defendant's plea agreement did state to make "restitution as needed," however, this is open ended and not clearly indicative of whether it applies to all the charges or just the charges being pled. Based on the juvenile law applied and the evidence presented at the hearing in this case, this Court does not believe it may rely on In the Interest of M.W.

Similar to the clear meaning of the statute, Pennsylvania courts have made criminal accountability a requirement for when restitution is imposed as a part of sentencing. In Cooper, the Superior Court of Pennsylvania found that restitution is "permissible only as to losses flowing from the conduct for which the defendant has been held criminally accountable." Commonwealth v. Cooper, 466 A.2d 195, 197 (Pa. Super. 1983). In that case, the defendant pled guilty to Accidents Involving Death or Personal Injury. The trial court ordered the

defendant to pay all costs and expenses incurred by the family as a result of the death of the other driver. The Superior Court found that the restitution was not a result of what the defendant had been held criminally responsible and therefore vacated the restitution.⁴ This holding has been stated in further cases within the Commonwealth. See Commonwealth v. Dohner, 725 A.2d 822, 824 (Pa Super. 1999) (“Restitution may be imposed only for those crimes to property or person where the victim suffered a loss that flows from the conduct that forms the basis of the crime for which the defendant is held criminally accountable.”); see also Commonwealth v. Nuse, 976 A.2d 1191, 1193-94 (Pa. Super. 2009) (distinguishing between when restitution is imposed as a part of a sentence and when it is imposed as a condition of probation).

The Court is sympathetic towards McWilliams, who was a victim of the Defendant and was greatly affected by the Defendant’s actions. The Commonwealth and the Defendant, however, entered a plea agreement that did not give the Defendant any criminal responsibility towards the crimes done to McWilliams’ residence. As the Defendant did not acknowledge any criminal responsibility towards McWilliams, this Court believes it is legally unable to order the Defendant to pay restitution on McWilliams’ residence.

Whether the Defendant is liable for all the restitution to Charles Rogers

The second issue raised by the parties is whether the Defendant is liable for all the restitution owed to Charles Rogers (Rogers). The parties both agree that Rogers’ loss for all the equipment, due to age and previous usage, would be \$57,843.00.⁵ Rogers has a well drilling

⁴ The Superior Court found that ordering restitution for crimes that the defendant was not found criminally accountable for denies due process of law. “Even where imposition of the restitution requirement is held to be proper under the circumstances of the particular case for the court, it can be imposed only as to loss caused by the very offense for which [sic] was tried and convicted. As to other crimes or offenses there has been no fixing of his liability therefore in a constitutional sense. Id. (citing People v. Becker, 84 N.W.2d 833, 838 (Mich. 1957)).

⁵ At the Restitution Hearing, Rogers testified regarding \$115,686.00 worth of stolen items from his property. The

company and kept all his equipment in sheds located on his residence. The Defendant and Giacomo were aware that Rogers would not be at his residence for an extended period of time and took his equipment and sold it as scrap metal. The Defendant testified that Giacomo had gone to the residence on multiple occasions without him and therefore argues that he is not liable for all the restitution owed to Rogers but just what he took and was involved with. The Defendant, however, is unable to identify what items he had taken and what Giacomo had taken while with the Defendant.

In Rush, two individuals stole metal from a company and sold it as scrap metal. Commonwealth v. Rush, 909 A.2d 805, 810 (Pa. Super. 2006). One of the defendants pled guilty and then argued that he was not jointly and severally liable for the restitution with his co-defendant. The Superior Court of Pennsylvania found that the defendant had made a voluntary, knowing, and intelligent guilty plea. Further, the Superior Court found that joint and several restitution was encompassed within the plea agreement and therefore the defendant's claim against the restitution could not be raised.

Here, the Defendant has not challenged whether his guilty plea was made voluntarily, knowingly, and intelligently. The Defendant raised his guilty plea only when it pertained to the restitution owed to McWilliams and that he did not plead guilty to an offense involving McWilliams' property. "Our law presumes that a defendant who enters a guilty plea was aware of what he was doing. He bears the burden of proving otherwise." Commonwealth v. Pollard, 832 A.2d 517, 523 (Pa. Super. 2003). As the Defendant has not challenged his guilty plea and the Court was not presented with a record of the guilty plea, this Court will presume that the

Commonwealth and the Defendant agree that one half of the restitution would be appropriate based on the usage and age.

guilty plea was made voluntarily, knowingly, and intelligently. Therefore, the Defendant knowingly pled guilty, knew he was jointly and severally liable for the restitution to Rogers, and may not raise an issue against the restitution that was part of his guilty plea.

The Defendant, however, argues that he is not completely jointly and severally liable because Giacomi had stolen from Rogers' residence on occasions without him and he was only involved in a portion of the stolen items.

[W]hen a plaintiff seeks to impose joint and several liability on two or more defendants, he seeks to recover a judgment which he can then enforce in whole or in part against each of them. As this Court opined in **Glomb v. Glomb**, 366 Pa.Super. 206, 530 A.2d 1362, 1365 (1987), “[i]mposition of joint and several liability enables the injured party to satisfy an entire judgment against any one of the tort-feasors, even if the wrong-doing of that tort-feasor contributed only a small part to the harm inflicted.” If the defendants are held jointly and severally liable, they may have contribution rights as between them, but this does not affect the plaintiff's right to collect this judgment from either.

Sehl v. Neff, 26 A.3d 1130 (Pa. Super. 2011) (citing Hileman v. Morelli, 605 A.2d 377 (Pa. Super. 1992)).

The Defendant's claim is not properly raised in a restitution hearing. The Defendant has contribution rights against Giacomi, which would allow him to civilly sue him in order for a court to determine the exact liability of each co-defendant. Instead, the Defendant is trying to bypass the purpose of joint and several liability, which is to have the victim recover the full judgment and for the defendants to exercise their contribution rights against one another. Further, a defendant cannot raise contribution during a restitution hearing, especially when the co-defendant is not part of the proceeding to determine their contribution. The Defendant makes many accusations against his co-defendant, however, Giacomi was not present to dispute them or make his own. For example, the Defendant testified at his restitution hearing that he only burglarized Rogers' property once, but briefs by both parties agree that the Defendant had

burglarized the property at least twice based on the Defendant's previous statements.

In addition, the Defendant was unable to determine exactly what he and Giacomi had taken from Rogers' property when he was present. The Defendant creatively determined that he is only liable for two-thirds ($2/3$) of the property taken from Rogers' property. The argument, which was not part of the record at the restitution hearing, is that Giacomi pled guilty to entering Rogers' property three (3) times, while the Defendant only entered the property twice (2). In determining the value of restitution, this Court is to impose an amount that is "supported by the record" and not an amount that is speculative or excessive. Commonwealth v. Pappas, 845 A.2d 829, 842 (Pa. Super. 2004). The Defendant's equation to determine restitution is wildly speculative and in no way legally sufficient to determine restitution. The issues raised by the Defendant are best resolved by finding him joint and severally liable and for him to raise his contribution rights against his co-defendant.

ORDER

AND NOW, this _____ day of February, 2014, based upon the foregoing Opinion, the Court finds that the Defendant is jointly and severally liable for all the restitution owed to Charles Rogers. The Defendant, however, is not liable for restitution to Gary McWilliams because the Defendant did not accept criminal responsibility for any offenses to McWilliams' residence. Therefore, it is ORDERED and DIRECTED that this Court's sentencing order of July 12, 2013 is hereby AMENDED. The Order is amended to reflect that the Defendant is to pay \$57,843.00 in restitution to Charles Rogers. It is further ORDERED, by agreement of the parties, that the Defendant pay \$2,960.00 in restitution to Matthew Smith, \$250.00 in restitution to Thorton Woodward, and \$932.96 in restitution to Penn National Insurance Company.

In all other respects the Court's sentencing order of July 12, 2013, shall remain in full force and effect.

By the Court,

Nancy L. Butts, President Judge

xc: DA
Donald Martino, Esq.