

**People v McBride**

2011 NY Slip Op 34318(U)

August 22, 2011

County Court, Broome County

Docket Number: 10-361

Judge: Joseph F. Cawley

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
COUNTY COURT : : BROOME COUNTY

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THE PEOPLE OF THE STATE OF NEW YORK

vs.

**DECISION AND ORDER**  
Ind. No. 10-361

LISA M. McBRIDE,  
Defendant.

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**JOSEPH F. CAWLEY, JR. J.**

This matter concerns the issue of restitution relating to theft of United States currency between September 2009 and December 2009 from the home of Ms. Frankie Contas.

On May 27, 2011, defendant McBride plead guilty to Grand Larceny in the Fourth Degree, wherein she admitted to stealing property from Frankie Contas, while acting in concert with another, the value of which exceed \$1,000.00. A restitution hearing was requested.

Although not *charged* as McBride's co-defendant, on June 10, 2011, Carol Contas plead guilty to Grand Larceny in the Third Degree, by Superior Court Information, wherein she admitted to stealing property from Frankie Contas, while acting in concert with another, the value of which exceeded \$50,000.00. The total restitution figure agreed upon was "in the ballpark of \$50,000.00" (Carol Contas, SCI Plea minutes, Pg. 3, June 10, 2011).

A restitution hearing was held on July 18, 2011, in the above referenced matter. The Court heard testimony from the victim, Ms. Frankie Contas, and received into evidence a notarized statement from the victim's son, George P. Contas, Jr. (People's Exhibit #1), which specified an amount of cash he and Ms. Contas had counted and placed in a safe within her

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residence in 2004. People's Exhibit #1 is entirely consistent with Ms. Frankie Contas' testimony that the amount of cash in the safe totaled \$50,000.00 and constituted the entire proceeds from the September 2004 sale of her home in Long Island, New York. The currency placed in the safe, to be used for emergency purposes only, was never removed by Ms. Contas from the time it was placed there in 2004.

Pursuant to Penal Law §60.27 when the court is aware that the victim seeks restitution, it shall order the defendant to make restitution of the fruits of her offense, unless the interest of justice dictate otherwise. The court must make a finding as to the dollar amount and the actual out-of-pocket loss to the victim caused by the offense. If the record is insufficient the court must conduct a hearing.

The Court is obligated to consider restitution solely in terms of a victim's out-of pocket loss; restitution may not be utilized to compensate for sentimental value of personal items. During the hearing, complainant testified as to items of jewelry she believed were taken. The Court will not consider restitution relating to the value of any jewelry as there has been no proof relating to the value of any such item(s).

Although the amount of restitution for a felony offense should not exceed \$15,000, pursuant to PL 60.27 (5) (a) the Court has discretion to impose restitution in excess of that amount where the sum is limited to the return of the victim's property, or the equivalent value thereof. (Penal Law §60.27 (5) (b)). Further, the People must establish the victim's out-of-pocket expenses by a preponderance of the evidence (*see, People v. Tzitzikalakis*, 8 NY3d 217 [2007] ). Any relevant evidence is admissible (*id.*).

When more than one defendant is involved, the Court may hold defendants jointly and severally liable for the amount of the restitution order (*see, People v. Kim*, 91 NY2d 407 [1998]). While the statute is silent on the issue, imposing joint and several liability on all perpetrators for the entire loss of the victim caused by their concerted action is more consistent with, and better promotes, the dual purposes of the restitution statute. These goals are to insure, to the maximum extent possible, that victims will be made whole and offenders will be rehabilitated and deterred, by requiring *all* defendants to confront concretely, and take responsibility for, the *entire* harm resulting from their acts. (*id.*, citing *People v. Hall-Wilson*, 69 NY2d 154; *People v. Turco*, 130 AD2d 785).

Based upon the preponderance of the evidence, it is quite clear that the victim has suffered out-of-pocket loss in the amount of \$50,000.00. This figure was determined through the credible testimony of the victim, Ms. Frankie Contas, and People's Exhibit #1. Although defendant contends insufficient proof was set forth as to the exact amount of monies given to her by Carol Contas, it is clear that both, between the foregoing dates, while acting in concert, stole \$50,000. from victim Frankie Contas. Imposing joint and several responsibility on all defendants for the entire amount of restitution is consistent with well established tort principals of liability pertaining to actors in concert, whether or not their conduct rose to the level of culpability justifying criminal sanctions (*People v. Kim*, 91 N.Y.2d 407; *see Prosser and Keeton, Torts*, section 52 at 346 [5<sup>th</sup> edition]).

Defendant's ability to pay the entire amount in the immediate future, may be doubtful. However, the defendant is employed and has sufficient sources of income to enable her to make payments. A defendant may apply for re-sentencing in the event she is unable to pay restitution

(see, CPL 420.10 [5]; see also, *People v. Christman*, 265 AD2d856 [4<sup>th</sup> Dept., 1999] *lv app denied* 94 NY2d 878 [2000] ).

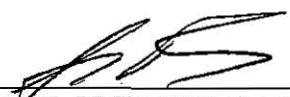
Considering all prior proceedings had in this matter and the defendants' ability to pay, it is determined that the defendant shall be jointly and severally responsible, along with Carol Contas, to pay restitution to Ms. Frankie Contas, in the amount of \$50,000.00.

The People may submit a restitution Order.

This constitutes the Decision and Order of the Court.

It is SO ORDERED.

DATED: August 22, 2011  
Binghamton, New York

  
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HON. JOSEPH F. CAWLEY,  
Broome County Court Judge

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