

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE

MICHAEL SPIVEY, :
Petitioner, :
vs. :
STATE OF FLORIDA, :
Respondent. :
_____ :

MAR 9 1987

CLERK, SUPREME COURT

DCA #86-369
Case No. _____

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

PETITIONER'S BRIEF ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

MICHAEL G. SPIVEY, :
Petitioner, :
vs. : Case No. _____
STATE OF FLORIDA, :
Respondent. :
_____ :

STATEMENT OF THE CASE AND FACTS

Petitioner, Michael G. Spivey, was charged with Armed Robbery, along with a codefendant. The Petitioner pled guilty on November 15, 1985, before the Honorable John T. Ware, III, Circuit Judge. On January 24, 1986, the Honorable Robert F. Michael, Circuit Judge, sentenced the Petitioner to three and one-half years imprisonment, and imposed the full amount of restitution on the Petitioner, some thirteen thousand eight hundred and fifty dollars. The stipulated factual basis for Petitioner's plea was that he participated with the codefendant in the robbery of the codefendant's aunt, in whose house both the Petitioner and the codefendant lived. The aunt was threatened until she revealed the location of some nine thousand dollars in cash hidden in her home.

Petitioner filed a Notice of Appeal to the Second District Court of Appeal, Lakeland, Florida, appealing the full order of restitution. In its written opinion the court affirmed the

conviction and the order of restitution making Petitioner responsible for the full amount. Petitioner now requests this Honorable Court to accept jurisdiction pursuant to F.R.App.P. 9.030(a)(2)(A)(iv).

SUMMARY OF ARGUMENT

The portion of the opinion of the Second District Court of Appeal, holding that the State is not required to show what portion of the victim's damages arose from the Petitioner's acts, rather than those of his codefendant, expressly and directly conflicts with Turner v. State, 431 So.2d 1017 (Fla. 4th DCA 1983): "To the extent that the Turner statement is to be construed as literally as it appears, we are in conflict."

ARGUMENT

THE SECOND DISTRICT COURT OF
APPEAL'S OPINION DIRECTLY CON-
FLICTS WITH AN OPINION OF THE
FOURTH DISTRICT COURT OF APPEAL
IN TURNER V. STATE.

In Turner v. State, 431 So.2d 1017 (Fla. 4th DCA 1983), the Fourth District Court of Appeal vacated an order of restitution imposing full restitution on one of four codefendants. That Court wrote: "the trial judge imposed restitution on appellant alone for the full amount of the victim's claimed damages, despite that fact that four co-defendants perpetrated the crimes. The State did not show what portion of the victim's damages arose from appellant's acts, rather than those of his codefendant's. . . [The trial judge] did not determine appellant's ability to pay, his financial resources or the burden that payment would impose on him. Id. The decision of the Second District Court of Appeal is in conflict with that holding.

For purposes of this Honorable Court's discretionary jurisdiction, the question of Petitioner's ability to pay, his financial resources, or the burden imposed by the restitution is not at issue since the Appellant did not object to those questions at the time of sentencing. The sole issue is imposition of the entire burden of restitution on the Petitioner, without a hearing to determine his codefendant's culpability or ability to pay all or part of the restitution.

The Second District Court of Appeal held, inter alia, in its opinion: "Neither the present [1985] version of 775.089 or its predecessor imposes any requirement upon the trial court to apportion restitution among codefendants equally guilty of the crime which resulted in the loss to the victim." The court wrote that while trial judges could apportion damages in such a manner, apportionment was not mandated. Further, the court held that the order of restitution was to be treated in the same way as a judgment in a civil action, and that remedies involving apportionment "would be the same as between judgment holders and cojudgment debtors."

The Second District Court of Appeal's opinion, vis-a-vis the Turner decision, raises serious conceptual concerns, and Petitioner contends that the court's reading of the criminal statute involved is inappropriate, if not unconstitutional. In addition, the opinion leaves crucial questions unanswered.

To begin with, there was no showing that the Petitioner and his codefendant were equally guilty, as the court implied. There was no showing of any proportional culpability, nor that the Petitioner was any more than minimally culpable. While he may have been the only codefendant in custody or the only one with the ability to pay, there was no hearing to determine if that was the case. Yet the trial court shifted the entire burden of restitution to Petitioner; that is as inappropriate as imposing

the death penalty without a hearing, solely because the State has only one codefendant which it can put to death. The difference between the two situations is only of degree.

The ruling of the Second District Court of Appeal allows trial courts to require one codefendant to bear the entire burden of restitution. Not only is this patently unfair to the Petitioner, it may not be in the best interest of the victim. If a trial court erroneously imposes the full burden to one codefendant who subsequently becomes insolvent, the victim may end up without compensation. The Petitioner is not contending that the victim ought not be paid, only that the entire burden should not be apportioned to one codefendant without a proper hearing. A hearing of the type suggested would insure, if nothing else, that the victim will receive the full compensation she is entitled to.

Criminal sanctions are vastly different from those of a civil court: the objective in a civil court is to "make a victim whole." While the same objective sometimes accrues in a criminal court, the primary objective is to punish the offender; if there are two or more codefendants a primary objective is to punish according to proportional culpability. But in the Petitioner's case, there was no showing either that he was the only culpable codefendant, thus properly liable for the entire amount of restitution, or that he was the only codefendant with the ability to pay.

The opinion of the Second District Court of Appeal, in direct conflict with the Fourth District Court of Appeal, fosters different and unequal treatment as to restitution among and between criminal codefendants, without regard to difference in culpability or financial ability to "make the victim whole." Accordingly, the Petitioner respectfully requests this Honorable Court to resolve the issue by invoking its discretionary jurisdiction in the matter and rendering a statewide final determination.


CONCLUSION

In light of the foregoing reasons, arguments and authorities, Petitioner has demonstrated that conflict does exist so as to invoke discretionary review of this Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Robert J. Landry, Assistant Attorney General, Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, FL 33602, and to Michael G. Spivey, Inmate No. 101099, Cocoa Community Correctional, P.O. Box 35, Sharpes, Florida 32959, March 5, 1987.

Respectfully submitted,



Brad Permar
Assistant Public Defender