

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

ANDREW SCHOETTLE

Appellant

No. 1325 MDA 2013

Appeal from the Judgment of Sentence of June 11, 2013
In the Court of Common Pleas of Lackawanna County
Criminal Division at Nos.: CP-35-CR-0001593-2010
CP-35-CR-0001594-2010
CP-35-CR-0001595-2010
CP-35-CR-0001596-2010
CP-35-CR-0001597-2010
CP-35-CR-0001598-2010
CP-35-CR-0002627-2012

BEFORE: PANELLA, J., WECHT, J., and STRASSBURGER, J.*

MEMORANDUM BY WECHT, J.:

FILED JULY 28, 2014

Andrew Schoettle appeals his June 11, 2013 judgment of sentence.

We affirm.

The sentencing court summarized the relevant factual and procedural history of this case as follows:

[Schoettle] was charged with multiple theft-related offenses stemming from [Schoettle's] severe substance abuse. In an effort to provide [Schoettle] with rehabilitation and address [Schoettle's] recidivism, [the sentencing court] accepted

* Retired Senior Judge assigned to the Superior Court.

[Schoettle] into the Lackawanna County [drug] treatment court program. [(“T.C.P.”)] Accordingly, [o]n September 16, 2010, [Schoettle] entered an open [T.C.P.] guilty plea¹ to the following criminal offenses: one count of acquisition or obtaining possession of a controlled substance by misrepresentation, docketed to 10 CR 1593;^[1] one count of theft by deception—false impression, and one count of receiving stolen property, docketed to 10 CR 1594;^[2] one count of theft by unlawful taking—movable property, one count of theft by deception—false impression, and one count of deceptive business practice—sale less than represented quantity, docketed to 10 CR 1595;^[3] one count of receiving stolen property, docketed to 10 CR 1596;^[4] one count of false identification to law enforcement, one count of operating vehicle without required financial responsibility, one count of vehicle registration suspended, and one count of turning movements and required signals, docketed to 10 CR 1597;^[5] and one count of bad checks, and one count of theft by deception—false impression, docketed to 10 CR 1598.^[6]

¹ Pursuant to Lackawanna County [T.C.P.] regulations, if a [T.C.P.] client successfully completes the [T.C.P.], the client will have [his or her] case dismissed within one year of the date of graduation from the Lackawanna County [T.C.P.]. As such, the guilty plea remains open should the client successfully complete [the T.C.P.]. In the alternative, if the client fails to complete the [T.C.P.], the client is terminated, the guilty plea is accepted, and the client is sentenced accordingly.

¹ 35 P.S. § 780-113(a)(12).

² 18 Pa.C.S. §§ 3922(a)(1) and 3925(a), respectively.

³ 18 Pa.C.S. §§ 3921(a), 3922(a)(1), and 4107(a)(2), respectively.

⁴ 18 Pa.C.S. § 3925(a).

⁵ 18 Pa.C.S. § 4914(a), 75 Pa.C.S. §§ 1786(f), 1371(a), and 3334(a), respectively.

⁶ 18 Pa.C.S. §§ 4105(a)(1) and 3922(a)(1).

On November 21, 2012, [the sentencing court] terminated [Schoettle] from the Lackawanna County [T.C.P.]. [The sentencing court] determined that [Schoettle] no longer proved a viable candidate for the [T.C.P.] when [Schoettle] relapsed, absconded from the [T.C.P.], and committed new criminal offenses.² Subsequently, on February 28, 2012, [Schoettle] pled guilty before the [trial judge] to criminal trespass—enter structure,^[7] docketed to 12 CR 2627. At the time of the plea, the [trial judge] instructed that sentence[ing] would be deferred to [the sentencing court] based upon [Schoettle’s] prior guilty plea into the Lackawanna County [T.C.P.].

² On November 21, 2012, the Commonwealth submitted a petition to terminate [Schoettle’s] participation in the Lackawanna County [T.C.P.]. The Commonwealth’s petition averred that since [Schoettle’s] acceptance into the [T.C.P.], [Schoettle] violated several terms and conditions of the [T.C.P.,] namely, missing probation appointments, heroin relapse, absconding from probation until October 2, 2012, admitted heroin, cocaine, and suboxone use, as well as committing new criminal offenses on October 6, 2012. On October 11, 2012, [Schoettle] was awaiting arraignment on the following charges[:] criminal trespass—enter structure, 18 Pa.C.S. § 3503(a)(1), theft by unlawful taking—movable property, 18 Pa.C.S. § 3921(a), and receiving stolen property, 18 Pa.C.S. § 3925(a)[,] docketed to 12 CR 2627.

In preparation for sentenc[ing], a pre-sentence investigation (“PSI”) was completed on April 24, 2013. The PSI recounted a detailed official version of events as well as [Schoettle’s] version regarding each docketed criminal offense. During the interview, with regards to 12 CR 2627, [Schoettle] admitted that he [had] relapsed and stated that he went to the victim’s home to provide roof repair and noticed gold jewelry on a dresser. [Schoettle] stated that he benefited from the crime by trading the jewelry for drugs. PSI, 3/24/2013, at 8. With regards to 10 CR 1593, 1594, 1595, 1596, 1597, and 1598, [Schoettle] stated that he

⁷ 18 Pa.C.S. § 3503(a)(1).

was irresponsible [in] consuming drugs daily and that he was blessed to have been involved in [the T.C.P.].

* * * *

[T]he PSI listed each victim, criminal docket number, and amount of restitution owed. Specifically, with regards to 10 CR 1593, 10 CR 1596, and 10 CR 1597[,] no restitution was requested. However, \$2000.00 in restitution was owed to victim [M.O.C.] docketed to 10 CR 1594. Regarding 10 CR 1595, \$1,400.00 in restitution was owed to victim, [C.C.]. Likewise, regarding 10 CR 1598, \$1,239.94 in restitution was owed to victim, [B.S.R.]. Lastly, with regards to 12 CR 2627, \$110[,]000[.00] in restitution was owed to victim, [("A.H.")]. Victim impact statements were also appended to the PSI, wherein victim [B.S.R.] docketed to 10 CR 1598, provided no personal statement but listed restitution for twelve returned checks and returned check fees including[] copies of returned checks; victim, [C.C.] docketed to 10 CR 1595, provided no personal statement but listed restitution for payment of roof repair never received, including a contractor's invoice and check payment; victim [M.O.C.] docketed to 10 CR 1594, noted feelings of embarrassment as well as anger and listed restitution for a down payment of a rubber roof never received, including contractor's invoice and down payment; lastly[,] victim [A.H.] docketed to 12 CR 2627, provided an itemized list of items that were removed from his home including a selective insurance property worksheet that documented and valued items as described in the Scranton Police Department incident report. [A.H.] expressed feelings of sadness, devastation, and anger at the loss of irreplaceable family heirlooms[,] namely his dental school class ring, [his] deceased father's gold watches, gold bracelets, and gold cufflinks[,] as well as his collection of rare gold coins.

Accordingly, [Schoettle] was sentenced on June 11, 2013. At the time of sentencing, [A.H.] testified about the circumstances surrounding the underlying criminal offense docketed to 12 CR 2627. [A.H.] stated:

This individual called my office after he worked for a reputable roofing agency and said that there was one tile loose and can he get back in the house to fix it for no charge, and trusting I had – my carpenter let him in, and then I thought that was the end of it.

Unbeknownst to me, because my wife was present every time that he came when they were doing the job legitimately, and when the carpenter came when he knocked on the door unexpectedly at noon one day she recognized him, this was the third time, "Oh, I have to fix an area, I called your husband," which he never did. And so he went up there and went to the roof and scoped out the whole area and I had a big jewelry box with things I can never replace and [he] came back a second time two weeks later and said, "Oh I left all of my instruments up there." And so what was lost was, you know, things like my dental school ring, which I'll never get back, my father, who is deceased, left m[e] lots of his jewelry, which is 30, 40, 50 years old and I'll never get that back. Gold coins. It's well over a \$100,000 loss, which is financials, but the deception to get in the house and then if my wife ever, you know walked him out and saw the stuff in his pockets what would he have done and since I found out that was just all melted for drugs, you know, it could have been something severe and catastrophic and so I just want your Honor to be aware that there was a lot of deception and this could have been more catastrophic things.

In response, defense counsel opposed the restitution amount listed for [A.H.] docketed to 12 CR 2627. Also, at the time of sentencing, [Schoettle] had ample opportunity to speak. [Schoettle] apologized to the Lackawanna County [T.C.P.] and recalled that he [had] maintained compliance with the [T.C.P.] until his relapse. [Schoettle] also expressed remorse for [A.H.], but shifted responsibility and stated [that] "I'd like to note that I wasn't the only [one] involved in the crime." When further questioned by [the sentencing court, Schoettle] showed reluctance to accept personal responsibility or admit criminal activity. However, he eventually stated [that] "it is my responsibility because I was the one that did own the company."

Therefore, although [the sentencing court] was particularly familiar with [Schoettle], in light of [the sentencing court's] supervision during [Schoettle's] two[-]year participation in the Lackawanna County [T.C.P., the sentencing court] carefully reviewed the applicable standard sentencing guidelines, [Schoettle's] PSI, the victim impact statements, including

restitution amounts, and the specific facts of the underlying criminal conduct.

Based upon [Schoettle's] deceptive underlying criminal conduct, the particularized facts of the above[-]captioned cases, [Schoettle's] long history of drug and alcohol abuse as well as [Schoettle's] failure to rehabilitate, [the sentencing court] sentenced [Schoettle] in the standard range on the following criminal docket numbers:

12 CR 2627, Count [One], [twelve] to [thirty-six] months in the state. 10 CR 1598, [six] to [twelve] months in the state. 10 CR 1598 theft by deception, [twelve] to [thirty-six] months in the state. 10 CR 1597, Count [One], [six] to [twelve months] in the state. 10 CR 1596, Count [One], [six] to [twelve] months in the state. 10 CR 1595, [twelve] to [twenty-four] months. On Count 2 on 1595, [six] to [twelve months] concurrent. That's concurrent, the other is consecutive. 10 CR 1595, Count [Three], [twelve] to [twenty-four months]. 10 CR 1594, [twelve] to [thirty-six months]. 10 CR 1594, Count [Two], two years [of] probation. 10 CR 1593, [twelve] to [twenty-four months], for an aggregate of [seven and a half to eighteen] years plus two years [of] probation.

Sentencing Court Opinion ("S.C.O."), 1/27/2014, at 1-7 (citations modified or omitted, minor modifications to capitalization). The sentencing court ordered Schoettle to pay restitution to A.H. in the amount of \$110,000.00.⁸ Sentencing order, 6/11/2013, at 1 (unnumbered). On June 11, 2013, Schoettle filed a motion for reconsideration of his sentence. On June 24, 2013, the sentencing court denied Schoettle's motion for reconsideration.

⁸ Schoettle was also ordered to pay \$591.50 in costs, and \$60.00 toward the Crime Victim's Compensation Fund. **See** Sentencing Order, 6/11/2013, at 1 (unnumbered).

On July 1, 2013, Schoettle filed a timely notice of appeal. On July 3, 2013, the sentencing court ordered Schoettle to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On July 23, 2013, Schoettle requested an extension of time for filing his Rule 1925(b) statement. On August 2, 2013, the sentencing court granted Schoettle an additional forty-five days to file his Rule 1925(b) statement. On September 16, 2013, and pursuant to the sentencing court's August 2, 2013 order, Schoettle timely filed his Rule 1925(b) statement. On January 27, 2014, the sentencing court entered an opinion pursuant to Pa.R.A.P. 1925(a).

Schoettle presents the following issues for our review: "(1) [w]hether the sentencing court imposed an illegal sentence when it ordered [Schoettle] to pay restitution in the amount of \$110,000.00 to [A.H.] where [Schoettle] pled guilty to criminal trespass only[; and] (2) whether the [imprisonment and restitution] sentences imposed were unduly harsh and excessive" Brief for Schoettle at 4.

In his first issue, Schoettle contends that the sentencing court's imposition of restitution in the amount of \$110,000.00 was illegal because "the crime to which [Schoettle pleaded guilty] did not involve the taking[,], receiving[,], or destruction of any property from [A.H.'s] house." Brief for Schoettle at 9. We disagree.

In ***Commonwealth v. Walker***, 666 A.2d 301 (Pa. Super, 1995), this Court explained that there are two types of challenges an appellant may raise when objecting to his sentence. This Court indicated that challenges to

the jurisdiction of the sentencing court to impose restitution pertain to the legality of a sentence. *Id.* at 307. This Court further indicated that challenges raising the excessiveness of a restitution award address the discretionary aspects of a sentence. *Id.* Instantly, Schoettle alleges that the sentencing court's imposition of restitution was illegal because he was not convicted of a property crime. Brief for Schoettle at 9. Based upon the distinction in *Walker*, we conclude that Schoettle's first issue constitutes a challenge to the legality of the sentencing court's imposition of restitution. "Issues relating to the legality of a sentence are questions of law, as are claims raising a court's interpretation of a statute. Our standard of review over such questions is *de novo* and our scope of review is plenary." *Commonwealth v. Brougher*, 978 A.2d 373, 377 (Pa. Super. 2009) (citation omitted).

Restitution awards for property crimes are mandatory pursuant to 18 Pa.C.S. § 1106, which provides, in relevant part, as follows:

(a) General rule.—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 . . . the offender shall be sentenced to make restitution in addition to the punishment prescribed therefor.

* * * *

(c) Mandatory restitution.—

(1) The court shall order full restitution:

(i) Regardless of the current financial resources of the defendant, so as to provide the victim with the fullest compensation for the loss.

* * * *

(2) At the time of sentencing[,], the court shall specify the amount and method of restitution. In determining the amount and method of restitution, the court:

(i) Shall consider the extent of injury suffered by the victim, the victim's request for restitution as presented to the district attorney in accordance with paragraph (4) and such other matters as it deems appropriate.

18 Pa.C.S. § 1106. When restitution is imposed as a direct sentence, a direct causal connection between the damage to property and the crime must exist. ***Commonwealth v. Harriott***, 919 A.2d 234, 237–38 (Pa. Super. 2007).

However, restitution also may be imposed as a condition of probation pursuant to 42 Pa.C.S. § 9754, which provides, in relevant part, as follows:

(a) General rule.—In imposing an order of probation[,], the court shall specify at the time of sentencing[,], the length of any term during which the defendant is to be supervised, which term may not exceed the maximum term for which the defendant could be confined, and the authority that shall conduct the supervision.

(b) Conditions generally.—The court shall attach such of the reasonable conditions authorized by subsection (c) of this section as it deems necessary to [e]nsure 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.

When restitution is imposed as a condition of probation, the aforementioned requirement of a nexus between the defendant's criminal conduct and the victim's loss is relaxed. **Harriott**, 919 A.2d at 238; **see Commonwealth v. Harner**, 617 A.2d 702, 707 (Pa. 1992) ("[T]he practice of ordering restitution or reparation as such a [probation] 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."). However, there must be at least an indirect connection between the criminal activity and the loss. **Harriott**, 919 A.2d at 238. Additionally, our Supreme Court has indicated that an appellate court "may still affirm the sentencing court[']s imposition of restitution] if there was **any** source of authority for the judgment of sentence—even if the source was not suggested to or known by the lower court at the time of sentencing." **Harner**, 617 A.2d at 706 (citing **Commonwealth v. Walton**, 397 A.2d 1179 (Pa. 1979)).

In the instant case, Schoettle was sentenced both to a term of imprisonment and a term of probation, and ordered to pay restitution to A.H. It is unclear whether the sentencing court imposed restitution upon Schoettle as part of his direct sentence or as a condition of probation. **See** Notes of Testimony, 6/11/2013, at 9 ("We will order restitution as stated on the record"). Even assuming, *arguendo*, that the sentencing court did not have the authority to impose restitution upon Schoettle as part of his incarceration pursuant to 18 Pa.C.S. § 1106, the sentencing court

nonetheless had the necessary authority to impose restitution upon Schoettle as a condition of probation. **See** 42 Pa.C.S. § 9754; **Harner**, 617 A.2d at 706.

Harriott is instructive. In **Harriott**, the appellant spit on the arresting police officers during the course of her arrest. The appellant was convicted of resisting arrest, driving under the influence (“DUI”), disorderly conduct, harassment, and flashing signals, none of which involve the taking, receiving, or destruction of property or persons. The appellant was sentenced to intermediate punishment (“IP”) for the DUI, and to probation for resisting arrest. 919 A.2d at 237. As a part of the appellant’s DUI penalty, the sentencing court ordered appellant to make restitution to the insurance company that paid for the blood tests performed on her arresting officers. **Id.** “Having been acquitted of assault, appellant contend[ed] that she was not convicted of any crime connected to her act of spitting. Therefore, even if the police did suffer some injury from the spitting, [appellant contended that] it did not result from the crimes for which she was convicted.” **Id.** at 239. This Court indicated that the direct nexus required by 18 Pa.C.S.A. § 1106(a) was lacking:

While driving, [a]ppellant did not wreck into another vehicle, collide with property, strike a pedestrian[,], or injure anyone. In fact, the restitution had nothing to do with any such matters. Appellant’s drunk driving did not directly cause the officers to require precautionary blood testing. Therefore, the direct nexus required by § 1106(a) is lacking, and the statute does not authorize, as part of the DUI sentence, restitution for the blood tests in this case.

Id. at 240.

Although the sentencing court in **Harriott** imposed restitution as part of the appellant's IP sentence, pursuant to 42 Pa.C.S. § 9763(b)(10), this Court noted:

Because the statute authorizing restitution as a condition of [IP] resembles the statute permitting restitution as a condition of probation, and because the purposes of [IP] and probation bear similarities, we find that the legal standard for attaching restitution as a condition of IP should be the same as the standard for restitution which is imposed as a probationary condition.

919 A.2d at 239. Thus, this Court analyzed restitution imposed as a condition of IP as if it were restitution imposed as a condition of probation. **Id.** In affirming the sentencing court's imposition of restitution, this Court stated in **Harriott** that "[w]hile the act of spitting was plainly not the same as drunk driving, it certainly was part of [the a]ppellant's overall conduct which stemmed from her DUI." **Id.** at 240. This Court indicated that "[r]estitution will serve the purposes of helping to teach [the a]ppellant the egregiousness of her conduct, to deter her from re-offending, and to encourage her to live responsibly [as well as] provid[ing] reimbursement to the insurance company. The insurance company is properly considered to be a victim for restitution purposes." **Id.** (citation omitted).

Turning to the instant case, Schoettle was charged with criminal trespass, theft of movable property by unlawful taking, and receiving stolen property. Schoettle ultimately pleaded guilty to criminal trespass only,

which does not involve the taking, receiving, or destruction of property or persons. Schoettle was sentenced to both a term of imprisonment and a term of probation. Schoettle also was ordered to pay restitution to A.H. in the amount of \$110,000.00. *Supra* at 4-7. Like the appellant in **Harriott**, Schoettle contends that restitution is illegal because he was not convicted of any crime that is directly related to A.H.'s pecuniary loss. As in **Harriott**, Schoettle's act of criminal trespass did not directly cause A.H.'s pecuniary loss, and the direct nexus required by 18 Pa.C.S.A. § 1106(a) is lacking. **Harriott**, 919 A.2d at 240. However, while it may not have been the direct cause of A.H.'s pecuniary loss, Schoettle's act of criminal trespass certainly was **part** of Schoettle's overall course of criminal conduct. **Id.** As in **Harriott**, there is at least an indirect connection between Schoettle's criminal activity and A.H.'s pecuniary loss. **See id.** at 238. The sentencing court's order of restitution was proper as a condition of probation pursuant to 42 Pa.C.S. § 9763. **Harner**, *supra*. The sentencing court had authority to impose restitution upon Schoettle as a condition of probation. **Harriott**, **Harner**, *supra*. Thus, we affirm the sentencing court's imposition of restitution upon Schoettle.

Schoettle further argues that the imposition of restitution is not supported by the record because "there was no identification [by the Commonwealth] of the items taken or their value[,]" and because "[t]he Commonwealth failed to . . . offer any evidence to support its request for restitution." Brief for Schoettle at 10-11. Schoettle is attempting to append

a challenge to the discretionary aspects of his restitution amount to his first claim challenging the legality of his restitution. **See** Brief for Schoettle at 14 (“Assuming *arguendo* that this Court finds that the [sentencing] court had the authority to impose a sentence of restitution, [Schoettle] contends that the [sentencing] court abused its discretion when ordering [Schoettle] to pay \$110,000.00 [to A.H.]”).

Prior to addressing the merits of this issue, we must assess whether Schoettle properly has preserved this issue for our review:

Objections to the discretionary aspects of a sentence are generally waived if they are not raised at the sentencing hearing or raised in a motion to modify the sentence imposed at that hearing. **Commonwealth v. Mann**, 820 A.2d 788, 794 (Pa. Super. 2003).

Commonwealth v. Hyland, 875 A.2d 1175, 1183 (Pa. Super. 2005) (citations modified).

The sentencing transcript in this case reflects that Schoettle did not raise a challenge to the discretionary aspects of his restitution in open court after the sentencing court announced its sentence. Moreover, Schoettle did not raise this issue in his motion for reconsideration. Brief for Schoettle at 15. In his motion for reconsideration, Schoettle raised only the following issue: “[Schoettle] is a product of particular circumstances and conditions of [his] environment, [and] these matters were not fully and completely expressed in a pre-sentence report prepared by the Lackawanna County Probation Office.” Schoettle’s Petition for Reconsideration of Sentence,

6/11/2013, at 2 (unnumbered). Therefore, Schoettle has waived his putative challenge to the discretionary aspects of the restitution imposed. **Hyland**, supra.

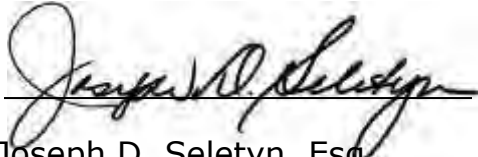
In his second issue, Schoettle contends that his overall sentence is unduly harsh and excessive given that “[the imprisonment sentences] were in the high end of the standard range[,] the charges were mostly misdemeanors[,]” and that “[Schoettle] was amenable to rehabilitation since he [had] successfully completed drug court.” Brief for Schoettle at 9, 18. Schoettle’s second issue implicates the discretionary aspects of his sentences.

Before addressing the merits of this claim, as we did in the earlier discretionary challenge above, we must first determine whether Schoettle has preserved his challenge to the discretionary aspects of his imprisonment sentence. As noted above, objections to the discretionary aspects of sentencing must be raised at the sentencing hearing or in a post-sentence motion. **Hyland**, 875 A.2d at 1183. The sentencing transcript reflects that Schoettle did not challenge the discretionary aspects of his imprisonment sentence in open court after the sentencing court announced its sentence. Moreover, Schoettle did not raise the issue in his motion for reconsideration. Thus, Schoettle has waived his second claim. **Id.**

Judgment of sentence affirmed.

J-S29029-14

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/28/2014