The court incorporates by reference in this paragraph and adopts as the findings and analysis of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.

Dated: June 02 2005

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 04-70754
	)	
Walter Wells, Jr.,	)	Chapter 7
	)	
Debtor.	)	Adv. Pro. No. 05-3064
	)	
Elizabeth A. Vaughan, Trustee,	)	Hon. Mary Ann Whipple
	)	
Plaintiff,	)	
v.	)	
	)	
Walter Wells, Jr.,	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION

This adversary proceeding is before the court for decision after trial on a complaint filed by Plaintiff Elizabeth Vaughn, the Chapter 7 Trustee in Defendant's underlying Chapter 7 bankruptcy case, seeking turnover of property or, in the alternative, objecting to Defendant/Debtor's Chapter 7 discharge. The court has jurisdiction over this adversary proceeding under 28 U.S.C. §1334(b) and the general order of reference entered in this

district. Proceedings to determine objections to discharge are core proceedings that this court may hear and determine. 28 U.S.C. § 157(b)(1) and (b)(2)(J).

This Memorandum of Decision constitutes the court's findings of fact and conclusions of law under Fed. R. Civ. P. 52, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052. Regardless of whether specifically referred to in this Memorandum of Decision, the court has examined the submitted materials, weighed the credibility of the witnesses, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the reasons discussed below, Defendant is entitled to judgment on the complaint.

FINDINGS OF FACT

Defendant is a 48 year-old gentleman with two years of post-secondary education, on completion of which he earned an associate degree. He works two jobs, one being part-time, as a janitor, and has two minor children, ages seven and six months. Defendant filed for relief under Chapter 7 of the Bankruptcy Code on December 29, 2004, seeking to discharge $31,885 in unsecured debt and personal liability for approximately $56,500 in secured debt. [*See* Case No. 04-70754, Doc. # 1, Schedule D and F]. [1] He testified that he provided the information set forth in his petition to his attorney and understood by filing the petition, that the court would exercise jurisdiction over his assets.

On February 5, 2005, H and R Block prepared his 2004 income tax returns and his returns were filed on that date. Defendant's federal income tax refund, including an earned income credit of $2,229, was $5,525 and his Ohio income tax refund totaled $132. [Ex. 2]. Defendant testified that he had only received a tax refund of approximately $600 the year before and that the 2004 refund was the largest income tax refund to which he had ever been entitled. He received a "rapid refund check" by financing obtained through H and R Block in the amount of his federal income tax refund less substantial finance charges. On February 6, 2005, H and R Block issued him a check in the amount of $5,186.05 ($5,525 less $338.95 in fees and finance charges). [Ex. 2]. Defendant cashed the check on the same day at a local carry-out store. After the carry-out's deduction of its $210 fee for cashing the check, Defendant received $4,976 in cash. [*See* Ex. 3]. The record is silent regarding how or when Defendant received his Ohio income tax refund.

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[1] The court takes judicial notice of the contents of its case docket and the Debtors' schedules. Fed. R. Bankr. P. 9017; Fed. R. Evid. 201(b)(2); *In re Calder*, 907 F.2d 953, 955 n.2 (10th Cir. 1990).

Defendant testified that after receiving the $4,976 in cash, he spent approximately $90 on groceries and purchased nearly $800 in money orders to pay his bills, leaving him with $4,100 in cash that he put in an inside pocket of his jacket. Because February 6, the day he cashed the H and R Block check, was a Sunday, he could not deposit the money in the bank. He testified that he knew at least a portion of his tax refund constituted an asset of his bankruptcy estate, but believed he could repay the amount he spent since he was working two jobs at the time. He did not, however, disclose an anticipated tax refund in his bankruptcy schedules nor did he disclose that he has two dependents. [*See* Case No. 04-70754, Doc. # 1, Schedule B and I].

February 6, 2005, was not just any Sunday – it was Super Bowl Sunday. Defendant had invited a number of people to his home, mostly family members, presumably to watch the game. During that time, he testified that the $4,100 remained in the pocket of his jacket in a closet at his house and that he intended to deposit the money in the bank on Monday. He testified, however, that on Monday morning he discovered that the money was missing. According to Defendant, only his sister and two cousins knew that he had received the tax refund. Troubled by the fact that most of the guests present on Sunday were family members, he began questioning his family as to any information they might have regarding the money. He testified that his questioning got him nowhere. The next day, on February 8, 2005, he filed a police report. [Ex. 6]. That same week, he also reported the loss to his insurance company, although his homeowner's coverage apparently did not cover the loss.

On February 10, 2005, after Defendant had discovered the money missing and filed the police report, he attended the first meeting of creditors in the underlying Chapter 7 proceeding. Either at that meeting or shortly thereafter Defendant provided copies of his 2004 income tax returns to the Trustee. By letter dated February 15, 2005, the Trustee notified Defendant's attorney that, by her calculations, Defendant must turnover to the bankruptcy estate $4,862.09 of the $5,657 he would receive in federal and state income tax refunds.[2] Defendant does not dispute the Trustee's calculation. In the letter, the Trustee requested that Defendant's attorney send a trust fund check in the amount of the estate's portion after Defendant receives his refund. Thus, it does not appear that Defendant disclosed to the Trustee at the first meeting of creditors that he had received the income tax refund and that the money was spent in part and stolen in part. She was, however, notified promptly thereafter as indicated

[2] From the total amount of Defendant's two refunds, the Trustee deducted $30.91 as Defendant's pro rata post-petition share of the refund and $764 as the exemption amount to which he is entitled.

by the fact that the complaint in this adversary proceeding was filed on February 22, 2005.

On March 2, 2005, Defendant paid in part the amount owed to the estate. He testified that he sought the assistance of family members not only in attempting to discover what happened to the $4,100 in his jacket but also in attempting to collect funds to pay the estate the amount owed to it. As a result, at least in part, of family contributions, he was able to tender payment to the estate in the total amount of $1,662.09.

Having observed Defendant testify and after carefully considering his testimony and the timeline of events surrounding his receipt of the H and R Block check, the court finds his testimony credible. He filed a police report regarding the theft before the first meeting of creditors even occurred. In light of the fact that his guests at the time the money disappeared were mostly family members, it is reasonable that he did not file the report until the next day, attempting first to question family members as to any information they might have.

He candidly admitted knowing at the time he cashed the H and R Block check that a portion of the tax refund must be turned over to the estate and, presumably, he knew that he would be permitted to keep a portion of the refund. But he did not know the amount that must be turned over or the amount that he could keep. The court finds Defendant's testimony credible that he believed he could repay the amounts he spent on groceries and money orders to the extent that it would be necessary for him to do so.

In finding his testimony credible, the court has considered the fact that Defendant did not disclose in his bankruptcy petition that he would be entitled to an income tax refund or that he had two children, a fact relevant to the likelihood and amount of his entitlement to a federal income tax refund. But the court finds the nondisclosure to have been inadvertent. Defendant testified that he had disclosed in the information sheet used by his attorney that he had received a 2003 tax refund of $600. While the fact that he had two children would have likely alerted the Trustee to the fact that he would be entitled to an earned income credit, there is no indication that Defendant was aware of that fact. He apparently did not qualify for the earned income credit the year before when he had only one child. Thus, the court cannot conclude that he would have known at the time he filed his petition that his federal income tax refund would be much higher due to the credit.

In making this credibility determination, the court has also considered the fact that after learning the amount of the tax return that is due to the bankruptcy estate, he made a good faith effort to gather funds to turn over to the Trustee in payment of this obligation. The court finds it unlikely that he would have done so if he had lied about the

money being stolen.

LAW AND ANALYSIS

I. Turnover of Property under 11 U.S.C. § 542(a)

In Count One of the Complaint, the Trustee seeks an order that Defendant turn over his 2004 federal and state income tax refunds to the extent that they constitute property of the estate. Under 11 U.S.C. § 542(a), "an entity . . . in possession, custody, or control, during the case, of property that the trustee may use . . .under section 363 of this title. . . shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate." The burden of proof is on the party seeking turnover of property of the estate. *United States v. Chalmers (In re Wheeler),* 252 B.R. 420, 425 (W.D. Mich. 2000). In order for the Trustee to prevail, she must prove that the property in question is in the "possession, custody, or control" of Defendant. In addition, the Trustee must demonstrate that the property is property the Trustee may use under § 363; that is, it must be property of the estate. *See id.*;11 U.S.C. § 363(b)(1) (providing that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, *property of the estate*").

There is no dispute that $4,862.09 of the total $5,657 income tax refunds to which Defendant was entitled is property of the bankruptcy estate. *In re Smith*, 310 B.R. 320, 322 (Bankr. N.D. Ohio 2004). However, the Trustee has not shown that those funds are in Defendant's "possession, custody, or control." As discussed above, Defendant spent approximately $1,425 of the $5,525 federal tax refund – $549 on fees and finance charges in obtaining a rapid refund check and cashing the check and the remaining approximately $876 on groceries and paying bills – with the balance having been stolen from his home. The record is silent regarding the disposition of Defendant's state income tax refund of $132. He did, however, turnover $1,662.09 to the Trustee, an amount that more than covers the amount of the federal return that Defendant spent and the state refund. Thus, the court cannot conclude that the state refund was not turned over to the Trustee. As such, Defendant is entitled to judgment on this claim.

II. Objection to Discharge under 11 U.S.C. § 727

In Count Two of the Complaint, the Trustee alleges that Defendant transferred or concealed his income

tax refunds with the intent to hinder, delay or defraud the Trustee. Section 727(a)(2)(B) provides that:

> (a) The court shall grant the debtor a discharge unless–
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> > (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated or concealed--
> >
> > . . . .
> >
> > > (B) property of the estate, after the date of the filing of the petition.

This section requires the Trustee to prove, by a preponderance of the evidence, the following elements: (1) the debtor transferred or concealed property, (2) such property constituted property of the estate, (3) the transfer or concealment occurred after the filing of the bankruptcy petition, and (4) the transfer or concealment was made with the intent to hinder, delay or defraud the bankruptcy trustee. *Hunter v. Sowers (In re Sowers* 229 B.R. 151, 156 (Bankr. N.D. Ohio 1998). Section 727(a)(2) requires a subjective intent on the debtor's part to hinder, delay or defraud the Trustee through the act concealing or disposing of the property. *See Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000) (quoting *Hughes v. Lawson (In re Lawson)*, 122 F.3d 1237, 1240 (9th Cir. 1997). Constructive intent cannot be the basis for denial of discharge. *Sowers*, 229 B.R. at 157 (Intent "must be actual, as distinguished from constructive, intent."). As it is unlikely that a debtor will admit an intent to hinder, delay or defraud, intent must be ascertained by the totality of the circumstances of the case at hand. *Mack Fin. Corp. v. Rowe (In re Rowe)*, 145 B.R. 556, 559 (Bankr. N.D. Ohio 1992).

In this case, Defendant did not conceal his tax refund after the filing of his petition. Although there was no testimony regarding how the Trustee learned of the tax returns and refunds, she clearly was made aware of the returns before February 15, 2005, the date of her letter setting forth her calculations as to the amount of the tax refunds to be turned over to the estate.[3] But Defendant did "transfer" approximately $1,425 of his 2004 federal income tax refund when he paid fees and finance charges totaling $548.95 to reduce his refund to cash on the day the return was filed and when he bought groceries and money orders to pay monthly bills. He at least arguably also permitted removal of the remaining $4,100 by recklessly leaving that amount of cash in his coat pocket throughout the weekend. Thus, the first element under 727(a)(2)(B) is satisfied.

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[3] Presumably she was made aware of the returns at the first meeting of creditors held on February 10, 2005.

The court also finds that the property transferred constitutes property of the estate. Under 11 U.S.C. § 541(a)(1), property of the bankruptcy estate, except for a few very limited exceptions not applicable here, includes, "all legal or equitable interest of the debtor in property as of the commencement of the case." Even though Defendant did not have a present right to receive the refund moneys on December 29, 2004, it is well-established that the proceeds of the right to the refund are property of the bankruptcy estate. *Smith*, 310 B.R. at 322. In addition, the transfers and removal occurred after Defendant filed his petition. Consequently, the second and third elements under 727(a)(2)(B) are also satisfied. But the Trustee has not proven that Defendant transferred or permitted removal of the funds with the requisite intent to hinder, delay or defraud creditors or the Trustee.

While it is true that Defendant knew that a portion of his tax refunds must be turned over to the Trustee as an asset of the bankruptcy estate, he was also entitled to keep a portion of his 2004 refund. According to the Trustee's calculations, that portion totaled $794, approximately the amount he spent on groceries and money orders to pay monthly bills. As discussed above, at the time Defendant spent the money, he believed he could replenish the amount spent since he was working two jobs at the time. And he did do so when he turned over to the Trustee the $1,662.09 shortly after the first meeting of creditors. He did not spend the money with the intent to withhold assets from his creditors or the Trustee. Likewise, while Defendant may have acted recklessly in obtaining the balance of his refund in cash and leaving it in his coat pocket, he did not do so with the intent to deprive his creditors or the Trustee of the funds. But for the fact that the money was stolen, the court believes that he would have deposited it in his bank account on Monday morning.

Considering the totality of the circumstances, and finding Defendant's testimony credible, the court concludes that he did not intend to hinder, delay or defraud his creditors or the Trustee.

CONCLUSION

Finding that the Trustee has not met her burden of proof on her claims under 11 U.S.C. § 542(a) and § 727(a)(2), judgment on the complaint will be entered in favor of Defendant. A separate judgment in accordance with this Memorandum of Decision will be entered by the court.