

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	
v.	
THOMAS WAYNE BIDEK,	
Appellant	No. 1029 WDA 2011

Appeal from the Judgment of Sentence January 20, 2011  
In the Court of Common Pleas of Allegheny County  
Criminal Division at No(s): CP-02-CR-0008852-2010

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COMMONWEALTH OF PENNSYLVANIA,	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	
v.	
JAKE THOMAS WICKS,	
Appellant	No. 1662 WDA 2011

Appeal from the Judgment of Sentence January 20, 2011  
In the Court of Common Pleas of Allegheny County  
Criminal Division at No(s): CP-02-CR-0011667-2010

BEFORE: STEVENS, P.J., MUNDY, J., and FITZGERALD, J.\*

MEMORANDUM BY STEVENS, P.J.

Filed: February 22, 2013

Appellants, Thomas Wayne Bidek and Jake Thomas Wicks, file this appeal from the judgments of sentence entered in the Allegheny County

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\* Former Justice specially assigned to the Superior Court.

Court of Common Pleas, challenging the restitution value assessed by the court.<sup>1</sup> We affirm.

Appellants pleaded guilty to vandalizing a place of worship, theft by unlawful taking, and burglary. These convictions arose from their attempt to steal copper pipes from a church, which resulted in a burst water line. The Commonwealth sought restitution, but at the first two scheduled hearings, the trial court concluded that there was not sufficient evidence available to make a proper determination of restitution.

At the third hearing, the Commonwealth presented the testimonies of a representative from Disaster Restoration Services and the pastor of the church, while Appellants presented the testimony of the church's insurance agent. At this hearing, the Commonwealth and Appellants argued about the proper restitution amount. The Commonwealth submitted an amount of over \$44,000 in structural-repair costs, in addition to over \$20,000 for the replacement of various pieces of equipment, including an organ and a podium. Appellants, meanwhile, argued that the court should rely primarily on the original estimate provided by Disaster Restoration Services, which was approximately \$15,000, and that the Commonwealth overestimated the cost of replacing the equipment.

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<sup>1</sup> These cases had previously been consolidated for appeal. Appellants have filed a joint appellate brief.

After receiving the evidence and hearing testimony and arguments, the trial court largely credited the latter, \$44,000 estimate provided by Disaster Restoration Services, with a few adjustments made for duplicative figures. The court also awarded restitution for replacement of the equipment cited by the Commonwealth, with some figures adjusted for lower values. The court thus entered a restitution order in a total amount of \$65,453, of which Appellants are jointly and severally liable. Appellants filed a motion to modify sentence, which the court denied. This appeal followed.<sup>2</sup>

Appellants raise the following claim on appeal: “Did the trial court err as a matter of law in holding [Appellants] jointly and severally liable for restitution in the amount of \$63,483 as that amount was not supported by a factual basis on the record, and thus illegal?” Appellants’ Brief at 6.

A challenge to a sentence of restitution constitutes a challenge to the legality of the sentence. *Commonwealth v. Langston*, 904 A.2d 917, 921 (Pa. Super. 2006) (quoting *Commonwealth v. Colon*, 708 A.2d 1279, 1280 (Pa. Super. 1998)). “[O]ur standard of review is plenary and is limited to determining whether the trial court committed an error of law.” *Id.* at 922 (quoting *Commonwealth v. Tareila*, 895 A.2d 1266, 1267-68 (Pa. Super. 2006)).

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<sup>2</sup> Appellants filed this notice of appeal before the court ruled on their motion to modify sentence. We consider the appeal filed the day the trial court denied their post-sentence motion. *See* Pa.R.A.P. 905(a)(5).

The record must support the amount of restitution imposed by the court, and may not be speculative or excessive. ***Commonwealth v. Rush***, 909 A.2d 805, 810 (Pa. Super. 2006). Restitution is mandatory when the victim has sustained personal injury or property damage as a result of the crime. ***Commonwealth v. Pleger***, 934 A.2d 715, 720 (Pa. Super. 2007) (citing 18 Pa.C.S. § 1106(a)). The court must consider the extent of the victim's injury, the victim's restitution request, and other matters it deems appropriate. ***Rush***, 909 A.2d at 810 (quoting 18 Pa.C.S. § 1106(c)(2)(i)).

Although restitution does not seek, by its essential nature, the compensation of the victim, the dollar value of the injury suffered by the victim as a result of the crime assists the court in calculating the appropriate amount of restitution. A restitution award must not exceed the victim's losses. A sentencing court must consider the victim's injuries, the victim's request as presented by the district attorney and such other matters as the court deems appropriate. The court must also ensure that the record contains the factual basis for the appropriate amount of restitution. In that way, the record will support the sentence.

***Pleger***, 934 A.2d at 720 (citations omitted).

In the case *sub judice*, after reviewing the parties' briefs, the trial court's opinion, and the certified record on appeal, we agree with the reasoning of the trial court and adopt it as our own. **See** Trial Ct. Op., filed 7/17/12, at 12-15 (finding testimony of Disaster Recovery Services representative "the most credible" and providing detailed reasons for restitution amounts imposed for equipment losses); **see also id.** at 5-8

(providing detailed findings of fact based on restitution hearings). Appellant's averment, that the restitution amount is speculative because of the lack of evidence explaining the difference between the original \$15,000 estimate and the latter \$44,000 quote, is meritless. The trial court gave Appellants the opportunity to request and present witnesses to challenge the Commonwealth's proposed restitution value, and Appellants also had a full opportunity to cross-examine the Commonwealth's witnesses. The trial court thus had ample opportunity and a clearly sufficient basis to find that Disaster Recovery Service's final and detailed report was accurate. The trial court's opinion also indicates its careful consideration of all aspects of the restitution calculation, as reflected by its subtraction of duplicative values and reduction of various equipment values.<sup>3</sup> Accordingly, we affirm on the basis of the trial court's opinion.

Judgments of sentence affirmed.

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<sup>3</sup> The trial court also declined to include certain equipment in the restitution calculation, such as video cameras, fire extinguishers, and an air conditioner. Trial Ct. Op. at 15.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMONWEALTH OF  
PENNSYLVANIA,  
APPELLEE

CC 201008852; CC 201011667

1029 WDA 2011; 1662 WDA 2011

v.

THOMAS WAYNE BIDEK

and

**OPINION**

JAKE THOMAS WICKS,

APPELLANTS.

FILED BY:  
THE HONORABLE  
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ALLEGHENY COUNTY PA

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

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APPELLANTS.

OPINION

BORKOWSKI, J.

PROCEDURAL HISTORY

Appellants, Thomas Bidek and Jake Wicks, were each charged by Criminal Information (CC 201008852; CC 201011667) with one (1) count of Institutional Vandalism/Place of Worship<sup>1</sup>, one (1) count of Theft By Unlawful Taking<sup>2</sup>, one (1) count of Burglary<sup>3</sup>, two (2) counts

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<sup>1</sup> 18 Pa.C.S.A. §3307(a)(1).

<sup>2</sup> 18 Pa.C.S.A. §3921(a). Appellant Wicks was charged under subsection (c)(1), Appellant Bidek was charged under subsection (c)(2).

<sup>3</sup> 18 Pa.C.S.A. §3502.

of Theft By Unlawful Taking–Immovable Property<sup>4</sup>, and two (2) counts of Theft By Unlawful Taking<sup>5</sup>.

On January 20, 2011, as part of a negotiated plea agreement, Appellants pled guilty to one (1) count of Institutional Vandalism/Place of Worship<sup>6</sup>, one (1) count of Theft By Unlawful Taking<sup>7</sup>, and one count of Burglary<sup>8</sup>. Immediately following the entry of their respective pleas, Appellants proceeded to sentencing. Appellants were sentenced to three (3) years of probation at the burglary count; no further penalty as to the remaining counts; restitution in an amount to be agreed upon by the parties or to be determined at a hearing; the costs of prosecution, and any measures put in place by probation.

Restitution hearings were held on March 14, 2011, April 14, 2011, and May 11, 2011. On May 24, 2011, the Trial Court found Appellants to be jointly and severally liable for restitution in the amount of \$65,453.

Appellant Wicks filed a post sentence motion which was denied, and this appeal followed.

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<sup>4</sup> 18 Pa.C.S.A. §3921(b).

<sup>5</sup> 18 Pa.C.S.A. §3921(b).

<sup>6</sup> 33 Pa.C.S.A. §3307(a)(1).

<sup>7</sup> 18 Pa.C.S.A. §3921(a).

<sup>8</sup> 18 Pa.C.S.A. §3502. Appellant Bidek pled guilty to subsection (c)(2). Appellant Wicks pled guilty to subsection (c)(1).



## STATEMENT OF ERRORS ON APPEAL

Appellants raise the following issues on appeal, and they are set forth exactly as Appellants frame them:

- I. The trial court erred in finding Mr. Bidek and Mr. Wicks jointly and severally liable for \$65,453. This sentence was illegal in that the Commonwealth failed to make a recommendation to the court at or prior to the time of sentencing as to the amount of restitution to be ordered, and the trial court, in turn, failed to specify the amount and method of restitution at the time of sentencing, in violation of the mandates of 18 Pa. C.S.A. 1106(c).
  
- II. The trial erred as a matter of law and/or abused its discretion in finding Mr. Bidek and Mr. Wicks jointly and severally liable for restitution in the amount of \$65,453. This restitution order was illegal in that it was speculative, excessive, and unsupported by a factual basis on the record.

### FACTS

#### A. Guilty Plea

On January 20, 2011, the prosecutor gave the following summary of the facts to the Trial Court:

MR. MELADA: Thank you, Your Honor. Had these two cases gone to trial, the Commonwealth would have called Detective Steve Colucci of the Indiana Township Police Department, two other officers with that department and Pastor Brian Smith of the Jerusalem Church of God in Christ in Indiana Township. The testimony would have been substantially as follows: that on May 20, 2010, the co-defendants were arrested after breaking into the aforementioned church with the intent to

steal copper. When they tried to remove pipes, the water line burst causing physical damage to the upstairs of the church. That figure we know exceeds \$5,000 today, but we don't have a definitive estimate. Defendant Bidek executed a full confession. And with that the Commonwealth would have rested.

(P.T. 6-7)<sup>9</sup>

#### B. Restitution Hearings

The damage to the church was significant, encompassing both the structure of the building as well as tangible property located within the building. (R.H. 7, 9, 19)<sup>10</sup>. The structural damage included broken glass along with damaged pews and carpet. (R.H. 7). Some copper piping was taken out of the basement, and consequently, there was water damage to tile floors, carpet, and the walls. (T.T. 10). The damage to tangible property included: an inoperable organ, various scratches on the piano, a broken fan, a broken desk lamp, multiple broken ceiling lights and covers, a scratched podium, an inoperable drum set, a broken communion table, and four damaged fire extinguishers. (R.H. 22, 25-31, 34-36). Additionally, several items were stolen from the church including two video cameras and a wireless microphone system. (R.H. 32-33).

In August 2010, Disaster Restoration Services (DRS) visited the church to assess the damage and provide an estimate of what it would

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<sup>9</sup> "P.T." refers to the Guilty Plea/Sentencing Transcript of January 20, 2011.

<sup>10</sup> "R.H." refers to the Restitution Hearing Transcript of May 11, 2011.

cost to repair the damage to the structure of the building. (R.H. 6). DRS inspected each area that was damaged, took measurements, and noted what needed to be repaired. (R.H. 7). Pastor Brian Smith of the church accompanied DRS to make certain that the estimate did not include any pre-existing damage or shortcomings of the church. (R.H. 64). The DRS Estimate Report contains a very detailed cost analysis for each room in the church; this document was admitted as Commonwealth Exhibit 1. (R.H. 7, 11-12).

According to the DRS estimate, the cost of structural damage was: \$11,731.35 for the Sanctuary (Church Area), \$2,438.36 for the Pastor's Office, \$14,536.04 for the Fellowship Hall (Recreation Room), \$1,570.10 for the Kitchen, \$4,490.17 for the Restrooms and Hallway, \$1,342.50 for the Cleanup (General), and \$7,445.26 for Overhead and Profit charges.<sup>11</sup> (Commonwealth Exhibit 1).

Meanwhile, the church proceeded to seek estimates on the tangible property that was damaged as a result of Appellants' actions. (R.H. 19). Two experts were called to inspect the organ. (R.H. 23, 53). Both experts came to the conclusion that it would cost more to repair the organ than to replace it with a brand new model. (R.H. 23, 42, 46, 54). The original organ was a rare model that was no longer in production. (R.H. 23). The experts recommended replacing the organ

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<sup>11</sup> The "overhead/profit" category refers to the fee paid to the general contractor for the labor performed to restore the Church. See R.H. at 12.

with a brand-new, similar model, specifically the Hammond model B-3 with a Leslie speaker system. (R.H. 23, 43, 53-54, Defense Exhibits A and B). One expert, Gerrero & Kirk Classic Organs, Inc., priced the comparable replacement organ at \$25,445. (R.H. 24, 57, Defense Exhibit A). The other expert, Modern Piano, LLC., priced the replacement organ at \$28,990; however, this dealer offered the organ at the discounted church price of \$18,995. (R.H. 47-48, 55, Defense Exhibit B).

Another item of tangible property that needed to be repaired or replaced was the podium. (R.H. 31). The original cost of one a podium of that type was about \$8,000. (R.H. 31). An expert went to the church to assess the damage and needed repair. (R.H. 31). It was determined that the podium would not need to be replaced, and could be repaired at a cost of \$2,500. (R.H. 31).

The church also had to replace the stolen microphone system (R.H.32). The microphone system had been purchased four or five years prior to its theft. (R.H. 33). The church was unable to find the exact same item in its search for a replacement. (R.H. 32). However, the church was able to find a similar system made by the same maker. (R.H. 33, 51). This item was priced at \$2,600. (R.H. 32-33). There were also several parts of the equipment to a drum set that needed to be replaced. (R.H. 34). The church was able to find the exact same set

of drum equipment. (R.H. 34). This equipment was priced at \$400. (R.H. 34). Finally, the church had to replace the wooden communion table. (R.H. 35-36). A furniture company estimated that this communion table would cost \$2,000 to replace. (R.H. 36).

Upon review of the evidence presented at the restitution hearing, the Trial Court found that restitution was proper in the amount of \$65,453, jointly and severally attributable to Appellants. (R.D. 4)<sup>12</sup>. In reaching this total, the Trial Court incorporated the costs of the following: (1) \$43,553 for the structural damage to the building (R.D. 3-4); (2) \$18,000 for the organ (R.D. 4); (3) \$1,200 for the podium (R.D. 4); (4) \$1,300 for the microphone system (R.D. 4); (5) \$400 for the drum equipment (R.D. 4); and, (6) \$1,000 for the communion table (R.D. 4).

## DISCUSSION

### I.

Appellants claim that restitution was illegal because the Commonwealth failed to make a recommendation to the Court at or prior to the time of sentencing as to the amount of restitution to be ordered, and that the Trial Court, in turn, failed to specify the amount and method of restitution at the time of sentencing. This claim has no merit.

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<sup>12</sup> "R.D." refers to the Restitution Decision Transcript of May 24, 2011.

The Superior Court has stated the applicable standard of review as follows:

Imposition of sentence is vested in the discretion of the sentencing court and will not be disturbed by an appellate court absent a manifest abuse of discretion. An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will."

*Commonwealth v. Redman*, 864 A.2d 566, 569 (Pa. Super. 2004) (citation omitted)

18 Pa.C.S. §1106(c)(2) states that "at the time of sentencing the court shall specify the amount and method of restitution." 18 Pa.C.S. §1106(c)(2). §1106(c)(3)(i) provides that "It shall be the responsibility of the district attorneys of the respective counties to make a recommendation to the court at or prior to the time of sentencing as to the amount of restitution to be ordered." 18 Pa.C.S. §1106(c)(3)(i).

§1106(c) is important because it provides the defendant with certainty as to what the sentence will be. *Commonwealth v. Dietrich*, 970 A.2d 1131, 1134 (Pa. 2009). This section ensures that defendants are not blindsided with an amount of restitution that they could not have foreseen. *Id.* The amount of restitution is to be determined under the adversarial process with considerations of due process. *Commonwealth v. Ortiz*, 854 A.2d 1280, 1282 (Pa. Super.

2004). It is well-established that orders of restitution that are left open are disfavored by the courts. *Dietrich*, 970 A.2d at 1133-34. Again, this is because of the degree of uncertainty left to the defendant as to what his or her financial obligation will be at the time of sentencing. *Id.* at 1134. However, the *Dietrich* Court indicated that all sentencing situations lend themselves to the hoped for finality. *Dietrich*, 970 A.2d at 1134 (no error where sentencing court originally set restitution based on information available at that time, while an open issue remained as to whether the amount constituted full restitution).

While the final restitution amount was not determined at sentencing, Appellants were not entirely left in an uncertain situation. Unlike an order of restitution left open, Appellants did not have an expectation of any particular amount that they must pay, only to have that amount changed subsequently. Appellants were involved in the process of determining the final amount of restitution.

The Commonwealth, because of the extent of the damage, was unable to provide the Court with a definitive restitution amount on the day of the guilty pleas. (P.T. 2-3). However, Appellants agreed to the Commonwealth's proposal to provide time for either a meeting of the minds as to the amount of restitution, or a restitution hearing for the amount to be determined by the Court. Appellants agreed to this

disposition when they agreed to enter into the guilty plea, with the agreement stated in open court. (P.T. 2-3, 10).

It is well recognized that the guilty plea and the frequently concomitant plea bargain are valuable implements in our criminal justice system. The disposition of criminal charges by agreement between the prosecutor and the accused is an essential component of the administration of justice. Properly administered, it is to be encouraged. In this Commonwealth, the practice of plea bargaining is generally regarded favorably, and is legitimized and governed by court rule. [...] [T]he desirability of disposing of criminal charges through plea bargaining is based on the premise that a plea agreement is advantageous to all concerned.

*Commonwealth v. Parsons*, 969 A.2d 1259, 1267 (Pa. Super. 2009) (citation omitted).

Plea agreements are acceptable when they are plainly set forth on the record, understood and agreed to by the parties, and approved by the trial court. *Id.* "Assuming the plea agreement is legally possible to fulfill, when the parties enter the plea agreement on the record, and the court accepts and approves the plea, then the parties and the court must abide by the terms of the agreement." *Id.* at 1268.

Although a plea agreement occurs in a criminal context, it remains contractual in nature and is to be analyzed under contract-law standards. Furthermore, disputes over any particular term of a plea agreement must be resolved by objective standards. A determination of exactly what promises constitute the plea bargain must be based upon the totality of the surrounding circumstances and involves a case-by-case adjudication.



*Commonwealth v. Anderson*, 995 A.2d 1184, 1191 (Pa. Super. 2010).

Here there was an agreement by all parties. Appellants consented to the restitution matter to be resolved in this manner. Merely because they are not satisfied with the outcome of the restitution decision does not mean that there was trial court error.

This claim is without merit.

## II.

Appellants claim that the restitution order was illegal in that it was speculative, excessive, and unsupported by a factual basis on the record. Appellants' claim has no merit.

When reviewing the Trial Court's decision regarding an order of restitution, the Court applies the aforementioned abuse of discretion standard. *Ortiz*, 854 A.2d at 1282. The Superior Court of Pennsylvania has held that an imposition of restitution must not be speculative or excessive. *Commonwealth v. Rush*, 909 A.2d 805, 810 (Pa. Super. 2006).

The Supreme Court of Pennsylvania has explained the role restitution plays in the criminal justice system:

It is well established that the primary purpose of restitution is rehabilitation of the offender by impressing upon him or her that his criminal conduct caused the victim's loss or personal injury and that it is his responsibility to repair the loss or injury as far as possible. Thus, recompense to the victim is only a secondary benefit, as restitution is

not an award of damages. Although restitution is penal in nature, it is highly favored in the law and encouraged so that the criminal will understand the egregiousness of his or her conduct, be deterred from repeating the conduct, and be encouraged to live in a responsible way. Thus, restitution, at its core, involves concepts of rehabilitation and deterrence.

*Commonwealth v. Brown*, 981 A.2d 893, 895-896 (Pa. 2009) (citations omitted).

In this case, a restitution hearing was held in which witnesses testified and evidence was presented regarding the amount of damage to the church. The Trial Court has set forth a detailed recitation of facts hereinabove (Facts) and respectfully incorporates that by reference for purposes of the present discussion. Briefly stated however, here the Trial Court found that restitution was proper in the amount of \$65,453, jointly and severally attributable to each of the Appellants. (R.D. 4). In reaching that total, the Trial Court incorporated the costs of the following: (1) \$43,553 for the structural damage to the building (R.D. 3-4); (2) \$18,000 for the organ (R.D. 4); (3) \$1,200 for the podium (R.D. 4); (4) \$1,300 for the microphone system (R.D. 4); (5) \$400 for the drum equipment (R.D. 4); and, (6) \$1,000 for the communion table (R.D. 4).

Commonwealth Exhibit 1 contained a very detailed estimate of all of the damage to the structure of the building. A representative of DRS explained the process by which he came to the total structural

damage figure of \$43,553.78. The Trial Court found this testimony to be the most credible and thus, incorporated that estimate in the total restitution. The amount for the structural damage was well established by the evidence. (Commonwealth Exhibit 1).

Regarding the organ, there were two experts that provided estimates as evidence; one was for \$25,445, and the other was for \$18,995. (Defense Exhibits A and B). Appellants argued during the restitution hearing that there were several cheaper organs available on eBay at a lesser price. (R.H. 44). However, one cannot simply compare a seller on eBay to a reputable organ dealer. No evidence was presented as to who exactly the eBay sellers were and whether or not an organ so purchased would be of the quality and carry the guarantee of one purchased from a reputable local dealer. Additionally, as an auction website, prices on eBay can increase drastically in a matter of seconds until bidding has ended. Appellants did not provide sufficient evidence as to the eBay prices being credible estimates. The Trial Court incorporated in the restitution an amount that was slightly lower than the lowest estimate from one of the reputable organ dealers. (Defense Exhibit B).

As to the estimates for the podium, microphone system, and communion table, the Trial Court incorporated in the restitution an amount that was roughly half of the amount presented during the

restitution hearing by witnesses for the church. The Trial Court allocated \$1,200 for the podium compared to the \$2,500 presented at the hearing, \$1,300 for the microphone system compared to the \$2,600 presented at the hearing, and \$1,000 for the communion table compared to the \$2,000 presented at the hearing. Finally, the Court ordered \$400 for the drum equipment, the same estimate presented during the hearing. These figures can hardly be said to be speculative, excessive, or unsupported by the record.

The Trial Court also did not award as part of the total restitution several figures that were presented in the hearing, such as estimates for video cameras, fire extinguishers, and an air conditioner.

The total restitution sum of \$65,453 jointly and severally attributable to Appellants was well-supported by the record and evidence presented to the Court.

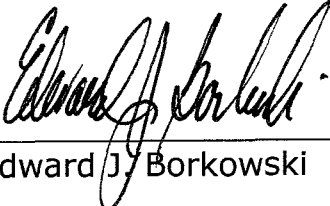
This claim is without merit.

#### CONCLUSION

For the aforementioned reasons, the designation of the imposed by the Trial Court should be affirmed.

By the Court,

July 17, 2012  
Date

  
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Edward J. Borkowski