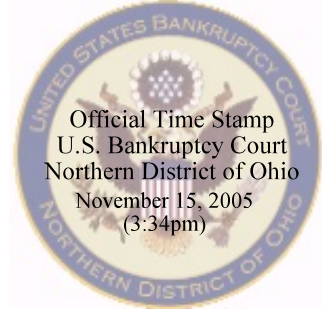


THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION



In re:	)	Case No. 04-19076
	)	
DONALD W. ROBINSON,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
_____	)	
	)	
STEPHEN W. POLK,	)	Adversary Proceeding No. 04-1565
	)	
Plaintiff,	)	
	)	
v.	)	<b><u>MEMORANDUM OF OPINION</u></b>
	)	
DONALD W. ROBINSON,	)	
	)	
Defendant.	)	

Plaintiff Stephen Polk filed this adversary proceeding against the debtor Donald Robinson seeking to have a debt declared nondischargeable under 11 U.S.C. § 523(a)(7). The debtor answered and denied that the debt is nondischargeable under that section. The plaintiff now moves for summary judgment. (Docket 41). The debtor, who is *pro se* at this point, has not responded and the time for doing so has elapsed. *See* case management order, docket 39. For the reasons stated below, the motion is granted.

**FACTS**

These are the undisputed facts, drawn from the pleadings and the affidavit in support of the summary judgment motion:

On June 16, 2004, the debtor was found guilty of perjury in the Lake County Court of Common Pleas. Perjury is a third degree felony under Ohio law. *See* OHIO REV. CODE § 2921.11(F). The state court judge subsequently entered a Judgment Entry of Sentence in which the court imposed this sentence: (1) two years of community control subject to the general supervision of the Adult Probation Department; and (2) “the Defendant shall serve One hundred and twenty days (120) in the Lake County Jail. Ninety of those days shall be suspended upon the payment of restitution in the amount of \$9,500.00 to Steve Polk[,]” together with other immaterial provisions. Exh. 1 to complaint. *See also*, OHIO REV. CODE § 2929.18(A)(1) (providing for the imposition of restitution payable to the victim as part of a felony sentence).

The debtor filed his chapter 7 case on July 18, 2004.

### **ISSUE**

Where a state court imposes restitution payable to an individual as part of a criminal sentence, is the restitution obligation dischargeable in a chapter 7 case?

### **DISCUSSION**

#### **11 U.S.C. 523(a)(7)**

An individual chapter 7 debtor’s debts are discharged with the exception of the debts identified in bankruptcy code § 523. 11 U.S.C. § 523. The plaintiff in this case relies on § 523(a)(7), which states that a chapter 7 discharge does not discharge a debtor from a debt:

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss . . . [with exceptions not relevant here].

11 U.S.C. § 523(a)(7).

The party seeking to except the debt from discharge has the burden of proving three things under this statute: the debt is (1) for a fine, penalty or forfeiture; (2) payable to and for the benefit of a governmental unit; and (3) is not compensation for an actual pecuniary loss.

The United States Supreme Court has held that the phrase “fine, penalty or forfeiture” is broad enough to include restitution imposed as part of a state criminal sentence. *Kelly v. Robinson*, 479 U.S. 36, 50 (1986). The plaintiff has, therefore, satisfied the first prong. The plaintiff must next prove that the restitution is payable to and for the benefit of a governmental unit. This was not an issue in *Kelly* because the court order in that case directed payment to the state probation department, which then forwarded the funds to the victim. As the victim was the state welfare agency, the funds were payable to a governmental unit. *See* 11 U.S.C. § 101(27). In this case, the criminal restitution is required to be paid directly to Mr. Polk rather than to a governmental agency. However, based on the Supreme Court’s instruction in *Kelly* that § 523(a)(7) preserves criminal restitution obligations from discharge, this court concludes that the debtor’s obligation to Mr. Polk is one for the benefit of a governmental unit.

The *Kelly* decision states without exception that “neither of the qualifying clauses of § 523(a)(7) allows the discharge of a criminal judgment that takes the form of restitution.” *Kelly*, 479 U.S. at 52. Reading § 523(a)(7) to prevent the discharge of the debtor’s obligation to Mr. Polk comports with that position. State criminal restitution by its very nature is an obligation that is imposed for the benefit of the state government. This is so, as the *Kelly* opinion notes, because restitution does not hinge on the injuries of the victim, but rather on a state’s interest in enforcing its criminal statutes:

Although restitution does resemble a judgment ‘for the benefit’ of the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim’s injury, but on the penal goals of the State and the situation of the defendant . . . ‘Unlike an obligation which arises out of a contractual, statutory or common law duty, . . . the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose.’

*Id.* (quoting *Pellegrino v. Div. of Criminal Justice (In re Pelligrino)*, 42 B.R. 129, 133 (Bankr. D. Conn.1984)). Moreover, interpreting § 523(a)(7) to preclude the discharge of a state criminal restitution judgment acknowledges “the fundamental policy against federal interference with state criminal prosecutions.” *Id.* at 48 (quoting *Younger v. Harris*, 401 U.S. 37, 46 (1971)). It also recognizes that “[t]he right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States.” *Id.* at 47.

Although the literal language of § 523(a)(7) does not cover a situation where a criminal penalty of restitution is payable to an individual rather than to a governmental entity, courts have looked to *Kelly* for guidance and concluded that such orders are nondischargeable under that section. *In re Thompson*, for example, holds that restitution payable to the state probation department for payment to a non-governmental fraud victim meets the requirements of § 523(a)(7), noting that, “[n]owhere in its discussion of the victim’s role in restitution orders did the *Kelly* Court suggest that the ‘payable to and for the benefit of a governmental unit’ language is actually limited to government victims . . . Given the many opportunities that the Court passed

to refer to ‘government victims’. . . *Kelly* strongly suggests that, indeed, § 523(a)(7) excepts from discharge all state criminal restitution orders, regardless of whether the payments are made to governmental units or individuals.” *In re Thompson*, 418 F.3d 362, 366 (3d Cir. 2005). The court in *Farmers Ins. Exch. v. Mills (In re Mills)*, 290 B.R. 822 (Bankr. D. Colo. 2003) reached the same conclusion with respect to a restitution award made directly payable to an insurance company. *See also, N. Am. Sci. Assocs., Inc. v. Clark (In re Clark)*, 222 B.R. 114 (Bankr. N.D. Ohio 1997) (holding that a debtor’s obligation to pay criminal restitution directly to his employer was nondischargeable under § 523(a)(7)). This court agrees with the reasoning of these decisions, and finds that the plaintiff has satisfied the second prong of § 523(a)(7).

The last prong of § 523(a)(7)—whether restitution is other than compensation for actual pecuniary loss— is also satisfied here. The *Kelly* decision notes that “[b]ecause criminal proceedings focus on the State’s interests in rehabilitation and punishment rather than the victim’s desire for compensation . . . restitution orders imposed in such proceedings ‘operate for the benefit of’ the State. Similarly, they are not assessed ‘for . . . compensation’ of the victim.” *Kelly*, 479 F.3d at 362-63. *See also, Tennessee v. Hollis (In re Hollis)*, 810 F.2d 106 (6th Cir. 1987) (determining that a debt for court costs assessed as part of a state criminal proceeding was not designed to compensate the state, because the obligation was imposed to serve the purposes of the State’s traditional penal obligations and goals); *State of Farmers Ins. Exch. v. Mills (In re Mills)*, 290 B.R. 822, 837 (Bankr. D. Colo. 2003) (finding that because a state criminal restitution order focuses “on the State’s interest in rehabilitation and punishment, instead of the victim[’]s

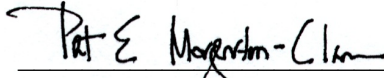
desire for compensation, the Restitution Order is not assessed to compensate for an actual pecuniary loss.”)<sup>1</sup>

In this case, there is no genuine issue of material fact about the terms of the state court criminal judgment entered against the debtor. The judgment provides that, as part of the criminal sentence on the perjury conviction, the debtor is to make restitution to the plaintiff of \$9,500.00. The plaintiff is, therefore, entitled to judgment that the restitution order is not dischargeable in this chapter 7 case.

### CONCLUSION

For the reasons stated, the plaintiff is entitled to summary judgment in his favor. A separate order will be entered reflecting this decision.

Date: 15 November 2005

  
\_\_\_\_\_  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

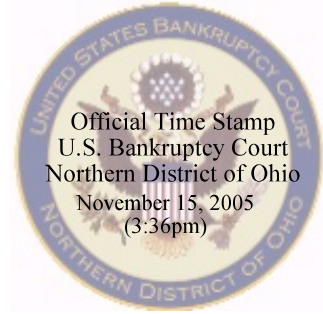
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<sup>1</sup> See also, 11 U.S.C. § 523(a)(13) (restitution orders issued by federal courts in criminal cases are not dischargeable); 11 U.S.C. § 1328(a)(3) (restitution included in a sentence on the debtor's conviction of a crime is not dischargeable in a chapter 13 bankruptcy).

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UNITED STATES BANKRUPTCY COURT  
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EASTERN DIVISION

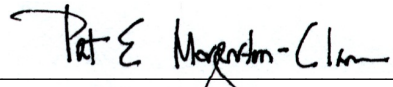


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STEPHEN W. POLK,	)	Adversary Proceeding No. 04-1565
	)	
Plaintiff,	)	
	)	
v.	)	<b><u>JUDGMENT</u></b>
	)	
DONALD W. ROBINSON,	)	
	)	
Defendant.	)	

For the reasons stated in the memorandum of opinion filed this same date, the restitution debt established as part of the state court criminal judgment entered against Donald Robinson is nondischargeable under 11 U.S.C. § 523(a)(7). The plaintiff's motion for summary judgment is, therefore, granted and judgment is entered in favor of the plaintiff on the complaint. (Docket 41).

IT IS SO ORDERED.

Date: 15 November 2005

  
 \_\_\_\_\_  
 Pat E. Morgenstern-Clarren  
 United States Bankruptcy Judge

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