

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MARCH 1999 SESSION

FILED

May 25, 1999

STATE OF TENNESSEE)
)
)
 Appellee,)
)
)
 vs.)
)
)
 ROBERT PATRICK SWYGERT,)
)
)
 Appellee.)

C.C.A. 03C01-9801-CR-0043
 HAMILTON Decision
 Appellate Court Clerk
 Hon. Rebecca J. Stern,
 Judge

(RESTITUTION)
 NO. 212355, 212357 & 212453

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OPINION FILED: _____

REVERSED AND REMANDED

CORNELIA A. CLARK
 Special Judge

OPINION

Appellant Robert Patrick Swygert appeals as of right from the order of the Criminal Court of Hamilton County requiring him to pay restitution in the amount of \$500.00 a month for twenty months. For the reasons set forth below, we remand the case for further proceedings.

On April 16, 1996, rural mail carrier Caroline Harris was on her route delivering mail to mailboxes. At one point she stopped barely off the edge of the pavement on the right-hand side, placed mail in a mailbox, and took her foot off the brake to continue her route. She noticed a vehicle coming toward her at an excessive rate of speed, straddling the center line. Appellant was driving that vehicle. Impact occurred in Harris's lane of traffic between the left front portions of each vehicle. Her vehicle was totally destroyed.

In September 1996 presentments were issued against appellant by the Hamilton County Grand Jury for four offenses: driving under the influence of an intoxicant, leaving the scene of an accident, driving on a revoked license, and aggravated assault. On July 8, 1997, defendant entered pleas of guilty to the offenses of driving under the influence, leaving the scene of an accident, and simple assault, all Class A misdemeanors. Under the terms of the plea agreement, defendant was sentenced to serve eleven months, twenty-nine days on each count. The sentences were run consecutive to one another. With the exception of the minimum forty-eight hour sentence imposed by statute for driving under the influence, the sentences were suspended in their entirety and the defendant was placed on probation for three consecutive terms of eleven months twenty-nine days. A fine of \$360.00 was imposed for driving under the influence. The issue of restitution was not agreed between the parties, but was left to be decided by the court at a later hearing.

The restitution hearing was conducted October 28, 1997. After hearing the testimony of the victim and the defendant, the trial court ordered that, effective November 15, 1997, the appellant pay "\$500.00 a month for the remaining period of his probation which is twenty months." This represents total restitution of \$10,000.00. On appeal the appellant contends that the trial court abused its discretion by ordering payment in this amount.

defendant to make restitution to the victim of an offense. There is no designated formula or method for the computation of the amount of restitution. State v. Smith, 898 S.W. 2d 742, 747 (Tenn. Crim. App. 1994), *per. app. denied* (Tenn. 1995). The trial court must consider the “pecuniary loss” incurred by the victim. Tenn. Code Ann. §40-35-304(e). The amount determined by the trial court must be reasonable, Tenn. Code Ann. §40-35-303(d), and must take into account the financial resources and future ability of the defendant to pay. Tenn. Code Ann. §40-35-304(d).

At the time of the restitution hearing, defendant was a thirty-two year-old single parent who had custody of his thirteen year-old son. He had been employed for six years with Dixie Group, Inc., making \$10.49 per hour. He had voluntarily elected not to seek child support from the mother of his son at the time of their divorce. His net monthly income was \$1,362.00. He also occasionally did odd jobs such as mowing yards, making approximately \$100.00 per month. His monthly expenses included a \$491.50 mortgage payment, \$173.95 for utility bills, just over \$200.00 for a car payment, \$140.00 for car insurance, \$200.00 credit card and doctor bills, \$100.00 for food, \$30.00 for clothing expenses, and other expenses for his son. He also was paying \$50.00 per month toward court costs and fines.¹

After considering the entire record, we find that the case must be remanded because the record contains insufficient evidence to support the trial court's decision. The only finding made by the trial court was the following:

THE COURT: Don't argue with me, you can talk to your lawyer. If she has custody of the child – I mean if he has custody of the child and she is working, she owes him child support. And if it is too big a hassle for him, I am sorry. But he is going to have to do something. If he wants to work another job, if he wants to go try to get child support so that she can help support the child so that he can help pay the victim. This man was driving under the influence at the time he hit a woman who was at work doing her job. It's hard to be too sympathetic about someone like that. He is a young man. He has the ability to work. He can work more odd jobs. It doesn't matter to me how he arranges this, either by getting his child support from his ex-wife or how he does it, but he is ordered to pay \$500 a month for the remaining period of his probation which is twenty months.

The trial court appears to assume that by getting rid of the automobile appellant had

¹ Defendant also testified that he had received a \$9,000.00 bill from an insurance company, apparently seeking reimbursement for payments made to the victim in this case. We note that a victim's insurer is not entitled to an award of restitution under Tenn. Code Ann. §40-35-304. State v. Alford, 970 S.W. 2d 944, 947 (Tenn. 1998).

purchased since the accident he could eliminate approximately \$500 per month in expenses. However, without an automobile, the proof is undisputed that he might not be able to maintain his employment or support himself at all. More specific findings as to appellant's ability to pay are needed.

Additionally, the court's order does not adequately define exactly what the court found the victim's pecuniary loss to be. Pecuniary loss includes "all special damages, but not general damages, as substantiated by evidence in the record or as agreed to by the defendant." Tenn. Code Ann. §40-35-304(e). The only evidence regarding the amount of loss was offered by Caroline Harris, the victim. She testified that as a rural mail carrier she was required to provide her own customized, dual-control vehicle for use in her business. At the time of the accident she was driving a used Jeep Cherokee, which was completely destroyed. Her own insurance company reimbursed her \$2,716.50, which, according to her, was the book value of the Jeep at that time. That value did not take into account the dual control that she had installed for her business purposes. Ms. Harris testified that because it was difficult to find a comparable used Jeep Cherokee large enough to carry her normal mail volume, she was required to purchase a new right-hand-drive vehicle at a cost of \$21,832.00. She further testified that her medical bills had been paid by her insurance company, with the exception of approximately \$300.00.

It is uncontroverted that Ms. Harris suffered damage to her vehicle through no fault of her own. However, her actual loss must be documented and must be based on realistic values. State v. Michael Wilson, No. 01C01-9602-CC-00073 (Tenn. Crim. App., Nashville, July 31, 1997). The general measure of damages to personal property is either the cost to repair (if the property in question can be repaired after it is damaged), or the difference in fair market value of the property immediately before the incident and immediately after the incident. See Irving Pulp & Paper, Ltd. v. Dunbar Transfer & Storage, Co., 732 F.2d 511 (6th Cir. 1984); Yazoo & M.V.R. Co. v. Williams, 182 Tenn. 241, 185 S.W. 2d 527, 529 (Tenn. 1945). The cost to replace the vehicle with a brand new vehicle is not the proper measure of damages.

Ms. Harris testified about the book value of the vehicle as determined by her insurance company. The amount she was paid must be deducted from any amount

determined by the court to be the actual value of the vehicle. She also testified that she had enhanced the value of the vehicle by installing special steering equipment necessary to perform her job duties as a rural mail carrier. However, the actual cost of that additional equipment is not contained in the record. The fact that she chose to purchase a brand new vehicle does not give her the right to ask that defendant be required to pay the entire amount of that cost.

For the foregoing reasons, we remand to the trial court for findings on the issue of restitution as required by Tenn. Code Ann. §40-35-304. The terms of restitution should be definitive and consistent. State v. Johnson, 968 S.W. 2d 883, 887 (Tenn. Crim. App. 1997). Upon remand, the trial court shall receive such further testimony as the parties might wish to offer.

CORNELIA A. CLARK
SPECIAL JUDGE

GARY R. WADE
JUDGE

NORMA M. OGLE
JUDGE

STATE OF TENNESSEE,)	C.C.A. 03C01-9801-CR-0043
)	HAMILTON COUNTY
)	
Appellee,)	Hon. Rebecca J. Stern,
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vs.)	(RESTITUTION)
)	NO. 212355, 212357 & 212453
)	
ROBERT PATRICK SWYGERT,)	
)	
Appellant.)	

JUDGMENT

Came the appellant, Robert Patrick Swygert., represented by counsel and also came the attorney general on behalf of the State, and this case was heard on the record on appeal from the Criminal Court of Hamilton County; and upon consideration thereof, this court is of the opinion that there is reversible error in the judgment of the trial court.

Our opinion is hereby incorporated in this judgment as if set out verbatim.

It is, therefore, ordered and adjudged by this court that the judgment of the trial court is reversed, and the case is remanded to the Criminal Court of Hamilton Count for any necessary further proceedings consistent with the opinion in this cause.

Costs of this appeal will be paid by the State of Tennessee.

PER CURIAM

Gary R. Wade, Judge
Norma M. Ogle, Judge
Cornelia A. Clark, Special Judge