

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS

DISTRICT COURT DEPARTMENT
HAVERHILL DIVISION
DOCKET NO. 0938CR1515

COMMONWEALTH OF MASSACHUSETTS

v.

JOSE A. MARTINEZ

**REPORT OF QUESTIONS OF LAW WITHOUT DECISION
TO THE APPEALS COURT PURSUANT TO MASS. R. CRIM. P. 34**

BACKGROUND AND FINDINGS OF FACT

On March 2, 2010, the defendant, Jose Martinez, pleaded guilty to possession with intent to distribute three types of controlled substances (Class A, Class B, and Class C), and unlicensed operation of a motor vehicle. Docket No. 0938CR1515. Mr. Martinez was represented by counsel at the time.

On the three drug convictions, Mr. Martinez was sentenced to concurrent sentences of one year in the House of Correction, suspended for two years (March 2, 2012). For the unlicensed operation conviction, the defendant was ordered to pay a \$100 fine. Mr. Martinez was ordered to pay \$65 per month while on probation (this amount is required by G.L. c. 276, § 87A which mandates collection of a probation service fee of \$60 per month and a victim services surcharge of \$5 per month), a victim witness fee of \$90 (G.L. c. 258B, § 8), and restitution to the Haverhill Police Department in the amount of \$1,000. The

defendant was also ordered to forfeit any monies found on his person at the time of the arrest.

Seven years later, on April 19, 2017, the single justice of the Supreme Judicial Court issued a global order in Docket No. SJ-2014-0005 as a result of Annie Dookhan and the Hinton drug lab scandal (hereinafter, the “global Dookhan order”). Pursuant to that order, the defendant’s three drug convictions were vacated and dismissed with prejudice.¹ On June 6, 2017, Mr. Martinez received a letter notifying him of this order.

On June 12, 2017, Mr. Martinez appeared in this court *pro se* and filed a “motion for restitution” seeking “restitution to me for court costs and supervision fees,” and claiming that he paid “almost three thousand dollars in court costs and supervision fees.” Although Mr. Martinez does not mention “restitution” in his motion, he did show the court a receipt for his restitution payment of \$1,000 to the Haverhill Police Department.

On review of the court’s file, the paper court docket reflects payment on April 21, 2010 of the \$90 victim witness fee.²

The paper docket does not reflect any payments of the \$65 per month assessment. However, the MassCourts docket states that:

As of the 05/13/2011, \$120 was assessed and \$70.00 has been paid to date, leaving a “remaining balance” of \$50. Refer to PRA

¹ This order did not affect the unlicensed operation conviction.

² That same day, the defendant also paid the \$100 fine imposed on the unlicensed operation conviction. However, where the conviction of unlicensed operation was not vacated, that \$100 fine is not subject to a refund.

account number 101083 for detailed accounting information.³ The PRA Offense code for this transaction was VSS.⁴

As of the 5/13/2011, \$1,440 was assessed and \$840 has been paid to date, leaving a “remaining balance” of \$600. Refer to PRA account number 101082 for detailed accounting information. The PRA Offense code for this transaction was PSF.⁵

Subsequent to May 13, 2011, the MassCourts docket notes the following receipts:

Date	Receipt #	Fee Type	Amount
5/27/11	859	PSF	\$65.00
7/1/11	1999	PSF	\$65.00
8/1/11	2843	PSF	\$65.00
9/6/11	4037	PSF	\$65.00
12/14/11	5296	PSF	\$65.00
12/7/11	6777	PSF	\$325.00
TOTAL		PSF	\$650.00

As such, the MassCourts docket appears to reflect payment of \$1,560 towards assessments imposed pursuant to G.L. c. 276, § 87A.

³ It is my understanding that PRA, which was the program utilized by the probation service to track the collection of monies, is no longer accessible now that the system has migrated to MassCourts.

⁴ I infer that “VSS” stands for “victim services surcharge,” the \$5 per month assessment required by G.L. c. 276, § 87A.

⁵ I infer that “PSF” stands for “probation service fee,” the \$60 assessment required by G.L. c. 276, § 87A.

There is no entry on either the paper docket or the MassCourts docket regarding payment of the \$1,000 restitution payment to the Haverhill Police Department. However, there is a MassCourts docket entry on May 5, 2016 that states that the “case was automatically closed and disposed on 5/5/2016 per AODC request,” citing as one of the reasons that there was “no money outstanding.”⁶

DISCUSSION AND REPORTED QUESTIONS

The defendant’s motion cites to no case law or statutory authority for his refund request. However, victim witness fees imposed pursuant to G.L. c. 276, § 87A, probation assessments pursuant to G.L. c. 276, § 87A, and restitution are “exactions dependent upon a conviction.” Nelson v. Colorado, 137 S. Ct. 1249, 1258 (2017).

Victim Witness Fee

The paper docket reflects payment of the \$90 victim witness fee. This fee was imposed on a drug conviction that was vacated and dismissed with prejudice pursuant to the global Dookhan order.

The statute mandating the imposition of a victim witness fee provides that “[t]he assessment from any conviction or adjudication of delinquency which is subsequently overturned on appeal shall be refunded by the court to the person whose conviction or adjudication of delinquency is overturned. Said court shall deduct such funds from the assessments transmitted to the state treasurer.” G.L.

⁶ The last entry on the paper docket is a stipulation to a probation violation on December 7, 2011, which resulted in an order for probation to stand through March 2, 2012.

c. 258B, § 8. The Supreme Judicial Court has held that this language only applies to convictions or admissions to sufficient facts “overturned on appeal,” and not where the trial court grants postconviction relief pursuant to Mass. R. Crim. P. 30. Commonwealth v. Martin, 476 Mass. 72, 75-76 (2016).

1. Does the refund language in G.L. c. 258B, § 8 apply to convictions vacated pursuant to the global Dookhan order? If the statute does apply, what is the showing a defendant must make to be entitled to a refund of a victim witness fee imposed pursuant to G.L. c. 258B, § 8, and, if a defendant makes such a showing, from what source should this payment be refunded?
2. If G.L. c. 258B, § 8 does not apply in these circumstances, is refund of a victim witness fee required pursuant to Nelson v. Colorado, 137 S. Ct. 1249 (2017)? If Nelson does require refunding victim witness fees, what is the showing a defendant must make to be entitled to a refund of such fees, and from what source should this payment be refunded?
3. If a refund is required either pursuant to the statute or pursuant to Nelson, can the court limit the refund to \$40 by redistributing \$50 of the victim witness fee to the surviving judgment on the misdemeanor offense of unlicensed operation in violation of G.L. c. 90, § 10? G.L. c. 258B, § 8 (\$90 victim witness assessment for felonies; \$50 victim witness assessment for misdemeanors); Commonwealth v. Zawatsky, 41 Mass. App. Ct. 392, 401 (1996) (remanding to discretion of trial

judge whether \$600 of victim witness assessment lost in connection with the vacated civil rights counts should be distributed among the surviving judgments of conviction).

Probation Service Fee and Victim Services Surcharge

Although the paper docket does not reflect the collection of the assessments pursuant to G.L. c. 287, § 87A, the MassCourts docket appears to indicate that a total of \$1,560 was collected.⁷ The assessments pursuant to G.L. c. 287, § 87A were imposed on the drug convictions that were vacated and dismissed with prejudice pursuant to the global Dookhan order.

There is no statute authorizing the refund of probation service fees and victim service surcharges imposed pursuant to G.L. c. 287, § 87A.

4. Does Nelson v. Colorado, 137 S. Ct. 1249 (2017) require refunding payments assessed pursuant to G.L. c. 276, § 87A? If so, what is the showing a defendant must make to be entitled to a refund of such payments, and from what source should this payment be refunded?
5. What verification is needed to determine the amount to be refunded?

Restitution

The defendant provided the Court with a receipt for the \$1,000 restitution payment to the Haverhill Police Department. The record does not contain any information regarding the basis of the restitution order. There is no specific court

⁷ The collection of monies was transferred from the probation department, which utilized a system called “PRA,” to the clerk’s office when MassCourts came online. As a result, money that had been collected through PRA would be noted on the MassCourts docket as a single entry, with subsequent payments noted in MassCourts. The PRA system is no longer accessible.

docket entry confirming payment other than the docket entry automatically closing the case on May 5, 2016, that notes “no money outstanding.”

There is no statute authorizing the refund of restitution payments.

6. Does Nelson v. Colorado, 137 S. Ct. 1249 (2017) require refunding restitution? If so, what is the showing a defendant must make to be entitled to a refund of this payment, and from what source should restitution payments be refunded?

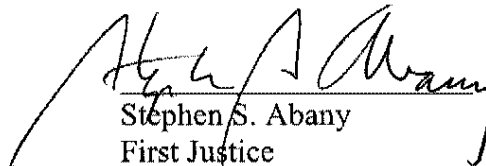
7. What verification is needed to determine the amount to be refunded?

ORDER

The defendant’s “motion for restitution” raises several issues of first impression, including what showing a defendant must make to be entitled to a refund and from what source refunds are to be made. As the resolution of the defendant’s motion could have a significant impact on the Commonwealth where the defendant’s convictions have been vacated and dismissed with prejudice as part of the global Dookhan order issued in SJ-2014-0005, in the exercise of my discretion, I report the foregoing questions of law to the Appeals Court pursuant to Mass. R. Crim. P. 34.

BY THE COURT:

Date: AUGUST 22, 2017


Stephen S. Abany
First Justice
Haverhill District Court