

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

STATE OF FLORIDA,)
)
 Appellant/Cross-Appellee,)
)
 v.)
)
 JUSTIN SCOTT SHIELDS,)
)
 Appellee/Cross-Appellant.)
 _____)

Case No. 2D09-1031

Opinion filed March 31, 2010.

Appeal from the Circuit Court for Pinellas
County; Cynthia J. Newton, Judge.

Bill McCollum, Attorney General,
Tallahassee, and Ha Thu Dao, Assistant
Attorney General, Tampa, for
Appellee/Cross-Appellant.

James Marion Moorman, Public Defender,
and Allyn M. Giambalvo, Assistant Public
Defender, Bartow, for Appellant/Cross-
Appellee.

CASANUEVA, Chief Judge.

The issues presented in this appeal resulted from Appellee/Cross-
Appellant Justin Scott Shields' reckless operation of a motorcycle, which caused his
passenger to fall from the motorcycle and sustain serious injuries upon impact with the

ground. Mr. Shields entered guilty pleas to the crimes of reckless driving and leaving the scene of an accident. As part of sentencing, the State sought restitution on behalf of the victim for her past and future medical expenses and loss of past and future income. The State now appeals the circuit court's restitution order, asserting two claims of error: that the restitution amount is insufficient and not based on the evidence adduced at the restitution hearing. Mr. Shields cross-appeals, claiming error in denying his motion to withdraw his plea. We review the order of restitution for abuse of discretion, see State v. Hawthorne, 573 So. 2d 330 (Fla. 1991), and reverse for the reasons discussed below. We affirm the cross-appeal without further discussion.

FACTS

The victim was injured on May 30, 2008. At a change of plea hearing in September 2008, the State mentioned that the victim had already incurred over \$7000 in medical expenses and approximately \$4000 in lost wages, with more expenses to come because she had not yet completed treatment or been released to return to work. At another restitution hearing in January 2009, the State produced evidence that her rehabilitation was further compromised by the fact that she had become pregnant, the child being due in May 2009, thus delaying surgery and recovery until at least February 2010. At the close of the January 2009 hearing, the circuit court asked for written argument from each party based on the evidence presented. In its written submission, the State sought \$91,228.78 in restitution.¹ Mr. Shields countered with a suggested restitution amount of either \$13,991.28 or \$24,510. The lower figure contemplated that Mr. Shields would still be responsible for supervision and court costs; the higher amount

¹The State calculated this figure to include loss of income during the victim's pregnancy.

contemplated that costs of supervision would be waived. In its final order, the court required Mr. Shields to pay \$14,191.28 at \$120 per month, which was merely the amount of current medical expenses.

DISCUSSION

We conclude that each party has presented valid legal arguments. Initially, we agree with Mr. Shields that any increase in the victim's monetary losses, most notably loss of income, caused by her post-injury pregnancy should not be borne by him. However, the State is correct that the amount of restitution awarded is inadequate and not supported by the preponderance of the evidence. See § 775.089(7), Fla. Stat. (2008); Hector v. State, 784 So. 2d 1207, 1208 (Fla. 2d DCA 2001). Further, Mr. Shields' ability to pay the amounts ordered is a factor to be considered at the time of enforcement, not at imposition. See Hector, 784 So. 2d at 1208 (citing § 775.089(6)(b), Fla. Stat. (2000), and Pickett v. State, 678 So. 2d 857, 858 n.1 (Fla. 5th DCA 1996)).

We reverse the order on the main appeal and remand for reconsideration of the amount of restitution. Because of the passage of time, the victim's recoverable expenses may be more accurately determined; thus, it may be advisable for the court to take further evidence on the issue. We affirm the cross-appeal.

KELLY and CRENSHAW, JJ., Concur.