

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : **No. CR-490-2012**
 :
 v. :
 :
 GREGORY FISHER, :
 Defendant :

OPINION AND ORDER

By Order of Court dated July 13, 2012, Defendant was sentenced on a Driving under the Influence of Alcohol offense. The sentence included six (6) months of intermediate punishment. With respect to restitution, the parties stipulated that restitution was owed but that the “figure” would be deferred until following a hearing scheduled for August 22, 2012.

Defendant’s plea agreement, which the Court accepted, noted that Defendant agreed to pay restitution but that the amount was to be determined.

While the guilty plea and sentencing did not take place before the undersigned, the restitution hearing was held before the undersigned on September 18, 2012.

The parties stipulated that the Court would consider the facts as set forth in the Affidavit of Probable Cause. Specifically, on December 12, 2011, Defendant was operating his pickup truck on Route 973 in Anthony Township, Lycoming County, Pennsylvania. Shortly before 7:00 a.m. Defendant struck a stopped garbage truck. The garbage truck was positioned in the left or opposite lane of travel and was struck head on by Defendant’s vehicle. Defendant did poorly on his standard field sobriety tests. He subsequently submitted to a chemical test of his blood within two hours of the time that he was driving. His BAC result was a .325%.

The parties further stipulated that the garbage truck was damaged and that the cost of repairing such damage was \$25,784.53. Of this amount, \$1,000.00 was incurred by the owner of the truck Fred Hamm and the remaining amount was paid by Mr. Hamm’s insurance

company.

At the hearing, the Commonwealth presented the testimony of Norman Rafter, Jr. On the date in question, he was employed by Fred Hamm, Inc. as a garbage collector.

Just before “daybreak” between 5:00 and 6:00 a.m., he was traveling on Route 973. He pulled off on the opposite side of the road to pick up garbage. He activated his hazard or “four-way” lights.

He was in a residential area. He was on a two-lane roadway. When he pulled in the opposite lane, he pulled a portion of his vehicle, approximately one to two feet in width, on the berm with the rest of his vehicle being in the lane of traffic. In addition to his hazard lights, his front headlights were on.

Soon after he parked, he noticed headlights approaching his vehicle approximately a half a mile away. The speed limit in the area he believed was between 35 to 40 mph. Shortly thereafter, Defendant’s vehicle struck the garbage truck head on. Mr. Rafter did not notice if Defendant made any attempt to avoid striking the garbage truck. He did not see Defendant take any evasive action nor did he hear any screeching of tires or brakes being applied.

Defendant testified as well. He indicated that he was traveling to work at approximately 6:45 a.m. The weather conditions were foggy, and it was still dark. As he was driving on Route 973 to work, he saw headlights ahead. He estimated that he was approximately 1500 feet when he first saw the headlights. He continued driving and approximately “a few hundred feet away” he realized that the lights were in his lane of traffic. He tried to avoid the impact by hitting his brakes. Obviously, he was unsuccessful and he

impacted the truck. He estimated that he was traveling approximately 40 mph. He did not recall seeing any flashing or hazard lights on the garbage truck. He testified further that at the time of the incident he was insured by GMAC. Introduced in evidence was his insurance declaration sheet verifying coverage and limits.

Comparing Defendant's testimony with the principles of mathematics, it is difficult to lend any credence to it. A car traveling 40 mph will travel 59 feet per second. Accordingly, Defendant drove his vehicle approximately 25 seconds between first seeing the garbage truck's headlights and impacting the garbage truck. Moreover, the average distance for stopping a vehicle traveling 40 mph would be approximately 85 feet. Defendant claims he was only driving at 40 mph, yet he could not stop his vehicle within the 200 feet after realizing the truck was in his lane. Finally, the Court cannot ignore that Defendant's BAC was .325% at the time of the incident, thus casting significant doubt on the Defendant's ability to accurately recall the incident.

In contesting the claimed restitution, Defendant argues alternatively that it should be mitigated by the victim's negligence in parking the vehicle in the wrong lane, that there should be a prorated reduction based on the victim's negligence, or that there should be no restitution due because the damage was not caused by the Defendant's criminal misconduct. With respect to this last assertion, Defendant argues that the accident would nonetheless have occurred regardless of whether Defendant had been driving under the influence of alcohol.

Restitution is governed by statute. Upon conviction for any crime wherein property's value has been substantially decreased as a direct result of the crime, the defendant shall be sentenced to make restitution in addition to the punishment prescribed. 18 Pa. C.S.A. §

1106 (a). At the time of sentencing, the Court must specify the amount of restitution and must consider, among other things, the extent of the victim's injuries, the victim's request for restitution, and such other matters that the Court deems appropriate. 18 Pa. C.S.A. § 1106 (c) (2) (i).

By ordering restitution, two purposes are served. First, the victim may be compensated for his injuries as a result of the defendant's criminal conduct. Second, the defendant may be rehabilitated by instilling in his mind that it is his responsibility to compensate the victim. 42 Pa. C.S.A. § 9654 (c) (8); 42 Pa. C.S.A. § 9754 (c) (13); Commonwealth v. Hall, 994 A.2d 1141, 1144 (Pa. Super. 2010). "Such sentences are encouraged to give the trial court the flexibility to determine all direct and indirect damages caused by a defendant and then permit the court to order restitution so that the defendant will understand the egregiousness of his conduct, be deterred from repeating this conduct, and be encouraged to live in a responsible way." In the Interest of M.W., 725 A.2d 729, 732 (Pa. 1999), citing Commonwealth v. Harner, 617 A.2d 702, 707 (Pa. 1992).

To determine the correct amount of restitution, a "but-for" test is utilized. Commonwealth v. Gerulis, 616 A.2d 686, 697 (Pa. Super. 1992). "Damages which occur as a direct result of the crime are those which should not have occurred but for the defendant's criminal conduct." Id. Due process requires that a defendant pay restitution only where the restitution arises from the action for which the defendant has been criminal accountable. Commonwealth v. Walker, 666 A.2d 301, 309 (Pa. Super. 1995), citing Commonwealth v. Cooper, 466 A.2d 195, 197 (Pa. Super. 1983).

Additionally, the Commonwealth bears the burden of proving its entitlement to

restitution by a preponderance of the evidence, and the record must contain a factual basis for the appropriate amount of restitution. Commonwealth v. Atanasio, 997 A.2d 1181, 1183 (Pa. Super. 2010).

The Court will order restitution in the amount of \$24,784.53 to the insurance company and \$1,000.00 (the deductible that was paid) to Fred Hamm. But for the Defendant's criminal misconduct by driving under the influence of alcohol, the victim would not have incurred the referenced economic losses. The amount of restitution has a sound basis in the record and is clearly not speculative or excessive. This amount of restitution is rehabilitative in nature in that it impresses upon the Defendant that his criminal conduct caused the victim's economic losses and further that it is his responsibility to repair the losses as fully as possible. Indeed, the victim must be made whole. See Commonwealth v. Solomon, 25 A.3d 380, 389 (Pa. Super. 2011); Commonwealth v. Mariani, 869 A.2d 484, 486 (Pa. Super. 2005).

In the early morning hours while driving under the influence of alcoholic beverages and with a blood alcohol content of .325%, the Defendant noticed the victim's headlights over a quarter mile away. According to his own testimony, the Defendant was only traveling 40 mph. While the victim's garbage truck was parked in the opposite lane, its headlights were on as well as its hazard lights. Moreover, there was nothing that precluded the Defendant from driving in the opposite lane of traffic around the victim's truck or simply stopping his vehicle until the victim's truck had finished its business.

The Defendant apparently did not realize that the victim's truck was in his lane of traffic until 200 feet between the two vehicles. Yet, he could not stop his vehicle or take evasive action in order to avoid the collision. Clearly, the Defendant was so intoxicated that he

did not have full control of his vehicle so as to avoid the collision; but for his intoxicated state, a collision would never have happened. It begs logic that a sober individual seeing a vehicle over a quarter mile away traveling at only 40 mph could not avoid the accident even if he did not realize that the vehicle was in his lane of traffic until 200 feet away.

Clearly under the circumstances of this case, the damage to the victim's truck was directly caused by the Defendant's criminal act and the economic loss flowed from the conduct which formed the basis of the crime for which the Defendant was held criminally accountable.

The Court also rejects Defendant's claims that the amount of restitution should be reduced due to the victim's alleged negligence of parking the garbage truck so that it was partially on the roadway and facing in the wrong direction. Although comparative negligence may be available in a civil action for damages, this is not a civil case; it is a criminal sentence. The restitution statute does not allow for any reduction in the amount of damages. Instead, the Court must order **full** restitution regardless of the financial resources of the defendant, so as to provide the victim with the fullest compensation for the loss. 18 Pa.C.S. §1106(c)(1)(i).

ORDER

AND NOW, this ____ day of September 2012, following a hearing, argument and the submission of Briefs, the Court **DENIES** Defendant's Motion to Reduce Bail. The Sentencing Order previously entered in this matter is amended to add the following:

Defendant is ordered and directed to pay restitution in the amount of \$24,784.53 to Mercer Insurance Group and \$1, 0000.00 to Fred Hamm. This restitution must be paid in the amount of \$500.00 per month unless otherwise modified by Order of Court. The first payment

is due no later than October 31, 2012 and each subsequent payment is due no later than the last day of each month thereafter.

By the Court,

Judge Marc F. Lovecchio

cc: Anthony L. Ciuca, ADA
John Gummo, Esquire
Victim/Witness Coordinator
Gary Weber, Esquire (Lycoming Reporter)
Work File