IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	ID No. 0602008833
	)	
DAVID R. STERNER,	)	
	)	
Defendant.	)	

Submitted January 14, 2008
Decided July 11, 2008

Lynn Jones, Esquire, Deputy Attorney General.
William E. Moore, Esquire, Assistant Public Defender, counsel for Defendant.

ORDER ON DEFENDANT'S MOTION
TO STRIKE RESTITUTION

The above captioned Defendant has motioned this Honorable Court to strike restitution in excess of $1,000.00 ordered after he pled guilty to Theft by False Pretenses (less than $1,000.00). For the following reasons, the motion to strike is granted and restitution in this case is limited to $999.99.

BACKGROUND

On January 25, 2006, Defendant presented Kerry Duperron ("Victim") with an out-of-state money order for $1,500.00 and asked her to deposit it in her checking account for him under the premise that he did not have a bank account. Victim deposited the money order and waited a few days for the money order to clear. On January 31, 2006, Defendant contacted Victim and requested that she write him a check for $1,000.00, as per their agreement whereby Victim was to keep $500.00 of the money

order as payment for helping Defendant. Victim wrote Defendant a check and on February 1, 2006 she was informed that a stop payment was placed on the money order. As a result of the stop payment, several of Victim's checks were returned as insufficient funds.

Defendant was arrested on February 28, 2006 and charged with Felony Theft by False Pretenses (over $1,000.00). His Preliminary hearing was held on March 6, 2006 and the case was transferred to Superior Court. On April 10, 2006, the charge was amended to Theft by False Pretenses (less than $1,000.00), and the case was transferred back to this Court from Superior Court. On May 17, 2006 the State filed an information for Theft by False Pretense under $1000.00. At Defendant's May 22, 2006 arraignment, he pled guilty to Theft by False Pretenses (less than $1,000.00). The recommended sentence written on the Plea Agreement signed by Defendant, his attorney, and the Deputy Attorney General was one year at Level V, suspended for one year of Level II probation and "Restitution – 30 Days to determine." The Court sentenced Defendant to six months at Level V, suspended for one year at Level II; no contact with Victim; and "State has 30 days to determine restitution." No other mention of restitution was made on the record.

On June 26, 2006, four days after the expiration of the 30-day period for determining restitution, the State submitted its request for restitution in the amount of $2,567.66. The State mailed notice of its request to Defendant but not Defendant's counsel. Defendant did not request a Restitution Hearing within thirty (30) days of receiving the notice and the Court amended the sentencing order to include the requested

restitution on July 31, 2006. The Amended Sentencing Order was mailed to Defendant and Defendant's counsel, but the Defendant's copy was returned as undelivered. Defendant has since made payments towards the restitution totaling $412.00. On October 18, 2007 Defendant's counsel filed the present Motion to Strike Restitution.

DISCUSSION

Restitution Under 11 Del.C. *§ 4106(a)*

Title 11, Section 4106(a) of the Delaware Code governs the imposition of restitution upon any person convicted of "stealing, taking, receiving, converting, defacing or destroying property." 11 *Del.C.* § 4106(a). Persons convicted of these offenses "shall" be liable to the victim of the offense for "the value of the property or property rights lost to the victim and for the value of any property which has diminished in worth" as a result of the convicted offender's actions. *Id.* Additionally, the convicted offender "shall also be liable for direct out-of-pocket losses, loss of earnings and other expenses and inconveniences incurred by victim as a direct result of the crime." *Id.* The Delaware Supreme Court has interpreted 11 *Del.C.* § 4106 to "expand (and not limit) the use of restitution in those cases where persons are convicted of 'stealing, taking, receiving, converting, defacing, or destroying property.'" *Wyatt v. State*, 498 A.2d 1088, 1089 (Del.1985) (quoting 11 *Del.C.* § 4106(a)).

In the motion *sub judice*, Defendant primarily relies on the interpretation of 11 *Del.C.* § 4106(a) found in *State v. Hoffman*, 2003 WL 21221811 (Del.Super. May 19, 2003), to support his position that restitution must be limited by the very nature of the charge, Theft by False Pretenses (less than $1,000.00). In *Hoffman*, the defendant pled

nolo contendere to Offensive Touching and one count of Criminal Mischief (less than $1,000.00)and the State entered a *nolle prosequi* on the remaining charges. *Id.* As part of the plea agreement, the defendant agreed to pay restitution to the victims for "[a]ll charged offenses." *Id.* The State sought $4,560.95 in restitution to compensate the victims for personal property damage. *Id.*

The defendant in *Hoffman* presented three arguments on appeal, two of which are relevant to the case at bar: (1) the victims lost their ability to collect restitution when the State submitted the required paperwork two weeks after the date agreed upon in the plea agreement; and (2) the conviction for Criminal Mischief (less than $1,000.00) limited his restitution liability to $999.99. *Id.* As to the first argument, the Court concluded that the lack of timeliness(2 weeks) in submitting the restitution amount did not prejudice the defendant and did not preclude restitution. *Id.* at *3. As to the second argument, the Court agreed with the defendant and held that restitution was limited to $1,999.98 (the sum of the maximum restitution under both Criminal Mischief charges). *Id.*

In this case, only four days lapsed in submitting the restitution amount beyond the thirty day limit. This Court agrees with the rationale in *Hoffman* and finds that this short delay of four days beyond the agreed time in no way prejudiced the Defendant or precluded the award of restitution.

Regarding the second argument, the Superior Court in *Hoffman* applied 11 *Del.C.* § 4106(a) and even noted the expansive effect of § 4106(a) as mentioned in *Wyatt*. *See Hoffman*, 2003 WL 21221811, at *1. However, the *Hoffman* Court considered *State ex rel. B.D.*, 1981 WL 382264 (Del.Super. Oct. 19, 1981), a Superior Court decision on a

Family Court appeal, and *State in the Interest of Steven P.*, 1989 WL 34334 (Del.Fam.Ct. Mar. 31, 1989), to be more factually similar to the issues before the Court and, therefore, more persuasive. *Hoffman*, 2003 WL 21221811, at *1-2. The *Hoffman* Court quoted the following language from *State ex rel. B.D.*:

> Unless there is a factual basis on record for establishing a defendant's responsibility for a victim's damages, the defendant cannot constitutionally be ordered to make restitution for the victim's loss. To hold otherwise would be to deprive such a defendant of his property without due process of law, for he would be paying for damages without it ever having been proven that he caused them. … If [a defendant] pleads guilty to the offense, or, even if not charged, if he voluntarily admits to having committed it, … questioning by the court on the record prior to accepting the plea or admission will establish the factual basis and satisfy the requirement.

Hoffman, 2003 WL 21221811, at *2 (quoting *State ex rel. B.D.*, 1981 WL 382264, at *1). Following this logic, the Court in *Hoffman* found that the defendant did not plead guilty or perform any act on the record to explicitly accept responsibility for any loss greater than $1,000.00. *Hoffman*, 2003 WL 21221811, at *2. By pleading *nolo contendere*, the defendant admitted his responsibility for $999.99 in damages on one count of Criminal Mischief (less than $1,000.00) and, by way of express language in the plea agreement, agreed to pay restitution on all other charged offenses. *Id.* Since, in the Court's view, the only two charges that raised the issue of restitution were the two criminal mischief offenses, the Court limited restitution to $1,999.98.[1] *Id.*

The facts of the case *sub judice* are very similar to those in *Hoffman*. Both Hoffman and Sterner pled guilty to offenses with monetary limits that defined the charge.

[1] In passing, the Court indicates that if the defendant had been convicted of lesser included offenses, rather than the original charges, this result could have been different. Hoffman, 2003 WL 21221811, at *2.

See id. at *1. The State in both cases was seeking restitution in an amount exceeding that monetary cap. *See id.* Neither Hoffman nor Sterner pled guilty to a lesser included offense. *See id.* The plea agreements drafted for Hoffman and Sterner each contained a specific provision for restitution. *See id.* And most importantly, neither the Defendant here, nor the defendant in *Hoffman* indicated on the record that they were accepting responsibility for any loss in excess of the monetary limit on the offense. *See id.* at *2.

There are some differences between this case and *Hoffman*, but those differences tend to favor Defendant in the case at bar. For example, unlike the facts in *Hoffman*, in the case at bar, Defendant was only charged with one count of Theft by False Pretenses (less than $1,000.00), hence in this case there is no basis for restitution outside of the single charge. *See id.* at *1. The most important difference between these two cases is that the defendant in *Hoffman* expressly agreed to pay restitution on all charged offenses, whereas here Defendant simply agreed to "restitution." *See id.*

Because *Hoffman* interprets 11 *Del.C.* § 4106(a) under a set of facts strikingly similar to those in the present case, this Court is bound to follow that decision. Title 11 Section 4106(a) of the Delaware Code governs restitution in this case because Defendant pled guilty to a charge of theft. 11 *Del.C.* § 4106(a). Defendant made no indication either in his plea agreement or on the record that he was admitting liability in excess of the $1,000.00 monetary limit attached to the charge. In *Hoffman*, the Superior Court held that under 11 *Del.C.* § 4106(a), restitution cannot exceed the monetary limits attached to a criminal charge unless the defendant indicates to the Court, either by way of plea agreement or by performance of an act on the record, the he is accepting responsibility

for restitution in excess of the monetary limit. 2003 WL 21221811, at *2. As a court of limited jurisdiction, the Court of Common Pleas is bound to follow the rulings of the Superior Court. *Dobyns v. Dobyns*, 2003 WL 22931393, at *3 (Del.Com.Pl. Sept. 30, 2003). Therefore, based on the *Hoffman* Court's interpretation of 11 *Del.C.* § 4106(a), this Court is obligated to limit restitution in this case to $999.99.

Timeliness

The State argues that because the restitution in this case was ordered over a year before the present motion was filed, Defendant is barred from asserting his claims under the equitable theory of laches. Laches has two essential elements: (1) the moving party must have knowledge of the claim and (2) there must be prejudice to the non-moving party from an unreasonable delay by the moving party in bringing the claim. *See Fike v. Ruger*, 752 A.2d 112, 113 (Del.2000). In determining what constitutes an unreasonable delay, "the temporal aspect of the delay is less critical than the reasons for it, because in some circumstances even a long delay might be excused." *Khanna v. McMinn*, 2006 WL 1388744, at *30 (Del.Ch. May 9, 2006).

As to the knowledge element of laches, the Court finds that Defendant did indeed have knowledge of the amount of restitution being requested by the State. On or about June 26, 2006, Defendant, but not Defense Counsel, was mailed notice from the State indicating that it was submitting a request for restitution in the amount of $2,567.66. On or about July 27, 2006, Defense Counsel, but not Defendant, received an Amended Sentencing Order from the Court indicating that restitution in the amount of $2,567.66

had been added. Moreover, the fact that Defendant later paid a portion of the restitution further confirms his knowledge that restitution had been ordered.

Turning to the second element of laches, the Court finds that Defendant's delay in filing the present motion was not unreasonable, and further, the delay has in no way prejudiced the State or the victim. Although the length of the delay in filing this motion was very large, considering the deficiencies in providing Defendant and his counsel with the notice of restitution and the Amended Sentencing Order, it was not unreasonable.

Rule 44 of the Court of Common Pleas Criminal Rules provides that every defendant who cannot afford representation shall have counsel assigned to represent them, pursuant to 11 Del.C. § 5103, "at every stage of the proceedings from initial appearance … through appeal when required by law or when deemed appropriate by the court …" Ct.Com.Pl.Crim.R. 44(a). Whenever a party is represented by an attorney, Court of Common Pleas Criminal Rule 49 requires that written notices and similar papers shall be served upon the attorney for that party unless service upon the party personally is ordered by the Court. Ct.Com.Pl.Crim.R. 49(a) and (b). By not providing Defendant's attorney with notice of the State's restitution request, the State effectively violated Court of Common Pleas Criminal Rule 49(b). *See* Ct.Com.Pl.Crim.R. 49(b). Furthermore, such failure of service also prohibited Defense Counsel from proactively consulting Defendant within the time period for requesting a Restitution hearing. As to the remainder of the delay in filing the present motion, it is foreseeable that the discrepancy between the documents received by Defendant personally and the documents received by

his attorney could cause a disconnect and confusion between Defendant and Defense Counsel. The consequent delay, while lengthy, is not unreasonable in this instance.

Furthermore, unreasonable delay in and of itself does not satisfy the second element of laches, but a resultant prejudice to the non-moving party is required. The Court finds that Defendant's delay did not result in prejudice to the State or the victim in this case. The State has not, in any of its pleadings, motions or memoranda, alleged that it would suffer any prejudice from allowing the present motion to be considered despite its untimely nature. Nor has the State alleged that the victim would suffer any prejudice. Additionally, the Court cannot perceive any prejudice that would be suffered by either the State or the victim if it were to consider this motion. Therefore, the Court holds that the equitable doctrine of laches does not bar the Court from considering Defendant's motion.

CONCLUSION

For the foregoing reasons, Defendant's motion to strike restitution exceeding $1,000.00 is GRANTED and restitution to the victim, Keri Duperron, is ordered in the amount of $999.99.

IT IS SO ORDERED, this _____day of July, 2008.

_____
The Honorable Rosemary Betts Beauregard