

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE

MICHAEL G. SPIVEY, :
 :
 Petitioner, :
 :
 vs. :
 :
 STATE OF FLORIDA, :
 :
 Respondent. :
 :
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JUL 6 1987

CLERK, SUPREME COURT
Case No. By 70-166
Deputy Clerk

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

PETITIONER'S BRIEF ON MERITS

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. 70,166
STATE OF FLORIDA, :
Respondent. :
_____ :

STATEMENT OF THE CASE

Petitioner, Michael G. Spivey, was charged with Armed Robbery in violation of Florida Statute 812.13(2)(a). (R1) Appellant pled guilty and was sentenced to three and one-half years in prison, and ordered to make restitution in the amount of thirteen thousand eight hundred fifty dollars. (R11,14)

Petitioner appealed the order of restitution to the Second District Court of Appeal. Spivey v. State, 501 So.2d 698 (Fla. 2d DCA 1987). The District Court affirmed the order of restitution, primarily on the authority of section 775.089, as amended in 1985. Under that statute, the District Court wrote: "The failure of appellant 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, did not meet the burden the statute places upon him." Id, at 699.

In its opinion the District Court noted an apparent conflict between its opinion in Petitioner's case and in the Fourth

District Court of Appeal's case of Turner v. State, 431 So.2d 1017 (Fla. 4th DCA 1983). The Turner court stated, in pertinent part, that the "State did not show what portion of the victim's damages arose from the appellant's acts, rather than those of his co-defendants," citing this Honorable Court in Fresnada v. State, 347 So.2d 1021 (Fla. 1977), as authority. The Second District Court of Appeal stated in Petitioner's case that Fresnada did not authorize "the broad statement for which it is cited." The Court felt that the statement cited in Turner was dicta, but ruled in closing: "To the extent that the Turner statement is to be construed as literally as it appears, we are in conflict."

The Petitioner filed his Petition for Discretionary Review pursuant to Fla.R.App.P. 9.030(a)(2)(A)(IV) with the Florida Supreme Court. This Honorable Court accepted jurisdiction and dispensed with oral argument by order dated June 10, 1987.

STATEMENT OF THE FACTS

The stipulated factual basis at the plea hearing was that while living in the victim's house with his co-defendant, who was the victim's nephew, Petitioner participated in robbing the victim. The victim, Dorothy Batton, was threatened until she revealed the location of some nine thousand dollars cash in her home. (R24) At the sentencing hearing the State Attorney asked for restitution. The court said, "Restitution I guess would be his proportionate share," but the State Attorney asked that the Petitioner be made responsible for the "full and complete" amount of restitution. (R39-40)

At the sentencing hearing, the State Attorney said that the victim had been "terrorized." (R37), Respondent's brief, page 1. At the plea hearing, the facts as stipulated were that the co-defendant, Russell Ryder, and the Petitioner handcuffed and tied up the victim, Ms. Batton, locking her in the bathroom and later the laundry room. There were indications, the State Attorney said, that both co-defendants threatened the victim with axes and knives. (R24) Petitioner's counsel stated that Petitioner's involvement in the crime was less than the co-defendant's and that the co-defendant Ryder was the prime motivator: he was related to the victim and it almost certainly was his idea to rob his aunt. (R37)

SUMMARY OF ARGUMENT

In making the Petitioner alone fully responsible for restitution, the trial court exonerated the more culpable co-defendant and failed to assure that the victim will be given full restitution. In a substantial way, the trial court's action punished the Petitioner for another man's crimes. The ends of justice demand that this case be remanded, if only to mandate joint and several liability. But the more equitable aim of remand is to assure punishment according to culpability.

ISSUE

THE TRIAL COURT ERRED IN IMPOSING
FULL RESTITUTION ON THE PETITIONER
WITHOUT REGARD TO HIS CO-DEFENDANT'S
CULPABILITY OR ABILITY TO PAY.

The Petitioner does not contest either the fact of guilt or the fact of restitution. In the opinion of his case the District Court wrote that Section 775.089, Florida Statute (1985) controls the imposition of restitution in criminal cases. But Petitioner does not contest the imposition of restitution, or that an order of restitution shall be "treated in the same way as a judgment in a civil action." Spivey, at 699. Neither is the Petitioner arguing that the victim should not receive full payment if the is the only co-defendant with the ability to pay. Indeed, as the judgment now stands the victim has only one hope: if Petitioner is unable to pay there is no indication that the victim's nephew is in any way liable for restitution, even though the co-defendant is equally if not more culpable. In addition, the codefendant Ryder can argue at a later date that he has no liability for restitution to his abut because the Petitioner already bears full responsibility.

The sole issue being raised by the Petitioner is the propriety of the trial court's imposition of the entire burden of restitution upon him without a hearing to determine his relative culpability and without even an attempt to discern relative ability to pay all or part of the restitution.

If nothing else, this case should be remanded so that both Petitioner and his co-defendant are made jointly and severally liable to the victim. Even if the Petitioner must return to prison because he is unable to pay, the victim would still be out some thirteen thousand dollars. And the co-defendant's behavior, just from a bare reading of the facts, seems far more culpable than the Petitioner, yet the co-defendant may end up being punished far less. It is one thing to rob a total stranger; it is quite another thing to cold-bloodedly plan to threaten and terrorize a member of one's family. Yet, from the record, it is quite possible that the co-defendant ended up with minimal prison time and no liability for restitution. Reversal is mandated, in part, to assure that the victim ends up being "made whole." But reversal is also mandated because the order of restitution, as it now stands, offends the "traditional notions of fair play and substantial justice" implicit in idea of due process of law. Milliken v. Meyer, 61 S.Ct. 339 (1940).

The punishment for any crime must be proportionate to its severity and to the culpability of the accused: that is the rationale both of the due process clause and of the Eighth Amendment. The prohibition against cruel and unusual punishments was based on the long-standing principle of English law that the punishment should fit the crime. Cook, J. Constitutional Rights of the Accused, 2d Ed., footnote 4 at page

225. A criminal sentence must be proportionate to the crime for which the Defendant has been convicted. Id. at 237-238, citing Solem v. Helm, 103 S.Ct. 3001 (1983). Finally, "theories of free will and retribution, which pervade common thought, require that the offender actually commit the crimes for which he is to be punished." Id., at 226-227, footnote 4.

Such fundamental concepts of criminal law, with emphasis on punishing crimes actually committed by the accused, were recognized by the Fourth District Court of Appeal in Turner v. State, 431 So.2d 1017 (Fla. 4th DCA 1983), and by this Honorable Court's decision in Fresnada, cited in Turner: "The trial judge imposed restitution on appellant alone for the full amount of the victim's claimed damages, despite the fact that four defendants perpetrated the crimes. The State did not show what portion of the victim's damages arose for appellant's acts, rather than those of his codefendants." The respondent argued that Turner was rendered obsolete by subsequent legislative amendment of 775.089. Respondent's jurisdictional brief, page 3. Such is not the case.

The Turner court based its decision on Fresnada v. State, 347 So.2d 1021 (Fla. 1977). In Fresnada, the defendant's car had run into one of two cars which had just collided with each other. Instead of stopping to help, the defendant drove away, and was subsequently charged with leaving the scene of an accident. As

part of his sentence, the defendant was made liable for one thousand six hundred dollars worth of restitution. In determining the case, this Honorable Court addressed section 948.03(1)(g): "This subsection authorizes conditioning probation on the probationer's making 'reparation or restitution to the aggrieved party for the damage or loss caused by his offense in an amount to be determined by the court.' (emphasis supplied)." Section 948.03(1)(g) has now become 948.03(1)(e): the probationer may be made liable for "reparation or restitution to the aggrieved party for the damage or loss caused by his offense in an amount to be determined by the court." Emphasis added. Thus, the applicable subsection of 948 and the Fresnada decision construing that subsection both remain valid law, and that law requires that restitution bear some relationship to damage caused by an accused's offense.

As this court wrote in Fresnada, "we glean no legislative intent to authorize trial courts to require probationer's to pay over random sums of money. Of course, the figure in the present case presumably bears some relationship to the accident out of which the prosecution arose, but it is not clear what the relationship to appellant's offense is." Id, emphasis added. "Random" is defined as having no specific pattern or objective; haphazard; without definite method or purpose. American Heritage Dictionary of the English Language, Delta,

1976, page 583. The trial court's actions were random, despite the clear mandate of the law to fulfill two goals in such cases: to assure full payment to the victim and to punish according to culpability. The trial court's imposition of full restitution upon the Petitioner falls short of both goals.

That an accused can be punished only for crimes that he committed and for which he is responsible is one of the oldest principles of law extant. Similarly, the "pound of flesh" exacted by the State as punishment must bear some relationship to the particular defendant's culpability. Even in the most primitive of societies, revenge or retaliation was limited to "an eye for an eye, a tooth for a tooth." Vetter, H.J. and Silverman, I.J. Criminology and Crime, Harper and Row, 1986, page 13. In its operation, the ancient principle of lex talionis, or the law of equivalent retaliation, did not demand retaliatory justice: "rather, it limited the victim's legitimate claim to no more than an eye for the lost eye - not a tooth, an ear, or an arm, as well... This concept of equivalent retaliation has been retained in the notion of making penalties proportionate to the gravity or severity of the criminal offense, that is 'letting the punishment fit the crime.'" Id.

Under 775.089 that limitation has been altered by statute with the noteworthy goal of assuring full restitution to victims of crime: that is the rationale of the District Court in Spivey.

But that alteration does not remove the primary goal of criminal law: to punish according to guilt. One man may still not be sent to prison for a crime committed by another man. If uncorrected by this Honorable Court, the restitution statute as applied can result in just such a fundamental inequity as exemplified by petitioner's case. The trial court abided by the need for notice to the accused, and substantially complied with the requirement for an opportunity to be heard. However, when the trial court simply went along with the State Attorney's suggestion that the Petitioner, and the Petitioner alone, bear full responsibility for restitution, the result was a substantial injustice. There was no showing that the petitioner was "equally guilty" with the co-defendant, as the District Court implied in its opinion, nor was there a showing that the co-defendant received any punishment whatsoever. Assuming for the sake of argument that the co-defendant 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.

The primary goal is to assure full restitution to the victim. For that reason alone, Petitioner's case should be remanded so that joint and several liability can be imposed on both co-defendants, and the victim better assured of restitution. But a significant goal of criminal justice remains to punish

according to culpability. In cases like the Petitioner's, at least some attempt must be made to apportion relative culpability, and to mandate payment of restitution according to that relative culpability, if possible. If the trial court rules that such apportionment is more trouble than it would be worth, that would be within his sound discretion. But at least the attempt to meet the ends of justice should be made.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, Petitioner asks this Court to reverse the judgment and sentence of the lower 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, Florida 33602, and to Michael Spivey, #101099, Cocoa Community Correctional, P.O. Box 35, Sharpes, FL 32959, July 1, 1987.

Respectfully submitted,



Brad Permar
Assistant Public Defender