

**SUPERIOR COURT
OF THE STATE OF DELAWARE**

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
(302) 255-0669

Submitted: January 25, 2005
Decided: April 29, 2005

Sean Lugg, Esquire
Department of Justice
Carvel State Office Building
820 N. French Street, 7th Fl.
Wilmington, DE 19801

Dean DelCollo, Esquire
Carvel State Office Building
820 N. French Street, 3rd Fl.
Wilmington, DE 19801

Re: *State v. Perry Casella, ID# 0310022700* - **Upon Defendant's
Motion for Reconsideration of Commissioner's Order -
DENIED**

Dear Counsel:

Defendant asks the court to reconsider the Commissioner's December 7, 2005 restitution order.

I.

On July 20, 2004, Defendant pleaded guilty and was convicted of four counts of home improvement fraud under 11 *Del. C.* § 916(b)(4). After a presentence

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investigation, he was sentenced on September 10, 2004. The sentence called for Defendant to make full restitution. At sentencing, the court reviewed the victims' claims. In some instances, the court rejected or scaled-back the claims. For example, the court rejected victim Conde's claim for almost \$20,000 in emotional, health-related, psychological, environmental and social injury damages. Ultimately, the court ordered Defendant to pay \$116,726.93.

On September 22, 2004, Defendant submitted a letter insisting that a restitution hearing should have been held before Defendant was sentenced. In response, the court granted Defendant's informal request and a Commissioner conducted an evidentiary hearing on November 8, 2004. The Commissioner's December 7, 2004 restitution order relied on the presentence investigation, the sentencing proceeding, Defendant's testimony at the restitution hearing, and voluminous financial records / work papers submitted by Defendant.

II.

Under Superior Court Criminal Rule 62(a)(4), each Commissioner has "[t]he power to conduct non case-dispositive hearings, including non case-dispositive evidentiary hearings. . . ." As Defendant recognizes, under Rule 62 (a)(4)(iv):

A judge may reconsider any hearing or pretrial matter under subparagraph (4) only where it has been shown on the record that the Commissioner's order is based upon findings of fact that are clearly erroneous, or is contrary to law, or an abuse of discretion.

Defendant claims the Commissioner's order "fails not just one, but all three standards of review under Superior Court Criminal Rule 62[(a)](4)(iv)."

III.

Defendant does not challenge the Commissioner's order as it relates to

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victims Lynch and Darlene Smith. But as to victims Conde, Bumgartner, Mullikin, Granger, Alexander and Elmond Smith, Defendant disputes the restitution order. At the hearing, Defendant offered his testimony and papers showing that he had performed some work or he supplied some materials to the victims' jobs.

In summary, Defendant complains that the Commissioner did not give him partial credit toward his restitution obligation for work he did or the supplies he provided. Moreover, relying on *Benton v. State*, 711 A.2d 792 (Del. 1998), Defendant argues that the court should consider Defendant's ability to pay.

The Commissioner correctly apprehended that Defendant was not entitled to a dollar-for-dollar set-off for whatever he spent on the victims' jobs. As the presentence investigation shows, and as reflected in the victims' claims as the Commissioner's order reflects, the victims did not benefit from the incomplete, slipshod work performed by Defendant. In some instances, Defendant's work increased the victims' losses. In his Motion, Defendant does not address the victims' losses. He merely asks the court to consider "what the Defendant spent on all of the jobs in question." And, Defendant asks the court to scrutinize his records and paperwork, without guidance.

IV.

The court agrees that *Benton v. State, supra*, is the most comprehensive authority on restitution under Delaware law. Summarizing, *Benton* recapitulates 11 *Del. C. § 4106*.¹ Under that law, Defendant is liable to each victim for the victims'

¹ 11 *Del. C. § 4106* (a)(b):

(a) any person convicted of stealing, taking, receiving, converting, defacing or destroying property, shall be liable to each victim of the offense for the value of the property or property rights lost to the victim and for the value of any property which has diminished in worth as a

(continued...)

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property loss, including the value of any property that diminished in worth as a result of Defendant's actions. Defendant also is liable for direct out-of-pocket losses, loss of earnings and other expenses and "inconveniences" incurred by the victim as a direct result of the crime. In other words, *Benton* holds that the court may order restitution exceeding the amount of money received by Defendant from the victims. Furthermore, *Benton* holds that restitution is determined by a preponderance of the evidence. As mentioned, at sentencing the court relied on the victims' loss statements.

As Defendant argues, *Benton* also addresses the propriety of awarding restitution beyond Defendant's ability to pay it. Quoting *Pratt v. State*, 486 A.2d 1154, 1161 (Del. 1983), *Benton* holds: "The Defendant's ability to pay is an element to be considered in determining the amount of restitution and the schedule of payments." *Benton* further holds, however, that Defendant has "the burden of

¹(...continued)

result of the actions of such convicted offender and shall be ordered by the court to make restitution. If the court does not require that restitution be paid to a victim, the court shall state its reason on the record. The convicted offender shall also be liable for direct out-of-pocket losses, loss of earnings and other expenses and inconveniences incurred by victim as a direct result of the crime. For each criminal offense resulting in arrest in which property is alleged to have been unlawfully taken, damaged or otherwise diminished in value, a loss statement shall be prepared, by the police or by the victim when there is no police involvement, documenting for the court the value of the property lost or diminished as a direct result of the crime.

(b) In accordance with the evidence presented to the court, the court shall determine the nature and amount of restitution, if any, to be made to each victim of the crime of each convicted offender. The offender shall be ordered to pay a fixed sum of restitution or shall be ordered to work a fixed number of hours under the work referral program administered by the Department of Correction, or both.

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proving, by a preponderance of the evidence, those financial needs and lack of resources which [Defendant] contend[s] were relevant to [Defendant]'s inability to make restitution.²

In his Motion, Defendant claims:

The defendant has been forced into a new career as a result of these convictions. He is a felon and though employed, he is unable to earn at his previous rate. He is married to a person who suffers from mental illness and cannot work. He is the father of three minor children. He is also solely responsible for the mortgage payment on their home.

Defendant, however, does not contend that he brought those claims to the Commissioner's attention. And although Defendant states in his Motion that he "has ordered the transcript to the November 8, 2004 restitution hearing," the court has no record of that request, much less the transcript itself. On review, the court simply has no way to evaluate Defendant's ability to pay. And so, it does not appear that he has met his burden of proof on that issue. Besides, Defendant's inability to pay, assuming it is established, is a consideration. It is not determinative.

The court observes that it often takes a wait-and-see approach toward large restitution awards. In the unusual instance where a defendant appears to make good faith efforts at restitution, the court remains willing to revisit its restitution order, the time limits in Superior Court Criminal Rules 35 and 61 notwithstanding. The court, however, is reluctant to undermine 11 *Del. C.* § 4106(a)'s mandate that defendants "shall be liable to each victim of the offense for the value of the property . . . and shall be ordered by the court to make restitution."

² *Benton*, 711 A.2d at 800.

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V.

For the foregoing reasons, Defendant has not demonstrated that the Commissioner's restitution order is based upon findings of fact that are clearly erroneous, or is contrary to law, or an abuse of discretion. Accordingly, Defendant's Motion for Reconsideration of Commissioner's Order is ***DENIED***.

IT IS SO ORDERED.

Judge

FSS/lah
oc: Prothonotary (Criminal Division)
pc: The Honorable Mark Vavala