

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

| | | |
|------------------|---|-----------------------------|
| STATE OF OHIO, |) | CASE NO. CRB-01-413486-ZA |
| |) | CRB-01-401663 |
| Plaintiff, |) | |
| |) | |
| v. |) | JUDGE BRENDAN J. SHEEHAN |
| |) | |
| JOHN CARTELLONE, |) | |
| |) | |
| Defendant. |) | OPINION AND JUDGMENT |
| |) | ENTRY |

This matter is before the Court on Defendant John Cartellone's (hereinafter "Cartellone's") Motion to Seal Records (Expungement). The issues have been fully briefed and argued to the Court.

On December 30, 2001, Cartellone pled guilty to one count of theft, a felony of the third degree. He was initially sentenced on February 15, 2002 for a term of five years and transported to LCI. On October 4, 2002, upon his Motion for Judicial Release, Cartellone was sentenced to 5 years of community control with conditions, including adherence to his restitution agreement to repay his victim approximately \$400,000.00. In his "Plan for Restitution", attached as Exhibit 1, provides:

In accord with the plea agreement the defendant John J. Cartellone is submitting the following Plan for Restitution to the victim in this matter. All restitution shall be paid through the Cuyahoga County Probation Department during Mr. Cartellone's probation period. As the restitution will be extensive it is anticipated that the same will be paid both during and after Mr. Cartellone' [sic] probation period, so that the victim can be repaid for 100% of her losses.

During the course of his community control, Cartellone paid approximately \$50,000 in restitution. After two probation violation hearings which continued his community control with

additional conditions, Cartellone executed a cognovit note in the amount of \$401,000.00 and his community control was terminated on September 19, 2007.

Cartellone now seeks expungement pursuant to R.C. 2953.32, which provides in relevant part:

(A) (1) Except as provided in section 2953.61 of the Revised Code, a first offender may apply to the sentencing court if convicted in this state, or to a court of common pleas if convicted in another state or in a federal court, for the sealing of the conviction record. Application may be made at the expiration of three years after the offender's final discharge if convicted of a felony, or at the expiration of one year after the offender's final discharge if convicted of a misdemeanor.

"Expungement is an act of grace created by the state' and so is a privilege, not a right."

State v. Simon, 87 Ohio St.3d 531, 533, 2000 Ohio 474, 721 N.E.2d 1041, quoting *State v. Hamilton*, 75 Ohio St.3d 636, 639, 1996 Ohio 440, 665 N.E.2d 669.

The pivotal issue concerning Cartellone's request is whether his "final discharge" has occurred. It is undisputed that he has not paid the \$401,000.00 restitution obligation represented by the cognovit note. The State maintains that Cartellone also failed to pay supervision fees in the amount of \$200 and court costs in the amount of \$311.20.

"Final discharge occurs where all obligations imposed by the court are completed." *State v. Alimi*, 8th Dist. No. 77890, 2000 Ohio App. LEXIS 5604, citing *State v. Flynn*, 8th Dist. No. 60484, 1991 Ohio App. LEXIS 1743; *State v. Braun*, 8th Dist. No. 46082, 1983 Ohio App. LEXIS 15139.

Cartellone argues that revisions to the Ohio Revised Code negate his agreement to pay full restitution beyond his sentence of community control and limit any obligation to pay full restitution to five years. His argument is based on the inclusion of restitution pursuant to R.C.

2929.18 within the general definition of community control sanctions in R.C. 2929.01. Because community controls are limited to a five year duration by R.C. 2929.15, Cartellone's position is that any obligation to fully pay restitution ends after five years.

While Cartellone is correct that a Court may not continue to monitor an individual's compliance and impose additional sanctions beyond the time limits established by R.C. 2929.15, that is not the legal equivalent of a "final discharge" for purposes of sealing records. Under Cartellone's preferred reading of the law, any incentive to pay full restitution would be completely destroyed. An offender could agree to full restitution in exchange for shorter incarceration with the plan to merely wait five years for the obligation to expire, then wait an additional three years to have his record expunged. Cartellone's proposed interpretation of the law runs counter to the general purposes of sentencing:

A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

R.C. 2929.11.

This Court agrees with the courts in this state that have uniformly held that a defendant is not finally discharged for purposes of expungement until all restitution has been paid. *In re Hopson*, 10th Dist. No. 12AP-67, 2012 Ohio 4509, P5; *State v. Jordan*, 10th Dist. No. 07AP-584, 2007 Ohio 6383, P6; *In re White*, 165 Ohio App.3d 288, 2006 Ohio 233, 846 N.E.2d 93, P7; *State v. McKenney*, 8th Dist. No. 79033, 2001 Ohio App. LEXIS 2424; *State v. Wallace*, 8th

Dist. No. 79669, 2001 Ohio 4184; *State v. Pettis*, 133 Ohio App.3d 618, 619-620, 729 N.E.2d 449 (8th Dist. 1999); *State v. Wainwright*, 75 Ohio App.3d 793, 795, 600 N.E.2d 831 (8th Dist. 1991)

While Cartellone asserts that he has paid a "substantial" amount of restitution and has completely discharged his obligation by executing a cognovit note, he has to date paid only approximately 12% of the restitution he agreed to repay to the victim of his crime. The cognovit note, a promissory note authorizing a confession of judgment, is not payment of the underlying debt:

[A] promissory note cannot be considered "payment in full" sufficient to constitute a final discharge under R.C. 2953.32. A promissory note is nothing more than the promise to pay in the future -- by definition, the holder of a promissory note is not paid until the holder actually receives payment pursuant to the terms of the note. Until the holder of a note actually has payment in hand, the debt cannot be considered to be discharged.

State v. Pettis, 133 Ohio App. 3d 618, 620 729 N.E.2d 449 (8th Dist. 1999).

Accordingly, Cartellone has not yet made full restitution as he agreed to do and cannot be deemed finally discharged for purposes of expungement. His Motion to Seal Records is denied as premature.

IT IS SO ORDERED.


JUDGE BRENDAN J. SHEEHAN

Dated: 10.22.12

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed to the following this 22nd day of October, 2012:

John Cartellone
11525 Dunham Road
Northfield, OH 44067

Diane Smilanick
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, OH 44113

PLAN FOR RESTITUTION

In accord with the plea agreement the defendant John J. Cartellone is submitting the following Plan for Restitution to the victim in this matter. All restitution shall be paid through the Cuyahoga County Probation Department during Mr. Cartellone's probation period. As the restitution will be extensive it is anticipated that the same will be paid both during and after Mr. Cartellone's probation period, so that the victim can be repaid for 100% of her losses. All restitution following the probationary period shall be directed to the victim at an address she later designates for the same.

The defendant is expected to reside at 11525 Durham Road, Sagamore Hills, Ohio 44067, following his release from incarceration. This is a home that the defendant and his wife have rented for a number of years. The defendant anticipates resuming regular and extensive visits with his two children, John and Lori. The defendant would also expect to, as soon as economically possible, resume payment of Child Support to his ex-wife whom has custody of his minor children. During his period of incarceration the defendant has been unable to pay any Child Support so additional Court ordered payments are anticipated to be added to the defendant's current monthly obligation which is presently approximately \$900.00 per month.

Ohio Revised Code §2929.18 (A) authorizes restitution as part of a penalty for felony violations. O.R.C. §2929.19 (B) (6); requires the Court to consider the offenders ability to pay before imposing a financial sanction. The defendant in the Case at Bar has been incarcerated for approximately seven months. In addition, as part of the plea agreement in this matter he was required to resign from the practice of law. The defendant had been a practicing attorney for a period of twenty-one years. He has been involved in no other type of gainful employment for a period in excess of twenty five years.

Exhibit A

The defendant is well educated, possessing a degree in business management, in addition to the J.D. degree he also possess. It is anticipated that the defendant's education and willingness to work, will eventually allow him to earn sufficient income in order to repay the victim in full in this matter. The defendant presently owns no assets whatsoever which can be liquidated to help pay restitution. The defendant owns no personal or real property at this time. The defendant will immediately, upon release by this Court begin to search for some significant gainful employment. The job search will be full time employment for the defendant initially upon his release from prison. The defendant will work diligently to obtain significant gainful employment so that he may begin restitution to the victim in this matter. The defendant should not accept or enter into any employment situation which provides only minimal earnings, if at all possible.

Employment at a low economic levels would not provide the defendant with earnings that are significant enough to provide any restitution to the victim; when his monthly living expenses and debt incurred, for both his period of incarceration, and his significant legal expenses incurred in defense of this matter, are considered. In light of the current economic condition in our area and the country in general, gainful employment at a significant economic level may take an extended period of time to obtain. During this period of extended time (estimated to be one hundred and twenty to two hundred and forty days) the defendant herein, will use all of his best effort to obtain significant gainful employment. The defendant shall devote at least forty hours per week to his job search. If necessary and available the defendant shall employ the appropriate professionals to help him secure significant gainful employment in any area in which his educational skills maybe best utilized. This shall include where appropriate employment agencies and/or job search agencies which are familiar with the placement of professionals in meaningful positions. The defendant, if at all possible, is to refrain

from accepting employment at a minimal amount of compensation. Such employment would only hinder his job hunt for significant gainful employment which would be in the best interest of all parties, as part of this Plan of Restitution. The defendant at all times shall have an up to date resume, professionally prepared if necessary, for distribution to potential job offerers. The defendant shall decimate the same to potential employers, and shall attempt to use the internet, and all other available sources to gain significant gainful employment. The defendant should use all his best efforts to obtain significant gainful employment, as soon as possible. When the defendant obtains significant gainful employment, he shall immediately begin paying restitution to the victim, through the Cuyahoga County Probation Department. Restitution shall continue throughout the probationary period, and certainly following the probationary period, so that the victim may be fully compensated by the defendant for her losses. Since the amount of the victims losses are great it is anticipated that restitution shall take a period between ten and twenty years to be completed. At all such times the defendant shall be required to use his best efforts & skills to maximize his earnings so in fact, at same time, the victim will be fully compensated for her financial losses. The defendant shall be required to make a good faith effort at restitution during the probationary period.

Following the obtaining of substantial gainful employment the defendant shall immediately begin to make restitution, as stated through the Cuyahoga County Probation Department. Defendant shall pay a portion of his disposable income to the Probation Department on a monthly basis, if possible, in an attempt to compensate the victim. Disposable income for the purpose of this plan shall consist of defendant's entire net monthly income less his living obligations for rent, utilities, transportation, automotive expenses, clothing, hygiene needs, child support, credit and debt from loans for litigation expenses and living expenses incurred during the case presently before the Court, credit card debt and any

other cost associated with his medical, mental or living ~~expenses~~ ^{or} necessities.

The defendant shall pay approximately 50% of his disposable income to the Cuyahoga County Probation Department on a monthly basis. To illustrate, in the event that the defendant has net monthly income of \$3,000.00 per month, and expenses ~~included~~ ^{as defined} above ^{of} \$2,200.00 per month, the defendant would be required to pay \$400.00 per month in restitution to the Probation Department. In the previous example if the defendant's net income increases to \$4,000.00 per month, and his expenses as defined above remained at \$2,200.00 per month, the restitution figure would increase to \$900.00 per month. In the event that his income increased to \$8,000.00 per month, and his expenses remained at \$2,200.00 per month, the restitution would increase to \$2,900.00 per month. It is anticipated that the defendant's income would increase over time, and in fact if that occurs the defendant's payments would increase over time as well. The defendant will use his best efforts at all times to increase his monthly income, and career opportunities. It is anticipated that defendant will be making monthly payments of some amount as indicated by the disposable income formula from the time that defendant gains substantial gainful employment until the time that he either completes his probationary period or the same is terminated by this Honorable Court. The maximum and minimum monthly payments to be made by the defendant shall be determined by the formula set forth in this document. The same is in complete accord with the existing Ohio and Federal Case Law which requires the Court to consider the defendant's living expenses and obligations when imposing restitution ~~on~~ ^{on} a defendant. The ~~statute~~ ^{statute} of a payment of a certain monthly dollar figure would do the victim and/or the defendant a disservice depending on the actual income of the defendant at the time. Furthermore, further quantification of a

monthly amount without reference to defendant's income and/or expenses would run contrary to the great majority of Ohio and Federal Case Law in this area.

The defendant may well be able to pay considerable monies above the stated monthly stipend, and as a result the victim would be short changed by the statement of a monthly minimum of 50 or 100 or 200 dollars per month. The Law requires that the defendant make a good faith ~~obligation~~^{effort} at restitution, and the included formula guarantees the same. As, defendant income increases his anticipated restitution will likewise increase. In addition to the restitution plan of this Court, the Plaintiff is continuing pursuit of a Civil Action against the defendant in the Cuyahoga County Court of Common Plea, Case No. 428359, Judge Nancy Fuest. It is anticipated that the victim will receive a substantial judgment against the defendant in that action. The Civil judgment will be further assurance that the victim herein, will receive complete restitution from the defendant.

In the event that the defendant were ever able to obtain any significant assets, which is extremely unlikely in view of this restitution plan; the victim could use her civil judgment to further assure payment of her compensation. The plan for restitution in conjunction with the victim's anticipated civil judgment assure that the victim will receive complete restitution from the defendant, as soon as the defendant is able to pay the same. It is anticipated that complete restitution will take at least ten to twenty years. In fact this Court may later find that early termination of the defendant's probation; so that defendant can have his record expunged, is actually^{ly} in the best interest of all concerned. An expunging^{ment} of defendant's record may allow the defendant to obtain better employment, including employment in the fields for which a license of some sort would be required. The same would ultimately lead to him ~~be~~ having greater income. The greater the defendant's

income, the larger the restitution payments to the victim will be. The same applies whether the payments come from the enclosed plan of restitution or pursuant to execution on the victim's anticipated civil judgment.

The aforementioned Plan for Restitution shall be followed by the defendant throughout the probationary period. It provides significant protection for the crime victim, and is in accord with current Federal and Ohio Laws regarding Restitution. The plan should provide even increasing amounts of restitution to the victim, as the defendant's income continues to rise. The plan requires the defendant at all times to use his best effort to increase his earnings, thereby, increasing his amount of restitution to the victim. The defendant agrees to make his best effort to at all times and to follow this enclosed plan of restitution.