IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JULY 1999 SESSION

STATE OF TENNESSEE,	*	No. 01C01-9812-CC-00477
Appellee	*	**M1998-00627-CCA-R3-CD** GILES COUNTY
V.	*	Hon. Stella L. Hargrove, Judge
JOHN W. BROWN, JR.	*	(Assault)
Appellant.	*	

For Appellant

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OPINION FILED:

AFFIRMED AS MODIFIED

NORMA MCGEE OGLE, JUDGE

OPINION

On November 3, 1998, the appellant, John W. Brown, Jr., pled guilty in the Giles County Circuit Court to assault. The appellant's plea agreement provided for a suspended sentence of eleven months and twenty-nine days incarceration in the Giles County Jail in conjunction with an equal period of probation. Additionally, the appellant agreed that the trial court would determine the amount of restitution. Accordingly, upon the appellant's plea of guilt, the trial court conducted a sentencing hearing and ordered restitution in the amount of five hundred and twenty-one dollars ($521.00).[1] As his sole issue on appeal, the appellant argues that the amount of restitution is not supported by the evidence presented at the hearing. Following a review of the record and the parties' briefs, we affirm the judgment of the trial court but modify the order of restitution.

I. Factual Background

The appellant's offense occurred as a result of an altercation on a school bus between his eight year old daughter and sixteen year old Darren Wayne McCree on October 10, 1997. The appellant's daughter reported the incident to her father, who entered the school bus and struck Darren in the face several times. Darren was injured during the assault and, consequently, was transported to the emergency room at Maury Regional Hospital. At the sentencing hearing, the appellant and the State jointly introduced billing records from the Maury Regional Hospital reflecting a charge of two hundred and twenty-two dollars ($222.00) for the emergency room visit and a charge of seventy-five dollars ($75.00) for the services of the emergency room physician. Additionally, the parties introduced billing and medical records reflecting Darren's visits to a Dr. Charles D. Atnip between October 4, 1997, and June 29, 1998, costing a total amount of two hundred and twenty-four dollars ($224.00).

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[1] We note that the record does not contain a pre-sentence report accompanied by documentation regarding the nature and amount of the victim's pecuniary loss, as required by Tenn. Code. Ann. § 40-35-304(b) (1997). However, technical compliance with Tenn. Code. Ann. § 40-35-304(b) is unnecessary when the trial court conducts a hearing to determine the amount of restitution. State v. Lewis, 917 S.W.2d 251, 256 (Tenn. Crim. App. 1995).

At the hearing, the appellant agreed that he should reimburse Darren for his visit to the Maury Regional Hospital. However, he contested his responsibility for Darren's visits to Dr. Atnip. The records submitted by the appellant and the State reflect that Darren originally sought treatment from Dr. Atnip due to a hunting accident, which occurred on October 3, 1997, and caused Hyphema[2] in his left eye. Prior to the appellant's assault, Darren received treatment from Dr. Atnip on October 4, 1997, October 6, 1997, and October 8, 1997. At the October 8 appointment, two days before the appellant's assault, Dr. Atnip noted that Darren's eye was "much better," although Darren was still experiencing some impairment to his vision. The doctor scheduled another appointment for Darren on October 17, 1997.

At the October 17 appointment, Dr. Atnip noted that Darren had "reinjured" his left eye due to the present assault and had stitches in his eye. However, the doctor also noted that the Hyphema in Darren's left eye had "resolved." Moreover, Darren expressed no complaints concerning his vision or any pain. Dr. Atnip scheduled a follow-up appointment for Darren on June 29, 1998, eight months later. At the June 29 appointment, Darren reported that he had experienced muscle spasms in his eye and discoloration in the corner of his eye two weeks before his appointment. Nevertheless, the doctor recorded that Darren was "doing very well."

In addition to the above records, the State presented the testimony of the victim's father, Stanley Wayne McCree.[3] Mr. McCree recounted that, after his son's hunting accident, Dr. Atnip warned Darren that any further trauma to his eye could cause permanent blindness in that eye. Accordingly, following the appellant's assault, Darren was examined by an ophthalmologist at Maury Regional Hospital, who instructed Darren to visit Dr. Atnip as soon as possible. Again, Darren simply attended his already scheduled appointment on October 17.

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[2]Hyphema is a condition of bleeding into the anterior chamber of the eye, a condition which may be caused by a contusion of the eye. 9 Robert K. Ausman & Dean E. Snyder, Medical Library § 21:13 (1992).

[3]Stanley Wayne McCree is referred to as Stanley Wayne "McCurry" in the transcript of the sentencing hearing.

At the conclusion of the sentencing hearing, the trial court made the following ruling:

> [A]fter considering the restitution arguments of counsel and the witness here, I think the visits to the doctor are close enough to the incident here that happened that it would be fair to access [sic] the total medical bills to you . . . .

II. Analysis

One purpose of the Criminal Sentencing Reform Act of 1989 is to encourage restitution to victims when appropriate, thereby promoting both rehabilitation and deterrence. Tenn. Code. Ann. § 40-35-102(3)(D) (1997); Tenn. Code. Ann. § 40-35-103(6) (1997); Lewis, 917 S.W.2d at 257. Accordingly, Tenn. Code. Ann. § 40-35-303(d)(10) (1997) authorizes "appropriate and reasonable" restitution to a victim as a condition of probation. There is no designated formula or method for computing restitution. State v. Smith, 898 S.W.2d 742, 747 (Tenn. Crim. App. 1994). However, the trial court must consider the financial resources and future ability of a defendant to pay restitution. Tenn. Code. Ann. § 40-35-304(d).[4] Moreover, "appropriate and reasonable" restitution should reflect the amount of the victim's pecuniary loss. See, e.g., Tenn. Code. Ann. § 40-35-304(b) and (e). See also Smith, 898 S.W.2d at 747; State v. Wilbanks, No. 01C01-9804-CR-00184, 1999 WL 325958, at *9 (Tenn. Crim. App. at Nashville, May 21, 1999). That having been said, the amount of restitution need not equal or mirror the *exact* pecuniary loss of the victim, but the trial court must determine actual loss based upon realistic values. State v. Wilson, No. 01C01-9602-CC-00073, 1997 WL 438175, at *6 (Tenn. Crim. App. at Nashville, July 31, 1997), perm. to appeal denied, (Tenn. 1998).

As relevant to this case, a victim's "pecuniary loss" includes "[a]ll special damages, but not general damages, as substantiated by evidence in the

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[4]The record suggests that the trial court did not consider this issue. Nevertheless, pursuant to our power of de novo review, see State v. Tatrow, No. 03C01-9707-CR-00299, 1998 WL 761829, at *22 (Tenn. Crim. App. at Knoxville, November 2, 1998), we note that the appellant's conditions of probation include the requirement that "he work at a lawful occupation and support [his] dependents." Moreover, the appellant did not indicate at the hearing that he was financially incapable of paying the ordered amount of restitution. Indeed, the appellant's attorney acknowledged to the court that a satisfactory payment schedule could be arranged with the appellant's probation officer. We conclude that the record adequately reflects the appellant's financial ability to pay the ordered amount of restitution.

record or as agreed to by the defendant." Tenn. Code. Ann. § 40-35-304(e)(1). Special damages are distinguishable from general damages by virtue of their origin in the special character, condition, or circumstances of the victim, rather than in the wrongful act itself. Compare Black's Law Dictionary 391 (6th ed. 1990)(defining general damages) and id. at 392 (defining special damages). Our supreme court has further explained, "'General damages are such as Naturally and necessarily result from the wrong o[r] injury complained of, while special damages are such as Naturally but not necessarily result from the wrong or injury complained of.'" Inland Container Corporation v. March, 529 S.W.2d 43, 44 (Tenn. 1975)(citation omitted). In sum, "special damages" are those damages that do not inhere in the wrongful act but are the actual result and "natural and proximate consequence" of the wrongful act. Id.; Black's Law Dictionary, supra at 32. See also 22 Am. Jur. 2D Damages § 39 (1988). Consistent with these principles, this court has held that hospital or medical expenses necessary for treatment of a victim of an assault generally qualify as special damages and are subject to an order of restitution. Lewis, 917 S.W.2d at 255.

Again, the appellant in this case does not dispute that Darren's pecuniary loss comprised the cost of the emergency room visit at Maury Regional Hospital and the services of the emergency room physician, amounting to two hundred and ninety-seven dollars ($297.00).[5] The sole issue before this court is whether the trial court erred in concluding that Darren's pecuniary loss or "special damages" also comprised the cost of his visits to Dr. Atnip, amounting to two hundred and twenty-four dollars ($224.00).

As an element of sentencing, this court reviews an order of restitution de novo with a presumption of correctness. State v. Hayes, No. 01C01-9601-CC-00036, 1997 WL 126815, at *8 (Tenn. Crim. App. at Nashville, March 20, 1997);

[5]The State correctly notes in its brief that the hospital billing records suggest that Darren's insurance company paid the two hundred and twenty-two dollar charge for the emergency room visit, leaving Darren with a balance of seventy-five dollars. Normally, in determining the amount of a victim's pecuniary loss, a trial court should consider any insurance coverage. Wilbanks, No. 01C01-9804-CR-00184, 1999 WL 325958, at *10. Nevertheless, as noted above, the amount of a victim's pecuniary loss may be established by agreement of the parties. Tenn. Code. Ann. § 40-35-304(e)(1).

State v. Blankenship, No. 02C01-9507-CC-00195, 1996 WL 39381, at *2 (Tenn. Crim. App. at Jackson, January 31, 1996). See also Tenn. Code. Ann. § 40-35-401(d) (1997). Because this is a misdemeanor case, the presumption of correctness is not conditioned upon the trial court's entry into the record of specific findings of fact relating to the sentencing determination. State v. Troutman, 979 S.W.2d 271, 274 (Tenn. 1998); State v. Leslie, No. 03C01-9804-CR-00125, 1999 WL 153773, at *2 (Tenn. Crim. App. at Knoxville), perm. to appeal denied, (Tenn. 1999). However, in any case, the presumption does not apply to sentencing determinations predicated upon uncontroverted facts. State v. Vanderford, 980 S.W.2d 390, 406 (Tenn. Crim. App. 1997); Smith, 898 S.W.2d at 745. Cf. State v. Parker, 932 S.W.2d 945, 956 (Tenn. Crim. App. 1996)(while this court generally does not interfere with a trial court's findings of fact unless the evidence contained in the record clearly preponderates against the findings, this court will not give such deference when evidence is stipulated or is in the form of a deposition, a statement contained in the pre-sentence report, or a record introduced as evidence). Finally, this court will not presume that a trial court's legal conclusions are correct. Vanderford, 980 S.W.2d at 406.

The trial court's determination of the amount of Darren's pecuniary loss was based upon the testimony of Mr. McCree in addition to the jointly submitted billing and medical records.[6] However, the trial court also relied upon the incorrect legal conclusion that temporal, rather than causal, proximity between the appellant's offense and the claimed damages was the measure of pecuniary loss. As previously noted, Tenn. Code Ann. § 40-35-304(e)(1) defines "pecuniary loss," in part, as "special damages" substantiated by the record. By including the term "special damages" in the statute authorizing restitution, the legislature included the requirement that a defendant's offense be the proximate *cause* of damages or loss claimed by the victim. See State v. Smith, 893 S.W.2d 908, 929 (Tenn. 1994)("[w]ords of art or technical terms in a statute are to be taken in their technical

[6]The appellant's attorney argued at the sentencing hearing that Mr. McCree's testimony, that an ophthalmologist at Maury Regional Hospital instructed Darren to visit Dr. Atnip following the appellant's assault, was not reflected in the jointly submitted records.

sense unless it is clear from the context that another sense was intended"). Thus, the State concedes and we agree that the appellant should not have been required to pay restitution for Darren's visits to Dr. Atnip prior to the present assault. The appellant was responsible for, at most, the visits to Dr. Atnip occurring on October 17, 1997, and June 29, 1998, which cost thirty-five dollars ($35.00) and ten dollars ($10.00) respectively.

With respect to these visits, the question of proximate cause involves first an inquiry into the question of cause in fact. Cook by and through Uithoven v. Spinnaker's of Rivergate, Inc., 878 S.W.2d 934, 939 (Tenn. 1994); Caldwell v. Ford Motor Company, 619 S.W.2d 534, 541 (Tenn. App. 1981). In the somewhat analogous context of torts, our supreme court has observed that a defendant's conduct is a "cause in fact" of a plaintiff's injuries if, but for the defendant's conduct, the plaintiff's injuries would not have occurred. Snyder v. LTG Lufttechnische GmbH, 955 S.W.2d 252, 256 n. 6 (Tenn. 1997); Kilpatrick v. Bryant, 868 S.W.2d 594, 598 (Tenn. 1993). Assuming proof of causation in fact, proximate or legal cause further requires that (1) the defendant's conduct was a substantial factor in bringing about the plaintiff's injuries, (2) there is no rule or policy relieving the defendant from liability, and (3) it was reasonably foreseeable that the defendant's conduct might result in the alleged injuries. McClenahan v. Cooley, 806 S.W.2d 767, 775 (Tenn. 1991).

In this case, Darren had already injured his eye at the time of the present assault and, in fact, had already scheduled the October 17 appointment with Dr. Atnip. Yet, it is equally clear from the record that the appellant's assault caused a new injury to or re-injured Darren's eye, requiring at least one appointment with Dr. Atnip. The Tennessee Court of Appeals, again in the context of tort liability, has observed that a person with a pre-existing disability is nevertheless entitled to recover from a defendant damages for any additional injury "over and above the consequences which normally would have followed from the preexisting condition absent defendant's negligence." Haws v. Bullock, 592 S.W.2d 588, 591 (Tenn. App.

1979)(citation omitted). See also T.P.I. Civil No. 14.14. Moreover, the court in Haws observed that

> [w]here the tort feasor's negligence has rendered it impossible to apportion the amount of disability caused by the pre-existing condition and that caused by the subsequent injury, it is generally held that the defendant is liable for the total damages for the injuries whether the injuries were for new ones or aggravation of a pre-existing condition.

592 S.W.2d at 591. See also Wilkinson v. Stinson, No. 03A01-9604-CV-00147, 1997 WL 129114, at *1 (Tenn. App. At Knoxville, March 21, 1997).

In applying the above principles, we acknowledge our prior observation that "'our restitution law does not require the sentencing court to determine a defendant's criminal liability for restitution in accordance with the strict rules of damages applicable to a civil case.'" State v. Cowart, No. 01C01-9508-CC-00251, 1996 WL 675542, at *5 (Tenn. Crim. App. at Nashville, November 22, 1996)(citation omitted). In other words, rules of causation will be more liberally applied in the context of restitution. However, the rules are not completely discarded. Cf. State v. McKinney, No. 03C01-9309-CR-00307, 1994 WL 592042, at *3 (Tenn. Crim. App. at Knoxville, October 26, 1994). Accordingly, we conclude that the appellant was only liable for restitution of the cost of the October 17, 1997 visit to Dr. Atnip in addition to the costs of the emergency room visit and the services of the emergency room physician.

III. Conclusion

We affirm the judgment of the trial court but modify the order of restitution to reflect an amount of three hundred and thirty-two dollars ($332.00).

Norma McGee Ogle, Judge

CONCUR:

Jerry L. Smith, Judge

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Thomas T. Woodall, Judges