IN THE SUPREME COURT OF FLORIDA

J.S.H., A CHILD, Petitioner, v. STATE OF FLORIDA, Respondent.	)	CASE NO: 66,029

PETITIONER'S BRIEF ON THE MERITS

JERRY HILL
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TENTH JUDICIAL CIRCUIT

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v.	)	CASE NO: 66,029
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STATEMENT OF THE CASE AND FACTS

J.S.H., Petitioner, appeals from that part of an order placing him in a community control program which requires him to pay restitution of $775 to the victim.

A Petition for Delinquency filed August 30, 1983 in Hillsborough County Circuit Court charged the juvenile Petitioner with Second-Degree Grand Theft (R 2). At a hearing held September 13, 1983, the juvenile pled guilty to this offense (R 1). The court withheld adjudication of delinquency and placed the juvenile in a community control program (R 5). The issue of restitution was held open to a later date (R 1).

On January 18, 1984, a hearing on the subject of restitution was held before the Honorable J. Calhoun (R 12-41). Arturo Alquizar testified at this hearing that on July 30, 1983 he was cruising the Hillsborough River in his twenty-one foot motorboat (R 20-21). Because the boat was low on fuel and a storm was approaching, Alquizar

left his boat moored to the Buffalo Avenue bridge in Tampa (R 21). The next morning he returned around 10:30 or 11:00 a.m. to find a person inside his boat cutting wires and loosening screws (R 23).

Inspection revealed that several items of property including a cooler, parts of the carburetor, a fire extinguisher, a compass, a tool box and an anchor had been taken (R 23-25). All of the property was recovered eventually except an ammeter (R 33). Alquizar testified that the value of the ammeter was fifty to seventy dollars (R 34).

The boat itself had been damaged by breaking a hole in the fiberglass bottom of the boat and by cutting or loosening the electrical wires to the motor (R 23). Alquizar said that a mechanic from a local marina estimated that it would cost "around fifteen hundred dollars" to restore the boat to its previous condition (R 28-30).

The prosecutor requested the court to assess a portion of the total damages against both the juvenile and his absent co-defendant (R 36). Defense counsel argued that restitution for damage to the boat was not appropriate because Petitioner was charged with the offense of Grand Theft to which he pled guilty (R 36). He was never charged with Criminal Mischief or any offense which would encompass damage to the boat (R 17-18). Therefore, there was no basis for restitution for the cost of repairs (R 36).

The court ordered Petitioner to pay one-half of the reported damages as restitution to Alquizar (R 37). The amount of damages was computed as $1500 boat repair and $50 for the ammeter (R 37). The Amended Order of Disposition filed January 26, 1984 imposed $775 restitution (R 5).

The juvenile filed a timely Notice of Appeal on February 9, 1984 (R 6). The Public Defenders for the Tenth and Thirteenth Judicial Circuits were associated and appointed as appellate counsel (R 11).

In an opinion filed September 19, 1984, the Second District Court of Appeal affirmed the order of the trial court. The appellate court certified that its decision was in direct conflict with the holding of the Fourth District in W.N. v. State, 426 So.2d 1206 (Fla. 4th DCA 1983).

Relying on Fla.R.App.P. 9.030(a)(2)(A)(vi), the petitioner filed a Notice to Invoke Discretionary Jurisdiction on October 1, 1984.

ARGUMENT

THE TRIAL COURT ERRED IN ORDERING RESTITUTION FOR DAMAGE WHICH WAS NOT CAUSED BY THE OFFENSE TO WHICH PETITIONER PLED GUILTY.

Section 39.11(1), Florida Statutes (1983) governs the disposition powers of a court in a juvenile proceeding. It allows the judge to:

> (g) As part of the community control program to be implemented by the department, order the child or parent to make restitution for the damage or loss caused by his offense in a reasonable amount or manner to be determined by the court.

A similar statute governing restitution in adult proceedings, Section 775.089(1), Florida Statutes (1983), was construed by the Florida supreme court in Fresneda v. State, 347 So.2d 1021 (Fla. 1977). The Fresneda court held:

> a condition of probation requiring a probationer to pay money to, and for the benefit of, the victim of his crime cannot require payment in excess of the amount of damage the criminal conduct caused the victim. 347 So.2d at 1022.

It was emphasized that the statutory language "caused by his offense" must be construed to include only damages directly flowing from the criminal conduct. The Fresneda decision has been held applicable to juvenile matters. W.N. v. State, 426 So.2d 1206 (Fla. 4th DCA 1983); G.H. v. State, 414 So.2d 1135 (Fla. 1st DCA 1982).

In W.N. v. State, supra, juveniles trespassed on school property and broke several thousand dollars worth of windows. They were originally charged with criminal mischief as well as trespass. The criminal mischief charges were, however, nolle prossed. The court, nonetheless, ordered restitution to be paid for the broken windows.

In ordering the restitution stricken, the Fourth District stated there was no relationship between the offense charged (trespass) and the damages. Only the criminal mischief charge had a direct relationship to the damages and because it was nolle prossed, there was no legal foundation to impose restitution.

In the case at bar, Petitioner was charged only with the offense of Grand Theft. All of the stolen property was recovered with the exception of an ammeter, valued at fifty dollars. The proper measure of restitution for a theft offense is the difference between the value of the stolen goods and the value of those recovered. Woods v. State, 418 So.2d 401 (Fla. 1st DCA 1982). Petitioner admits that the judge correctly ordered restitution for the value of the ammeter.

With regard to the restitution ordered for damages to the boat itself, it is clear that Petitioner was never charged with an offense which would encompass this damage. Neither did he admit guilt for damaging the boat. Following the reasoning of the W.N., supra, court, the lack of a direct relationship between the offense charged and the damage for which restitution was sought means that a legal foundation for ordering restitution is lacking.

The Second District rejected the reasoning of W.N., supra and certified that its decision was in direct conflict. See Appendix. The appellate court distinguished such decisions as Fresneda v. State, 347 So.2d 1021 (Fla. 1977) and G.H. v. State, 414 So.2d 1135 (Fla. 1st DCA 1982) by noting that in these cases, the criminal

offense did not occur until after the damages arose. Because the damages at bar occurred during the time frame when Petitioner committed the theft, the Second District found a significant enough relationship between Petitioner's offense and the damages to the boat to support an order of restitution.

This analysis, based upon temporal relationship, ignores the fundamental deprivation of due process of law which occurs when the loss for which restitution is ordered did not arise from the action for which Petitioner has admitted his guilt. Petitioner may well have had a meritorious defense to any charge of criminal conduct predicated upon damage to the boat. It is not enough to assert as did the prosecutor that Petitioner could "iron it out" with his co-defendant if there was unequal liability (R 36). Certainly the boat owner had an adequate remedy in the civil court for damages to the boat.

By comparison, the Federal probation statute, 18 U.S.C. § 3651 allows the court to order "restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had". (e.s.) The actual loss "flowing from the offense for which the defendant has been convicted" determines the cap on the amount of resitution. United States v. Johnson, 700 F.2d. 699 (11th Cir. 1983). Thus, the Federal statute specifically requires the direct relationship between the criminal offense and the damages which the Fourth District found essential by judicial interpretation in W.N., supra.

Since the scope of the statutory language "caused by his offense" is the central inquiry here, it is instructive to peruse other statutes which might reveal the intent of the legislature. Section 921.143(2), Florida Statutes (1983) states:

> (2) The state attorney or any assistant state attorney shall advise all victims that statements, whether oral or written, shall relate solely to the facts of the case and the extent of any injuries, financial losses, and loss of earnings directly resulting from the crime for which the defendant is being sentenced.
> (e.s.)

Another analoguous provision is found in Section 947.181, Florida Statutes (1983), providing in part:

> **947.181 Victim restitution.-**
> (1) The Parole and Probation Commission may require, as a condition of parole, reparation or restitution to the aggrieved party for the damage or loss caused by the offense for which the parolee was imprisoned.
> (e.s.)

Such statutes are almost identical to the expression of the Federal statute and would indicate that the Florida legislature intended the language "caused by his offense" of Section 39.11(1), Florida Statutes (1983) to be interpreted as requiring a direct relationship between the offense of conviction and the loss. Because the design of permissible penalties for crime is a legislative function, the judiciary should not interfere with the clear expression of the legislative will.

New Jersey has a statute governing restitution with nearly identical language to that of F.S. 39.11(1). N.J.S.A. 2A:168-2 provides in part:

> the probationer...shall make reparation or restitution to the aggrieved parties for the damage or loss caused by his offense.

In State v. Bausch, 83 N.J. 425, 416 A.2d 833 (1980), the New Jersey supreme court construed the scope of the language "caused by his offense". The court held that "offense" referred only to the crime for which the defendant was convicted of or pled to and that the defendant could not be punished for any other offense. Summarizing its holding, the Bausch court explained:

> When the defendant has pleaded guilty to a crime and restitution involves damage due to that criminal event, support for the plea will establish responsibility. When, however, the defendant has not pleaded guilty to the crime on which the restitution is based, then the defendant cannot be obligated to make restitution unless he had voluntarily, with an understanding of the nature and consequences of what he is being asked to state, described a factual basis for liability.
>
> 416 A.2d at 839.

Another Florida case merits discussion because it shows that the First District Court of Appeal has also insisted upon a direct relationship between the offense of conviction and the damages for which restitution may be ordered. Hamm v. State, 403 So.2d 1155 (Fla. 1st DCA 1981) pertained to restitution under the statute governing adults rather than juveniles, but since the significant statutory language is identical in the two statutes, restitution imposed on juvenile defendants should be governed by the same factors.

In Hamm, the defendant pled guilty to the charge of stealing a shotgun. When the gun was stolen, the defendant apparently decided to test fire the shotgun and caused extensive damage to the victim's house. In a prior incident, jewelry was stolen from the victim's house and she suspected the defendant was responsible. Restitution was ordered to include damages to the victim's house and for the stolen jewelry. The appellate court reversed the award of restitution because the accused was never charged with nor convicted of either damaging the house or the jewelry theft.

Similar considerations apply to the case at bar. Peltitioner was never charged with nor did he plead guilty to damaging the boat. The restitution order of the trial court for this damage was error.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Petitioner J.S.H. respectfully requests this Court to quash the decision of the Second District Court of Appeal and to strike the restitution ordered by the trial court.

Respectfully submitted,

JERRY HILL
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TENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to the Office of the Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida and to the Petitioner, J.S.H., 808 W. Fribley Street, Tampa, Florida 33603 this 7th day of November, 1984.

Douglas S. Connor
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