

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : **No. CR-1437-2017**
:
vs. :
: **Restitution**
MILLARD BEATTY, III, :
Defendant :

OPINION AND ORDER

By Information filed on September 15, 2017, Defendant was charged with two counts of retail theft. Count 1 related to a 39” Visio TV taken on July 29, 2017, and Count 2 related to a 40” Phillips TV taken on August 9, 2017.

On October 5, 2017, Defendant pled guilty to Count 1 of the Information. He admitted that he entered Walmart and exited with a TV without paying for it. The plea agreement consisted of the defendant pleading guilty to Count 1 for a dismissal of Count 2 and a recommended sentence of seven (7) months to twenty-four (24) months’ incarceration at a State Correctional Institution. Restitution was not negotiated as part of the plea agreement. It was, however, ordered in the amount of \$854.00

Defendant subsequently filed a PCRA Petition which the Court treated as a Petition to Determine Restitution. In the Order directing that a restitution hearing be scheduled, the Court noted that the restitution amount of \$854.00 exceeded the value of the TVs alleged to have been stolen by Defendant. Specifically, the affidavit of probable cause and the Information both listed the value of the 39” TV as \$139.00. The value of the TV contained in Count 2 was listed at \$298.00.

The restitution hearing was held on September 6, 2018 and inexplicably, the Commonwealth presented conflicting testimony.

Specifically, Officer William Hagemeyer, Jr. of the Montoursville Borough Police Department testified that Defendant admitted to him that he stole both the 39” and 40” TVs from Walmart, as well as a 43” TV on another occasion. Defendant told Officer Hagemeyer that he sold the 39” and 40” inch TVs for cocaine but the 43” TV was inside his residence. Officer Hagemeyer went to Defendant’s residence and saw the 43” TV. It looked like the TV was just taken out of the box. The box and the wrappers for the accessories were still there. In view of Officer Hagemeyer, Defendant packed the 43” TV and its accessories in the original packaging materials and placed them in the box. He then helped Officer Hagemeyer load the box in the police cruiser. Officer Hagemeyer returned the 43” TV to Wal-Mart. Officer Hagemeyer could not address where the additional restitution claim “came from.”

Kirsten Barner, the Asset Protection Assistant Manager at Walmart testified differently than Officer Hagemeyer. While she did not personally determine the restitution amount or submit the restitution claim, it was her understanding that the 39 inch TV was returned and that its value was \$178.00, not \$139.00. She stated restitution was requested for that TV because company policy dictated that the TV could not be resold. On cross-examination, however, she admitted that the TV would have been sent to a return center and Wal-Mart would have received credit if everything was returned with the TV. The monthly report that Wal-Mart receives, however, is not necessarily broken down by individual items and does not indicate whether all items were returned with respect to this TV. Therefore, she did not know if Wal-Mart received any credit for the TV in this case. She further admitted that the specific TV returned was not noted on the document provided to counsel. Instead, there was a notation written in the folder by another employee which indicated that the 39” TV was

recovered. As to the restitution claim of \$854.00, it was her “information” that the 39” TV was valued at \$178.00, the 40” TV was valued at \$298.00 and the 43” TV was valued at \$378.00, for a total of \$854.00.

The court cannot credit the testimony of Ms. Barner. All of her information was based upon information received from others, and although the documentation upon which she relied was completed in the regular course of business, the court cannot place any weight on it. None of the documentation was admitted into evidence, the notation regarding which TV was returned was not part of the documentation provided to defense counsel, and Ms. Barner had no personal knowledge regarding which TV was returned.

Officer Hagemeyer observed Defendant place the 43” TV and all of its accessories in the original box, and Officer Hagemeyer personally delivered that TV to Walmart. Therefore, the only evidence of which the court will give any weight is that Officer Hagemeyer returned the 43” TV that was not part of the charges filed against Defendant.

As to the 39” and 40” TVs, Defendant admitted stealing them from Walmart. Accordingly, the only restitution at issue concerns those two TVs.

Restitution is governed by statute. Upon conviction for any crime wherein the value of any property has been substantially decreased as a direct result of the crime, the offender must be sentenced to make restitution. 18 Pa. C.S.A. §1106(a). At the time of sentencing, the court must specify the amount of restitution and must consider, among other things, the extent of the victim’s injuries, the victim’s request for restitution, and such other matters as the court deems appropriate. 18 Pa. C.S.A. §1106(c)(2)(i).

By ordering restitution, two purposes are served. First, the victim may be compensated for his injuries as a result of defendant’s criminal conduct. Second, the defendant

may be rehabilitated by instilling in his mind that it is his responsibility to compensate the victim. 42 Pa. C.S.A. § 9754(c)(8); 42 Pa. C.S.A. § 9754(c)(13); *Commonwealth v. Brown*, 981 A.2d 983, 895 (Pa. 2009); *Commonwealth v. Kline*, 695 A.2d 872, 876-877 (Pa. Super. 1997).

“Such sentences are encouraged to give the trial court the flexibility to determine all the direct and indirect damages caused by a defendant and then permit the court to order restitution so that the defendant will understand the egregiousness of his conduct, be deterred from repeating this conduct, and be encouraged to live in a responsible way.” *In re M.W.*, 725 A.2d 729, 732 (Pa. 1999)(citing *Commonwealth v. Harner*, 617 A.2d 702, 707 (Pa. 1992)).

The Commonwealth bears the burden of proving its entitlement to restitution by a preponderance of the evidence, and the record must contain a factual basis for the appropriate amount of restitution. *Commonwealth v. Le Atanasio*, 997 A.2d 1181, 1183 (Pa. Super. 2010). As well, the amount of restitution must not be excessive or speculative. *Id.* “To determine the correct amount of restitution, a ‘but for’ test is used-damages which occur as a direct result of the crime are those which should not have occurred but for the defendant’s criminal conduct.” *Commonwealth v. Gerulis*, 616 A.2d 686, 697 (Pa. Super. 1992).

Based on the evidence which the Court deems credible and of weight, the value of the 39” TV stolen by the defendant from Walmart was \$139.00. While the defendant never pled guilty to stealing the other TV, the Court cannot ignore the obvious nor the fact that Defendant must be responsible for the damage that he caused. That damage included the stealing of the 40” TV to which he admitted to Officer Hagemeyer. Moreover, Defendant did not challenge the restitution for the 40” TV. The disputes centered on the value of the 39” TV and the addition of any restitution for the 43” TV, which was not part of the criminal charges

and was returned to Wal-Mart. Accordingly, the restitution will include \$298.00 for the 40” TV.

As to the 43” TV, no restitution shall be awarded. It was returned to Walmart, and the Commonwealth has not met its burden of proving that Walmart suffered any loss relating to it.

ORDER

AND NOW, this ____ day of September 2018, following a hearing, the court GRANTS Defendant’s Motion to Modify Restitution. The sentencing order dated August 5, 2017 is amended to order restitution to Walmart in the amount of \$437.00 and not \$854.00.

BY THE COURT,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire, DA
Victim/Witness Coordinator
Ryan Gardner, Esquire
Suzanne Fedele, Prothonotary
Cost Clerk
Gary Weber, Esquire (Lycoming Reporter)
Work File