

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs May 2, 2023

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STATE OF TENNESSEE v. BRUCE ANTIONE COLE

**Appeal from the Circuit Court for Madison County
No. 19-922 Donald H. Allen, Judge**

No. W2022-00656-CCA-R3-CD

For the second time, the Defendant, Bruce Antione Cole, appeals the trial court's order of restitution in the amount of \$25,474.16 associated with his convictions for aggravated assault and possession of a firearm by a convicted felon. Specifically, the Defendant argues that the trial court abused its discretion by reinstating a restitution amount that was not substantiated by evidence in the record and by failing to consider the Defendant's financial resources and future ability to pay. After review, we reverse the restitution order of the trial court and remand for a new restitution hearing.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed;
Case Remanded**

KYLE A. HIXSON, J., delivered the opinion of the court, in which TIMOTHY L. EASTER and JOHN W. CAMPBELL, SR., JJ., joined.

Jessica F. Butler, Assistant Public Defender-Appellate Division (on appeal), Franklin, Tennessee, and Jeremy B. Epperson, District Public Defender (at remand hearing), Jackson, Tennessee, for the appellant, Bruce Antione Cole.

Jonathan Skrmetti, Attorney General and Reporter; Jonathan H. Wardle, Senior Assistant Attorney General; Jody S. Pickens, District Attorney General; and Matthew Floyd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

This case arose from a March 26, 2019 shooting at Foam Fabricators, Inc. where the Defendant and the victim, Kevin Transou, worked together as machine operators. *State v. Cole*, No. W2021-00175-CCA-R3-CD, 2022 WL 420880, at *1 (Tenn. Crim. App. Feb.

11, 2022). During their shift, a machine the two were working on together malfunctioned, and the two started arguing. *Id.* The argument began as a verbal altercation and escalated when the victim slapped the Defendant after growing tired of the Defendant's repeated insults. *Id.* Afterwards, the Defendant retrieved a gun. *Id.* At the end of the shift, the victim exited the building where the Defendant was "waiting on [him]" in the parking lot. *Id.* The Defendant then shot the victim twice in the left leg, once in the right leg, and after a struggle ensued for the gun, the Defendant "pistol whipped" the victim and shot the victim once more in the stomach. *Id.* The Defendant said that he should have killed the victim and then fled the scene. *Id.*

The Defendant was apprehended by law enforcement and indicted for attempted first degree murder, aggravated assault, employing a deadly weapon during the commission of a dangerous felony, employing a deadly weapon during the commission of a dangerous felony when the Defendant had a prior felony conviction, and being a convicted felon in possession of a firearm. *Id.* at *1-3. On October 15, 2020, the Defendant proceeded to trial. *Id.* at *1.

During the trial, the victim testified that after being shot, he was airlifted to Regional One Health in Memphis where he stayed for nine days. *Id.* at *2. The victim stated that, as a result of his injuries, he had been unable to return to work and was scheduled for another stomach surgery. *Id.* The Defendant did not testify. *Id.* at *3. The jury convicted the Defendant of aggravated assault and possession of a firearm by a convicted felon. *Id.* at *4. The Defendant was acquitted on all other charges. *Id.*

The sentencing hearing was held on November 30, 2020. The State entered into evidence the Defendant's criminal record and the presentence report that included the victim's self-reported pecuniary loss of \$25,474.16 and medical invoices. The medical invoices included: a \$16,631.30 collection letter sent on behalf of UT Regional One Physicians; a \$1,003.00 bill from Emergency Medical Care Facilities; a \$525.00 bill from Jackson Radiology Associates; another \$525.00 bill from Jackson Radiology Associates; a \$3,570.00 bill from UT Regional One Physicians; a \$3,706.38 bill from Jackson Madison County General Hospital; and another \$3,706.38 bill from Jackson Madison County General Hospital. Defense counsel acknowledged that the medical invoices had dates occurring after the shooting but stated that the trial court was required to consider the Defendant's ability to pay. Defense counsel argued that the Defendant was indigent, facing a lengthy sentence, and did not have ability to pay any substantial amount of the restitution. Defense counsel also requested that the trial court waive the fines based upon the Defendant's indigency status. Only the Defendant's sister, Brittie Weddle, testified at the sentencing hearing, and she asked that the court be lenient when sentencing the Defendant.

The trial court stated it would review the evidence and continued the sentencing hearing to a later date.

The sentencing hearing resumed on December 3, 2020. The trial court imposed a fifteen-year sentence for the aggravated assault conviction and a thirty-year sentence for the possession of a firearm conviction, both to be served at sixty percent confinement and consecutively to each other, for an effective forty-five-year sentence. These sentences were ordered to run consecutively to another twelve-year sentence that the Defendant was on parole for at the time of the shooting. Relying on the investigation report, the trial court additionally ordered restitution in the amount of \$25,474.16 for the aggravated assault conviction. In support of the restitution order, the trial court stated that the victim had suffered “devastating” and “disabling” injuries and was entitled to be paid for his medical expenses. The trial court ordered the Defendant to pay \$150 a month because that was “probably . . . the most [the Defendant] could pay each and every month.” The trial court then waived the fines stating that the Defendant did not have the “ability to necessarily pay fines.”

The Defendant filed a motion for a new trial, verdict of acquittal, or a modification of sentence. On January 19, 2021, the trial court heard the Defendant’s motion. The Defendant argued that the evidence was insufficient to support his convictions, that the trial court erred by denying his motion to cross-examine the victim about the victim’s prior conviction, and that the trial court erred by ordering consecutive sentencing. The trial court denied the motion. The Defendant appealed.

In his first direct appeal, of which we take judicial notice, the Defendant challenged, *inter alia*, the trial court’s imposition of restitution. *Cole*, 2022 WL 420880, at *1. Specifically, the Defendant argued that there were “no findings in the record to support” the amount ordered and that the trial court failed to consider the Defendant’s “ability to pay or set a timeframe in which payment had to be completed.” *Id.* at *7. The State likewise conceded that the trial court abused its discretion by failing to consider the Defendant’s financial resources and ability to pay. *Id.* This court agreed, holding “that the trial court erred by failing to consider the requirements imposed by statute before entering an order of restitution.” *Id.* This court determined that nothing in the record indicated the ordered restitution amount or performance schedule was reasonable because the trial court failed to consider the Defendant’s financial resources or ability to pay. *Id.* at *8. This court stated that the trial court’s reasoning and logic for imposing restitution was improper because the trial court had determined that the Defendant did not have the financial resources or future ability to pay the fines. *Id.* It further found that the victim’s alleged pecuniary loss was not substantiated by evidence in the record because of potential

duplicates in the medical invoices. *Id.* This court reversed the trial court's restitution order and remanded the case for a new restitution hearing. *Id.*

Upon remand, a restitution hearing was held on April 25, 2022. The State did not enter any new evidence and instead relied on the proof that was submitted at the first sentencing hearing. The State argued that the victim had a constitutional right to restitution, even if the court found the Defendant did not have the ability to pay, and that the victim could convert the restitution into a civil judgment after one year. The State said that the victim had testified to his \$25,474.16 worth of medical expenses, referred to the medical invoices introduced at the previous hearing, and provided an explanation of his treatment and recovery. Defense counsel argued restitution was not proper in this case because of potential duplications in the medical invoices supporting the victim's pecuniary loss and because, at the time of sentencing, the Defendant was age forty-two, declared indigent, and facing a forty-five-year sentence consecutive to another twelve-year sentence.

Regarding its logic and reasoning for imposing restitution when previously waiving the fines, the trial court stated that it did so because it believed restitution was more important than fines and it was trying to "give the [D]efendant a break[.]" When assessing the victim's pecuniary loss, the trial court stated it had previously determined the victim's loss was \$25,474.16 based on the victim's testimony and the victim impact statement and that the court had not picked that "figure . . . out of thin air." The trial court reasoned that the victim had testified to his out-of-pocket expenses, injuries, and recovery and that it had accredited this testimony.

In regards to the Defendant's financial resources and future ability to pay, the trial court expressed frustration predicting the Defendant's future ability to pay. The trial court stated that it did not know how long the Defendant would be incarcerated or if he would be paroled. The trial court further stated that it did not have any strong evidence that the Defendant could or could not pay restitution and that the State had not presented proof on this issue. The trial court acknowledged that it had found the Defendant indigent for the purpose of hiring an attorney and that the Defendant had been in custody since sentencing. The court then stated that the Defendant would "certainly" have the ability to pay the \$25,474.16 restitution within the next forty-five years if he was released on parole and obtained employment. Otherwise, the trial court reasoned, a victim of crime would never receive restitution if a defendant received a long prison sentence.

Addressing the payment schedule for restitution, the trial court stated its previous order instructed the Defendant to pay \$150 a month but said it was doubtful that the Defendant was making \$150 a month while incarcerated. The trial court stated it was

“almost impossible” to establish a payment plan when ordering an incarcerative sentence where the Defendant may be paroled.

The trial court then imposed the same restitution amount of \$25,474.16 based on the victim’s pecuniary loss. It stated that the Defendant did not currently have the ability to pay but that, if paroled, he might have the future ability. It further imposed the same payment schedule of \$150 per month. The trial court stated that the victim would likely need to get a civil judgment because the “reality” was that the Defendant was not going to pay the restitution and that it was doubtful payment would be enforced as a condition of parole.

The trial court entered a restitution order on May 12, 2022. The trial court found that the Defendant did not have the present ability to pay because he was incarcerated but that the Defendant “may . . . at some point” in the next forty-five years have the ability to pay the restitution after making parole. This timely appeal followed.

II. ANALYSIS

The Tennessee Constitution guarantees victims of crime the “right to restitution from the offender.” Tenn. Const. art. I, § 35. Tennessee’s Victims’ Bill of Rights further provides that victims of crime have the right to collect court-ordered restitution in the same manner as a civil judgment. Tenn. Code Ann. § 40-38-102(c). As such, trial courts are encouraged to use alternatives to incarceration that include reparations and victim compensation. *Id.* § 40-35-103(6). Our supreme court has held that the purpose of restitution is to both compensate victims and to punish offenders. *See State v. Cavin*, No. E2020-01333-SC-R11-CD, --- S.W.3d ---, 2023 WL 3879891, at *3 (Tenn. June 8, 2023) (citing Tenn. Code Ann. § 40-35-102(3)).

Pursuant to Tennessee Code Annotated section 40-35-104, a trial court may impose an order of restitution with a defendant’s incarcerative sentence. *See* Tenn. Code Ann. § 40-35-104(c)(2), (8). With limited exceptions, the procedure for ordering restitution for a defendant sentenced pursuant to Tennessee Code Annotated section 40-35-104 is the same as for a defendant sentenced under Code section 40-35-304. *Id.* § 40-35-304(g). While restitution has no set formula, the amount must be reasonable. *Cavin*, --- S.W.3d ---, 2023 WL 3879891, at *4; *State v. Mathes*, 114 S.W. S.W.3d 915, 919 (Tenn. 2003). When a trial court believes that restitution is proper or restitution is requested by the victim or the district attorney general, the trial court “shall order the presentence report . . . to include documentation regarding the nature and amount of the victim’s pecuniary loss.” Tenn. Code Ann. § 40-35-304(b), (g). Pecuniary losses are “[a]ll special damages . . . as substantiated by evidence in the record or as agreed to by the defendant.” *Id.* § 40-35-

304(e)(1). Special damages are “‘specifically claimed and proved’ damages ‘that are alleged to have been sustained in the circumstances of a particular wrong.’” *Cavin*, --- S.W.3d ---, 2023 WL 3879891, at *4 (quoting *Damages*, Black’s Law Dictionary (11th ed. 2019)). The burden is on the State to prove the victim’s pecuniary loss. *Cavin*, --- S.W.3d ---, 2023 WL 3879891, at *4.

After determining the victim’s pecuniary loss, the trial court must consider the defendant’s financial resources and future ability to pay. Tenn. Code Ann. § 40-35-304(d). However, the trial court is not required to make individual, specific findings regarding a defendant’s ability to pay. *Cavin*, --- S.W.3d ---, 2023 WL 3879891, at *6. Once the trial court has determined the victim’s pecuniary loss and considered the defendant’s financial resources and future ability to pay, it must specify at the time of sentencing the restitution amount and time of payment. *Id.* § 40-35-304(b)-(e). Restitution, however, that cannot be fulfilled “serves no purpose” to a defendant or victim. *State v. Gevedon*, No. M2020-00359-SC-R11-CD, --- S.W.3d ---, 2023 WL 3880366, *at 5 (Tenn. June 8, 2023). The ordered restitution amount, therefore, is not required to precisely match the victim’s pecuniary loss as the trial court must determine an amount that a defendant can reasonably pay. *Mathes*, 114 S.W.3d at 919.

When ordering restitution, the trial court “may” impose a payment schedule for the defendant; however, if a payment schedule is not specified, restitution must be paid by the expiration of the defendant’s sentence. Tenn. Code Ann. § 40-35-304(c), (g)(2); *Gevedon*, --- S.W.3d ---, 2023 WL 3880366, at *3. Any unpaid portion of the restitution at the end of a defendant’s sentence may be converted to a civil judgment. Tenn. Code Ann. § 40-35-304(h)(1). However, regardless of this possible conversion to a civil judgment, the trial court is still required to enter a restitution order that the defendant can reasonably pay. *Cavin*, --- S.W.3d ---, 2023 WL 3879891, at *4. Moreover, a defendant, victim, or district attorney general may, at any time, petition the trial court to waive, adjust, or modify the restitution order. Tenn. Code Ann. § 40-35-304(f).

This court reviews a trial court’s restitution order under an abuse of discretion standard with a presumption of reasonableness. *Cavin*, --- S.W.3d ---, 2023 WL 3879891, at *4. “A trial court abuses its discretion when it applies incorrect legal standards, reaches an illogical conclusion, bases its ruling on a clearly erroneous assessment of the proof, or applies reasoning that causes an injustice to the complaining party.” *State v. Phelps*, 329 S.W.3d 436, 443 (Tenn. 2010).

Here, both parties agree that the victim’s pecuniary loss remains unsubstantiated because the State failed to present evidence establishing the victim’s actual loss and the

trial court failed to resolve discrepancies and redundancies in the medical invoices. We agree.

In this court's previous opinion, a panel of this court held that the victim's pecuniary loss was unsubstantiated by the record in violation of Tennessee Code Annotated section 40-35-304 and noted possible duplications in the victim's medical invoices. *Cole*, 2022 WL 420880, at *8. At the second restitution hearing, however, the State opted to rely on the evidence previously presented at the first sentencing hearing, notwithstanding that this court had determined that evidence was insufficient to establish the victim's loss. Further, the trial court failed to resolve the possible duplications and redundancies in the medical invoices. While the victim reported a loss of \$25,474.16, the invoices total \$29,667.06. The State concedes that two of these invoices are likely duplicates, making the total \$25,435.68. However, even if the possibility of duplicate invoices is ignored, a discrepancy of \$38.48 in the reported amount and the total amount remains. While this discrepancy is minimal, we also note that it is possible at least one of the individual invoices might have been included in the debt collection letter for \$16,631.30 sent on behalf of UT Regional One Physicians.

Moreover, both the State and the trial court erroneously said that the victim had testified to \$25,474.16 worth of medical expenses. The trial court additionally stated that it based the \$25,474.16 restitution amount on the victim's testimony regarding his out-of-pocket expenses and on the victim impact statement. The record, however, reflects that the victim only testified at trial regarding his injuries and recovery and not to his alleged \$25,474.16 worth of medical expenses. Further, the record contains no victim impact statement and the presentence investigation report notes that that no formal victim impact statement was provided. The only reference in the record to the victim's \$25,474.16 loss is the self-reported amount found in the presentence investigation report. While a victim's testimony alone may be sufficient to support a restitution order, general statements without further explanation as to pecuniary loss are insufficient. *Cavin*, --- S.W.3d ---, 2023 WL 3879891, at *4. We conclude, therefore, that the victim's pecuniary loss is still unsubstantiated by the record. Tenn. Code Ann. § 40-35-304(e)(1). Accordingly, we remand to the trial court for a determination on the victim's actual loss. Upon remand, the trial court must resolve the duplications and redundancies in the victim's medical invoices.

Next, both parties agree that the trial judge did not follow this court's instruction on remand to properly consider the Defendant's financial resources and future ability to pay. *Cole*, 2022 WL 420880, at *8. The Defendant argues that the trial court engaged in an erroneous analysis of his ability to pay because it contradicted itself concerning its belief in the Defendant's ability to pay and instead relied on the possibility of a future conversion of the restitution award to a civil judgment. As such, the Defendant requests that the

restitution be set at \$0. The State, however, requests a second remand, arguing that if the trial judge properly considers the Defendant's financial resources and future ability to pay, it may still find that the Defendant is able to pay the restitution amount.

While the trial court acknowledged its obligation to consider the Defendant's financial resources and future ability to pay, we agree with the parties that it did not engage in a proper analysis of these statutory requirements. The trial court stated that the State did not present proof on this matter and that no strong evidence existed to support the Defendant's ability to pay. However, the presentence investigation report showed that the Defendant had no reported financial assets or debts but that he had a partial employment history, education, training as a plumber, and a lengthy criminal record. The trial court was further aware, in rendering its decision that the Defendant did not have the current ability to pay, that the Defendant was indigent for the purpose of hiring an attorney, was forty-two years old at the time of sentencing, and faced a lengthy incarceration. Rather than analyzing this proof in its totality, the trial court only speculated that the Defendant might get a job if paroled. While the potential for parole is a proper circumstance for trial courts to consider, the trial court did not analyze the Defendant's ability to pay the restitution in light of the other evidence available in the record—*i.e.*, the Defendant's education, employment potential, training, and age. *See, e.g., Cavin*, --- S.W.3d ---, 2023 WL 3879891, at *7 (considering a defendant's income, monthly expenses, and probationary period); *State v. Bottoms*, 87 S.W.3d 95, 106, 108 (Tenn. Crim. App. 2001) (considering a defendant's eventual parole, employment history, education, indigency status, and future employment potential); *State v. Ballew*, No. M2016-00051-CCA-R3-CD, 2017 WL 1103034, at *3 (Tenn. Crim. App. Mar. 24, 2017) (considering a defendant's age, education, and employment history). Although we acknowledge that the trial court does not need to make specific, individual determinations on the Defendant's financial resources and future ability to pay, *see Cavin*, --- S.W.3d ---, 2023 WL 3879891, at *6, we conclude that the trial court did not properly consider these facts, as required by the statute, in setting the Defendant's ultimate restitution amount.

Further, the trial court repeatedly stated that the Defendant would realistically not pay the restitution and that the victim would need to obtain a civil judgment in order to receive payment. This reliance on the possibility of a future civil judgment is improper when setting the restitution amount in a criminal case. *See State v. Bohanon*, No. M2012-02366-CCA-R3CD, 2013 WL 5777254, at *8 (Tenn. Crim. App. Oct. 25, 2013) (“While it is true that any unpaid portion of court-ordered restitution may be converted to a civil judgment, the amount ordered in the first place must be reasonable and in accordance with statutory requirements.”); *State v. Carder*, No. W2009-01862-CCA-R3-CD, 2010 WL 5272938, at *5-6 (Tenn. Crim. App. Dec. 10, 2010). We further note that the State's comment at the hearing on remand that the victim could convert the restitution order into

a civil judgment after one year is incorrect. A victim may only convert any unpaid restitution amount into a civil judgment after the expiration of the defendant's sentence. Tenn. Code Ann. § 40-35-304(h)(1).

Upon remand, the trial court must analyze evidence in the record and any further evidence submitted and, upon that, 1) reconcile any duplications in the victim's claimed losses to determine the victim's exact pecuniary loss; and 2) consider the Defendant's financial resources, future ability to pay, and other relevant evidence to set a reasonable restitution amount. While this can be a difficult determination, the Tennessee General Assembly nonetheless mandates trial courts to engage in this analysis. Tenn. Code Ann. § 40-35-304(d), (g). In addition, as noted above, the victim has a right to restitution, and this right should be considered in imposing restitution. Tenn. Const. art. I, § 35; Tenn. Code Ann. §§ 40-35-103(6), -38-102(c). Otherwise, as the trial court stated, a victim could be erroneously denied restitution just because a defendant faces lengthy incarceration.

While the Defendant further challenges the payment schedule of \$150 a month as unreasonable, a finding on this contention is unnecessary because a remand is required to determine the victim's actual pecuniary loss and to set a reasonable restitution amount based upon the required statutory considerations. We note, however, that trial courts are not required to impose payment schedules for restitution. Tenn. Code Ann. § 40-35-304(c); *Gevedon*, --- S.W.3d ---, 2023 WL 3880366, at *3. If a trial court in its discretion decides not to impose a payment schedule, the time by which a restitution order must be paid is the expiration of the defendant's sentence. Tenn. Code Ann. § 40-35-304(g)(2); *Gevedon*, --- S.W.3d ---, 2023 WL 3880366, at *3. Because we are vacating the restitution order and remanding for the trial court to engage in the required statutory analysis, we need not determine at this time whether the payment schedule originally imposed was reasonable under the circumstances of this case.

Because the victim's pecuniary loss is not substantiated by the record and the trial court did not engage in the required statutory analysis in setting the final restitution amount regarding the Defendant's financial resources and future ability to pay, we conclude that the restitution order of \$25,474.16 is again unreasonable. Therefore, the trial court abused its discretion in imposing it. As such, we reverse the trial court's order of restitution and remand for a new restitution hearing to determine the victim's actual pecuniary loss and to consider the Defendant's financial resources and future ability to pay.

III. CONCLUSION

In consideration of the foregoing and the record as a whole, we reverse the judgment of the trial court with respect to restitution and remand the case for a new restitution hearing consistent with this opinion.

KYLE A. HIXSON, JUDGE