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IN THE SUPREME COURT OF FLORIDA

MICHAEL G. SPIVEY,

Petitioner,

v. CASE NO. 70,166

STATE OF FLORIDA,

Respondent.

ON APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

BRIEF OF THE RESPONDENT

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TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

PAGE NO.

OTHER AUTHORITIES CITED

FLORIDA STATUTES:

Law Reviews

PRELIMINARY STATEMENT

MICHAEL G. SPIVEY will be referred to as the "Petitioner" in this brief. The STATE OF FLORIDA will be referred to as the "Respondent". The record on appeal will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case as to the procedural aspects. Regarding petitioner's discussion of the opinion of the court below, respondent defers discussion of the opinion to the appropriate portions of the argument, infra.

STATEMENT OF THE FACTS

Respondent accepts petitioner's statement of the facts with the following additions:

Petitioner's accomplice, Russell Ryder, as well as petitioner, had escaped to another state. At the time of the plea hearing, petitioner had been captured, returned to Florida, and was prosecuted alone, R 33, while Ryder remained at large. R 23. By the time of sentencing, Ryder had been captured and returned to Florida, but the record is silent as to proceedings against Ryder. R 33. The record is inconclusive and vague as to which of the accomplices originated the idea for the robbery, R 23 (defense counsel "suspects" Ryder originated the criminal plan, concedes both participated) R 37 - 38 (defense counsel speculates Ryder was prime motivator), or which of them may have inflicted more abuse on the victim. R 2 (witness affidavit alleging equal participation of both perpetrators); R 36 (detailing some of acts of petitioner during the offense).

The record does not show that Ryder was a co-defendant, as the proceedings in the record show a single prosecution against petitioner. The trial court therefore had no jurisdiction over Ryder at the time it sentenced petitioner.

SUMMARY OF THE ARGUMENT

I.

The court below overlooked the fact that petitioner waived the proration issue when he failed to object at sentencing, and this case should be disposed of on this ground. Ruling on this basis would eliminate the conflict between the case sub judice and Turner v. State, 431 So.2d 1017 (Fla. 4th DCA), dismissed, 436 So.2d 101 (Fla. 1983). Respondent concedes that conflict exists. Resolving the instant conflict on the waiver ground would allow conflict to remain between Turner and two cases from the First District which were overlooked in the proceeding below, Pollreisz v. State, 406 So.2d 1297 (Fla. 1st DCA 1981), and Woods v. State, 418 So.2d 401 (Fla. 1st DCA 1982); respondent urges the Court to resolve the instant case on the waiver ground, but to include citation to and discussion of Pollreisz and Woods to offer guidance by way of dicta to the courts statewide.

If the Court chooses to reach the merits, the remainder of the brief addresses the question of proration in restitution orders.

II.

Doctrinally, restitution seeks to acheive the goals of the criminal justice system, and as such the considerations controlling restitution radically differ those controlling civil remedies. The goal of restitution is not to make the victim whole: it is limited to easily determined damages, omitting pain and suffering, punitive damages, and other cognizable civil damages;

it is not dischargeable in bankruptcy, unlike civil judgments; it is limited to damages arising directly from the offense of conviction, rather than all damages arising from the defendant's conduct; and it is limited to the ability of the defendant to pay, while civil law considers this factor to be irrelevant (except for punitive damages).

III.

Case law from other jurisdictions demonstrates that proration may be appropriate under certain circumstances, but, under circumstances such as those sub judice, where two or more accomplices undertake a joint criminal enterprise with relatively equal culpability, a single accomplice may be held to pay the entire amount of restitution. The decision below in this case expressly found the circumstances sub judice did not justify proration.

The conflicting holding of Turner is based on a misreading of this Court's opinion in Fresnada v. State, 347 So.2d 1021 (Fla. 1977). Fresnada holds that a defendant may not be required to pay restitution for damages other than those arising directly from the offense for which he was convicted. This so-called "offense of conviction" principle is unrelated to the proration issue, other than that the amount one or more defendants might be ordered to pay, prorated vel non, is limited to the offenses for which they stand convicted. The opinion below recognized that Turner misinterpreted Fresnada. The distinction between the offense of conviction principle and the proration issue is the

underlying rationale controlling a consistent resolution of the Florida case law.

The opinion below is consistent with the correct rule of law expressed in Pollreisz and Woods, and advances Florida law of restitution by recognizing the potential for proration under appropriate circumstances, in line with the case law from other jurisdictions.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN IMPOSING FULL RESTITUTION ON THE PETITIONER WITHOUT REGARD TO HIS ACCOMPLICE'S CULPABILITY OR ABILITY TO PAY.

I. Petitioner waived his right to complain of the court order when he failed to object or present evidence of his ability to pay, and when he failed to object to the lack of apportionment between accomplices.

The district court in the opinion below held that petitioner waived his right to complain about the failure to assess restitution based on ability to pay when he failed "to object in the court below to the order of restitution or to attempt to reduce the amount of restitution by citing his financial circumstances." Spivey v. State, 501 So.2d 698, 699 (Fla. 2d DCA 1987). Inexplicably, the court below failed to address the waiver argument made by respondent regarding the second complaint raised by petitioner, i.e. failure to evaluate relative culpability, despite clear authority holding that objections to restitution may be waived. Holland v. State, 485 So.2d 471 (Fla. 1st DCA 1986); Gilmore v. State, 479 So.2d 791 (Fla. 2d DCA 1985). Minimal constitutional rights are at issue in assessing restitution. Note, Victim Restitution in the Criminal Process: A Procedural Analysis, 97 Harv. L. Rev. 931, 944 n. 99 and accompanying text (1984), and there is no reason, if ability to pay may be waived, that culpability, which is not even mentioned in the statutes, may not likewise be waived.

Ruling on this alternative ground would effectively void the opinion below and eliminate the clear conflict with Turner v. State, 431 So.2d 1017 (Fla. 4th DCA), dismissed, 436 So.2d 101 (Fla. 1983). See Jacobson v. State, 476 So.2d 1282, note at 1287 (Fla. 1985) (higher court decision on grounds other than conflict issue which moots conflict issue renders conflict issue "of no precedential value for law of the case, stare decisis, or conflict." Id. at 1288). However, conflict would remain between Turner and Pollreisz v. State, 406 So.2d 1297 (Fla. 1st DCA 1981) and Woods v. State, 418 So.2d 401 (Fla. 1st DCA 1982). This conflict is discussed infra.

Despite petitioner's "parade of horribles," no injustice will be done if petitioner is denied a hearing on either issue at the sentencing stage. Section 948.03(4), Florida Statutes (1985), permits the trial court to rescind or modify any condition of probation, including restitution, at any time. If the accomplice, Ryder, has been or will be assessed for restitution, the trial judge is always free under section 948.03(4) to modify petitioner's order to reflect the changed circumstance (which could be to reduce petitioner's liability, or to reduce it contingent on Ryder satisfying his restituion obligation, see People v. Flores, 197 Cal. App. 2d 611, 17 Cal. Rptr. 382 (1961) (defendant liable for full debt if codefendant defaults on pro rata share restition)). The probation department might also handle the problem more informally, declining to needlessly seek probation modification if restitution is satisfied by the joint efforts of petitioner and Ryder.

A second protection against injustice is section 948.06(4), wherein, if petitioner fails to make restitution and faces probation revocation, he may present clear and convincing evidence of his inability to pay, and the court is obliged to seek alternatives to imprisonment. One such alternative would certainly be modification of the order to provide for only partial restitution. While petitioner may not be prohibited from asserting inability to pay at an earlier date, Ballance v. State, 447 So.2d 974 (Fla. 1st DCA 1984), petitioner waived the right to do so at the sentencing hearing.

In the event the Court rejects the waiver rationale, the remainder of the brief is offered on the merits of the conflict issue.

II. Florida's restitution provisions meet the needs of the criminal justice system and only coincidentally resemble civil remedies.

One commentator notes the overlap between the objectives of criminal and civil law, but that restitution in the criminal law is uniquely and exclusively a creature of the criminal justice system:

> Although both civil damage awards and restitution orders require the defendant to reimburse his victim, the types of decisions made when each is imposed -- and the private interests affected by each -- are different. These distinctions bear on the procedures required for the imposition of each sanction. A civil action typically concerns the relation between two individuals and determines which of the two should bear an existing loss. The court's power to award damages stems not only from the finding of liability, but also from the proof of loss. Thus, an exact assessment of damages is crucial, and a trial on the amount of damages, with a high level of procedural safeguards, is necessary to ensure that this assessment is accurate.
>
> In contrast, a court's authority to order a criminal defendant to pay money flows solely from the adjudication of criminal guilt. Upon a finding of criminal liability, the court is authorized to impose a punitive sanction that is not limited by the amount of harm the offender inflicted on the victim.[1] Thus, the amount of restitution ordered, like the magnitude of any other sanction, bears only upon the degree of deprivation that the offender will suffer. Restitution does not infringe any absolute right to liberty or property; once a defendant has been convicted,

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[1] Cf., e.g., 250 775.083(1)(f), Fla. Stat. (1985) (allowing fines assessed as criminal penalties to be up to double the gain of the defendant or the loss of the victim).

> these interests are merely conditional, and their deprivation does not require a full jury trial.

Note, Victim Restitution in the Criminal Process: A Procedural Analysis, 97 Harv. L. Rev. 931, 944 (1984) (footnotes deleted, footnote added) (hereinafter cited as "Harvard Note"). See also id. at 935-41; People v. Richards, ___ Cal. ___, 552 P.2d 97, 131 Cal. Rptr. 537 (1976) ("Disposing of civil liability cannot be a function of restitution in a criminal case." Id. at ___, 552 P.2d at 101, 131 Cal. Rptr. at ___.).

The goals of criminal law are rehabilitation, deterrence, and retribution. Harvard Note at 937. Restitution achieves the rehabilitative goal by, inter alia, impressing on the criminal defendant the harm he has caused and his personal responsibility to other members of society. Deterrence is achieved by tailoring the pecuniary punishment to the loss suffered by the victim rather than arbitrarily fining the defendant. Retribution is achieved by emphasizing the defendant's moral responsibility and the wrongfulness of his act. Id. at 938 - 39. By at least partially compensating the victim, restitution also furthers the goal of preventing private revenge. Id. at 936.

The distinction between civil remedies and restitution as a criminal sanction is further emphasized by the provision of most restitution statutes that the remedy be limited to the ability of the criminal defendant to pay. See §775.089(6), Fla. Stat. (1985); Ark. Stat. Ann. §41-1203(5) (Michie Supp. 1985); Mich. Comp. Laws §28.1133(5)(a)(1986); Note, Restitution in the

Criminal Process: Procedures for Fixing the Offender's Liability, 93 Yale L.J. 505 (1984) (hereinafter cited as "Yale Note"). The Yale Note author wrote that the Victim and Witness Protection Act of 1982, Public Law No. 97-291, 96 Stat. 1248 (1982), which deleted the requirement under prior federal law that restitution be ordered with reference to the ability of the defendant to pay, shifted the focus of federal restitution from rehabilitation of the offender to reparation for the victim. Yale Note at 508 - 09. The author also noted that even with the deletion, and the Act's requirement that the victim be fully compensated, restitution under the Act still retained rehabilitative potential. Id. at 508 n.13. Thus, Florida's restitution statute, which requires consideration of ability to pay, retains its focus on the criminal law nature of the sanction.

Portions of Florida's restitution statute suggest restitution is the same as a civil remedy. §775.089(4) (victim may enforce restitution order in same manner as judgment in civil action); §775.089(8) (amount of restitution must be set off against any subsequent civil recovery); §775.089(10) (default in payment may be collected by any means authorized for enforcement of a judgment). However, a civil damage award may be paid by a third party while restitution must be paid personally by the offender, Harvard Note at 941, and a civil damage award may be discharged in bankruptcy while a restitution order may not be. Kelly v. Robinson, 479 U.S. __, 93 L.Ed.2d 216 (1986). See Kelly generally for a discussion of the nature of restitution as a

criminal sanction.

Florida's restitution provisions are therefore clearly grounded on principles of criminal law, with only coincidential resemblance to civil remedies.

Three other arguments raised by petitioner bear discussion in the context of the civil/criminal dichotomy. First, petitioner raises an indistinct complaint of denial of due process. Petitioner's Brief at 6. Restitution is levied to achieve criminal justice goals, not the goals of civil remedies. For example, petitioner could have been fined up to twice the pecuniary loss suffered by his victim, without reference to relative culpability between himself and his accomplice. §775.083(1)(f), Fla. Stat. (1985) (allowing fines assessed as criminal penalties to be up to double the gain of the defendant or the loss of the victim). Presumably, if four accomplices had gone into the victim's home and terrorized her in order to steal her money and valuables, all four could have been subjected to the double fines of §775.083(1)(f).

If petitioner could have suffered the purely punitive pecuniary burden of a section 775.083)(1)(f) fine without regard to any fine of his accomplice, how may he now complain of some violation of due process rights for suffering only one-half (or one-third had the judge levied the maximum fine as well) the pecuniary burden in furtherance of not only punitive but rehabilitative goals? In addition, petitioner's due process rights are much more limited after adjudication of guilt. Harvard Note at 944, quoted supra.

Secondly, appellant argues that "Assuming for the sake of argument that the co-defendant [sic] was liable to a twenty year term of prison, the trial court's action would be the functional equivalent of making the petitioner serve the co-defendant's full twenty year term in prison because the co-defendant cannot be brought to justice." Petitioner's Brief at 10. The logical extension of this argument is that the punishment is to be measured from the victim's perspective: one theft is worth 20 years, one armed robbery is worth 25, etc. Sentences would be apportioned among the number of perpetrators -- two thieves, ten years each; four thieves, five years each.

This is, of course, absurd and contrary to the entire scheme of the criminal justice system. Sentencing is from the perspective of the defendant, not the victim, aimed at rehabilitation, deterrence, and retribution. This is recognized, inter alia, in the sentencing guidelines, section 775.083(1)(f), and in the restitution statute.

Finally, following the language quoted above from petitioner's brief is his argument that the primary goal of restitution is to assure full restitution to the victim, and that the case should be remanded to impose joint liability to better assure restitution. The primary goal is, of course, not full restitution to the victim and imposition of joint liability is not required. Section 775.089(2) does not provide for restitution for punitive damages and suffering or other legally cognizable damages available to a victim in an independent civil

suit. Also, since the accomplice was not a party to petitioner's prosecution, the trial court does not have jurisdiction to impose such joint liability.

III. Proration of the restitution is inappropriate in this case.

Requiring a defendant to pay the full amount of restitution without assessing an accomplice is within the discretion of the trial judge and has been recognized by the courts of Florida:

> Petitioner has been placed on probation with a requirement that he make full restitution, while his co-defendant has been sentenced to a term of imprisonment with no requirement of restitution. We find no error in this procedure. Of course, a probationer may not be required to make restitution in excess of the amount of damage caused by his criminal conduct. Fresnada v. State, 347 So.2d 1021 (Fla. 1977). But where criminal activity is undertaken in concert with others, the method of pro-rating any required restitution is a matter within the discretion of the trial judge.

Pollreisz v. State, 406 So.2d 1297, 1298 (Fla. 1st DCA 1981) (emphasis added). See also Woods v. State, 418 So.2d 401 (Fla. 1st DCA 1982) (citing and quoting Pollreisz).

Thus, although not raised by petitioner in his jurisdictional brief to this Court, the instant case below is entirely consistent with the First District in Pollreisz and Woods, the only other Florida cases to directly address the proration issue, and thus all three stand in conflict with Turner v. State, 431 So.2d 1017 (Fla. 4th DCA), dismissed, 436 So.2d 101 (Fla. 1983).

The Pollreisz rationale, that criminal activity taken in concert is sufficient to justify burdening only one accomplice with restitution, is entirely consistent with cases from other jurisdictions.

In People v. Kay, 36 Cal. App. 759, 111 Cal. Rptr. 894 (1973), five demonstrators convicted on charges arising from a sit-in demonstration at Stanford University Hospital were each assessed one-fifth of the total damages to the hospital. The appellate court reversed the restitution order, instructing the trial judge to

> take into account the entire situation, including the responsibility of other guilty parties, not only those who were convicted in the municipal court [18 other demonstrators not assessed restitution], but also the total number of demonstrators [up to 123], because apparently it is impossible to determine who among them was responsible for any particular damage to the property. We ought not spell out in more detail our conclusions but rather to leave the matter to the judge's good discretion.

Id. at ___, 111 Cal. Rptr. at 896 (emphasis added). Reversal was also grounded on failure to determine ability to pay, apparently properly preserved by objection at trial.

Thus, on the facts of Kay (i.e. restitution levied on a small number of many persons engaged in political activities under confused conditions where the political activities evolved into mayhem) restitution may require examination of relative culpability. Even then, the ultimate decision of assignment of restitution obligations lies within the discretion of the trial judge.

The facts likewise controlled in State ex rel. D.G.W., 70 N.J. 488, 361 A.2d 513 (1976), wherein the court distinguished Kay, which had been argued as support for rejecting an arbitrary proration of equal restitutionary liability:

> [Kay] is distinguishable since the record there indicated that 123 persons were involved in the demonstration, and 18 who were convicted in municipal court were not required to pay anything; nor was there any evidence that the defendants had damaged any property since they were convicted of assault [thus raising the "offense of conviction" issue]. As indicated, the record here discloses that four persons participated in the vandalism of certain high school facilities and that D.G.W. admitted his role therein. In the circumstances here, had there been a summary hearing [the New Jersey court was creating a summary hearing procedure for restitution orders in juvenile courts in this case], the trial judge would not have been remiss in finding a rebuttable presumption of proportionate liability against the juveniles before him. . . .

Id. at ___, 361 A.2d at 523 - 24 (emphasis added). Appended to this paragraph was the following footnote:

> We do not wish to be understood as implying that there might not be circumstances justifying imposition upon multiple delinquents of a joint obligation to pay the entire amount, or some portion thereof, of the damage caused.

Id. n.5, 361 A.2d at 524 n.5 (emphasis added).

Finally, the California courts have approved holding one of two co-defendants liable for the entire restitution order on a theory of joint liability:

> Defendant argues that he should be liable for only his one-half of the total, at the most, and not be held liable for his codefendant's one-half or for her omissions [defendant was ordered to pay half, plus any amount unpaid by the co-defendant]. The court concluded that the total loss by theft by both defendants, acting in concert, amounted to $1,685 . . . It appears to us that the full amount ordered repaid has evidentiary support. Prosser on Torts (2d ed. 1955) sec. 45, p. 225, holds:

> "Where two or more persons act in concert, it is well settled in criminal and civil cases that each will be liable for the entire result."

People v. Flores, 197 Cal. App. 2d 611, ___, 17 Cal. Rptr. 382, 385 (1961). See also People v. Peterson, 62 Mich. App. 258, 233 N.W.2d 250 (1975) (affirming joint liability on conviction for larceny from an automobile and quoting extensively from Flores).

Therefore, while there may be exceptions to the rule that a single defendant may bear the entire burden of restitution, such as when only one or a few of many persons involved in a riotous situation face restitution, Kay, or when one of several juveniles is involved in youthful vandalism, State ex rel. D.G.W., when the circumstances clearly show two or more persons directly involved in a felonious crime against person or property, one of the perpetrators may be held to pay the full amount of restitution.

Fresnada v. State, 347 So.2d 1021 (Fla. 1977), is therefore easily distinguishable, and the citation to Fresnada in Pollreisz in the quote, supra, takes on clear meaning. The criminal charge in Fresnada arose from an accident involving two separate collisions:

> Appellant's offense was leaving the scene of the accident, not causing it. The record does not establish what injury was caused by the collision between appellant's car and the Volkswagon, as opposed to injury caused by the earlier collision between the Volkswagen and the Cadillac. [Appellant had been ordered to pay restitution for the injuries sustained by the passengers of the Volkswagen.] There is no basis in the record for distinguishing between injuries sustained in either of the collisions from aggravation of those injuries

> attributable to such delay, if any, in securing medical attention as the appellant may have caused.
>
> * * *
>
> We hold that 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. The Court's concern in Fresnada, therefore, was that the defendant not pay for damages arising from either his collision (which were not caused by his offense of leaving the scene of the accident) or the Cadillac's collision with the victim's Volkswagen, but solely from the "aggravation of those injuries attributable to such delay, if any, in securing medical attention as the appellant may have caused [by leaving the scene of the accident illegally]." Id.

The Pollreisz court was able to make the distinction between limiting restitution to the damages arising from the "offense of conviction," the rationale of Fresnada,. see Yale Note at 509 - 10 (discussing the narrow range of restitition available under "offense of conviction" statutes versus broader reparations available under the reparational scheme of the Victim and the Witness Protection Act designed to make victims whole), and the entirely separate concept of prorating vel non if the conclusion is reached that restitution for the offense of conviction should be made.

The Turner court apparently was unable to see this distinction. Turner cited to an "offense of conviction" case (Fresnada)

for support for proration, an entirely inappropriate citation clearly not in support of the proposition for which it was cited, based on a superficial and out of context reading of Fresnada.

The Second District in the opinion below sub judice recognized this misreading when it wrote "[w]e do not believe Fresnada is authority for the broad statement for which it is cited [in Turner]." Spivey, 501 So.2d at 699.

The Second District opinion also does not foreclose the possibility that proration might be appropriate in certain circumstances, at the trial judge's discretion:

> The court in imposing restitution certainly could, if it stated reasons on the record, apportion restitution among codefendants if the factual circumstances of the crime and the resulting damage or loss to the victim justified such apportionment. The facts in this case do not justify such apportionment.

Id. (emphasis added)

The decision below therefore is not only consistent with Pollreisz and Woods but advances the jurisprudence of criminal restitution in Florida to recognize that proration may be appropriate under certain circumstances, a principle well developed in other jurisdictions as demonstrated by the cases discussed supra.

The district court further observed that it believed the Turner statement to be dicta. However, it appears that the Turner statement was made in a discussion of reasons for vacating the restitution order, anyone of which would have supported vacating, and respondent urges this Court, if it decides on the merits, to squarely address the error rather than resolve the

conflict by finding Turner to be dicta. To resolve the issue on the merits would elevate the rule of Pollreisz to statewide authority, providing clear guidance to all trial courts and eliminating the potential for conflict in the future.

CONCLUSION

Respondent urges the Court to hold that petitioner waived his right to appeal the apportionment issue.

If the Court reaches the merits, the conflict of the instant case, Pollreisz, and Woods with Turner should be resolved as urged by respondent in the argument and citations herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Brad Permar, Assistant Public Defender, Criminal Courts Complex, 5100 - 144th Avenue North, Clearwater, Florida 33520, this 28th day of July, 1987.

David R. Gemmer

OF COUNSEL FOR RESPONDENT.