

**Commonwealth of Pennsylvania vs. Joseph Johnson-Glover, Defendant**  
**Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin**  
**County Branch**  
**Criminal Action No. 1579-2011**

HEADNOTES

*Criminal Law: Right of Accused to Confront Witnesses*

1. The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to confront the witnesses against him.
2. The Confrontation Clause does not apply at sentencing or post-sentencing hearings.
3. Defendant's right to confront witnesses was not violated where he had no opportunity to cross-examine representative of commercial retail store who testified to support amount of restitution. Defendant had no confrontation rights at hearing challenging restitution amount, Commonwealth produced testimony of second representative who provided sufficient factual basis to support award.

*Sentencing and Punishment: Restitution*

1. Restitution is appropriate if during the crime, the defendant stole, converted, or otherwise unlawfully obtained property, or substantially decreased the value thereof as a direct result of the crime, or if the victim suffered personal injury directly resulting from the crime. 18 Pa. C.S. § 1106.
2. The amount of restitution awarded must be supported by the record and may not be speculative.
3. Although the Rules of Evidence apply at sentencing, in fashioning a sentence a court is not limited to evidence that would be admissible at trial. Pa. R.E. 101.
4. An award of restitution may be based on hearsay.
5. A restitution award to a commercial retail store as compensation for defendant's retail theft was not speculative where representative lacked personal knowledge of the thefts, but was able to testify based on corporate documents and his general knowledge about the store's practices and policies regarding retail theft.

Appearances:

Franklin County District Attorney

Franklin County Public Defender

Joseph Johnson-Glover, Defendant

OPINION

Before Meyers, J.

The Defendant, Joseph Johnson-Glover, was stealing diabetic test strips from Target. Caught and charged, he pleaded guilty to felony organized retail theft. In this Petition, he argues that the Court illegally ordered him to compensate Target in the amount of \$6,844.34. According to Johnson-Glover, the restitution order does not comply with the Crimes Code or the Confrontation Clause, and is unsupported by the record and speculative. The Court rejects all three arguments and denies the motion.

FACTS AND PROCEDURAL HISTORY

Johnson-Glover schemed with others to steal diabetic-test-strip supplies from Target. Over three years, Johnson-Glover was stole more than \$7,100.00 in merchandise. Target's asset protection team had been watching him all along, hoping to ensnare his fellow collaborators. After the 14th theft, they alerted police officers, who apprehended Johnson-Glover after an interstate pursuit. The officers charged Johnson-Glover with theft, etc. in this case and various other crimes in a second case<sup>1</sup> relating to his flight from apprehension.

<sup>1</sup> CP-CR-28-1044-2011

On December 19, 2011, Johnson-Glover pleaded guilty to one count of organized retail theft of at least \$5,000.00 but less than \$19,999.00 in merchandise, a third-degree felony.<sup>2</sup> On January 18, 2012, the Court sentenced him to 18 – 60 months in state prison, concurrent with the sentence in his other case. Because of a clerical error, the original sentencing order did not include a restitution amount. Later the same day, the Court therefore entered an amended sentencing order with a restitution amount of \$6,844.34.

On January 23, 2012, Johnson-Glover filed a Petition to Modify Sentence to Correct Restitution. The Court began a hearing on April 16, 2012, at which the local Target's asset-protection officer, Emad Habib testified. The hearing was continued generally before Defense counsel had a chance to cross-examine Habib. Then, nothing happened in the case for ten months. In the meantime, Habib left his position at Target and moved away from this area.

When the hearing resumed on May 16, 2013, Habib was not available for cross examination. Instead, the Commonwealth presented his successor, a Mr. Pfeifferberger. Pfeifferberger had no personal knowledge of the facts surrounding Johnson-Glover's theft of diabetic test strips. Rather, Pfeifferberger testified based solely on corporate documents. He relayed his knowledge about Target's corporate practices designed to deter and catch shoplifters. Target has a practice of "zoning" which tracks non-purchasing movement of merchandise throughout the store. You may be aware of this. You grab a six-pack of Diet Coke in the soft drinks isle, but you find a 12-pack of Diet Pepsi on sale next to the grilling supplies in Isle 7, and you have no affinity for one brand over the other. So, you place the Diet Pepsi 12-pack in your cart and place the Diet Coke on an empty spot on the Isle-7 shelf. Target can track certain movements of merchandise. Pfeifferberger also testified about the fair market value of the test strips that Johnson-Glover stole and the cost of replacing them.

## DISCUSSION

### *1. The amended order to pay restitution does not violate the Crimes Code.*

First, Johnson-Glover contends that the restitution order is illegal because it was not entered "at the time of sentencing," 18 Pa. C.S. § 1106(c)(3).

This argument lacks merit. Johnson-Glover's sentencing order was amended to correct a clerical omission—the restitution amount. The written guilty plea colloquy—initialed and signed by Johnson-Glover—states that the Probation Department would determine the amount of restitution. He cites no authority and points to no prejudice suffered because of the lack of a restitution amount in the original sentencing order. The delay in adding the restitution amount to the sentencing order was minimal—only a few hours. *Cf. Commonwealth v. Dinoia*, 801 A.2d 1254, 1257 (Pa. Super. 2002) (holding that adding restitution to a sentence 18 months after the sentencing date was illegal). Finally, if Johnson-Glover had challenged the restitution amount at sentencing, the Court probably would have told him to file a post-sentence motion to modify. That is what he has done.

### *2. The Confrontation Clause does not apply at sentencing or post-sentence hearings.*

Johnson-Glover argues that his right to confront the witnesses against him was violated, because he was never able to cross-examine the first loss-prevention officer, and the second loss-prevention officer lacked personal knowledge of his case and testified solely on the basis of corporate documents.

The Confrontation Clause<sup>3</sup> is a trial right. *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987)(plurality opinion); *Barber v. Page*, 390 U.S. 719, 725 (1968). *But see Commonwealth v. Atkinson*, 987 A.2d 743, 746 (Pa. Super. 2009) (noting that the Confrontation Clause applies at preliminary hearings and suppression hearings). Thus, a defendant does not have a constitutional right to confront witnesses at sentencing. *Williams v. Oklahoma*, 358 U.S. 576, 584 (1959); *United States v. Robinson*, 482 F.3d 244, 246 (3d Cir. 2007). Indeed, every court to have considered the issue has held that the Confrontation Clause does not apply at sentencing hearings.<sup>4</sup> *United States v. Powell*, 650 F.3d 388,

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2 18 Pa. C.S. § 3929.3(a).

3 The federal and state confrontation clauses are coextensive. *Commonwealth v. Borovichka*, 18A.3d 1242, 1253 (Pa. Super. 2011).

4 Several state courts have held that the Confrontation Clause applies at noncapital jury sentencing trials. See, e.g., *Vankirk v. State*, 385 S.W.2d 144 (Ark. 2011); *State v. Rodriguez*, 754 N.W.2d 672 (Minn.

393 (4th Cir. 2011) (“[I]n holding that the Confrontation Clause does not apply at sentencing, we join every other federal circuit court that hears criminal appeals.”); Stringer v. State, 309 S.W.2d 42, 48 (Tex. Crim. App. 2010); People v. Leon, 884 N.E.2d 1037, 1039 & n.4 (N.Y. 2008); Summers v. State, 148 P.3d 778, 781-82 (Nev. 2006). Similarly, the Confrontation Clause does not apply at hearings to determine restitution. Franco v. State, 918 A.2d 1158, 1161 (Del. 2007); People v. Cain, 97 Cal. Rptr. 2d 836, 839-40 (Ct. App. 2000) (citing People v. Arbuckle, 587 P.2d 220 (Cal. 1978)); Box v. State, 993 So. 2d 135 (Fla. Dist. Ct. App. 2008). But cf. State v. Martin, 724 N.W.2d 872, 873 (S.D. 2006); (concluding that due process extends the right to confront witnesses to restitution hearings); In re James C., 871 A.2d 940, 943 (R.I. 2005) (same).

Johnson-Glover’s confrontation rights were not violated at his post-sentence motions hearings. He had no rights to assert under the Confrontation Clause. Although some Pennsylvania courts have ruled that the Confrontation Clause applies at pretrial hearings, Commonwealth ex rel. Buchanan v. Verbonitz, 581 A.2d 172, 174-75 (Pa. 1990) (plurality opinion), no court has held that confrontation rights apply at sentencing or at post-sentencing hearings. Moreover, a sentencing judge must consider information contained in a presentence investigation report, most of which comes from “witnesses” who do not “testify” at the sentencing hearing. Pa. R. Crim. P. 702. Johnson-Glover offers no compelling reasons why the Court should extend the Confrontation Clause to post-sentence hearings. And the case he cites in support, Commonwealth v. Robins, 812 A.2d 514, 526 (Pa. 2002) (plurality opinion) (concerning confrontation rights and a non-testifying co-conspirator’s statements introduced at trial), is irrelevant and non-precedential.

### *3. The restitution order is not speculative or excessive.*

Lastly, Johnson-Glover argues that the restitution award in this case is speculative and excessive, because the second asset-protection officer did not personally investigate Johnson-Glover’s crimes and instead relied exclusively on the written reports of others. The Commonwealth argues that Johnson-Glover was able to cross-examine Pfeiffenberger about the manner in which Target determines the value of stolen merchandise, and how it tracks whether items are taken.

The Crimes Code authorizes mandatory restitution, inter alia, as a part of a sentence upon conviction of a crime in which property has been stolen, converted, or otherwise unlawfully obtained. 18 Pa. C.S. § 1106(a). The amount of restitution should be supported by the record, and should not be excessive. Commonwealth v. Rush, 909 A.2d 805, 810 (Pa. Super. 2006).

Although the Rules of Evidence apply at sentencing, Pa. R.E. 101, courts have traditionally and universally relaxed the rules of evidence at sentencing. Williams v. New York, 337 U.S. 241 (1949); Commonwealth v. duPont, 730 A.2d 970, 986 (Pa. Super. 1999) (“[I]n sentencing, a court is not limited only to consideration of information which would be admissible evidence at trial.”). Thus, in fashioning a restitution amount, a sentencing judge is not bound by the rules of evidence, but rather must find some support in the record for the amount.

Today, much of this country’s commerce takes place at large chain stores. Long gone (mostly, at least) are the days of the Mom and Pop general store where Ma and Pa knew every customer’s name. No longer can Pa say that there were five bags of Tootsie Rolls on the shelf above the gum machines because he counted them on Monday. These things have gone the way of the manual typewriter, the milkman, and the telephone booth.

Target and other retail stores operate differently and rely almost exclusively on computerized records to track inventory. Target’s method is fairly sophisticated. It has the ability to determine how many items of each type of inventory are on the shelves, and whether those items have been moved throughout the store to another “zone” within the store (as in the case of the misplaced Diet Coke pack).

Target’s restitution form is a quasi-business record.<sup>5</sup> And Target has so many items and makes so many sales per day that any one member of the asset protection team probably lacks personal knowledge about any one specific item. Insofar as Target’s records are hearsay, this Court finds that they have sufficient indicia of reliability to support

2008).

5 Target’s forms are not true business records Cf. Pa. R.E. 803(6); 42 Pa. C.S. § 6108. Reports made for the purpose of litigation are never made “in the regular course of business” and do not qualify for the business-records exception to hearsay. Pompa v. Hojancki, 281 A.2d 886, 888 (Pa. 1971). The Target restitution reports are prepared in anticipation of litigation—to recover the value of stolen merchandise in a criminal or civil proceeding.

the calculation of restitution. Indeed, the records are probably more reliable than a particular employee's subjective memory.

Thus, calling the actual witness who compiled a certain form is a wash. Modern retailers don't work that way. They rely on computer records—not employees' memory—to track inventory. Thus, Pfeiffenberger's testimony has the same probative value as Habib's.<sup>6</sup> In sum, the Court finds that the amount of restitution awarded is not speculative or excessive.

#### CONCLUSION

For the foregoing reasons, the Court denies Johnson-Glover's petition. The Court's same-day amendment to the sentencing order was not illegal. And Johnson-Glover has rights under neither the Confrontation Clause nor the Rules of Evidence to a mini-trial on the issue of restitution. The Court's order is plainly legal, and Johnson-Glover's petition to modify the restitution award must be denied.

#### ORDER OF COURT

AND NOW THIS 15th day of July, 2013, the Court having read and considered Defendant's Post-Sentence Petition to Modify Restitution, the Commonwealth's Answer thereto, having received evidence and post-hearing briefs IT IS HEREBY ORDERED that the Petition is DENIED.

Pursuant to the requirements of Pa.R.Crim.P. 114 (B)(1), (2) and (C)(1), (2), the Clerk shall promptly serve this Order or court notice on each party's attorney, or the party if unrepresented; and shall promptly make docket entries containing the date of receipt in the Clerk's office of the Order or court notice; the date appearing on the Order or court notice; and the date and manner of service of the Order or court notice.

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<sup>6</sup> This is not a justification of Habib's unavailability for cross-examination