

COMMONWEALTH OF PENNSYLVANIA
v. KENNETH EUGENE DESHONG, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Fulton County Branch
Criminal Action No. 16 of 2001

Sentencing; Restitution; Proper time to calculate amount

1. Imposing a probationary sentence rather than a term of incarceration is appropriate in any number of circumstances and has been approved by the Pennsylvania Supreme Court.
2. Courts are vested with a broad measure of discretion in fashioning conditions of probation appropriate to the circumstances of the individual case; restitution may be imposed as a condition of probation.
3. Waiver of a constitutional right must be made voluntarily, intelligently and knowingly.
4. Waiver of a statutory right is subject to a more relaxed standard.
5. Upon 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 therefor.
6. The court shall attach such of the reasonable conditions authorized by subsection (c) of this section as it deems necessary to insure or assist the defendant in leading a law-abiding life; the court may as a condition of its order require the defendant to make restitution of the fruits of his crime or to make reparations, in an amount he can afford to pay, for the loss or damage caused thereby.
7. In order for a sentence that includes restitution to be considered legal, the amount of restitution that defendant owes must be included on the sentencing order.

Appearances:

- Dwight C. Harvey, Esq., *District Attorney*

David S. Keller, Esq., *Counsel for the Defendant*

Travis Kendall, Esq., *Counsel for Fulton County National Bank*

Todd Narvol, Esq., *Counsel for Merchants & Businessmen's Mutual Insurance Company*

Dan Miller, *Probation Officer*

OPINION

Background

This case arises out of a criminal prosecution for felony arson, 18 Pa. C.S.A. §3301, and felony insurance fraud, 18 Pa. C.S.A. §4117. The information alleges that on or about January 15, 2001, the Defendant intentionally started a fire on his own property and did so with the intent of destroying or damaging a building or unoccupied structure on which the Fulton County National Bank had an interest (arising out of a mortgage). The information further alleged that with the intent to defraud an insurer, the Defendant presented or caused to be presented to the insurer a statement forming a part of a claim that contained false, incomplete or misleading information concerning the facts or things material to the claim.

On March 6, 2001, the Defendant pleaded guilty to a single count of felony-three insurance fraud in exchange for the Commonwealth's nol pros of the felony-two charge of arson. As part of the plea agreement between the parties and accepted by the Court on March 6, 2001, there were included the following terms:

Defendant further agrees to make restitution on charges to which he pleads guilty (as determined by the Fulton County Probation Department, subject to a hearing if requested) or (in an amount as follows: \$). Strike whichever is inapplicable.

Defendant further agrees to make restitution on the additional charges of not pleaded to (as determined by the Fulton County Probation Department, subject to a hearing, if requested) or (in an amount as follows: \$). Strike whichever is inapplicable.

The Defendant agrees to the following additional terms of this Plea Agreement: Count 1 will be nolle prossed, and the Commonwealth will not oppose his request for a probationary sentence, which is within the standard guideline range.

The total maximum penalty on the charges to which the Defendant is pleading guilty is 7 years and/or \$15,000.00 fine.

See Plea Agreement, Commonwealth's Exhibit No. 1.

Attached to the Plea Agreement is a three page written Plea Colloquy to all of the questions in which Defendant responded by writing his own answers. The Plea Agreement and Plea Colloquy were initialed, signed and dated by the Defendant and signed by the Defendant's attorney. Defense counsel's signature is preceded by the following language:

I, David S. Keller, attorney for the above named Defendant, state that I have advised my client of the contents and meaning of this document; that it is my belief that he/ she comprehends and understands what is set forth above; and that the Defendant understands what he/ she is doing by pleading guilty.

As noted above, the Defendant's counseled, negotiated Plea Agreement allows, by its express terms, restitution to be determined by the Fulton County Probation Department.

Five weeks after entering his guilty plea, the Defendant was sentenced and as part of that sentence, consistent with the terms of the negotiated Plea Agreement, the sentencing order contained the following language:

"that restitution shall be made in an amount of \$ TBD to persons or entities to be determined as determined to be due and payable by the Franklin Fulton County Probation Department."

See sentencing order of April 10, 2001.

Because the property in question was both insured and subject to a mortgage, equitable interests in the property were somewhat complex. The Pennsylvania State Police and the state fire marshal conducted an arson investigation. It is fair to say that the full extent of damage to the subject property was not easily or quickly ascertainable; nor, apparently, was it an easy task to determine precisely the extent of the competing interests of the bank-mortgagee or of the casualty insurer. Certainly, such detail was not available at the time of sentencing. Neither the Commonwealth nor Defense counsel urged the Court to include liquidated amounts of restitution in the sentencing order. In fact, everyone was on the same page as of the time of sentencing: the Commonwealth, the Defendant and the Defendant's victims were aware [1] that restitution would be substantial, [2] that the amount of restitution had not been distilled to a

liquidated sum and [3] that there were competing interests between the mortgagee-bank and the casualty insurer as to how much restitution each was owed. Moreover, as of the time of sentencing, both the bank-mortgagee and the casualty insurer were represented by counsel.

Approximately one year after the date of sentence, during which year the Defendant paid virtually no restitution, the Fulton County Probation Department advised the undersigned that it was having a difficult time determining the precise amount of restitution due, and to whom it was due. As a result, the Court directed the Fulton County Probation Department to author a memorandum setting forth the then existing circumstances particularly with regard to the amount of restitution already paid, and the restitution sought by the bank on its mortgage interest and by the insurer on the casualty insurance policy. Upon receipt of a memorandum, the Court promptly set the matter down for hearing and/or argument which was held on October 15, 2002. Defense counsel objected even to the matter being set down for hearing, on the authority of *Commonwealth v. Dinoia*, 801 A.2d 1254, 2002 Pa. Super. 195. At the hearing, the evidence established that the amount of restitution is approximately \$150,544. Subsequently, the parties, through their counsel, have had the opportunity to brief the matter. The matter is now ready to be decided.

Analysis

This case arises in the shadow of the Superior Court's recent opinion in *Commonwealth v. Dinoia*, 801 A.2d 1254, 2002 Pa. Super. 195. The Defendant argues that the Superior Court's holding in *Dinoia* is controlling. The Commonwealth, on the other hand, directs our attention to 42 Pa.C.S.A. §9754(c)(8) and to *Commonwealth v. Harner*, 533 Pa. 14, 617 A.2d 702 (1992).

Dinoia distinguished on its facts . A close reading of *Dinoia* reveals that there is no indication in that case that there was any agreement between the Defendant and the prosecution either that the defendant pay restitution or as to any terms for payment. Although the sentencing judge ordered the defendant to pay restitution, it was at the request of the Commonwealth at sentencing that the amount of restitution was left open. *Dinoia*, 801 A.2d at 1255. Of added significance, there is no indication in *Dinoia* that determination of the amount of restitution was particularly troublesome; certainly there is no indication of anything as complex as an arson investigation and multiple entities with competing equitable interests in the destroyed property. Further, in *Dinoia*, and in stark contrast to the circumstances in this case, there is no indication of the terms of the plea agreement or of the status of the defendant's representation at the time of the negotiation of the plea.

In the case before us, on the other hand, several weeks before sentencing, the Defendant, by and through his counsel, negotiated a plea agreement that expressly authorized restitution to be determined by the probation department; and the terms of that agreement did not require the Court to include a liquidated amount of restitution in the sentencing order. In addition, the negotiated agreement further expressly authorized a restitution hearing upon request of the defendant. Finally, the negotiated agreement called for the Commonwealth to *nol prosee* the charge of felony-two arson in exchange for a plea on felony-three insurance fraud which, under the sentencing guidelines, provided for a sentence of probation within the standard range of the guidelines. It is abundantly clear that the Defendant, as of the time of sentencing, sought to avoid imprisonment in part so that he could make payment of restitution. It is noteworthy that the Defendant never sought a hearing on restitution, as was his bargained-for right; and that it was only *after* the Probation Department contacted the Court, having had troubles getting the bank's and the insurance company's attorneys to give him solid, and final, information as to the claims of their clients, that Mr. Deshong's attorney objected to a hearing based on the Superior Court's intervening decision in *Dinoia*.

The effect of 42 Pa.C.S.A. §9754 . In this case, the court ordered that the defendant serve a probationary sentence. The Commonwealth argues that that raises a question as to the latitude of the sentencing court on the matter of restitution. The Commonwealth refers us to section 9754 of the sentencing code, 42 Pa.C.S.A. §9754. Imposing a probationary sentence rather than a term of incarceration is entirely appropriate in any number of circumstances and has been approved by the Pennsylvania Supreme Court:

As we noted in *Walton*, the practice of ordering restitution or reparation as such a condition is widely established and highly favored in the law, as an aid both to the criminal in achieving rehabilitation and to his victim in obtaining some measure of redress. *Id.* at 599, 397 A.2d at 1185.

**707 [8] Such sentences are encouraged and 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. The trial court indicated so much as its *raison d'etre* in imposing *23 restitution and we are persuaded that its intent was to impose restitution as a constructive alternative to imprisonment.

Commonwealth v. Harner , 533 Pa. 14, 617 A.2d 702 (1992) at 706-707. The Commonwealth essentially argues that if the intention of the sentencing court was to "rehabilitate" rather than to "punish" the defendant, then §9754 effectively trumps *Dinoia* and the mandate of 18 Pa.C.S.A. §1106.

The intention of the sentencing court . Defendant's counsel seems to suggest that in light of the mandatory language of 18 Pa.C.S.A. §1106, it is inappropriate to consider the intention of the court at the time of sentencing. Such argument simply cannot prevail. What the court had in mind at the time of sentencing is critical to the favorable sentencing disposition that counsel obtained for his client. What's more, surely defense counsel, in earlier arguing for a probationary sentence, was suggesting that the court have the intention of coming down on the side of rehabilitation for his client and reparations for his client's victims rather than on the side of punishment and imprisonment. To neglect to inquire into the court's intention does a disservice to the foundations of the sentencing process. There is simply no doubt that from the time the defendant recognized the folly of his criminal conduct, through the time he gave his statement to the state police, through the time of his plea negotiations, through the time of his plea hearing in which he admitted his guilt and displayed sincere contrition for his conduct and continuing through the time of his sentencing, the defendant was hoping to avoid a sentence of incarceration. He accomplished that, in short order and with uncharacteristic speed (given what is generally a much longer time between commission of the offense and sentencing) by agreeing to make restitution and letting it up to the probation department to work out the numbers. We note that the guideline range for the offense on which the defendant was sentenced is restorative sanctions to 3 months imprisonment. The defendant got no jail time; he has benefitted from his bargain and he enjoys a "constructive alternative to imprisonment. *Harner, supra*, at 707.

The applicability of 18 Pa.C.S.A. §1106 . We note that just as there is nothing either in the plea agreement or in the sentence suggesting that the Court was operating within the framework of 18 Pa.C.S.A. §1106, there is also nothing in the plea agreement or the sentence suggesting that the Court was operating under the purview of 42 Pa.C.S.A. §9754. Nevertheless, the circumstances of this case, the speed with which it was resolved, and the ultimate manner in which the defendant was sentenced make clear that it was this court's intention at sentencing to rehabilitate the defendant; and to allow him to make reparations to his victims as was his expressed desire; and to allow him to avoid imprisonment, given his age, his contrition and his flawless prior record as a law-abiding citizen.

Under such circumstances, the court has wider latitude to fashion a sentence under all of the circumstances of the case:

Restitution may also be imposed as a condition of probation and, under such circumstances, the courts are traditionally and properly vested with a broader measure of discretion in fashioning conditions of probation appropriate to the circumstances of the individual case. The reason for this attitude stems from the purpose of imposing conditions of probation *22 which are primarily aimed at rehabilitating and reintegrating a law breaker into society as a law-abiding citizen. This is deemed a constructive alternative to imprisonment. *Walton*, 483 Pa. at 598, 397 A.2d at 1184.

Commonwealth v. Harner , 617 A.2d at 706. The Commonwealth again argues that given the statute and given the language of *Harner*, the sentencing court cannot be put squarely within the framework of 18 Pa.C.S.A. §1106 or under the holding in *Dinoia*. The circumstances of this individual case included extensive fire damage, competing equitable mortgage and equitable casualty insurance interests and an ongoing arson and damage investigation. The Defendant, counseled and with eyes wide open, entered into a plea agreement to a prompt probationary sentence and was content to let until a later day and to the probation department's determination the precise amount of restitution which he would be required to pay as a condition of that probationary sentence. At no point has defendant or his counsel argued that such was not the case, other than to suggest, in his brief, that greater diligence on the part of the bank and the insurance company between January and April, 2001 would likely have enabled these victims to accurately establish their losses as of the time of sentencing.

Waiver or arms-length, bargained-for provision? The Commonwealth urges us to find waiver of the strict mandate of 18 Pa. C.S.A. §1106. We recognize that waiver is part and parcel of the criminal law. As a general rule, a waiver of a constitutional right must be made voluntarily, intelligently and knowingly. *Commonwealth v. Coleman*, 477 Pa. 400, 383 A.2d 1268 (1978). Further, waiver of a statutory right is subject to a more relaxed standard. *Commonwealth v. Green*, 503 Pa. 278, 469 A.2d 552 (1983).

In this case, there is no indication that defense counsel, defendant or the district attorney were even aware of the existence of the mandate of 18 Pa.C.S.A. §1106, so there can be no claim that its provisions were waived. Moreover, *Dinoia, supra*, makes clear that at least one Superior Court panel simply will not hear a claim of waiver:

We find meritless the Commonwealth's attempt to circumvent a statutory mandate and illegal sentence

with a claim of waiver. We also find the language of the statute, as amended, is clear and therefore we need not pursue statutory construction. The statute plainly requires the determination of the amount of restitution, if ordered, at the time of sentencing.

Commonwealth v. Dinoia , 801 A.2d 1254 at 1256.

Clearly it can be argued (and the Commonwealth has done so) that the sentence imposed in this case is based upon the agreement of the parties, an agreement very favorable to the defendant and one which the defendant negotiated with the assistance of counsel. It does appear to us to be duplicitous at best that a legitimate bargained-for provision of the agreement, now ratified and effectuated by a favorable sentencing order, is so abhorrent to the sensibilities of the defendant. If the defendant made a bad bargain, so be it. But it is just a bit too clever for the defendant now to claim that the very term of his agreement that allowed him to escape imprisonment should also now permit him to escape his responsibility for making his victims whole. If the defendant mistakenly neglected to require the prosecution to determine an amount of restitution as of the time of the sentencing, he should, under the equities of this case, be required to live with that mistake. There appears to be no prejudice to the defendant in requiring him to live up to his bargain.

Conclusion . All of the following notwithstanding, Dinoia imposes upon us a requirement to strictly interpret the mandate of 18 Pa.C.S.A. §1106. Dinoia notes that absent a sentencing order which sets forth the amount of restitution, the sentence is illegal. It appears as though Dinoia requires the sentencing court either to delay sentencing or to order some dollar amount, however difficult it may be to determine, noting that if such procedure is followed, it allows for subsequent modification of the restitution amount if that becomes necessary. Commonwealth v. Dinoia, 801 A.2d at 1257. Dinoia leaves no room for parties to bargain for a later determination of restitution as the parties did in this case in light of the mandate of 18 Pa.C.S.A. §1106. The net result, in this case, is that the defendant now enjoys the benefit of his bargaining by having avoided incarceration; and his victims remain unable to collect restitution because no amount of restitution was set forth in the sentencing order.

The result seems unfair, but Dinoia leaves little, if any, wiggle room. It will likely have the effect, at least in cases where restitution is a complex matter, of forcing the sentencing judge to make his or her best estimate based on information from the prosecutor. The logical consequence will be follow-up costly and protracted restitution hearings to modify that which could not be determined with precision at the time of sentencing.

ORDER OF COURT

January 29, 2003, upon consideration of the evidence, the briefs and arguments of the parties and the law, it is hereby ordered that the Commonwealth's request that the Court enter an order setting the amount of restitution in this matter is denied.

It should be noted that this case took on an unusually rapid disposition. The time line is as follows:

- January 15, 2001 Fire
- January 29, 2001 Defendant notifies his Casualty Insurer that he was not, in actuality, making a claim.
- February 6, 2001 Defendant provides a statement to the Pennsylvania State Police.
- February 13, 2001 Charges are filed: Felony-two arson and Felony-three insurance fraud.
- March 6, 2001 Defendant enters a guilty plea to Felony-three insurance fraud.
- March 7, 2001 Defendant appears for his pre-sentence interview.
- April 10, 2001 Defendant is sentenced.

Notably, the Defendant was sentenced less than 3 months after he committed the crime. Our recollection is that the Defendant was interested in hastening the disposition; and it is probable, if not certain, that the Defendant's interest in disposing of the matter with haste had much to do with his anxiety over whether he would be given a probationary sentence or sentenced to a term of imprisonment. At the time he committed the offense, the defendant was widowed, 4 days short of his 59th birthday, and had no prior record. Further, the Court's recollection is that the Defendant wanted a probationary sentence, in part, so that he could begin to pay the substantial restitution that he acknowledged that he owed. The Defendant obtained the benefit of his bargain by getting the probationary sentence that he sought, in light of a guideline standard range that would have permitted up to three (3) months of incarceration.

The court had the following information made available to me at sentencing in the pre-sentence report:

VICTIM'S STATEMENT & RESTITUTION INFORMATION: This officer has been in constant communication with Carolyn Kerlin, Victim Services Coordinator concerning restitution. This officer also has talked to Barbara Scollo - Paralegal, on April 3, 2001. Ms. Scollo is handling [sic] the case for the insurance company. Ms. Scollo reported that an estimate for the damage has not been completed and she will provide the information to this officer as soon as she receives it. This officer also contacted the insurance Claim Adjuster Michael V. McCollum; however this officer has yet to receive any information from Mr. McCollum.

At the hearing, the casualty insurer, Merchants & Businessmen's Mutual Insurance Company testified as to its claim totaling \$93,936.43. That figure, however, includes \$4905.00 in attorneys' fees. Also at the hearing, Fulton County National Bank's (i.e., the mortgagee's) President and Chief Executive Officer, Clyde Bookheimer, testified as to the bank's claim of \$92,928.22, an amount which includes both legal fees and delinquent taxes paid on the real estate. Under the authority of 18 Pa.C.S.A. §1106, the defendant should be held accountable only as to losses for which he has been found to be criminally liable. Excluding attorneys' fees and delinquent taxes, restitution totals \$150,544.00.

Whether the sum of his victims' claims was \$150,000 or even more was apparently of little moment to Mr. Deshong. Of course, Mr. Deshong, in addition to his sincere *apologia* and contrition at the time of sentencing, benefitted from a standard range probationary sentence which allowed him to remain free of incarceration, in the workplace, and positioned to begin making payments on the substantial restitution which he knew that he owed. It appears that, based upon the defendant's understanding, generally, of the amount of restitution that he owed, as of one year after his sentencing, he still had no need to know precisely the amounts that the bank and insurance company were claiming--he had never sought a hearing (to which he was entitled based on his bargain) on the amount of restitution.

This section provides in relevant part as follows:

...

§ 9754. Order of probation

...

(b) Conditions generally.-- The court shall attach such of the reasonable conditions authorized by subsection (c) of this section as it deems necessary to insure or assist the defendant in leading a law-abiding life.

(c) Specific conditions.--The court may as a condition of its order require the defendant:

...

(8) To make restitution of the fruits of his crime or to make reparations, in an amount he can afford to pay, for the loss or damage caused thereby.

A criminal defendant is permitted to waive his constitutional right to counsel. *Commonwealth v. Glover*, 247 Pa.Super. 465, 372 A.2d 919 (1977). A criminal defendant is permitted to waive his right to a trial by jury. *Commonwealth v. O'Donnell*, 559 Pa. 320, 740 A.2d 198 (1999); *see also* *Commonwealth v. Garrett*, 439 Pa. 58, 266 A.2d 82 (1970). A criminal defendant may waive his *Miranda* rights. *Commonwealth v. O'Bryant*, 479 Pa. 534, 388 A.2d 1059 (1978). A criminal defendant may waive his right to formal arraignment. Pa.R.Crim.P. 571(D). A criminal defendant may waive an argument on appeal by not briefing it. *Commonwealth v. Prisznyak*, 306 Pa.Super. 137, 452 A.2d 253 (1982). A criminal defendant may be found to have waived all arguments on appeal by failing to file a Rule 1925(a) statement when ordered to do so. *Commonwealth v. Kimble*, 756 A.2d 78, 2000 Pa.Super. 197 (2000). A criminal defendant may waive his Rule 600 rights. *Commonwealth v. Moyer*, 301 Pa.Super. 414, 447 A.2d 1034 (1982). The list could go on.