

[Cite as *State v. Casteel*, 2004-Ohio-3987.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	W. Scott Gwin, P.J.
Plaintiff-Appellee	:	William Hoffman, J.
	:	Julie Edwards, J.
-vs-	:	
	:	Case No. 2003 AP 12 0094
KRISTOPHER CASTEEL	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal Appeal From the Tuscarawas
County Court of Uhrichsville Case 2002
CRB 29

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: JULY 21, 2004

APPEARANCES:

For Plaintiff-Appellee

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Assistant Prosecuting Attorney
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New Philadelphia, OH 44663

For Defendant-Appellant

RONALD L. COLLINS
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Edwards, J.

{¶1} Defendant-appellant Kristopher Casteel appeals from his conviction and sentence in the Tuscarawas County Court of Uhrichsville, Ohio, which sentenced appellant to pay restitution for medical expenses and lost wages. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On January 8, 2003, appellant entered a plea of no contest to one count of misdemeanor assault. On May 6, 2003, a Magistrate recommended that appellant be sentenced to 180 days in jail, with half of the time suspended and on probation for two years. One of the terms and conditions of the probation was that appellant pay restitution to the victim, Michael Miller, in the amount of \$11,277.11 for medical expenses and \$4,124.00 for lost wages.

{¶3} On July 16, 2003, appellant filed an Objection to the Magistrate's Decision. On September 2, 2003, appellant again filed an objection to the Magistrate's sentencing, citing authority that lost wages and medical expenses were not permissible parts of sentencing. On December 1, 2003, the trial court overruled all objections and adopted the Magistrate's Decision thereby imposing payment of the victim's medical expenses and lost wages as part of the terms of appellant's probation. Thus, it is from the November 21, 2003, Judgment Entry that appellant appeals, raising the following assignments of error:

{¶4} "I. A COURT ERRS WHEN IT ORDERS RESTITUTION FOR MEDICAL EXPENSES AND LOST WAGES AS PART OF A MISDEMEANOR SENTENCING."

{¶5} In his sole assignment of error, appellant contends that the trial court erred when it ordered restitution for medical expenses and lost wages. We disagree.

{¶6} Appellant's argument is based upon R.C. 2929.21(E). Revised Code 2929.21 concerns penalties for misdemeanors. At the time of sentencing, Revised Code 2929.21(E) stated as follows: "The court may require a person who is convicted of or pleads guilty to a misdemeanor to make restitution for all or part of the property damage that is caused by his offense and for all or part of the value of the property that is the subject of any theft offense. . . ." Appellant contends that ordering appellant to pay for financial losses which did not arise from property damage or theft violated R.C. 2929.21(E).

{¶7} Appellee responds that it is not R.C. 2929.21 that is determinative. Appellee asserts that the applicable statute is R.C. 2951.02. Revised Code 2951.02 concerns conditions of probation. Revised Code 2951.02(C)(1) provides as follows: "When an offender is placed on probation . . . , the probation . . . shall be at least on condition that, during the period of probation or other suspension, the offender shall abide by the law, including, but not limited to, complying with the provisions of Chapter 2923. of the Revised Code relating to the possession, sale, furnishing, transfer, disposition, purchase, acquisition, carrying, conveying, or use of, or other conduct involving, a firearm or dangerous ordnance, as defined in section 2923.11 of the Revised Code, and shall not leave the state without the permission of the court or the offender's probation officer. In the interests of doing justice, rehabilitating the offender, and ensuring the offender's good behavior, the court may impose additional requirements on the offender, including, but not limited to, requiring the offender to make restitution for all or part of the property damage that is caused by the offender's offense and for all or part of the value of the property that is the subject of any theft

offense. . . . Compliance with the additional requirements also shall be a condition of the offender's probation or other suspension.”

{¶8} Thus, appellant contends that the challenged terms of his probation violate the misdemeanor sentencing statute and appellee contends that the terms of appellant's probation do not violate the statute concerning terms of probation. Some appellate courts have recognized the distinction between the statutory sentencing language and the statutory probation language, including this court. In *State v. Pittman* (1990), 61 Ohio App.3d 425, 572 N.E.2d 841, this court recognized that while R.C. 2929.21(E) limits the authority of a trial court to order restitution to property damage or value of the property stolen as part of a sentence, restitution for medical expenses could be ordered as part of the terms of probation. *Pittman*, 61 Ohio App.3d at 427 (citing *Brook Park v. Smith* (Aug. 14, 1986), Cuyahoga App. No. 51013, 1986 WL 8987); In accord, *State v. Shenefield* (1997), 122 Ohio App.3d 475, 702 N.E.2d 134.

{¶9} We recognize that there is a difference between a penalty and a term of probation. A penalty is such that it must be complied with whether or not the offender serves a term of incarceration. A term of probation is limited in that it must only be complied with if the person is on probation and stops being a requirement once probation is terminated. See *State v. Wohlgemuth* (1990), 66 Ohio App.3d 195, 583 N.E.2d 1076; *State v. Shenefield*, supra.

{¶10} Accordingly, we find that the trial court did not violate R.C. 2929.21(E) when it ordered appellant to pay the victim for medical wages and lost wages as a term of probation.

{¶11} Appellant's sole assignment of error is overruled.

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Tuscarawas County Court of Uhrichsville is affirmed. Costs assessed to appellant.

JUDGES