

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
March 28, 2023 Session

**FILED**  
05/31/2023  
Clerk of the  
Appellate Courts

**STATE OF TENNESSEE v. HOPIE CONLEY**

**Appeal from the Criminal Court for Sullivan County  
No. S72746 James F. Goodwin, Jr., Judge**

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**No. E2022-00237-CCA-R3-CD**

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Defendant, Hopie Conley, pled guilty to two counts of aggravated assault, one count of reckless aggravated assault, and one count of reckless endangerment, with an agreed sentence of six years, split confinement, with Defendant serving 180 days incarcerated and the remainder of her sentence on supervised probation. Following a restitution hearing, the trial court ordered Defendant pay \$83,366.68 in total restitution through monthly payments of \$500. On appeal, Defendant contends the trial court erred in determining the restitution amount because the total amount awarded could not be satisfied prior to the end of her sentence, Defendant lacked the financial ability to pay the ordered monthly restitution amount, and the State failed to prove the victim's pecuniary loss. The State concedes that the trial court erred in ordering a monthly restitution payment schedule that would not satisfy the total restitution award prior to the end of Defendant's sentence. However, it contends the trial court properly determined the monthly restitution amount and submits that the matter does not need to be remanded. After reviewing the record, the briefs and oral arguments of the parties, and considering the applicable law, we reverse the judgments of the trial court in part and remand for a new restitution hearing consistent with this opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed in Part and Reversed in Part.**

JILL BARTEE AYERS, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., P.J., and KYLE A. HIXSON, J., joined.

Kendall Stivers Jones, Assistant Public Defender, Franklin, Tennessee (on appeal); Leslie Tiller, Public Defender (at plea) for the appellant, Hopie Conley.

Jonathan Skrmetti, Attorney General and Reporter; Garrett D. Ward, Assistant Attorney General; Barry P. Staubus, District Attorney General; and Alex Griffith, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### Facts and Procedural History

This case arose when Defendant drove James Cordle to a mobile home park to fight Damon Alexander on January 9, 2020. After the fight was over, Mr. Cordle got back into Defendant's car to leave. Defendant drove toward Mr. Alexander and two other people. Gregory Abner and Hannah Abner managed to avoid being hit, but Defendant struck Mr. Alexander. When she struck Mr. Alexander, Defendant also struck a parked car and a mobile home, causing Mr. Alexander to be dragged under her vehicle. The collision caused significant damage to the side of the mobile home. According to officers who were dispatched to the scene, Mr. Alexander suffered an "obvious" broken leg. He had been pulled from underneath the vehicle before any officers arrived at the scene. Defendant stipulated to these facts as set forth in the affidavit of complaint as the basis for her guilty plea.

Defendant agreed to waive the right of indictment or presentment by the grand jury, and on March 19, 2021, Defendant was charged by criminal information with two counts of aggravated assault, a Class C felony, one count of reckless aggravated assault, a Class D felony, and one count of reckless endangerment, a Class E felony. According to the plea agreement, Defendant was to serve a six-year sentence, suspended to supervised probation after serving 180 days in the Sullivan County Jail. Additionally, Defendant was to have no contact with Mr. Alexander, Gregory Abner, Hannah Abner, and Christa Abner, and she was to pay restitution to Mr. Alexander in an amount to be determined at a restitution hearing. Defense counsel suggested that the restitution hearing be held after Defendant "is out of jail . . . so we know if she's gotten a job and how much she makes." The State agreed that a delay in holding the restitution hearing would also be helpful to the victim who was applying to the Criminal Injuries Compensation Fund ("the Fund").

#### *Restitution Hearing – January 28, 2022*

At the restitution hearing, the victim in count one, Damon Alexander, testified that he sustained a broken leg and a broken hip from being struck and dragged by Defendant's car. Mr. Alexander remained in the hospital "roughly a week," and over the course of several months, underwent four surgeries which involved the placement of three plates, a

bar, twelve regular screws, and one long screw in his hip and leg. After the surgeries, he underwent physical therapy and had multiple follow-up physician appointments. Mr. Alexander's medical bills and a spreadsheet of itemized expenses prepared by the State were admitted as exhibits without objection. The total sum of Mr. Alexander's medical bills as shown on the spreadsheet was \$97,020.07.

Mr. Alexander testified that he would have to file a civil lawsuit to recover his costs but could not afford an attorney. He stated that he had reached out to "every lawyer from here to like Kingsport" but no one would take his case or represent him pro bono. Due to his injuries from the incident, Mr. Alexander was unable to work for nine months. Although he had resumed full-time work as a painter for Woods Paint Company, Mr. Alexander testified that his injuries made it "harder to go up the ladders and use the lifts."

Mr. Alexander did not have health insurance at the time he sustained the injuries. He talked to "a few people" at the hospital but received no helpful information or relief in paying or reducing his medical bills. The only relief Mr. Alexander received was from the Fund. Three letters from the Fund were admitted as a collective exhibit without objection. According to the letters, Mr. Alexander was approved to receive \$14,571.43 in economic support from the Fund. The Fund also made direct payment to seven providers totaling \$12,771.39. In addition, the letters explained to Mr. Alexander that the Fund would pay no greater than 75% of an "eligible" bill, and should the providers accept payment from the Fund, they were prohibited by operation of law from billing Mr. Alexander the balance of the bill. Mr. Alexander testified that he was contacted by collectors "every day" for the outstanding medical bills and that it would take "a long time" for him to pay off his medical bills.

Defendant, age twenty-six, pled guilty to the four charges in the case and served time following the entry of the plea. She testified that she was released on June 13, 2021, and had obtained work through a temporary agency. She worked at different work sites depending on the need, and her wages varied. She earned as much as \$13/hour and as little as \$10.50/hour. A "majority of the time," Defendant worked close to a forty-hour work week. She obtained fairly steady work after she started working with the temporary agency. Previously, she would go "weeks at a time" without work. She had gone as long as two months between jobs. Despite having a "good work ethic," Defendant explained that multiple employers declined to offer her a permanent job when they learned she had felony convictions.

At the time of the hearing, Defendant had recently secured a job at a fast-food restaurant in Elizabethton. She expected to complete the training phase in "another week or two." She stated that she could earn between \$11-12 per hour depending on the shift; the night shift paid more. She was unaware how many hours she could expect to work in

a week. However, her manager stated that he would try to put her on the schedule between twenty-five to forty hours per week, “if not more,” and schedule her for the night shift.

Defendant was pregnant at the time of the hearing, due to deliver March 5-19, 2022. She expected to take four to six weeks off work for maternity leave, but added, “I plan on going back as soon as I can.” She had already arranged for childcare when she returned to work.

Defendant testified that she lived with her grandparents in Bluff City. She had applied for public housing because it is located closer to the new employment. She learned that it takes four to six weeks for the housing application to process and another two weeks before she would be matched with available housing. Defendant was unaware of the cost of rent for public housing.

Defendant had a suspended driver’s license and testified that she would be eligible for reinstatement of her license at the end of March 2022, once she paid the reinstatement fee of \$600. Defendant’s grandmother had been driving her to work, and she reimbursed her grandmother \$80 to \$120 per month for transportation costs. If she remained living with her grandparents, Defendant confirmed that she could reduce half her transportation costs once her license was reinstated.

As for her remaining expenses, Defendant testified that she paid \$60 monthly for her phone, \$45 monthly for probation fees, and \$85 weekly for child support. She also owed \$1,600 in child support which had accrued while she was incarcerated, and she owed her grandfather \$2,500 for a vehicle he purchased for her grandmother to drive her back and forth from work to avoid wearing out her grandmother’s car. She did not testify when or how she planned to pay those debts. Defendant stated that her monthly expenses were “about \$565” and before taxes, she would make approximately \$1,100 monthly. Defendant stated that she had no savings.

The State argued for “all or a significant portion” of Mr. Alexander’s outstanding bills be paid in restitution. The defense argued that a person making \$11-\$12/hour cannot reasonably be expected to pay \$97,000 during the remainder of six-year probated sentence. The defense asked the trial court to consider Defendant’s financial resources and ability to pay given “the kind of jobs she’s had and the hourly wage that she makes.”

In determining the amount of restitution, the trial court used the total amount of Mr. Alexander’s medical bills as shown on the exhibited spreadsheet, \$97,020.07, and deducted

\$13,653.32<sup>1</sup>, to arrive at a total restitution award of \$83,366.68. The court then considered Defendant's ability to pay and a payment schedule:

If you divide [\$83,366.68] by 72, it comes out to be about \$1,127.00 a month, which she is not able to pay, based on her testimony. She's twenty-six years old, she says that the fact that she has felony convictions has cost her temporary jobs in the past and that she's having issues finding employment, that she is going to work at [the restaurant], make either \$11.00 or \$12.00 an hour and work between either twenty to forty hours a week. So, if I use \$11.00 an hour at thirty hours a week, that's \$1,320.00 a month. She testified that she has \$500.00 and some dollars in expenses every month. So, if you take \$1,320.00 and subtract \$600.00, she's got \$720.00 left. I don't think in her estimate of her expenses she included food. So, if I require her to pay \$500.00 a month, for 72 months, it will be \$36,000.00.

The trial court next considered Defendant's future ability to pay:

Now, I think that in the future that she can earn more than \$1,320.00 a month[.] [S]he's twenty-six-year[s] old, she's able-bodied, she's getting ready to have another child. But just driving back to court today from lunch, I noticed that the Pal's across the road is advertising \$15.00 an hour for help wanted. I know that I have convicted felons with much worse records than Ms. Conley in Recovery Court, who are making a career at Robinette in Bristol, making \$15.00 to \$20.00 some dollars an hour, working forty hours or more a week. So, I find that employment is out there if Ms. Conley really wants to work.

The trial court acknowledged that the ordered monthly payment amount would total \$36,000 over the term of Defendant's sentence and would not fully satisfy the victim's damages:

Now, if I say that restitution is only \$36,000.00, then at the end of the, or coming up near the end of the probation, Mr. Alexander can't go get [c]ivil [j]udgment for his full damages. So, what I'm going to do is, I'm going to find that restitution is \$83,366.68. I find that Mr. Alexander has received \$13,755.43 plus maybe a little bit more for his lost work and wages as far as his economic support. Looks like it's a little bit over \$14,000.00 because there is another \$816.00 here that was paid to him. So, I am not going to order any of that for restitution, I am only ordering the medical bills less what

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<sup>1</sup> We are unable to determine from the record the origin of this sum used as a deduction.

the Criminal Injuries Fund paid. Now, while she is on probation, I am ordering that she pays \$500.00 a month, based on her testimony today. So, during probation she should pay approximately \$36,000.

An amended judgment was entered to reflect the findings of the trial court at the restitution hearing. The special conditions box read:

Restitution hearing was held on 1/28/2022. Judge Goodwin ordered restitution in the amount of \$83,366.68. \$36,000 is to be paid while the defendant is on probation in \$500 a month payment. If \$36,000 is paid by the end of sentence, no violation is to be filed. If the state becomes aware of a decrease in the amount of medical bills owed by the victim, the state is to contact the court to address the overall restitution amount.

Following the imposition of the sentence, Defendant filed this timely appeal.

### **Analysis**

On appeal, Defendant contends, and the State concedes, that the trial court erred in ordering a total restitution payment that exceeded an amount that would be paid back over the course of Defendant's six-year sentence at the ordered monthly installment amount. As for the remaining two issues, Defendant maintains that the trial court failed to consider her financial resources and ability to pay when calculating the monthly restitution amount of \$500, and the State failed to present adequate proof of the victim's pecuniary loss totaling \$83,366.68. Defendant contends that the case should be reversed and remanded for a new restitution hearing. The State agrees that a new restitution order is needed based on its concession on the total restitution amount but avers that this court should adjust the order to reflect "a pecuniary loss amount . . . commensurate with the amount the trial court determined [Defendant] could pay" rather than remand for a new hearing.

"The purpose of restitution is not only to compensate the victim[,] but also to punish and rehabilitate the guilty." *State v. Johnson*, 968 S.W.2d 883, 885 (Tenn. Crim. App. 1997). "A sentencing court may direct a defendant to make restitution to the victim of the offense as a condition of probation." T.C.A. § 40-35-304(a). Issues regarding restitution are reviewed for abuse of discretion. *State v. Byron Cole Tucker*, No. M2021-00839-CCA-R3-CD, 2022 WL 2308988, at \*3 (Tenn. Crim. App. June 28, 2022), *no perm. app. filed* (citing *State v. David Allan Bohanon*, No. M2012-02366-CCA-R3-CD, 2013 WL 5777254, at \*5 (Tenn. Crim. App. Oct. 25, 2013)). "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. Raymond Brandon Saffles*, No. E2020-01116-CCA-R3-

CD, 2021 WL 4075030, at \*6 (Tenn. Crim. App. Sept. 8, 2021) (quoting *State v. Phelps*, 329 S.W.3d 436, 443 (Tenn. 2010)), *no perm. app. filed*.

In setting restitution, the court “shall specify at the time of the sentencing hearing the amount and time of payment or other restitution to the victim and may permit payment or performance in installments.”<sup>2</sup> T.C.A. § 40-35-304(c). A defendant sentenced to the payment of restitution “shall be responsible for the payment of the restitution until the expiration of the sentence imposed by the court, and any payment or performance schedule established by the court shall not extend beyond the expiration date.” T.C.A. § 40-35-304(g)(2). While there is no designated formula or method for determining restitution, the amount must be reasonable. *State v. Smith*, 898 S.W.2d 742, 747 (Tenn. Crim. App. 1994).

At the time Defendant committed the crimes in this matter, trial courts were also required to consider “the financial resources and future ability of the defendant to pay or perform.” T.C.A. § 40-35-304(d) (2021).<sup>3</sup> In determining the restitution amount, the trial court must also consider the victim’s “pecuniary loss” which includes:

- (1) All special damages, but not general damages, as substantiated by evidence in the record or as agreed to by the defendant; and
- (2) Reasonable out-of-pocket expenses incurred by the victim resulting from the filing of charges or cooperating in the investigation and prosecution of the offense; provided, that payment of special prosecutors shall not be considered an out-of-pocket expenses.

T.C.A. § 40-35-304(e) (1)-(2); *see State v. Lewis*, 917 S.W.2d 251, 254-55 (Tenn. Crim. App. 1995) (hospital or medical expenses necessary for treatment of a victim constitute special damages for purposes of restitution); *Johnson*, 968 S.W.2d at 886 (lost wages and rehabilitation expenses constitute special damages for restitution).

Therefore, “the amount of restitution a defendant is ordered to pay must be based upon the victim’s pecuniary loss and the financial condition and obligations of the defendant; and the amount ordered to be paid does not have to equal or mirror the victim’s

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<sup>2</sup> T.C.A. § 40-35-304(b) (2020) provides: “Whenever the court believes that restitution may be proper or the victim of the offense or the district attorney general requests, the court shall order the presentence service officer to include in the presentence report documentation regarding the nature and amount of the victim’s pecuniary loss.” We note that there was no discussion on the record in this case for a presentence report to be prepared for the restitution hearing, and if one was prepared, it is not in the record.

<sup>3</sup> After the crimes and the entry of the plea, the restitution statute was amended. After January 1, 2022, trial courts *may* consider the financial resources and future ability of the defendant to pay or perform. T.C.A. § 40-35-304(d).

precise pecuniary loss.” *Smith*, 898 S.W.2d at 747. “It is important for trial courts to distinguish between the victim’s pecuniary loss and the restitution amount ordered after consideration of a defendant’s financial resources and ability to pay.” *Saffles*, 2021 WL 4075030, at \*17.

As acknowledged by both parties, the trial court violated Tennessee Code Annotated section 40-35-304(g)(2) when it ordered restitution in the amount of \$83,366.68 and ordered Defendant to pay \$500 monthly over her six-year sentence. The ordered restitution exceeded an amount which Defendant could satisfy prior to the expiration of her sentence. *See Smith* 898, S.W.2d 742 (Tenn. Crim. App. 1994).

Thus, we will next review the trial court’s order of Defendant’s monthly payment schedule to determine if it abused its discretion. Initially, the trial court delayed the restitution hearing ten months from entry of Defendant’s plea on March 19, 2021, until January 28, 2022, to give Defendant time to serve her sentence and seek employment upon her release. The trial court then considered Defendant’s testimony and made detailed findings regarding her financial resources, monthly expenses, and future ability to pay. Defendant, a young, able-bodied person, demonstrated that she was capable of working, and at the time of the hearing was working with the management of her new jobsite to receive the maximum number hours of work during a shift where she could earn the maximum wage. Because she lived with her grandparents, as she testified, her living expenses were minimal, but did include expenses for her phone, transportation, probation fees, and child support.

On appeal, Defendant emphasizes that the trial court erred in setting a monthly restitution amount based on her gross monthly income. At oral argument, the parties agreed that the trial court considered Defendant’s potential gross income undiminished by taxes, social security, or back child support. The record shows that the trial court calculated Defendant’s income at the time of the hearing at thirty hours per week, even though she testified that she could work up to forty hours per week. Recognizing that Defendant may have underestimated her expenses, the trial court increased the amount of expenses which Defendant claimed to include cost for food, even though Defendant did not testify that she incurred any such cost. However, the trial court did not consider Defendant’s monthly income taxes, social security, back child support or car loan. While we recognize that any paycheck will suffer some diminution from taxes and other withholdings, the plain language of the restitution statute does not include a requirement that a defendant’s net income must be considered in the trial court’s decision. *See* T.C.A. § 40-35-304(d) (2021) (“[i]n determining the amount and method of payment or other restitution, the court shall consider the financial resources and future ability of the defendant to pay or perform”); *see also People v. Spears-Everett*, 940 N.W.2d 797, 804–05 (Mich. Ct. App. 2019) (trial court permitted to consider defendant’s gross income in determining restitution payment



schedule where statute required courts to consider defendant's "earning ability" and "financial resources" and did not limit restitution to defendant's net income); *United States v. Inouye*, 821 F.3d 1152, 1156-57 (9th Cir. 2016) (district court did not abuse its discretion in setting defendant's restitution schedule at 8% of his gross monthly income where federal restitution statute required "a sentencing court [to] consider the defendant's financial resources in setting a restitution payment schedule"). While a trial court may, in its discretion, consider a defendant's after-tax or net income, it is not required to consider it when determining a defendant's restitution obligation.

Here, the court's decision to impose a monthly amount of \$500 was not illogical, implausible, nor without support from the record. The trial court considered Defendant's testimony regarding her current employment, her future plans for employment and her income and expenses. The trial court also considered Defendant's future ability to pay. *See State v. Jay Herman Sanders*, No. M2014-00346-CCA-R3-CD, 2015 WL 526818, at \*10-11 (Tenn. Crim. App. Feb. 9, 2015) (upholding that Defendant pay high restitution payments where amount would be challenging but did not determine that Defendant would not be able to pay); *see also State v. Jerry Lee Truette*, No. M2005-00927-CCA-R3-CD, 2006 WL 2000540, at \*2 (Tenn. Crim. App. Jul. 19, 2006) (upholding that Defendant pay restitution in monthly installments and had ability to obtain additional employment). Moreover, Defendant is free to seek modification of her restitution obligation as her circumstances evolve. *See* T.C.A. § 40-35-304(f). Accordingly, we cannot find that the trial court abused its discretion.

Next, Defendant contends the trial court abused its discretion in determining the victim's pecuniary loss, pointing to three errors: one, many of the victim's medical bills were counted multiple times; two, the State used figures that were not accurate, or failed to reflect adjustments the medical providers made because the victim was uninsured; and three, the State failed to consider that payments from the Fund, once accepted, extinguished any claim to the balance owed by the victim. As for the third error, Defendant points out that although the Fund pays only 75% of the value of the outstanding debt, when a creditor accepts the reduced payment, the entire debt is extinguished by operation of law. *See* T.C.A. § 29-13-107(7) ("[a]ny medical provider or hospital that accepts payment under this part for medical or medical-related expenses or services shall accept the payment as payment in full and shall not bill any balance of those expenses to the victim or the claimant if the total payments made under this part to any such provider or hospital equal seventy-five percent (75%) of the billed charges"). Defendant adds that the trial court also erred in counting the economic support payments the victim received toward restitution because that money was to replace the income the victim was unable to earn while injured. By Defendant's calculation, the record supports a pecuniary loss "closer to \$40,000" instead of the \$83,366.68 as determined by the trial court. Accordingly, Defendant requests this court remand for a new restitution hearing.

The State agrees that a new restitution order should be entered but contends that a remand for a new restitution hearing is not necessary. Instead the State asks this court to adjust the restitution amount to the figures “conceded” by Defendant because the record supports an amount “commensurate with the amount the trial court determined [Defendant] could pay,” namely, \$36,000.

We observe that the calculation errors alleged by Defendant were not raised at the restitution hearing and are raised for the first time on appeal. However, a review of the record supports Defendant’s claims that the victim’s pecuniary loss as shown on the exhibited spreadsheet is not supported by the medical bills also exhibited to the hearing. Accordingly, the trial court appears to have abused its discretion in miscalculating the victim’s pecuniary loss. *See State v. John N. Moffitt*, No. W2014-02388-CCA-R3-CD, 2016 WL 369379, at \*6 (Tenn. Crim. App. Jan. 29, 2016) (hospital or medical expenses which have been forgiven by the hospital cannot be considered special damages for restitution).

“It is important for trial courts to distinguish between the victim’s pecuniary loss and the restitution amount ordered after consideration of a defendant’s financial resources and ability to pay. The pecuniary loss and restitution amount are distinct and in many cases may not be the same amount.” *Saffles*, 2021 WL 4075030, at \*17. We acknowledge this court’s opinion in *Tucker* concluding that a “defendant is not required to satisfy the full restitution amount by the conclusion of his sentence.” 2022 WL 2308988, at \*5. “Rather, the trial court is simply not permitted to impose a payment schedule beyond the expiration of the sentence imposed.” *Id.* (citing *Moffitt*, 2016 WL 369379, at \*5). We reconcile *Tucker* with *Saffles* in that both cases recognize that the court may find that a victim’s total loss, referenced in *Tucker* as “restitution” and in *Saffles* as “pecuniary loss,” may be more than the amount of restitution a defendant can be ordered to pay over the term of defendant’s sentence based on the defendant’s financial resources and future ability to pay. Indeed, the trial court in this case similarly recognized that the victim’s loss was greater than Defendant could pay during her probated sentence. However, because the trial court accepted the victim’s spreadsheet which miscalculated the victim’s documented pecuniary loss, we agree with Defendant that a remand is required for determination of the victim’s actual pecuniary loss. We also recognize that a remand to determine the victim’s pecuniary loss may affect the restitution amount Defendant is ordered to pay, which in any event shall not exceed an amount which Defendant can satisfy prior to the expiration of her sentence.

## **Conclusion**

Based upon the foregoing authorities and reasoning, the judgment of the trial court is affirmed in part, reversed in part, and remanded for a new restitution hearing consistent with this opinion.

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JILL BARTEE AYERS, JUDGE