IN THE SUPREME COURT
OF PENNSYLVANIA
MIDDLE DISTRICT

47 MAP 2018

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

JOSEPH PETRICK,
Appellant

Appeal from the Order of the Superior Court (619 MDA 2017) dated February 20, 2018 per the Honorable Gantman, P. J., Shogun, J., and Ott, J. affirming the Judgment of the Court of Common Pleas of Lackawanna County per the Honorable Vito Geroulo entered on December 12, 2016

BRIEF FOR APPELLANT

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III. STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 42 Pa. C.S. § 724 which grants the Supreme Court jurisdiction of appeals from orders of the Superior Court.

IV. STATEMENT OF BOTH THE SCOPE OF REVIEW AND THE STANDARD OF REVIEW

A claim challenging the legality of a sentence of restitution is a question of law. Com. v. Karth, 994 A.2d 606 (Pa. Super. Ct. 2010). Questions of law are subject to *de novo* review by the appellate courts. The scope of review is plenary. Id.

V. ORDER IN QUESTION

"Judgment of sentence affirmed. Jurisdiction relinquished."

Memorandum by Ott, J.

Gantman, P. J, Shogun, J. join in.

s/Joseph D. Seletyn, Esq."

Prothonotary

Date: 2/20/18"

Due to the length of the Memorandum Opinion, the same has been attached hereto as Appendix A.

VI. STATEMENT OF QUESTION INVOLVED

A. WHETHER THE COURTS BELOW HAD THE AUTHORITY TO DIRECT PAYMENT OF RESTITUTION WHICH OBLIGATION HAS BEEN PREVIOUSLY DISCHARGED IN APPELLANT'S BANKRUPTCY.

1. Illegality of Sentence is Not Waived
2. Balancing a State's Police and Regulatory Powers Against the federal Bankruptcy Code Permitting Discharge of Certain Debts
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VII. STATEMENT OF THE CASE

A criminal complaint was filed against the Appellant, Joseph Petrick, on or about October 5, 2015, charging him with Deceptive Business Practices, 18 Pa. C.S. § 4107(a)(2) and Theft by Deception, 18 Pa. C.S. § 3922(a)(1). Upon the conclusion of a preliminary hearing held on January 12, 2016, the charges were bound over. After a non-jury trial, Appellant was found guilty of Theft by Deception and not guilty of Deceptive Business Practices. Prior to the commencement of trial, the Commonwealth had filed a *Motion in Limine* to preclude the introduction of any evidence regarding his bankruptcy proceeding. There is nothing in the record indicating that the trial court ever ruled on this motion. The record does indicate that there were limited questions and minimal evidence regarding his bankruptcy. (N.T., 12/12/16, p. 64-65, 66, 74, 78)

The following testimony was proffered at the bench trial:

Carmen Fazio, the complainant Donna Sabia's son, testified first. He explained that Appellant was hired to do some home improvement work on a home owned by his mother, Donna Sabia, located at 991 Albright Ave, Scranton. (N.T., 12/12/16, p. 6) Mrs. Sabia (hereinafter referred to as homeowner) and Appellant entered into a written contract dated April 14, 2015 for the work to be done to commence on April 16, 2015. (Commonwealth's Exhibit A; N.T., 12/12/16, pp. 7- 8, 10) The contract called for new plumbing, new sheet rock in the living room, bathroom, kitchen and to prep the walls for painting for a total price of $3,500.00. (N.T., 12/12/16, p. 9) The parties had discussed Appellant performing additional work involving painting for approximately $700.00 to $800.00. (N.T., 12/12/16, p.

12) The parties entered into a separate contract for additional work to be done on the outside of the house for a price of $2,300.00.

Appellant did commence work on the job, having done some framing for the fireplace and the ceiling, installing other framing in the kitchen and purchasing materials for the job and transporting them to the job site.(N.T. 12/12/16, pp. 10, 11, 15, 56-57, 58) Despite promises and/or explanations as to why he was unable to immediately return to the job, he never did return to complete the work,. (N.T., 12/12/16 p. 19, 21-24) The record indicates that the total amount the homeowner paid Appellant was $6,100.00, plus $300.00 for permits, which the homeowner claimed Appellant never obtained. (N.T., 12/12/16, pp. 18-19)

Appellant filed for bankruptcy on or about August 5, 2015. (N.T., 12/12/16, p. 38) The homeowner acknowledged receipt of notification by the bankruptcy court of Appellant's filing and stated she was listed as a creditor. (N.T., 12/12/16, pp 37-38, 65) However, neither the homeowner nor her son appeared at the 341 hearing that was held in December 2015. (N.T., 12/12/16, p. 65) There was no evidence proffered when the discharge was entered. As noted above, the criminal complaint was filed on October 5, 2015, when no return of money was made to the homeowner.

At the conclusion of the Commonwealth's case, Appellant's demurrer to the evidence was denied. (N.T., 12/12/16, p. 54)

Appellant testified. He explained that due to a number of reasons, *inter alia*, inability to obtain helpers/employees, not being paid for other jobs, theft of his tools, he was unable to complete the work. He explained that because of financial difficulties, he eventually had to file for bankruptcy. (N.T., 12/12/16, pp. 62-63, 64)

He further testified that due to his financial difficulties, money from one job would be moved to another until he got paid from that other job. (N.T., 12/12/16, p. 63)

Appellant testified that he filed *pro se* for Chapter 7 bankruptcy in August 2015. (N.T., 12/12/16, pp. 64, 74) He explained that he and "his family" filed for bankruptcy. (N.T., 12/12/16, pp. 64-65) However, there was no further information or identification of exactly what names were listed as debtors on the filing. Appellant initially listed Fazio in his Bankruptcy Petition as a creditor because he was the contact individual and he considered him the general contractor. He later amended his Bankruptcy Petition to include Mrs. Sabia, Mr. Fazio's mother, the actual homeowner, as a creditor. (N.T., 12/12/16, pp. 64-65) Appellant's bankruptcy was completed and the homeowner's debt was discharged. (N.T., 12/12/16, p. 66) He stated that he believed that while he was in bankruptcy he was not allowed to make payment to the homeowner. Id.

Upon conclusion of the bench trial, Appellant was found guilty of theft by deception and found not guilty of deceptive business practices. He was sentenced on March 8, 2017 to 3 to 18 months incarceration and was ordered to pay restitution of $6,700.00 to the homeowner at a rate of $100.00 a month commencing 30 days after he is released from parole. (N.T., Sentencing, 3/8/17, p. 11)

At sentencing, Appellant attempted to explain that he was only attempting to follow the bankruptcy laws. He informed the court that he was not trying to get out of paying the homeowner and thought that the homeowner would file a claim in bankruptcy court. (N.T., Sentencing, 3/8/17, p. 8) Counsel for Appellant at sentencing represented to the court that there was no objection to restitution. (N.T., Sentencing, 3/8/17, p. 2)

Appellant did not file post-trial motions, but did file a Motion for Reconsideration of Sentence which was denied. A timely appeal to the Superior Court followed. The Appellant filed a Concise Statement of Matters Complained of on Appeal on May 11, 2017. The trial court filed its Opinion Pursuant to Pa.R.A.P. 1925(a) on June 2, 2017. The Superior Court affirmed the judgement of the trial court by Memorandum filed on February 20, 2018.

Appellant filed a Petition for Allowance of Appeal which was granted on August 29, 2018 on the limited issue of whether the courts below had the authority to direct payment of restitution which obligation had been previously discharged in Appellant's bankruptcy.

VIII. SUMMARY OF ARGUMENT

Appellant asserts that the trial court committed an error of law and imposed an illegal sentence when it ordered that he pay restitution of the full amount paid to him by the homeowner which debt had been previously discharged in bankruptcy. Although his claim of an illegal sentence was not raised in the trial court at sentencing, in his Motion for Reconsideration, or in his concise statement, he submits that a claim of an illegal sentence can never be waived. Com. v. Jacobs, 900 A.2d 368, 374 (Pa. Super. Ct. 2006) (en banc).

18 Pa. C.S. § 1106(c)(1)(i), re-written in 1995, provides that: "(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." 18 Pa. C.S.A. § 1106(c)(1)(i). (emphasis supplied) Relying on pre-1995 case interpretations and despite significant post-1995's changes, recent appellate courts have ignored the statute's current mandatory compensatory purpose. This characterization of the current restitution statute as rehabilitative fails to consider its mandatory language and the fact that consideration of a defendant's ability to pay restitution is no longer necessary. In light of the compensatory purpose of 18 Pa. C.S. § 1106, Appellant asserts that the imposition of restitution in the amount of a debt previously discharged in Appellant's bankruptcy is in violation of Section 362(a)(6) of the Bankruptcy Code. 11 U.S.C. §362(a)(6)

Kelly v. Robinson, 479 U.S. 36, (1986), is clearly distinguishable from the facts and the restitution statute presented for this Court's consideration for several reasons. The Appellant filed for bankruptcy well before the criminal charges were filed and his debt was discharged prior to the restitution order. The restitution is

for the benefit of the homeowner and, once collected, will be paid to her. Appellant contends that it is an attempt to collect a debt through the criminal process which had been discharged. But more significantly, since the Pennsylvania restitution statute is compensatory rather than rehabilitative, and since the Connecticut statute was found in Kelly to be rehabilitative, Appellant asserts that the Superior Court's reliance on Kelly was in error.

It has been repeatedly held that the Bankruptcy Code will not permit the State to use criminal prosecution for the sole purpose of collecting a debt dischargeable in bankruptcy, or to use law enforcement as a collection agency. Johnson v. Lindsey, 16 B.R. 211, 212 (Bankr. M.D. Fla. 1981). The imposition of the restitution by the trial court runs an end game around the provisions of the Bankruptcy Code's protection afforded to debtors from the collection of debts which have been discharged. The homeowner was notified of Appellant's bankruptcy filing but failed to avail herself of the process for pursuing her claim. The restitution order constituted an illegal sentence since it is an attempt to collect a debt which has been discharged in bankruptcy through the criminal process.

Appellant asserts that Com. v. Shotwell, 717 A.2d 1039 (Pa. Super. Ct. 1998) is not binding on this Court since it is a decision from an intermediate appellate court and since it erroneously applied Kelly, a rehabilitative restitution statute decision. Pennsylvania is compensatory restitution statute. As such, the debt was discharged under the Bankruptcy Code.

Finally, Appellant urges, as suggested by *Amici*, that the Court adopt and apply a multi-factor test to evaluate the use of restitution ordered in state criminal proceedings *vis-à-vis* the Bankruptcy Code's discharge provisions. If this test is adopted, Appellant believes that it would then be appropriate for this Court to

remand the present case for development of the relevant facts for the application of this test.

IX. ARGUMENT

A. WHETHER THE TRIAL COURT COMMITTED AN ERROR OF LAW AND IMPOSED AN ILLEGAL SENTENCE WHEN IT ORDERED RESTITUTION TO THE HOMEOWNER SINCE THE DEBT HAD BEEN DISCHARGED IN APPELLANT'S BANKRUPTCY.

1. Illegal Sentence Issue is Not Waived

Appellant asserts that the trial court committed an error of law and imposed an illegal sentence when it ordered that he pay restitution in the full amount to the homeowner. Although his claim of an illegal sentence was neither objected to at sentencing nor raised in his motion for reconsideration of sentence nor in his concise statement, Appellant submits that a claim of an illegal sentence can never be waived. See, Com. v. Wallace, 533 A.2d 1051 (Pa. Super. Ct. 1987) (sentences beyond the power of the court to impose are illegal sentences as a matter of law); Com. v. Isabell, 467 A.2d 1287 (Pa. 1983) (claim that sentence is beyond the court's power can be raised for the first time on appeal). "An illegal sentence can never be waived and may be reviewed *sua sponte* by this Court." Jacobs, 900 A.2d at 374. A penalty or sanction that the State imposes solely as a means to collect a debt for a pecuniary loss can be discharged in the bankruptcy process—and once it is discharged, a state trial court cannot order that a defendant pay that debt in the form of restitution. 11 U.S.C. § 523 (a)(7).

As part of his sentence, the trial court ordered Appellant to pay restitution in the full amount the homeowner claimed, despite the fact this debt was previously discharged in his bankruptcy. As such, Appellant assert that the trial

court did not have the authority to order restitution to the homeowner, since this debt had been discharged in his bankruptcy prior to the filing of criminal proceedings and prior to the restitution order. Consequently, Appellant asserts that the restitution order was an illegal sentence.

Although Appellant's trial counsel stated at sentencing that there was no objection to restitution, this statement does not change the fact that the trial court imposed an illegal sentence since sentences beyond the power of the court to impose are illegal sentences as a matter of law. Isabell, 476 A.2d at 1291.

2. Balancing a State's Police and Regulatory Powers Against the federal Bankruptcy Code Permitting Discharge of Certain Debts

This Court is confronted with the balancing of the interests of a State's police power to protect its citizens by prosecuting and punishing individuals who are found guilty of a crime against the protection afforded by the federal Bankruptcy Code which allows a debtor a fresh start through the discharge of preexisting debts. As observed in United States v. Kras, 409 U.S. 434, 457 (1973), the intention of the bankruptcy discharge is to excuse an insolvent debtor "from the weight of oppressive indebtedness, and permit him to start afresh . . . ." (quoting Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 554-55 (1915)). Furthermore, as recognized by the Supreme Court almost 75 years ago "This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time

of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt". Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934). The ability to discharge a debt is, however, not unhampered. The United States Bankruptcy Code (Bankruptcy Code) sets forth certain protections which support a State's police powers.

The Bankruptcy Code provides that a debt is non-dischargeable to the extent it is "for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not for compensation of actual pecuniary loss." 11 U.S.C. § 523(a)(7). Consequently, a fine payable to and for the benefit of a State (e.g., to serve a rehabilitative purpose of the State) is non-dischargeable. However, a penalty or sanction that the State imposes solely as a means to collect a debt for a pecuniary loss can be discharged in the bankruptcy process—and once it is discharged, a state trial court cannot order that a defendant pay that debt in the form of restitution. 11 U.S.C. § 523(a)(7).

Appellant argues that the Pennsylvania restitution statute at issue is purely compensatory and serves no rehabilitative purpose. Thus, he contends the trial court was without the legal authority to order that he pay restitution to the homeowner in the amount of $6,700.00, which sum had been previously discharged in his bankruptcy.

Restitution is mandated by statute in Pennsylvania, as set forth in two separate statutory provisions. The Sentencing Code, 42 Pa. C.S. § 9721(c), provides:

> (a) Mandatory Restitution. - In addition to the alternatives set forth in subsection (a) of this section the court shall order the defendant to compensate the victim of his criminal conduct for the damages or injury that he sustained.

The Crimes Code also includes mandatory restitution sections. Section 1106(c)(1)(i) of the Crimes Code, provides that:

> (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. The court shall not reduce a restitution award by any amount that the victim has received from the Crime Victim's Compensation Board or other governmental agency but shall order the defendant to pay any restitution ordered for loss previously compensated by the board to he Crime Victim's Compensation Fund or other designated account when the claim involves a government agency in addition to or in place of the board. The court shall not reduce a restitution award by any amount that the victim has received from an insurance company but shall order the defendant to pay any restitution ordered for loss previously compensated by an insurance company to the insurance company.

18 Pa. C.S. § 1106(c)(1)(i)(emphasis added).

In 1995, Section 1106 was rewritten. Prior to the 1995 revisions, when imposing a restitution order, the sentencing court was required to consider a defendant's ability to pay the restitution imposed. See, Com. v. Runion, 662 A.2d 617 (Pa. 1995); Com. v. Valent, 463 A.2d 1127 (Pa. Super. Ct. 1983); Com. v. Wood, 446 A.2d 948 (Pa. Super. Ct. 1982).

By requiring a court to consider a defendant's financial resources and his ability to pay, restitution served as an element of rehabilitation by "impressing upon the offender the loss he has caused and his responsibility to repair that loss as far as it is possible to do so." Com. v. Fuqua, 407 A.2d 24, 26 (Pa. Super. Ct. 1979)(citation omitted). As noted in Fuqua, "If the amount of restitution imposed exceeds the defendant's ability to pay, the rehabilitative purpose of the order is disserved, especially where the restitution payment is a condition

of probation, for in such a case the defendant is told that he will not be imprisoned only if he somehow satisfies a condition he cannot hope to satisfy. Indeed, this was key to rehabilitation, as a "concern that the victim be fully compensated should not overshadow its primary duty to promote the rehabilitation of the defendant." Id. Consequently, where "the amount of restitution imposed exceeds the defendant's ability to pay, the rehabilitative purpose of the order is disserved." Id.

Relying on pre-1995 case interpretations and despite significant post-1995's changes, recent appellate courts have ignored the statute's mandatory compensatory purpose. The characterization of the current restitution statute as rehabilitative fails to consider its mandatory language and the fact that consideration of a defendant's ability to pay restitution is no longer necessary.

In Com. v. Veon, 150 A.3d 435, 466–67 (Pa. 2016), this Court recently commented that "the well-established principle [is] 'that the primary purpose of restitution is rehabilitation of the offender.'" To support its conclusion that restitution in Pennsylvania is rehabilitative, the Veon Court relied upon and quoted Com. v. Runion, 662 A.2d 617. Appellant respectfully submits that Runion was decided in a different time, one in which restitution under Scetion 1106 could only be imposed in "the amount that the offender can afford to pay." Runion, 662 A.2d at 619. Appellant submits that the Veon Court inappropriately relied on Runion when describing the Pennsylvania restitution statute as rehabilitative. Appellant maintains that in Pennsylvania, restitution no longer serves the rehabilitative purpose that it once did. Rather, restitution now focuses on compensating victims for their loss. Appellant asserts that the imposition of mandatory restitution in the full amount of the victim's damages

without consideration of a defendant's financial ability is clearly compensatory and serves no rehabilitative purposes. He submits that this Court has never addressed whether the post-1995 statute remains rehabilitative. Rather, as in Veon, the Court had simply looked back to the pre-1995 cases and repeated their finding that Pennsylvania statute was rehabilitative, which at the time, was correct.

In the present matter, the trial court, as part of its sentence, ordered Appellant to pay restitution in the exact amount the homeowner believed that the Appellant owed her. In light of the compensatory purpose of Section 1106, Appellant asserts that this is in violation of both the Bankruptcy Code and the case law which has addressed the interpretation of Section 362(a)(6)'s provision that a penalty or sanction that the State imposes solely as a means to collect a debt for a pecuniary loss can be discharged in the bankruptcy process—and once it is discharged, a state trial court cannot order that a defendant pay that debt in the form of restitution. As such, Appellant argues trial court violated this prohibition. He maintains that restitution order constituted an illegal sentence and should, therefore, be vacated.

3. Kelly v. Robinson

In light of the compensatory nature of the Pennsylvania statute, Appellant submits that the Superior Court reliance on Kelly, 479 U.S. 36 was in error.

Kelly involved a Connecticut welfare cheat, Carolyn Robinson, who pled guilty to larceny. Id. at 38. The Connecticut Superior Court ordered her to pay restitution to the state's probation office in the amount of welfare benefits she wrongfully received, the sum of $9,932.95. Id. Robinson filed a Chapter 7

bankruptcy petition three months later. Id. at 39. When the probation office informed Robinson that it considered the restitution obligation to have survived her bankruptcy discharge, she filed a declaratory judgment action to determine whether 11 U.S.C. § 523(a)(7) rendered the restitution non-dischargeable. Id. at 39–40.

Appellant contends that Kelly is not controlling. First, Appellant points out that Kelly involved the filing of bankruptcy after the state court order restitution, a post-judgement filing. In the matter *sub judice,* Appellant filed his bankruptcy months before he was criminally charged, before any conviction was entered, and before any restitution was ordered.

Next, Kelly involved restitution to the state for welfare fraud. Here, the restitution is for the benefit of the homeowner and once collected will be paid to her. It is an attempt to collect a debt through the criminal process which had been discharged.

Finally, and more significantly, Kelly involved a Connecticut statute which was found to be rehabilitative.[1] Kelly recognized that both Congress and the federal courts have acknowledged that a state's interest in enforcing its criminal statutes through the criminal justice system must remain free from federal interference. Id. at 49. After reviewing the Connecticut restitution statute in question, the Kelly Court concluded that it was rehabilitative rather than compensatory. Id. At 53.

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[1] Connecticut Gen.Stat. § 53a–30 (1985) sets out the conditions a trial court may impose on a sentence of probation. Clause 4 of that section authorizes a condition that the defendant "make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay or provide in a suitable manner, for the loss or damage caused thereby and the court may fix the amount thereof and the manner of performance."

As argued, the Pennsylvania statute at issue is clearly compensatory and not rehabilitative. Appellant asserts that the Kelly is, therefore, inapplicable. The Superior Court erred when it applied Kelly to the restitution sentence implicated here.

4. Use of Criminal Prosecution for the Sole Purpose of Collecting a Debt Dischargeable in Bankruptcy

Although federal courts generally abstain from interfering with state criminal matter, see, In re Thompson, 418 F.3d 362 (3d Cir. 2005), Appellant contends that consideration of the purpose behind a state's restitution statute is significant, relevant and applicable. "It is well established . . . that the Bankruptcy Court will not permit the State to use criminal prosecution for the sole purpose of collecting a debt dischargeable in bankruptcy, or to use law enforcement as a collection agency. "Johnson, 16 B.R. at 212.

11 U. S.C. §362(a)(6) provides:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—
>
> ***
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title...

As noted in Johnson:

> To protect a debtor from criminal prosecution is one thing and to protect a debtor from the collection of a dischargeable debt is another. While this Court is satisfied that it would be improvident to interfere with the criminal

> prosecution by the State, it is equally satisfied that neither the State Attorney nor his deputies shall be permitted to use the criminal process to compel the Debtor to make restitution. Accordingly, they should not be permitted, in the event the Debtor is found guilty, to recommend or request that the Court order a restitution either as part of the sentence or as a condition to probation, and the Defendant, [creditor] shall not be permitted to benefit by the criminal prosecution and collect or recover its claim, which is an act expressly covered by the Bankruptcy Code and clearly within the protective provisions of the automatic stay, § 362(a)(6) [11 U.S.C. § 362 (a)(6)].

Johnson, 16 B.R. at 212.

In re Redenbaugh, 37 B.R. 383 (Bankr. C.D. Ill. 1984), the bankruptcy court was asked to enjoin a state criminal prosecution against the debtor for passing worthless checks. In its review, the bankruptcy court first addressed whether the state criminal action conflicted with the Bankruptcy Code. After reviewing the conflict between the state statute and 11 U.S.C. § 524(a)(2), the court focused on the possibility of restitution in the state statute. Upon a review of the record, the court noted that the claimant/creditor had received adequate notice of the debtor's bankruptcy petition and had time to file proof of claim and to file objections to discharge. He did not do so. The debtor was discharged in bankruptcy including the claimant/creditor's debt. Subsequent to this discharge, the claimant/creditor contacted the State's Attorney of Macoupin County to request the State to file criminal charges against the debtor. A preliminary hearing was held after which the charges were bound over. Thereafter, the debtor filed for Injunctive Relief and a Petition for Contempt in bankruptcy court. The bankruptcy court conducted an extensive review of the case law, noting that the issue pits strong policy consideration against each other: the pervasive philosophy and jurisdiction of the Bankruptcy Code buttressed by the Supremacy Clause against the concepts

of comity and federalism and the philosophy that federal courts are loath to enjoin a state court criminal proceeding. The court concluded that the claimant/creditor was enjoined from requesting or receiving any portion of his claim which was discharged in bankruptcy through the criminal action. The court declined to enjoin the criminal prosecution since there was no suggestion that the State's Attorney initiated or proceeded the criminal prosecution in bad faith, but found that the State's Attorney was precluded from recommending to the State Court that the debtor pay restitution as a part of the sentence or as a condition of probation. Id. at 387. In doing so, the Redenbaugh court reviewed the line of cases in which this issue has been raised. Specifically, the court found the analysis in In re Holder, 26 B.R. 789 (Bankr. M.D. Tenn. 1982) and Johnson, and In re Barnett, 15 B.R. 504 (Bankr. D. Kan. 1981) relevant.

In In re Barnett, 15 B.R. 504, the bankruptcy court noted that:

> The creditor cannot request restitution or direct the county attorney to request it, and the county attorney cannot recommend it. The federal Bankruptcy Code, by virtue of the Constitution Supremacy Clause, forbids it, and this Court can and will enjoin any such requests or recommendations. Though this Court cannot enjoin a... state court from ordering restitution because a bankruptcy court does not have the injunctive power against other court, 28 U.S.C.A. § 1481 (West), the federal law nevertheless protects a debtor from having to involuntary satisfy a discharged debt.

In re Barnett, 15 B.R. 504.

As the bankruptcy court in court observed in Johnson, 16 B.R. 211:

> There is no doubt that the filing of a petition in bankruptcy does not immunize a debtor from criminal prosecution. It is well established, however, that the Bankruptcy Court, will not permit the state to use criminal prosecution for the sole purpose of collecting a debt dischargeable in bankruptcy, or to use law enforcement as a collection agency.

Johnson, 16 B.R. at 212.

Even though the above-cited authorities arise out of proceedings in bankruptcy court, Appellant asserts that they, nonetheless, are applicable to the matter herein. Appellant recognizes that the record below was not fully developed as to the timing of Appellant's filing for bankruptcy, that, is whether he was aware of pending criminal charges prior to his filing. The record is, nonetheless, clear that he filed for bankruptcy over a month prior to the filing of the criminal charges.

Next, as the record indicates, the homeowner was notified of the Appellant's bankruptcy, but failed to avail herself of the protection afforded to creditors by the Bankruptcy Code. Sections 501, 502, 523 of the Code sets for the process for creditors to protect their debts. 11 U.S.C. §§ 501, 502, 523. Upon receiving notification of Appellant's bankruptcy, the homeowner could have filed a claim asserting the amount she claim owed and could have objected to or challenged the Appellant's request for discharge of her debt. She did neither. Rather than pursuing through the bankruptcy process the collection of the debt she claimed that Appellant owed, the homeowner chose to pursue him criminally.

5. Commonwealth v. Shotwell

Appellant asserts that the Superior Court's decision in Com. v. Shotwell, 717 A.2d 1039 is not controlling since it is a decision from an intermediate appellate court. Moreover, Appellant submits that the Shotwell court misunderstood and misapplied Kelly for reasons argued *ante*. Appellant contends that the Superior Court's reliance on Shotwell was in error and should not be considered by this Court.

6. Adoption of a Multi-Factor Test

Finally, Appellant urges, as suggested by *Amici*, that the Court adopt and apply a multi-factor test to evaluate the use of restitution ordered in state criminal proceedings. Appellant is cognizant of the difficulties this Court is confronted with when balancing of the interests of a State's police power to protect its citizens by prosecuting and punishing individuals who are found guilty of a crime, against the protection afforded by the federal Bankruptcy Code which allows a debtor a fresh start through the discharge of preexisting debts. *Amici's* proposed five-part test, Appellant believes, would insure that, as has occurred in the present matter, creditors do not improperly pursue criminal charges against debtors to avoid their debts from being discharged. Moreover, it would address the attempt by a criminally charged individual to avoid the imposition of a restitution sentence. As proposed by *Amici* the following questions should be addressed prior to the imposition of a restitution sentence: "(1) whether the statute, rule, or judgment imposing the restitution obligation is compensatory or rehabilitative in nature, (2) whether the proceeding resulting in the imposition of the restitution obligation was initiated at the request of private creditors of the debtor, (3) whether the prosecutor's office conducted an independent investigation into the criminal charges, (4) whether the proceeding resulting in the imposition of the restitution obligation was commenced after the debtor received a discharge in bankruptcy, and (5) whether the beneficiaries of the restitution obligation had notice of the debtor's bankruptcy proceeding and an opportunity to assert their claims in the bankruptcy court and object to the discharge of their claims."

In the present case, the record is not sufficient to address all of these questions. Appellant urges this Court to adopt this this multi factor test and to remand his case to the trial court for the proper development of the facts of his case in order to apply this test.

X. CONCLUSION

For these reasons, the Appellant respectfully request that the restitution order of the lower court be vacated and to remand the case to the lower court for correction of an illegal sentence, or in the alternative, to adopt the *Amici's* proposed five-part test and remand the matter to the trial court for further testimony in order to apply this test in light of the facts and circumstances of this case.

s/ Donna M. DeVita
Donna M. De Vita, ESQUIRE
ATTORNEY FOR APPELLANT

XI. CERTIFICATE OF SERVICE

NOW this 10th day of December, 2018, I, Donna M. De Vita Esquire, Attorney for the Appellant do hereby certify that I served the Brief for Appellant upon the following Individuals by U.S. First Class Mail, Postage Prepaid:

Mark Powell, District Attorney/ Lisa Swift, ADA
Lackawanna County District Attorney's Office
200 North Washington Avenue
Scranton, PA 18503

s/ Donna M. DeVita
Donna M. De Vita, Esq.
ATTORNEY FOR APPELLANT

XIII. APPENDICES

(A) Superior Court Memorandum filed on February 20, 2018

(B) Trial Court Opinion Pursuant to Pa. R.A. 1925(a)

(C) Concise Statement

APPENDIX A

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

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOSEPH PETRICK	:	
Appellant	:	No. 619 MDA 2017

Appeal from the Judgment of Sentence March 8, 2017
In the Court of Common Pleas of Lackawanna County
Criminal Division at No(s): CP-35-CR-0000068-2016

BEFORE: GANTMAN, P.J., SHOGAN, J., and OTT, J.

MEMORANDUM BY OTT, J.: **FILED FEBRUARY 20, 2018**

Joseph Petrick appeals from the judgment of sentence imposed March 8, 2017, in the Lackawanna County Court of Common Pleas. The trial court sentenced Petrick to a term of three to 18 months' imprisonment, and directed him to pay $6,700.00 in restitution, following his non-jury conviction of theft by deception.[1] On appeal, Petrick challenges the sufficiency of the evidence supporting his conviction, as well as the legality and discretionary aspects of his sentence. For the reasons below, we affirm.

The facts underlying Petrick's conviction were summarized by the trial court as follows:

> These charges arose on April 14, 2015, when [Petrick] entered into a contract with Donna Sabia to perform remodeling

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[1] ***See*** 18 Pa.C.S. § 3922(a)(1).

> work on her home in Scranton. The contract provided that in exchange for $3500, [Petrick] would frame and sheet rock the kitchen, bathroom and living room, and lower the kitchen ceiling. The contract also provided that the work would start on April 16, 2015, and would last 5 to 7 days. Ms. Sabia gave [Petrick] a check for $1750 as a deposit and a check for $300 to obtain permits from the city. [Petrick] began some of the work on the home on April 18, 2015, and on that date, Ms. Sabia gave him another check for $1750. [Petrick] cashed each of these checks. Donna Sabia's son, Carmen Fazio,[2] also purchased a saw for approximately $600 for [Petrick] in exchange for a contract to perform painting in the home, but the painting was never done. [Petrick] returned to the home on April 19 and performed more work. He also entered into another contract with Mr. Fazio to put siding on the exterior of the home and stated that he could obtain the siding materials for $2300. Mr. Fazio paid [Petrick] $2300 in cash to purchase the siding, but the siding was not purchased. After April 19, 2015, [Petrick] never returned and did no more work on the home, leaving the interior of the vicitm's home an uncompleted construction project. He also never obtained the required permits, and never returned the saw that Mr. Fazio purchased for him. Mr. Fazio called and texted [Petrick] numerous times in April and May of 2015. At first [Petrick] stated that he needed to hire help and was working on another job but would return to finish the work. He agreed to return on May 22, 2015, but did not. On May 26, 2015, he texted Mr. Fazio and stated he would not be able to complete the job after all, but would refund $4950 to them within the week. He never refunded any of the funds paid.

Trial Court Opinion, 6/2/2017, at 1-2. In August of 2015, Petrick filed for Chapter 7 bankruptcy, and listed both Sabia and Fazio as creditors. ***See*** N.T., 12/12/2016, at 64-65, 74. The bankruptcy has since been discharged. ***See id.*** at 65.

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[2] Although Sabia owned the property and signed the contract, Fazio lived at the house where the work was being done.

In October of 2015, Petrick was charged with theft by deception and deceptive business practices.[3] He waived his right to a jury trial, and, on December 12, 2016, the court found him guilty of one count of theft by deception, and not guilty of deceptive business practices. On March 8, 2017, Petrick was sentenced to a standard range term of three to 18 months' imprisonment, and directed to pay restitution in the amount of $6,700.00. He filed a motion for reconsideration of sentence, which the trial court denied on March 21, 2017. This timely appeal followed.[4]

Petrick's first two issues challenge the sufficiency of the evidence supporting his conviction.[5] Our review of a sufficiency claim is well-established:

> "Whether sufficient evidence exists to support the verdict is a question of law; our standard of review is de novo and our scope of review is plenary." ***Commonwealth v. Tejada***, 107 A.3d 788, 792 (Pa. Super.2015), *appeal denied*, ___ Pa. ___, 119 A.3d 351 (2015) (citation omitted). "When reviewing the sufficiency of the evidence, this Court is tasked with determining whether the evidence at trial, and all reasonable inferences derived therefrom, are sufficient to establish all elements of the offense beyond a reasonable doubt when viewed in the light most favorable to the Commonwealth [.]" ***Commonwealth v. Haney***, ___ Pa. ___, 131 A.3d 24, 33 (2015) (citation omitted). "The evidence need

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[3] ***See*** 18 Pa.C.S. § 4107(a)(2).

[4] Although the record does not reflect an order from the trial court directing Petrick to file a concise statement of errors complained of on appeal, Petrick's counsel filed a Pa.R.A.P. 1925(b) concise statement on May 11, 2017, after requesting, and being granted, an extension of time.

[5] We will address Petrick's first two claims together.

> not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented." ***Commonwealth v. Coleman***, 130 A.3d 38, 41 (Pa. Super.2015) (internal quotation marks and citation omitted).

Commonwealth v. Walls, 144 A.3d 926, 931 (Pa. Super. 2016), *appeal denied*, 167 A.3d 698 (Pa. 2017).

In the present case, Petrick was convicted of theft by deception, which is defined in Section 3922 of the Pennsylvania Crimes Code as follows:

> A person is guilty of theft if he intentionally obtains or withholds property of another by deception. A person deceives if he intentionally:
>
> (1) creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise[.]

18 Pa.C.S. § 3922(a)(1). This Court has explained that, in order to sustain a conviction of theft by deception, "the Commonwealth [is] required to prove beyond a reasonable doubt that when [the defendant] received the initial payment from [the complainants] he did not intend to perform his part of the contract." ***Commonwealth v. Layaou***, 405 A.2d 500 (Pa. Super. 1979). ***See also Commonwealth v. Bentley***, 448 A.2d 628 (Pa. Super. 1982) ("If the current appellant's conviction for theft by deception is to be affirmed, we must find that appellant never intended to perform his part of the contract(s).").

Here, Petrick asserts the evidence was insufficient to establish the *mens rea* for his conviction. ***See*** Petrick's Brief at 14. Relying on ***Layaou*** and ***Bentley***, he argues the Commonwealth failed to prove beyond a reasonable

doubt he intended to deprive the complainants of their money at the time he entered into the contracts. ***See id.*** at 15. Rather, he insists, "the Commonwealth showed nothing more than a breach of contract." ***Id.*** at 18. Furthermore, Petrick contends the trial court erred when it cited his failure to refund any money to the complainants as evidence of his intent to deceive. ***See id.*** at 19-20. Rather, he states he was "unable to refund the [complainants] any portion of their deposit due to the Bankruptcy Act's prohibition of the same." ***Id.*** at 20.

A review of the decisions in ***Layaou*** and ***Bentley*** is instructive. In ***Layaou***, ***supra***, the defendant entered into a contract to build an addition for the complainants, who made an initial payment of $1,017.00, approximately one-third of the contract price. He purchased some materials and "had his workers dig and put in a footer and put up a floor on stilts," before he failed to return and complete the job. ***See Layaou***, ***supra***, 405 A.2d at 412. The trial court found that although the evidence "up to the time [the defendant] first abandoned the job was not sufficient to show more than mere non-performance," the defendant's "later actions of refusing to return the [complainants'] calls and of failing to complete the job" after promising to do so at his preliminary hearing, was sufficient to support a conviction of theft by deception. ***Id.*** at 414. A panel of this Court disagreed and reversed the conviction. ***See id.*** The panel explained the defendant's actions demonstrated he "intended to perform originally but for some reason later abandoned the job." ***Id.***

Similarly, in ***Bentley***, a couple entered into several, successive contracts with the defendant to repair a porch, rebuild a garage, and build a retaining wall. ***See Bentley, supra***, 448 A.2d at 629-630. The couple made down payments totaling approximately one-third of the contract costs. The defendant also requested an additional payment of $1,655.00, and told the couple "he needed the money because of personal family problems[,]" but would build a patio at no cost. ***Id.*** at 629. Although he began to perform some work under the contracts, he did not complete any of the jobs. Further, the defendant testified, and the couple agreed, "at least in part, that unexpected problems arose in the course of the work, including the type of concrete block to be used, the width of the porch and other expenses." ***Id.*** at 630 (record citations omitted). Similar to ***Layaou***, the trial court found the defendant guilty of theft by deception, and a panel of this Court reversed on appeal. The panel opined:

> If the [defendant's] conviction for theft by deception is to be affirmed, we must find that [he] never intended to perform his part of the contract(s). Our review of the record fails to show any evidence as to [the defendant's] intent, except his failure to perform. This alone is insufficient. The [complainants] were referred to [the defendant], unlike [in other cases], in which the defendants initiated the business relationship. [The defendant] supplied his correct name, address and phone number. [His] use of the proceeds for unrelated purposes, ... was not barred by the contract; in fact, the payment of the second third of the contract price was made knowing that [the defendant] intended to use the money for nonbusiness purposes. Finally, [the defendant] had expended substantial resources in attempting to fulfill his side of the bargain.

Id. at 631-632.

Petrick insists that here, like in ***Layaou*** and ***Bentley***, there was no evidence he intended to deceive the complainants at the time he entered into the contract. ***See*** Petrick's Brief at 18. Moreover, he maintains the trial court erred when it found he was insolvent at that time. ***See id.*** Rather, he states he did not file for bankruptcy until four months later after experiencing additional financial problems. ***See id.*** at 19. He emphasizes that he made no statements to the complainants which misrepresented his financial situation, he provided them with his correct address and phone number, and he actually purchased materials for the job and began the work. ***See id.*** Accordingly, he argues the evidence was insufficient to establish he intended to commit theft when he entered into the contracts.

The trial court addressed Petrick's sufficiency claim as follows:

> In this case, [Petrick] represented to the victims that in exchange for $6100, he would perform remodeling work on their home, and in reliance on this, they paid him $6100.[6] They believed that he was solvent and that he would be able to fulfill his contractual obligations. However, [Petrick] testified at trial that when he entered into this contract, his business was struggling financially and he had money issues. He testified that he did not finish the job or refund the money because he was in a bad financial situation and that he used the money for other jobs. He testified that he eventually filed for bankruptcy in August of 2015. He testified that he never obtained permits for which the victims had paid him $300 because he was not certain that permits were required. In finding [Petrick] guilty, this court stated that [Petrick] never got the permits, and that his testimony that

[6] The $6,700.00 in restitution ordered by the trial court also included the price of the saw Fazio purchased for Petrick in exchange for painting work that was never completed.

> he did not know whether they were needed is a great challenge to his credibility since he had been in the contracting business for 20 years. The court also sound that [Petrick] acknowledged that he was having business difficulties when he entered into the contract and that it appears that his main objective in contracting with the victims was to obtain cash to satisfy other creditors who were clamoring and snapping at his heels. The court found that [Petrick's] motive behind the whole thing was to obtain money and that the Robin Hood defense that he was robbing one person to pay another does not work since it is still theft. The court found that if [Petrick] had been operating in good faith, he would have finished the work since he had all of the materials and tools necessary to do so. Finally, the court found that [Petrick's] defense that he had filed for bankruptcy and could not reimburse the victims is without merit since there was plenty of time between April of 2015 and August of 2015 when he could have completed the work or reimbursed the victims.
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> Thus, as this court found at the time of trial, [Petrick's] own testimony established that [he] obtained the victims' money by creating the false impression that his business was solvent and that he would complete the work. He testified that he used the money instead to pay other creditors. The evidence was thus sufficient to establish that he had the requisite intent to commit theft by deception. [Petrick's] argument that because he filed for bankruptcy, he could not reimburse the victims and could not have committed theft is without merit. He testified that he did not file for bankruptcy until August of 2015, but he entered into the contract in April of 2015. He committed the theft when he took the victims' money in April and used it to pay other creditors. He could have performed under the contract or reimbursed the victims between April and August 2015, but he chose not to do so.

Trial Court Opinion, 6/2/2017, at 5-6 (record citations omitted).

Bearing in mind our standard of review, and viewing all facts in a light most favorable to the Commonwealth as verdict winner, we conclude the record supports the ruling of the trial court. Petrick, himself, testified that because of the "bad financial situation" he was experiencing, he was "contemplating" bankruptcy even before taking the complainants' job, but he

decided to "struggle through it[.]" N.T., 12/12/2016, at 62-63. Moreover, despite this knowledge, he agreed to perform several different jobs for the complainants, accepted checks and cash as down payment for these jobs and materials, and "juggled" the money he received "from one job to another[.]" ***Id.*** at 63. Furthermore, as emphasized by the trial court, the testimony revealed Petrick accepted and cashed a check for $300.00 specifically for permits, but never applied for or received any permits for the construction project. ***See id.*** at 18-19, 47-48. Unlike in ***Bentley***, ***supra***, Petrick never indicated he was using the funds the complainants provided for anything but the job at hand. ***Compare Bentley***, ***supra***, 448 A.2d at 631-632. The trial court, acting as fact finder, determined Petrick never intended to complete the jobs when he entered into the contracts. We find no reason to disagree.

In his second sufficiency argument, Petrick contends the trial court erred in relying upon "his inability to refund any money to the homeowners" as evidence supporting his conviction. ***See*** Petrick's Brief at 20. He maintains he properly listed Fazio and Sabia as creditors on his bankruptcy petition, and was, therefore, legally prohibited from refunding any money while the petition was pending. ***See id.***

Petrick misrepresents the court's findings. The trial court emphasized Petrick took no steps to finish the work or refund any of the complainants' deposits between April 2015 and August 2015, **before** he filed a petition for bankruptcy. ***See*** Trial Court Opinion, 6/2/2017, at 6. Indeed, the court stated: "[Petrick] committed the theft when he took the victims' money in

April and used it to pay other creditors. He could have performed under the contract or reimbursed the victims between April and August of 2015, but he chose not to do so." ***Id.*** Accordingly, the court committed no error.

Next, Petrick contends the court's order directing him to pay $6,700.00 in restitution is illegal because the debt owed was discharged in his bankruptcy proceedings. ***See*** Petrick's Brief at 20-23. Citing Section 362 of the Bankruptcy Code, and a decision of the United Stated Bankruptcy Court, Petrick maintains a state may not use a criminal proceeding "for the sole purpose of collecting a debt dischargeable in bankruptcy." ***Id.*** at 22, *quoting* ***Johnson v. Lindsey***, 16 B.R. 211, 212 (Bankr. M.D. Fla. 1981). ***See also*** 11 U.S.C. § 362(a)(6). Accordingly, he asserts the restitution part of his sentence is illegal.

Preliminarily, we note that although Petrick failed to raise this claim in the trial court, he correctly states this challenge, which questions the court's authority to impose restitution, implicates the legality of his sentence, and, therefore, is not subject to waiver. ***See Commonwealth v. Burwell***, 42 A.3d 1077, 1084 (Pa. Super. 2012). Nevertheless, we find he is entitled to no relief.

A panel of this Court addressed the same issue in ***Commonwealth v. Shotwell***, 717 A.2d 1039 (Pa. Super. 1998). In that case, the defendant filed for bankruptcy, after defrauding the victim, and listed the debt owed to the victim as an "unsecured debt in dispute." ***See id.*** at 1044. Before his conviction, the debt was discharged in bankruptcy. ***See id.*** at 1046.

Accordingly, the defendant asserted the victim was "using the criminal proceedings to circumvent the discharge,"[7] and the trial court "had no authority 'to reimpose' the debt through an order of restitution." ***Id.*** at 1044. In affirming the restitution order, the panel opined:

> Upon examination of the facts of this case, in light of the relevant law, we hold that an order of restitution, payable pursuant to the Pennsylvania Crimes Code, is not subject to discharge under the Bankruptcy Code. ***See*** 11 U.S.C.A. § 523(a)(7); ***Kelly v. Robinson***, [479 U.S. 36 (1986)]. We further hold that an order of restitution entered subsequent to a bankruptcy discharge is separate and distinct from any discharge involving a civil debt. Here, the trial court's order of restitution arose out of the traditional responsibility of the Commonwealth to protect its citizens by enforcing its criminal statutes and to rehabilitate offenders by imposing a criminal sanction intended for that purpose. ***See id.*** Neither the Bankruptcy Code nor Pennsylvania law will allow appellant to avoid the consequences of his criminal scheme, as the decision to impose restitution turns on the penal goals of the State and the situation of the offender. A condition of restitution in a criminal sentence simply does not recreate the civil debtor-creditor relationship that existed in the bankruptcy proceedings. ***Id.*** Accordingly, we will not disturb the trial court's restitution order.

Id. at 1046.

We find the facts in the present case indistinguishable from those in ***Shotwell, supra***. Accordingly, we conclude the court's restitution order was not an illegal sentence, and Petrick is, therefore, entitled to no relief.

In his final issue, Petrick challenges the discretionary aspects of his sentence. When considering such claims, we must bear in mind:

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[7] ***Shotwell, supra***, 717 A.2d at 1046.

> Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion.

Commonwealth v. Gonzalez, 109 A.3d 711, 731 (Pa. Super. 2015) (quotation omitted), *appeal denied*, 125 A.3d 1198 (Pa. 2015). Furthermore, it is well-settled that:

> [a] challenge to the discretionary aspects of sentencing is not automatically reviewable as a matter of right. Prior to reaching the merits of a discretionary sentencing issue:
>
> > We conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, ***see*** Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, ***see*** [Pa.R.Crim.P. 720]; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b).

Commonwealth v. Grays, 167 A.3d 793, 815–816 (Pa. Super. 2017) (some citations omitted).

In the present case, Petrick complied with the procedural requirements for this appeal by filing a timely post-sentence motion for modification of sentence, subsequent notice of appeal, and by including in his appellate brief a statement of reasons relied upon for appeal pursuant to ***Commonwealth v. Tuladziecki***, 522 A.2d 17 (Pa. 1987), and Pa.R.A.P. 2119(f). Therefore, before we may address the merits of his claim, we must determine whether

he has raised a substantial question justifying our review.[8] Petrick's assertion that the trial court failed to consider the sentencing factors set forth in 42 Pa.C.S. § 9721(b),[9] before imposing his sentence raises a substantial question for our review. ***See Commonwealth v. Fullin***, 892 A.2d 843, 847 (Pa. Super. 2006).

Section 9721(b) of the Pennsylvania Sentencing Code provides that when imposing a sentence,

> the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant.

42 Pa.C.S. § 9721(b). Petrick alleges the trial court failed to consider these factors, and "relied solely on his failure to refund money to the homeowner as reason for his sentence." Petrick's Brief at 24. He argues he did not repay them before filing for bankruptcy because he did not have the money, and he did not attempt to repay them after trial "because he was concerned that this would affect his appellate rights." ***Id.*** Petrick emphasizes he had no prior record score, and his "lifelong history of blameless, law abiding conduct should

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[8] A substantial question exists when an appellant sets forth "a colorable argument that the sentence imposed is either inconsistent with a specific provision of the Sentencing Code or is contrary to the fundamental norms underlying the sentencing process." ***Commonwealth v. Ventura***, 975 A.2d 1128, 1133 (Pa. Super. 2009), *appeal denied*, 987 A.2d 161 (Pa. 2009) (citation omitted).

[9] ***See*** Petrick's Brief at 13, 23.

be a mitigating factor ... where the misconduct is a wholly isolated event and where the offender has experienced such shame and remorse that he has been, at least, partially punished." ***Id.*** at 25. Accordingly, he requests we vacate his sentence and remand for resentencing.

Our review reveals no abuse of discretion on the part of the trial court. First, Petrick readily admits the three-month minimum sentence imposed by the trial court fell within the standard range of the sentencing guidelines. ***See*** Petrick's Brief at 23 (noting the standard range was restorative sanctions to nine months' imprisonment). Second, the trial court specifically stated that, in imposing the sentence, it took into "consideration the nature and gravity of the offense and [Petrick's] own rehabilitative needs, the entire contents of the presentence file and the specific facts of this case." N.T., 3/8/2017, at 12. Moreover, although the trial court did question Petrick regarding his failure to make any restitution payments since he had been "back in business,"[10] the court did not impose a term of imprisonment solely for that reason. ***See*** N.T., 38, 2017, at 8. Rather, the court focused on the fact Petrick took no steps between April 2015 and August 2015, when he filed his Petition in Bankruptcy, to either issue a partial refund to the complainants or perform some of the work. ***See id.*** at 10. Specifically, the court found Petrick's inaction did not

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[10] At the sentencing hearing, counsel explained Petrick was "still in the construction business," but that "he's changed his policies and his practices" and tries not to "overextend himself." N.T., 3/8/2017, at 6.

display any "good faith" on his part. ***Id.*** at 11. Because Petrick fails to identify how the trial court abused its discretion in imposing a standard range sentence, he is entitled to no relief.

Judgment of sentence affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/20/2018

APPENDIX B

COMMONWEALTH OF PENNSYLVANIA	:	**IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY**
	:	
vs.	:	**CRIMINAL ACTION**
	:	
JOSEPH PETRICK,	:	
Defendant	:	**NO. 16-CR-68**

OPINION

GEROULO, J.

On December 12, 2016, Defendant Joseph Petrick was convicted of one count of theft by deception following a bench trial. On March 8, 2017, he was sentenced to 3 to 18 months and ordered to pay restitution. On April 4, 2017, the defendant filed a Notice of Appeal of the judgment of sentence to the Superior Court. This opinion is filed in compliance with Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure.

I. BACKGROUND

These charges arose on April 14, 2015, when the defendant entered into a contract with Donna Sabia to perform remodeling work on her home in Scranton. The contract provided that in exchange for $3500, the defendant would frame and sheet

rock the kitchen, bathroom and living room, and lower the kitchen ceiling. The contract also provided that the work would start on April 16, 2015, and would last 5 to 7 days. Ms. Sabia gave the defendant a check for $1750 as a deposit and a check for $300 to obtain permits from the city. The defendant began some of the work on the home on April 18, 2015, and on that date, Ms. Sabia gave him another check for $1750. The defendant cashed each of these checks. Donna Sabia's son, Carmen Fazio, also purchased a saw for approximately $600 for the defendant in exchange for a contract to perform painting in the home, but the painting was never done. The defendant returned to the home on April 19 and performed more work. He also entered into another contract with Mr. Fazio to put siding on the exterior of the home and stated that he could obtain the siding materials for $2300. Mr. Fazio paid the defendant $2300 in cash to purchase the siding, but the siding was not purchased. After April 19, 2015, the defendant never returned and did no more work on the home, leaving the interior of the victim's home an uncompleted construction project. He also never obtained the required permits, and never returned the saw that Mr. Fazio purchased for him. Mr. Fazio called and texted the defendant numerous times in April and May of 2015. At first the defendant stated that he needed to hire help and was working on another job but would return to finish the work. He agreed to return on May 22, 2015, but did not. On May 26, 2015, he texted Mr. Fazio and stated that he would not be able to complete the job after all, but would refund $4950 to them within the week. He never refunded any of the funds paid.

On December 12, 2016, a bench trial was conducted before this court, and this court convicted the defendant of theft by deception, but acquitted him of deceptive

business practices. On March 8, 2017, he was sentenced to 3 to 18 months and ordered to pay restitution. On March 17, 2017 he filed a motion for reconsideration of sentence which was denied on March 21, 2017. On April 4, 2017, the defendant filed a Notice of Appeal of the judgment of sentence to the Superior Court, and this court ordered him to file a concise statement of the matters complained of on appeal within 21 days pursuant to Pa.R.A.P. 1925(b). On May 11, 2017, the defendant filed a Statement of Matters Complained of on Appeal.

II. DISCUSSION

A. Defendant's Statement

In his statement, the defendant submits that the issues for appeal are: (1) whether the Commonwealth presented sufficient evidence to prove beyond a reasonable doubt that the defendant committed theft by deception, since the defendant was unable to refund the victims' money due to his filing for bankruptcy; (2) whether the Commonwealth presented sufficient evidence to prove beyond a reasonable doubt that the defendant had the mens rea or intent necessary for the commission of the crime of theft by deception; and (3) whether the trial court imposed a harsh and unreasonable sentence by erroneously considering and relying upon the fact that the defendant did not make any restitution payments since this matter resulted in a guilty verdict and such payments may have adversely affected his appellate rights.

B. Analysis

The defendant asserts that the evidence was insufficient to prove that he committed theft by deception since he was unable to refund the victims' money because he filed for bankruptcy, and because he lacked the intent necessary for

commission of the crime. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission of the crime by the accused, beyond a reasonable doubt. Commonwealth v. Johnson, 910 A.2d 60 (Pa. Super. 2006). When reviewing a sufficiency claim, the court must view the evidence in the light most favorable to the Commonwealth, giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence. Id. at 64. A sufficiency argument that is founded upon disagreement with the credibility determinations made by the fact finder, or discrepancies in the accounts of the witnesses, does not warrant relief, for it is within the province of the fact finder to determine the weight to be accorded each witness's testimony and to believe all, part or none of the evidence introduced at trial. Id.

A defendant is guilty of theft by deception when he intentionally obtains or withholds the property of another by deception, and deception occurs if he creates or reinforces a false impression as to law, value, intention or other state of mind. 18 Pa.C.S.A. § 3922(a)(1). The Commonwealth must establish that the defendant made a false impression, and the victim relied upon that impression. Commonwealth v. Fisher, 682 A.2d 811 (Pa. Super. 1996). Moreover, the defendant's intent to deceive may be inferred from words or conduct or from facts and attendant circumstances. Commonwealth v. Shapiro, 418 A.2d 594 (Pa. Super. 1980). Where a defendant represents to his customers that his business is solvent and that he will be able to fulfill his contractual obligations, and his customers then deposit sums of money with him as down payments, but he does not fulfill the contracts or refund the deposits, and instead uses the funds advanced for purposes other than fulfilling the contracts, this constitutes

circumstantial evidence from which it can be inferred that the defendant possessed the requisite intent to deceive at the time he obtained the funds. Id.

In this case, the defendant represented to the victims that in exchange for $6100, he would perform remodeling work on their home, and in reliance on this, they paid him $6100. They believed that he was solvent and that he would be able to fulfill his contractual obligations. However, the defendant testified at trial that when he entered into this contract, his business was struggling financially and he had money issues. Transcript of Trial at 60-62. He testified that he did not finish the job or refund the money because he was in a bad financial situation and that he used the money for other jobs. Id. at 62-63. He testified that he eventually filed for bankruptcy in August of 2015. Id. at 74. He testified that he never obtained the permits for which the victims had paid him $300 because he was not certain that permits were required. Id. at 80-81. In finding the defendant guilty, this court stated that the defendant never got the permits, and that his testimony that he did not know whether they were needed is a great challenge to his credibility since he had been in the contracting business for 20 years. Id. at 90-91. The court also found that the defendant acknowledged that he was having business difficulties when he entered into this contact and that it appears that his main objective in contracting with the victims was to obtain cash to satisfy other creditors who were clamoring and snapping at his heels. Id. at 91. The court found that the defendant's motive behind the whole thing was to obtain money and that the Robin Hood defense that he was robbing one person to pay another does not work since it is still theft. Id. The court found that if the defendant had been operating in good faith, he would have finished the work since he had all of the

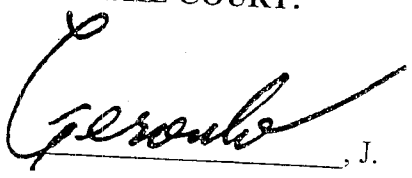
materials and tools necessary to do so. Id. at 91-92. Finally, the court found that the defendant's defense that he had filed for bankruptcy and could not reimburse the victims is without merit since there was plenty of time between April of 2015 and August of 2015 when he could have completed the work or reimbursed the victims. Id. at 92.

Thus, as this court found at the time of trial, the defendant's own testimony established that the defendant obtained the victims' money by creating the false impression that his business was solvent and that he would complete the work. He testified that he used the money instead to pay other creditors. The evidence was thus sufficient to establish that he had the requisite intent to commit theft by deception. The defendant's argument that because he filed for bankruptcy, he could not reimburse the victims and could not have committed theft is without merit. He testified that he did not file for bankruptcy until August of 2015, but he entered into this contract in April of 2015. He committed the theft when he took the victims' money in April and used it to pay other creditors. He could have performed under the contract or reimbursed the victims between April and August of 2015, but he chose not to do so.

The defendant also asserts that the trial court imposed a harsh and unreasonable sentence by erroneously considering and relying upon the fact that the defendant did not make any restitution payments. A claim that the sentence imposed by the trial court was excessive is a challenge to the discretionary aspects of the sentence. Commonwealth v. Seagraves, 103 A.3d 839 (Pa. Super. 2014); Commonwealth v. Marts, 889 A.2d 608 (Pa. Super. 2005). In order to challenge a discretionary aspect of sentencing, the defendant must show that there is a substantial

question that the sentence imposed is not appropriate under the Sentencing Code or contrary to the fundamental norms underlying the sentencing process. Id. This court considered many factors in sentencing the defendant in this case. The court noted that the defendant took $6650 from the victims in April of 2015 but did not file his bankruptcy claim until September 3, 2015. Transcript of March 8, 2017 Sentencing at 10. The court noted that there was nothing barring the defendant from paying the victims between April and September, but he did not pay a dime and did not do a lick of work. Id. The court stated that it did not see any good faith on his part and that in reviewing the facts of the case as well as the time frames involved and the impact he had on this family, that he should be incarcerated for 3 to 18 months. Id. at 11. The court stated that it took into consideration the nature and gravity of the offense, the defendant's rehabilitative needs, the entire contents of the presentence file and the specific facts of this case. Id. at 12. The court noted that the sentence falls in the standard range of the sentencing guidelines. Id. The defendant has not shown how the sentence was not appropriate under the Sentencing Code or contrary to the fundamental norms underlying the sentencing process, and thus has not shown that the sentence was excessive or unreasonable.

BY THE COURT:



, J.

cc: Donna DeVita, Esq.
Office of District Attorney

APPENDIX C

Donna M. DeVita, Esq.
Lackawanna County Public Defender's Office
Lackawanna County Court House
Scranton, Pa. 18503

COMMONWEALTH OF PENNA.	:	IN THE COURT OF COMMON PLEAS
	:	OF LACKAWANNA COUNTY
v.	:	CRIMINAL DIVISION
	:	
JOSEPH PETRICK	:	NO. 2016 CR 68

CONCISE STATEMMENT

(a) Whether the Commonwealth presented sufficient evidence to prove beyond a reasonable doubt that Defendant committed Theft by Deception, since the Defendant was unable to refund victims' money due to his filing for bankruptcy?

(b) Whether the Commonwealth presented sufficient evidence to prove beyond a reasonable doubt that the Defendant had the *mens rea*-the intent-necessary for the commission of the crime of Theft by Deception?

(c) Whether when imposing sentence this court imposed a harsh and unreasonable sentence by erroneously considering and relying upon the fact that the Defendant did not make any restitution payments; however, since this matter resulted in a guilty verdict such payments may have adversely affected his appellate rights?

Respectfully Submitted By,

Donna M. DeVita, Esq.
Assistant Public Defender

IN THE SUPREME COURT
OF PENNSYLVANIA

MIDDLE DISTRICT
DOCKET NO.:
47 MAP 2018
Commonwealth of Pennsylvania,
Appellee

.

v.

JOSEPH PETRICK
Appellant

AVERMENT

I, Donna M. DeVita , Esquire, attorney for Petitioner, hereby certify and aver that the Petition for Allowance of Appeal filed in this matter does not exceed 14,000 words.

Date:_____

s/*Donna M. DeVita, Esq.*
Lackawanna County Public Defender's Office
Lackawanna County Courthouse
Scranton, Pennsylvania, 18503
I.D. #: 30846
(570) 963-6761
Attorney for Appellant