

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**ROGER A. GRADEN,
Defendant**

:
:
:
:
:
:
:

**NO. 724-2005
CRIMINAL DIVISION**

ORDER AND OPINION

Before this Honorable Court, is the Defendant's November 7, 2005 Motion to Modify Sentence/Determine Restitution. After carefully considering the Defendant's Motion and memoranda from both parties, the Court hereby DENIES the Defendant's Motion to Modify Sentence/Determine Restitution.

I. Background

At 2:30 a.m., on April 2, 2005, Doris Poole (hereinafter "victim") arrived at the residence she shared with the Defendant. The Defendant immediately began to yell at the victim accusing her of "screwing around." According to the victim's testimony at the Preliminary Hearing on this matter, the Defendant then threw her to the ground and dragged her outside into a puddle. When the victim attempted to crawl back inside the house, the Defendant used a storm door to push her away. The altercation left the victim with a broken hip and a broken index finger. Following the attack, the victim aggravated her injuries when she fell once on April 9th and again on April 11, 2005.

On October 20, 2005, the Defendant pleaded guilty to one count of Simple Assault, a misdemeanor of the second degree. That same day, the Court sentenced the Defendant to twenty-

four (24) months of Intermediate Punishment, nine months (9) of which to be served at the Pre-release Center. Moreover, the Court ordered the Defendant to pay restitution in the amount of \$783.70 to the Victim's Compensation Fund and \$16,160.72 to First Priority Health, the victim's insurance provider.

On November 7, 2005, the Defendant filed his Motion to Determine Restitution and, after a December 19, 2005 conference on that Motion, the Court, after determining that no facts were in dispute, ordered the parties to file briefs/memoranda of law on the issue.

II. Discussion

Court ordered restitution is made pursuant to one of three provisions:

- (1) 42 Pa.C.S.A. § 9763 (b)(10): “[t]he court may attach . . . as a condition of [a sentence of county intermediate punishment] . . . restitution of the fruits of the crime or to make reparations, in an affordable amount, for the loss or damage caused by the crime.”
- (2) 42 Pa.C.S.A. § 9754(c)(8): “[t]he court may, as a condition of its order [of probation] require the defendant . . . [t]o make restitution of the fruits of his crime or to make reparations, in an amount he can afford to pay, for the loss or damage caused thereby.”
- (3) 18 Pa.C.S.A. § 1106(a): “[u]pon conviction for any crime . . . wherein the victim suffered personal injury directly resulting from the crime, the offender shall be sentenced to make restitution in addition to the punishment prescribed therefore.”

18 Pa.C.S.A. § 1106(a) applies to restitution orders for victims' injuries that, should not have occurred “but for” the defendant's criminal conduct; i.e. victims' injuries *directly* resulting from the defendant's conduct. *Commonwealth v. Pappas*, 2004 Pa. Super. 32, 845 A.2d 829 (2004). Alternatively, the Pennsylvania Superior Court has interpreted 42 Pa.C.S.A. § 9754(c)(8) to apply to victims' injuries that were an *indirect* result of the defendant's criminal conduct: “[t]he sentencing court is accorded latitude in fashioning probationary conditions designed to rehabilitate the defendant and to provide some measure of redress to the victim. And, when restitution is

imposed as a condition of probation, the required nexus is relaxed.” *Commonwealth v. Popow*, 2004 PA Super 34, P17; 844 A.2d 13, 19 (2004). Because the language of 42 Pa.C.S.A. § 9763(b)(10) is nearly identical to the language in 42 Pa.C.S.A. § 9754(c)(8) and, both sections seek to achieve the same goals (i.e. rehabilitate the defendant and provide the victim with some measure of redress while recognizing that total confinement is not appropriate), it is reasonable to apply the *Popow* court’s interpretation of 42 Pa.C.S.A. §9754(c)(8) to 42 Pa.C.S.A. § 9763(b)(10); i.e. the relaxed nexus between the victim’s injuries and the defendant’s criminal conduct required as a precursor to a restitution order issued pursuant to 42 Pa.C.S.A. §9754(c)(8) (as a condition of probation) is equally applicable to a restitution order issued pursuant to 42 Pa.C.S.A. § 9763 (b)(10) (as a condition of a county intermediate punishment program).

Pennsylvania courts have adopted a “but for” test to determine whether a victim’s injuries are or are not a direct result of the Defendant’s criminal conduct. *Commonwealth v. Pappas*, 2004 PA Super 32, 845 A.2d 829 (2004). Injuries which occur as a direct result of the Defendant’s criminal conduct are those which should not have occurred “but for” the defendant’s criminal conduct. *Id.*, at 842 citing *Commonwealth v. Gerulis*, 616 A.2d 686 (1992); *Commonwealth v. Penrod*, 396 Pa.Super. 221 (1990). For example, in *Pappas*, the defendant used car dealer was ordered to pay consumers restitution after he was convicted of theft by deception for failing to notify the consumers that the cars he sold them were previously damaged and repaired (importantly, all the consumers stated that, “but for” the defendant’s deception, they would not have purchased the vehicles). *Pappas*, 2004 PA Super 32, 845 A.2d 829 (2004). Alternatively, in *Commonwealth v. Popow*, the defendant, convicted of simple assault (specifically, 18 Pa.C.S.A. § 2701(a)(3) attempting, by physical menace, to put another in fear of imminent serious bodily

injury), but acquitted of aggravated assault, was ordered to pay restitution for the victim's injuries. 2004 PA Super. 34, 844 A.2d 13 (2004). The appellate court ordered the Defendant to be re-sentenced because "the victim's injuries were not directly caused by the simple assault for which the defendant was held accountable." *Id.* at P19, 20.

In the instant matter, the Defendant was ordered to pay restitution as a "condition of an intermediate punishment program, probation or parole," *see*, Sentencing Order, ¶ 8 (Oct. 20, 2005); therefore, this Court finds that, this Court's October 20, 2005 order to pay restitution was issued pursuant to 42 Pa.C.S.A. § 9763(b)(10). Accordingly, in order for this Court's order of restitution to be proper, the Defendant's criminal conduct must have, at a minimum, indirectly caused the victim's injuries for which restitution is ordered. Here, the Defendant's criminal conduct directly caused the victim's injuries. More specifically, the victim sustained a broken hip and finger as a result of the Defendant assaulting her. Because our hips are a vital part of our mobility, a fractured hip would necessarily limit that mobility making us more susceptible to falls. Therefore, it is reasonable to deduce that, "but for" a broken hip, the victim in the current matter would not have fallen and aggravated her injuries; i.e. the victim fell because of her broken hip which was caused by the Defendant's criminal conduct and, therefore, the assault and subsequent injuries are directly connected. Moreover, even if the victim was prone to falls prior to the assault resulting in her broken hip, "a defendant should not not have to pay restitution because the person that they chose to victimize had some other problems; if that were true anybody who becomes a victim that already had problems would never be entitled to restitution." *Commonwealth v. Boyles*, 407 Pa.Super. 343, 362 (1991) (the defendant was order to pay restitution to the victim he

sexually assaulted for a portion of her mental health costs even though she likely had some emotional problems prior to the assault).

ORDER

AND NOW, this _____ day of January 2006, for the reasons set forth above, the Court **DENIES** the Defendant's Motion to Modify Sentence/Determine Restitution.

By the Court,

Nancy L. Butts, Judge

cc: Nichol Spring, Esq. (PD)
DA
Judges
Law Clerk
Gary L. Weber, Esq.