

**COPY**

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION - LAW

COMMONWEALTH OF PENNSYLVANIA, :  
:   
Appellee :   
:   
v. : No. CR-2-2020  
:   
REBECCA HETHERINGTON, :   
:   
Appellant :

Brian B. Gazo, Esquire  
Assistant District Attorney

Counsel for Appellee

Michael P. Gough, Esquire  
Conflict Counsel

Counsel for Appellant

**MEMORANDUM OPINION**

Serfass, J. - November 2, 2022

Rebecca Hetherington (hereinafter "the Appellant") appeals from this Court's Order of September 27, 2022, pursuant to which we denied the "Post-Sentence Motions Submitted by the Defendant". We file the following Memorandum Opinion in accordance with Pa.R.A.P. 1925(a), respectfully recommending that the instant appeal be denied and that our Order of September 27, 2022 be affirmed.

**FACTUAL AND PROCEDURAL HISTORY**

Appellant was charged with Aggravated Assault (18 Pa.C.S.A. §2702 §§A1); Simple Assault (18 Pa.C.S.A. §2701 §§A1); and Harassment (18 Pa.C.S.A. §2709 §§A1) with regard to an incident which occurred at Skirmish Paintball in Penn Forest Township, Carbon County, Pennsylvania on July 11, 2019 where both Appellant and Thomas Grande injured Nicholas DiConstanzo.

On May 18, 2021, Appellant entered into a *nolo contendere* plea to Simple Assault (18 Pa.C.S.A. §2701 §§A1) with the remaining charges to be dismissed and restitution to Mr. DiConstanzo to be later determined. On July 6, 2021, a pre-sentence investigation report was prepared which included a recommendation of restitution in the amount of twenty-two thousand three hundred thirty-three dollars and ninety-eight cents (\$22,333.98) to Mr. DiConstanzo. On August 23, 2021, Appellant filed a "Petition for Leave to Withdraw Nolo Contendere Plea" which included an assertion that she was not advised by her former counsel that she would be directed to remit restitution to Mr. DiConstanzo as part of her sentence. On September 27, 2021, we entered an order granting Appellant's petition to withdraw her *nolo contendere* plea.

On May 2, 2022, Appellant entered into a guilty plea to Simple Assault (18 Pa.C.S.A. §2701 §§A1) and the remaining charges were dismissed. The written stipulation included the following language: "As per prior PSI ... Restitution to victim in pro rata share of 23,344.85."<sup>1</sup> That same day, Appellant was sentenced to a period of probation for twenty-four (24) months under the supervision of the Carbon County Adult Probation and Parole Department and directed to pay restitution in the amount of twenty-three thousand three hundred

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<sup>1</sup> We note that there is a discrepancy between the restitution amount listed in the pre-sentence investigation report and the amount listed in the guilty plea stipulation. At the hearing on Appellant's post-sentence motions, counsel for the Commonwealth indicated that the amount listed in the guilty plea stipulation was calculated based on lost wages over a period of six (6) months taken from Mr. DiConstanzo's 2017 and 2018 W-2 forms combined with his unreimbursed medical expenses and out-of-pocket costs.

forty-four dollars and eighty-five cents (\$23,344.85) to Mr. DiConstanzo.

On May 6, 2022, Appellant filed her "Post-Sentence Motions Submitted by the Defendant" challenging the imposition of restitution and seeking clarification regarding the amount of restitution for which she is responsible. Appellant claimed she believed that she was responsible for one-half of twenty-three thousand three hundred forty-four dollars and eighty-five cents (\$23,344.85) rather than that entire sum. On September 27, 2022, following an extensive hearing and the receipt of supplemental documentation from Mr. DiConstanzo, we entered an order denying Appellant's post-sentence motions and directing her to pay restitution in the amount of twenty-three thousand three hundred forty-four dollars and eighty-five cents (\$23,344.85) to Mr. DiConstanzo.<sup>2</sup> (Court's Order of 9/27/22). Although the record supported a higher restitution amount, we found that because the parties entered into a written stipulation for a guilty plea which included restitution to Mr. DiConstanzo in the pro rata share of twenty-three thousand three hundred forty-four dollars and eighty-five cents (\$23,344.85), the parties were therefore bound by the terms of this agreement. (Court's Order of 9/27/22).

On October 4, 2022, Appellant filed an Appeal to the Superior Court of Pennsylvania requesting review and reversal of this Court's

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<sup>2</sup> On August 30, 2022, Appellant's counsel submitted a written request for a thirty (30) day extension of the one hundred twenty (120) day time limit for rendering a decision on Appellant's post-sentence motions.

September 27, 2022 Order denying her post-sentence motions. On October 5, 2022, we entered an order directing Appellant to file a concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). In compliance with our order, Appellant filed her "Concise Statement of Matters Complained of on Appeal" on October 25, 2022.

### ISSUES

In her Concise Statement, Appellant raises the following issues:

1. Whether this Court erred in enforcing the terms of the guilty plea stipulation; and
2. Whether this Court erred in calculating the average annual income of Mr. DiConstanzo for purposes of restitution.

### DISCUSSION

Appellant first argues that this Court erred in strictly enforcing the terms of the guilty plea stipulation executed on May 2, 2022 because the terms of the stipulation were ambiguous. "'A stipulation is a declaration that the fact agreed upon is proven, and a valid stipulation must be enforced according to its terms.'" Commonwealth v. Gboko, 243 A.3d 247, 249 (Pa.Super. 2020) (*quoting* Commonwealth v. Mitchell, 902 A.2d 430, 460 (Pa. 2006)). The guilty plea stipulation executed on May 2, 2022 provides: "Restitution to victim in pro rata share of \$23,344.85."

"[E]ven though a plea agreement arises 'in a criminal context, it remains contractual in nature and is to be analyzed under contract law standards.'" Commonwealth v. Hainesworth, 82 A.3d 444, 449 (Pa.Super. 2013) (*quoting* Commonwealth v. Kroh, 654 A.2d

1168, 1172 (Pa.Super. 1995)). "Accordingly, it is critical that plea agreements are enforced, 'to avoid any possible perversion of the plea bargaining system.'" Id. (*quoting Commonwealth v. Fruehan*, 557 A.2d 1093, 1094 (Pa.Super. 1989)) (internal citations omitted). "Assuming the plea agreement is legally possible to fulfill, when the parties enter the plea agreement and the court accepts and approves the plea, then the parties and the court must abide by the terms of the agreement." Commonwealth v. Kerns, 220 A.3d 607, 612 (Pa.Super. 2019) (*quoting Commonwealth v. Farabaugh*, 136 A.3d 995, 1001-02 (Pa.Super. 2016)).

"Moreover, when a plea is entered following negotiations, it is even more important that the terms of the agreement be followed." Commonwealth v. Ortiz, 854 A.2d 1280, 1283 (Pa.Super. 2004). The Superior Court has held that it is improper to modify the terms of restitution where the amount of additional restitution could have been ascertained and revealed to the trial court prior to sentencing, the restitution was part of a plea agreement and there was no change in circumstances. Id. at 1284.

Here, the Commonwealth and Appellant entered into a written stipulation for a guilty plea which included restitution to Mr. DiConstanzo in the pro rata share of twenty-three thousand three hundred forty-four dollars and eighty-five cents (\$23,344.85). This Court approved the parties' stipulation and accepted Appellant's guilty plea at her sentencing on May 2, 2022. No testimony or evidence was presented at the hearing on Appellant's post-sentence motions

indicating a material change in Appellant's circumstances warranting a modification of the terms of the agreement. Therefore, we found that the parties were bound by the terms of this agreement and thus denied Appellant's post-sentence motions.

Appellant's second and final issue concerns whether this Court erred in calculating the average annual income of Mr. DiConstanzo for purposes of restitution. Appellant argues that this Court's calculation was erroneous because Mr. DiConstanzo's income was variable based on the particular job or project at which he was employed during a given year.

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.

Commonwealth v. Pleger, 934 A.2d 715, 720 (Pa.Super. 2007) (internal citations omitted).

During the hearing on Appellant's post-sentence motions, Mr. DiConstanzo testified that he was employed as an electrician for ADCO Electrical Corporation at Hudson Yards Tower A in New York City, that he earned approximately fifty-two dollars (\$52.00) per hour and that he typically worked forty (40) hours per week. Mr. DiConstanzo



testified regarding his annual earnings as reflected in his 2017 and 2018 W-2 forms and stated that he worked the same job for the same rate for the same number of hours throughout 2017, 2018 and 2019 up until his injury. Mr. DiConstanzo further testified that he was unable to work from the time of the incident in July of 2019 until February of 2020 due to the injuries he sustained as a result of Appellant's criminal conduct.

Based upon our review of the testimony and evidence presented, we found that the record supported restitution in the amount of twenty-five thousand forty-six dollars and twenty-nine cents (\$25,046.29). This sum was based on a thorough review of Mr. DiConstanzo's 2019 and 2020 W-2 forms, taking into account that he worked until he was injured on July 11, 2019 and that he did not return to his employment until February of 2020. Based upon the documentation introduced into evidence, Mr. DiConstanzo's total wage loss during this period was forty-eight thousand forty-two dollars and forty-seven cents (\$48,042.47).<sup>3</sup> In addition, unreimbursed medical expenses and out-of-pocket costs totaled two thousand fifty dollars and ten cents (\$2,050.10) for a combined total restitution figure of fifty thousand ninety-two dollars and fifty-seven cents (\$50,092.57). Dividing that sum in half to arrive at Appellant's pro rata share yielded a restitution amount of twenty-five thousand forty-

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<sup>3</sup> Mr. DiConstanzo testified that he receives supplemental income from the additional security benefit fund through his union. A W-2 form documenting the supplemental income Mr. DiConstanzo received in 2019 was produced, but a 2020 W-2 form was not. This supplemental income was considered in our calculation.

six dollars and twenty-nine cents (\$25,046.29) which reflects the lost wages, unreimbursed medical expenses and out-of-pocket costs sought by Mr. DiConstanzo and sustained as a direct result of Appellant's criminal conduct in this matter.

We find that Mr. DiConstanzo's 2019 and 2020 W-2 forms provide the best evidence to most accurately calculate his lost wages during the period between July of 2019 and February of 2020 when he was unable to work due to his injuries. Additionally, we note that we did not impose restitution in the amount of twenty-five thousand forty-six dollars and twenty-nine cents (\$25,046.29) based on the lost wages, unreimbursed medical expenses and out-of-pocket costs sought by Mr. DiConstanzo, but held Appellant responsible for restitution in the lesser amount of twenty-three thousand three hundred forty-four dollars and eighty-five cents (\$23,344.85) as the agreed-upon sum in the parties' written stipulation.

#### CONCLUSION

Based upon the foregoing, we respectfully recommend that the instant appeal be denied and that our Order of September 27, 2022 be affirmed accordingly.

BY THE COURT:

A handwritten signature in black ink, appearing to read "S.R. Serfass", written over a horizontal line.

Steven R. Serfass, J.