

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

ALEJANDRO R. ROMERO JR.

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 788 MDA 2012

Appeal from the Order Entered March 27, 2012
In the Court of Common Pleas of York County
Criminal Division at No(s): CP-67-CR-0003611-2011

BEFORE: MUNDY, J., OTT, J., and STRASSBURGER, J.*

MEMORANDUM BY OTT, J.: Filed: February 22, 2013

Alejandro R. Romero, Jr., appeals the order of restitution entered March 27, 2012, in the Court of Common Pleas of York County. On January 26, 2012, Romero pleaded guilty to driving under the influence (DUI) — highest rate.¹ On that date, the trial court sentenced Romero to 72 hours to six months' imprisonment, and ordered him to pay restitution in the amount of \$9,455.62 to Erie Insurance and \$530.75 to Pedro Vargas.² Counsel filed

* Retired Senior Judge assigned to the Superior Court.

¹ 75 Pa.C.S. § 3802(c) (blood alcohol content greater than .16%). Romero's blood alcohol content (BAC) was .174. See Affidavit of Probable Cause, 4/29/11.

² Romero's DUI charge arose following a collision that occurred with a car owned by Pedro Vargas.

a motion for a restitution hearing, which was held on March 27, 2012, and the trial court, at the conclusion of the hearing, upheld its original restitution order. Romero contends that "the trial court issued an illegal sentence by ordering [him] to pay restitution when the Commonwealth failed to establish [the damages/injuries] of the victim were a direct result of the crime charged, as required by 18 Pa.C.S. § 1106[.]"^{3, 4} We affirm.

The trial court aptly summarized the evidence presented at the March 27, 2012 restitution hearing as follows:

Luz Vargas testified that on April 7, 2011, at approximately 11:00 p.m., she driving [sic] to work when [Romero's] vehicle struck her vehicle. Ms. Vargas was stopped at a stop sign, looked both ways, and then proceeded to make a left turn. A large truck was parked at the corner of the intersection, which obstructed her view. She inched forward to make sure it was clear before she turned. While she was making her turn, she saw [Romero's] vehicle moving toward her on her left, but had no way to avoid the impact. The front of Ms. Vargas's vehicle hit [Romero's] front passenger side.

Officer Benjamin Smith of the York City Police Department responded to the accident. He observed Ms. Vargas's car, which he identified as a Toyota Corolla, and [Romero's] car, a BMW sedan. Officer Smith described the extent of the damage to [Romero's] car as the worst he had ever seen in his investigation of over 100 accident scenes. The BMW was on top of a fire hydrant, with part of the fire hydrant in the driver's seat on the floor where the driver seat would have been. The top part of the hydrant that is typically visible above ground, the tall top, was

³ Romero's Brief at 4.

⁴ Section 1106 of the Pennsylvania Crimes Code governs "restitution for injuries to persons or properties." 18 Pa.C.S. § 1106.

located across the street. Officer Smith explained that [Romero's] car drove over the hydrant and forced it between the engine and the dash into the driver's seat. Due to the damage to the vehicle, the officer was unable to determine if the headlights had been on prior to the collision.

The posted speed limit on West College Avenue, where [Romero] was driving, was 25 miles per hour. Officer Smith estimated that [Romero's] vehicle traveled 40 to 45 feet from the point of impact to its point of rest. Both vehicles were inoperable and towed from the scene.

[Romero] testified that on the date of the accident he was at James Sport Bar and left when a friend called and asked for a ride. When he approached the intersection where the accident occurred in York City, he was traveling the posted speed limit of 25. He testified that Ms. Vargas never stopped at the stop sign; when he saw her car coming out he tried to swerve to avoid hitting her. [Romero] testified that he did not feel impaired by the alcohol that he had consumed.

Trial Court Opinion, 6/18/2012, at 2–3. At the conclusion of the hearing, the trial court held Romero responsible for the damage caused by the accident, and ordered him to pay restitution as specified at the sentencing hearing. This appeal followed.⁵

Romero claims that the trial court erred in ordering restitution because the Commonwealth failed to establish a direct causal connection between his driving under the influence conviction and the damage caused as a result of the accident. Romero contends that facts of record demonstrate that the accident was at least partially the fault of both drivers. Romero argues the

⁵ Romero timely complied with the order of the trial court to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b).

trial court erred in failing to do a comparative negligence analysis, and in ordering restitution based on a finding of Romero's reckless conduct.

The principles that guide our review are well established:

[W]hen a defendant enters a guilty plea, he or she waives all defects and defenses except those concerning the validity of the plea, the jurisdiction of the trial court, and the legality of the sentence imposed.

In the context of criminal proceedings, an order of "restitution is not simply an award of damages, but, rather, a sentence." An appeal from an order of restitution based upon a claim that a restitution order is unsupported by the record challenges the legality, rather than the discretionary aspects, of sentencing. "The determination as to whether the trial court imposed an illegal sentence is a question of law; our standard of review in cases dealing with questions of law is plenary."

Commonwealth v. Stradley, 50 A.3d 769, 771–772 (Pa. Super. 2012) (citations omitted). Accordingly, because Romero's claim in this appeal challenges the legality of his sentence, "its review is not abrogated by the entry of his guilty plea." ***Id.***

Section 1106 of the Crimes Code provides, in relevant part:

General rule.—Upon conviction for any crime wherein property has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime, or 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 therefor.

18 Pa.C.S. § 1106(a).⁶ Therefore, when restitution is imposed as part of the defendant's sentence, a direct causal connection between the damage to person or property and the crime must exist. ***Commonwealth v. Pappas***, 845 A.2d 829, 842 (Pa. Super. 2004), *appeal denied*, 862 A.2d 1254 (Pa. 2004); ***see also Commonwealth v. Harriott***, 919 A.2d 234, 237 238 (Pa. Super. 2007) (citations omitted), *appeal denied*, 934 A.2d 72 (Pa. 2007). "Damages which occur as a direct result of the crimes are those which should not have occurred but for the defendant's criminal conduct." ***Commonwealth v. Wright***, 722 A.2d 157, 159 (Pa. Super. 1998) (citation omitted).

The trial court, in its Pa.R.A.P. 1925(a) opinion, addressed Romero's argument as follows:

[Romero] maintains that his driving under the influence with a BAC of [.174] was criminal, but had no connection to the damage or loss caused by the accident. We disagree.

The testimony presented at the restitution hearing established that [Romero's] driving under the influence offense was a substantial factor in causing the accident. We heard from Ms. Vargas that while the truck parked at the intersection obstructed her view of oncoming traffic, she stopped at the stop sign and inched forward before proceeding to make a left-hand turn. The testimony of the officer regarding the accident scene and the extent of the damage to the vehicles was indicative of [Romero's] vehicle traveling above the posted speed limit before impact. In addition, we find that because [Romero] was driving

⁶ ***See also*** 42 Pa.C.S. § 9721(c) (providing that "the court shall order the defendant to compensate the victim of his criminal conduct for the damage or injury that he sustained").

with a blood alcohol content of .174, his conduct was reckless and negates any comparative negligence of Ms. Vargas. Accordingly, we hold [Romero] responsible for restitution.

Trial Court Opinion, *supra*, at 4. We find no basis upon which to disturb the decision of the trial court.

In *Commonwealth v. Walker, supra*, 666 A.2d 301 (Pa. Super. 1995), *appeal denied*, 680 A.2d 1161 (1996), the defendant pleaded guilty to driving under the influence of alcohol after his arrest, following a two car collision.⁷ *Id.* at 303–304. However, the defendant maintained that the victim's car entered his lane of travel. *Id.* at 304. The trial court, at sentencing, made the following finding:

I find that you were intoxicated that night ... and that your intoxication caused your driving to be faulty, and that your driving was a substantial factor in the causing of this accident. I don't believe that it was the sole factor; that there were other factors. I'm finding that it is a substantial factor.

Id. at 305. On appeal, the defendant argued, *inter alia*, that the trial court improperly ordered restitution because the court did not specifically find that his criminal conduct was the factual cause of the victim's injuries. *Id.* at 308–309. This Court rejected the defendant's argument, stating:

[W]e find that it is impossible to separate appellant's driving under the influence from the injuries resulting to the victims. The sentencing court found appellant's

⁷ In *Walker*, the defendant pleaded guilty to driving "while under the influence of alcohol to a degree which renders the person incapable of safe driving[.]" and driving "while the amount of alcohol by weight in the blood of the person is 0.10% or greater[.]" *Walker, supra*, 666 A.2d at 303 n.1 and n.2, *citing* 75 Pa.C.S. §§ 3731(a)(1), (a)(4) (now repealed), respectively.

criminal conduct, the drunk driving, to be a **substantial factor** in causing the victims' injuries As a result, we find no abuse of discretion in the sentencing court's imposition of restitution.

Id. at 310 (emphasis supplied).

The reasoning of *Walker* applies here. Romero pleaded guilty to DUI — highest rate, and the record indicates that Romero had a BAC of .174. Further, the trial court found Romero's testimony that he was traveling at 24–25 miles per hour not credible because he was under the influence of alcohol at that time. N.T., 3/27/2012, at 33. The trial court reasoned that Romero's conduct constituted a "substantial factor" in causing the accident.

Id. We discern no error in the trial court's credibility determination, and conclude that the court's determination that that Romero's criminal conduct was a "substantial factor" in causing the accident — the very same finding as in *Walker* — was proper and supports the imposition of restitution.

In this regard, we reject Romero's argument that the trial court's statement that Romero's conduct was "reckless,"⁸ was essentially a finding of recklessness *per se*. Romero contends that such finding was not permissible as driving under the influence does not establish legal recklessness *per se*, "but must be accompanied by other tangible indicia of unsafe driving"⁹ In support, Romero relies upon cases discussing the

⁸ N.T., 3/27/2012, at 33.

⁹ Romero's Brief at 9.

standard of proof for the crime of reckless endangerment, 18 Pa.C.S. § 2705.¹⁰ However, the crime of reckless endangerment was not at issue here, and the record reflects that the trial court simply stated that it was "reckless" to drive with a BAC of .174 in considering whether Romero's actions caused the victim's losses.¹¹ Furthermore, we reject Romero's contention that the trial court should have conducted a comparative

¹⁰ See Romero's Brief at 9–10, citing **Commonwealth v. Hutchins**, 42 A.3d 302 (Pa. Super. 2102), appeal denied, 56 A.3d 396 (Pa. 2012); **Commonwealth v. Mastromatteo**, 719 A.2d 1081, 1083 (Pa. Super. 1998).

¹¹ The trial court stated:

We believe having heard from the witnesses and having viewed the photos that [Romero] was probably driving faster than he should have been. His credibility is suspect somewhat because of his blood alcohol content.

And while ordinarily it would be a comparative negligence situation, we are satisfied that [Romero] because he was driving with a blood alcohol content of .174, that his conduct actually would be reckless, and when you have a situation with reckless conduct that kind of wipes out any comparative negligence on behalf of the other individual. So, we don't really get into the comparative negligence issue.

We are satisfied that [Romero's] conduct was indeed a substantial factor in causing the accident. And given that it was a substantial factor and he was reckless, we are satisfied that he would indeed be responsible for the restitution given the damage done to the vehicles.

N.T., 3/27/2012, at 33.

negligence analysis, pertinent in civil negligence cases, since Romero has offered no legal support for this proposition.

Accordingly, we affirm.