

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

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**NO. 09-09-00343-CR**

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**JUDITH FAYE HANDY, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 284th District Court  
Montgomery County, Texas  
Trial Cause No. 07-10-10549-CR**

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**MEMORANDUM OPINION**

After entering into a plea bargain agreement, appellant, Judith Faye Handy, pleaded guilty to intoxication assault. The trial court sentenced Handy to five years imprisonment, then suspended imposition of the sentence, placed Handy on community supervision for five years, assessed a \$1,000 fine, and restitution in the amount of \$25,678<sup>1</sup> as a condition

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<sup>1</sup> We note that at the conclusion of the hearing on restitution the trial court ordered restitution in the amount of \$25,678.42. The trial court's written judgment deleted the 42 cents.

of community supervision. Handy appeals the trial court's restitution award. We hold the trial court's restitution award is improper under the Texas Code of Criminal Procedure. We reverse the portion of the trial court's community supervision order requiring Handy to pay restitution.

On May 24, 2007, Handy was driving while intoxicated and struck the vehicle of Walter E. (Rusty) Herman III, causing him bodily injury. Herman suffered a herniated spleen, punctured lung, and six broken ribs. Herman spent roughly nine days in the hospital undergoing treatment for his injuries. Following his recovery, Herman entered into a settlement agreement with Handy's insurance company. Herman agreed to release Handy and her insurer from all claims arising out of the accident for a sum of \$70,000.

Following Handy's guilty plea, the trial court held a hearing on punishment and restitution. At the hearing, the State presented evidence that Herman received a check in the amount of \$49,127.84 from Handy's insurer. Herman testified that the insurance company took \$20,872 from his \$70,000 settlement and "gave it to hospitals, insurance companies or whatever." According to Herman, \$20,872 from his settlement with Handy's insurer was used to offset claims by third parties for medical and other related expenses.<sup>2</sup> The State also presented evidence that Herman incurred "out of pocket" expenses. Herman testified regarding an itemized list of expenses he created entitled

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<sup>2</sup> See generally Tex. Prop. Code Ann. § 55.002(a) (West 2007) ("A hospital has a lien on a cause of action or claim of an individual who receives hospital services for injuries caused by an accident that is attributed to the negligence of another person.").

“Expenses Due To Assault,” which was admitted into evidence. The itemized list of expenses included \$4,724.50 for medical expenses Herman paid, \$75.76 for the replacement of a damaged Bluetooth headset, and \$6 for a copy of the DPS accident report. In addition to these itemized expenses totaling \$4,806.26, Herman also listed as an expense the \$20,872 that Handy’s insurer deducted from his \$70,000 settlement to pay third parties. Thus, Herman asserted that he incurred a total of \$25,678.42 in expenses, excluding lost income.

In addition to these asserted out of pocket expenses, the State presented evidence of Herman’s estimated lost income. Herman testified that he was a self-employed attorney and that he was out of the office most of June and July of 2007 recovering from his injuries. Herman testified that to calculate his lost income, he looked at his net income during the thirteen weeks prior to his accident, and the thirteen weeks following his accident. In addition, Herman testified that he looked at his reported net income from 2006 and 2008 and compared those numbers with his net income from 2007. Herman estimated that he lost income in the amount of \$24,771 as a result of his injuries. The trial court ordered that Handy pay Herman restitution in the amount of \$25,678 as a condition of community supervision.

In her sole issue on appeal, Handy argues that the trial court’s restitution award was improper under article 42.037(f)(1) of the Texas Code of Criminal Procedure. *See* Tex. Code Crim. Proc. Ann. art. 42.037(f)(1) (West Supp. 2010). We review challenges to

restitution orders under an abuse of discretion standard. *Drilling v. State*, 134 S.W.3d 468, 469 (Tex. App.—Waco 2004, no pet.) (citing *Cartwright v. State*, 605 S.W.2d 287, 289 (Tex. Crim. App. 1980)). The Code of Criminal Procedure sets limits on the trial court’s discretion to award restitution. *See* Tex. Code Crim. Proc. Ann. art. 42.037. We will reverse a trial court’s restitution order if it violates the provisions of the statute. *See generally Campbell v. State*, 5 S.W.3d 693, 696-97 (Tex. Crim. App. 1999).

In addition to fines authorized by law, a sentencing court may order a defendant to make restitution to any victim of the offense or to the Crime Victims’ Compensation Fund. Tex. Code Crim. Proc. Ann. art. 42.037(a). If the offense results in personal injury to the victim, the court may order the defendant to make restitution to the victim for any expenses incurred by the victim as a result of the offense or to the compensation fund for payments made to or on behalf of the victim. *Id.* art. 42.037(b)(2). However, the trial court may not order restitution for a loss if the victim has or will receive compensation from another source. *Id.* art. 42.037(f)(1). Article 42.037(f)(1) states as follows:

The court may not order restitution for a loss for which the victim has received or will receive compensation only from a source other than the compensation to victims of crime fund. The court may, in the interest of justice, order restitution to any person who has compensated the victim for the loss to the extent the person paid compensation. An order of restitution shall require that all restitution to a victim or to the compensation to victims of crime fund be made before any restitution to any other person is made under the order.

*Id.*

The trial court's award appears to be based on Herman's itemized list of expenses, which totaled \$25,678.42, and included the \$20,872 Handy's insurance company paid directly to medical providers on behalf of Herman as a part of Herman's settlement. The State acknowledges that a complainant is not ordinarily entitled to restitution for expenses paid by a third party. *See generally id.* art. 42.037(b)(2), (f)(1). The State notes that the insurance company may have been entitled to restitution for money paid directly to Herman's creditors, but recognizes that Herman was not entitled to restitution for such payments. In addition, the State concedes that "[w]hen a victim has received compensation from . . . a third party, such as an insurance company, the trial court cannot order the defendant to make restitution to the victim for the same loss." The State contends that the amount of restitution ordered by the trial court should be set aside and the case remanded for a hearing to determine a just amount of restitution. We disagree.

It is undisputed that Herman settled with Handy's insurance company for the sum of \$70,000 and received a check in the amount of \$49,127.84 as the balance due him after payment of medical expenses incurred for treatment of injuries received in the accident. It is also undisputed that Herman was not entitled to restitution for the \$20,872 the insurance company paid directly to third party creditors on his behalf. *See Tex. Code Crim. Proc. Ann.* art. 42.037(b)(2), (f)(1). The \$70,000 settlement that Herman received from Handy's insurance company and the release Herman executed for the benefit of Handy covered all claims arising from Handy's offense, including the \$4,806.26 in itemized expenses

Herman provided to the court as arising from the assault, as well as any estimated loss of income. *See generally id.* art. 42.037(b)(2). Because Handy's insurance company compensated Herman for the injuries, damages and expenses he incurred as a result of the offense, the trial court's restitution award was improper. *See id.* art. 42.037(f)(1).

We reverse the portion of the trial court's judgment ordering Handy to pay restitution. We sustain Handy's sole issue on appeal. The trial court's restitution award is hereby ordered deleted from the judgment and the order granting community supervision. *See Gonzalez v. State*, 954 S.W.2d 98, 105-06 (Tex. App.—San Antonio 1997, no pet.). As reformed, the judgment is affirmed.

AFFIRMED AS REFORMED.

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CHARLES KREGER  
Justice

Submitted on March 30, 2011  
Opinion Delivered May 11, 2011  
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Before Gaultney, Kreger, and Horton, JJ.