OIA 1-4-88

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

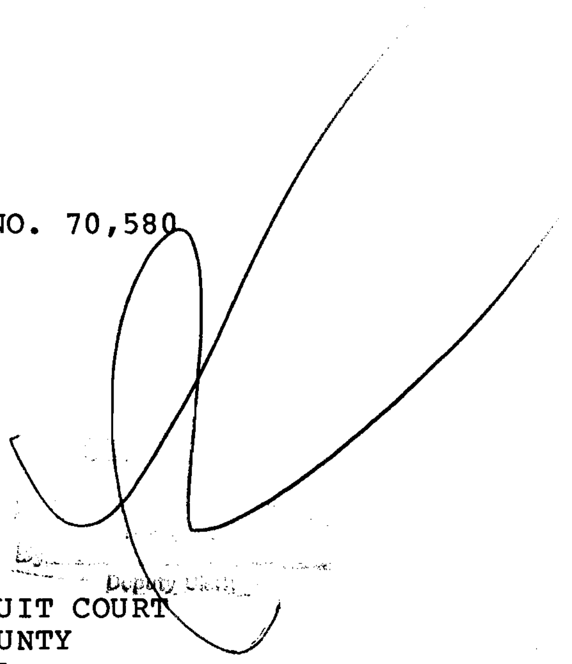
Petitioner,

v.

CASE NO. 70,580

ROXANNE WILLIAMS,

Respondent.



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

BRIEF OF THE PETITIONER

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DAVIS G. ANDERSON
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602

OF COUNSEL FOR PETITIONER

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PRELIMINARY STATEMENT

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

STATEMENT OF THE CASE AND FACTS

THE CHARGE

On May 21, 1985, the State Attorney for the Tenth Judicial Circuit of Florida filed an information charging Respondent with a violation of **§316.027** of the **Florida Statutes.** It specified that on April 25 of that year, she had been the driver of a vehicle that was involved in an accident resulting in injury to persons and that she willfully failed to stop at the scene, failed to return to the scene and failed to remain at the scene until such time as she complied with the provisions of **§316.062** of the **Florida Statutes,** the requirement that she give information and render aid. R. 1 - 2

TRIAL COMMENCES

On September 17, she had a bench trial before the Honorable Susan Wadsworth Roberts. R. 3 - 177 Prior to the commencement of trial, Respondent's counsel announced that the defense would be a lack of willfulness. R. 8 Respondent's counsel and the state then entered into a number of factual stipulations prior to the presentation of the testimony. They agreed that Respondent was involved in the accident, that she left the scene, that she had a blood alcohol level of .314 and that the accident occurred in Polk County. R. 8 - 9 On questioning by the court, Respondent's counsel stipulated to the identification of the Defendant. R. 9

THE EVIDENCE

The state presented the testimony of the victims. R. 10 - 19 (Troy Shane McCraney) 20 - 21 (Ginger McCraney) Mr. McCraney described how the accident occurred. R. 10 - 12 He recounted that he and his wife were riding on a motorcycle going south on Airport Road in the two sharp curves just before the straightaway going to Drane Field. R. 12 He told the court that as they were at the second curve, the Respondent's car came around the curve and started sliding back and forth. R. 12 He said that he thought that they were "going to get by." He surmised that Respondent must have seen them and hit her brakes. R. 12 He told how Respondent's car slid over right in front of them. R. 12 He testified as to their hitting the front of Respondent's car, flying over it and landing in a ditch. R. 12 He described how Respondent's car continued to slide, eventually landing in a ditch and turning off. R. 13 And, he related that he looked her in the eye and asked her not to leave, but that she turned on the car as he was asking for help and left. R. 13, 14

He described the injuries he received in the accident. He said that his femur broke in three different places in his hip and knee. R. 16 He said that his kneecap cracked in four different places. He said that he severed his right wrist with both bones coming completely unattached. And, he testified that his scrotum had been cut off. R. 18 He also testified about his wife's injuries. She was knocked unconscious by the collision. R. 13 And, he testified that she had a broken left femur. R. 16

The other victim, Mrs. McCraney, took the stand and testified. She confirmed that she had no recollection of the accident. She said that she broke her left femur, that the thumb on her right hand was crushed and that there was a break in a bone she could not name in her right hand.

Trooper Nowling's investigation showed that Respondent had come around a curve, lost control of her vehicle to the extent that she was broadside to the roadway and that on crossing the center line, she hit the victims in this case. R. 53

The rest of the state's case involved testimony from various witnesses who saw Respondent and her behavior after her car came to a stop and while she was at the hospital. R. 22 - 71 The details of this testimony going to the willfulness element are developed in the briefs of the parties in district court.

After the state rested (R 71), Respondent put on her case. It focused around the defense announced at the opening of trial. It included testimony from her employer and dinner companion about how much they were drinking before she left. He told how he left to follow her and arrived at the scene where her car had come to rest and what he observed there. There was testimony from the triage nurse at the hospital. And, she put on evidence from the evaluation of her DUI evaluator as well as that persons's supervisor in an attempt to cast doubt on the willfulness element by suggesting that she was in an alcoholic blackout at the time she left the victims.

THE TRIAL COURT'S RULING

Following Respondent's rest, the court entertained argument from counsel. After argument, the court stated that the state had presented sufficient evidence to get past a directed verdict. R. 175 She then took her determination on the facts under advisement saying that she wanted to read the cases cited by counsel. R. 175

On November 13, 1985, the court adjudicated Respondent to be guilty and placed her on probation for a period of five years. At that point, she added, addressing Respondent, that she was to make restitution "to the insurance company -- pursuant to any subrogation claim that they may make against you." R. 180 Appellant made no objection. The written order contains the formulation contained in the decision below. It varies slightly from the written order.[1] The court then went on to place other conditions relating to her alcohol problem on appellant's probation. R. 180 - 181

THE RULING BELOW

Respondent perfected a timely appeal. She briefed the sufficiency of the evidence to establish the willfullness element of her offense. And, she challenged that condition of her probation requiring her to make restitution on the ground that the damages to the victims did not flow from the convicted offense. The

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[1] The spoken order controlls over the written. See e.g. Maxon v. State, No. 4-86-2942 (Fla. 4th DCA Oct. 7, 1987)[12 F.L.W. 2381]

district court rejected her attack on the sufficiency of the evidence. Williams v. State, 505 So.2d 478, 479 (Fla. 2d DCA 1987) It then ruled that while there was some relationship between the convicted offense and the victims' injuries, there was no significant relationship. 505 So.2d at 480 Accordingly, it found that requiring her to make restitution as a condition of her probation was error. Id. After noting that Respondent had not preserved the issue by objection in the trial court, the decision went on to find it was a violation of due process to assess "restitution for damages not flowing from the criminal conduct for which a probationer is convicted." 505 So.2d at 481 It then concluded that it could reach the claim and struck the restitution order as "not reasonably related to her rehabilitation for the crime of which she was charged and convicted." 505 So.2d at 482.

THE CASE COMES TO THIS COURT:

Petitioner sought rehearing. The district court denied it making a correction for a factual mis-statement in the opinion and expressing the jurisdictional conflict giving rise to this Court's power to review the case. The state sought a stay of the mandate pending this Court's resolution of the case and the district court granted same.

SUMMARY OF THE ARGUMENT

It is the law of this state that when there is a "significant relationship between a convicted offense and damages to victims that the trial court must award restitution to those victims or find reasons not to do so. Florida courts have appropriately ordered restitution for damages to property done in the course of a grand larceny where the stolen property was largely recovered, J.S.H., infra, for personal injuries caused in an auto accident that eventually resulted in the convicted offense of leaving the scene without offering aid to an injured person, Bowling, infra, and for items taken in a burglary where the convicted offense was dealing in stolen property Jones, infra. Federal courts follow a liberal approach to the adminstration of federal restitution statutes although they have not adopted this court's "significant relationship" test.

The statute at issue here and the case law provide an offender with notice that restitution for any damages with a "significant relationship" to the convicted offense will be an issue at sentencing. It spells out the items to be considered when restitution is to be made for bodily injury. It allocates the burdens of proof and persuasion as to the issues.

The case law on which the district court rested its due process analysis is clearly distinguishable from the situation presented in this case. To the extent those cases manifest specific due process concerns, the restitution scheme at issue in this case meets those concerns. Some of the case law cited by the

court below supports the inference that there is no due process prohibition on restitution for damages that do not flow solely and directly from the convicted offense. Richards infra. This case also shows why there is a reasonable relationship between the convicted offense and the restitution ordered in this case. Both result from the same state of mind, a refusal to accept responsibility for the offender's actions.

This Respondent had notice of the facts against her, their relationship to the convicted offense and the issues regarding restitution that would be open at her sentencing hearing. She chose not to object in the trial court. And, therefore, the issue should not have been considered by the district court.

ARGUMENT

QUESTION PRESENTED

> WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT THERE WAS NO SIGNIFICANT RELATIONSHIP BETWEEN THE CONVICTED OFFENSE, WILFULLY LEAVING THE SCENE OF AN ACCIDENT, AND THE DAMAGES FOR WHICH RESTITUTION WAS ORDERED, VICTIM INJURIES OCCATIONED BY THE ACCIDENT SHE LEFT, WHERE THE STATE'S PROOF, OF NECESSITY, SHOWED THE OFFENDER CAUSING THE ACCIDENT AND CONSEQUENT INJURY TO THE VICTIMS AND IN FURTHER CONCLUDING THAT IT WAS VIOLATIVE OF DUE PROCESS TO ORDER RESTITUTION FOR THOSE DAMAGES AND FURTHER THAT RESTITUTION FOR THOSE DAMAGES WAS NOT REASONABLY RELATED TO HER REHABILITATION?

Florida policy has, in recent years, manifested growing concern for and interest in the victims of crime. This Court made a significant contribution to this reform movement with its decision in J.S.H. v. State, 472 So.2d 737 (Fla. 1985). The district court erred in failing to follow this Court's precedent. And, that error works a material prejudice to crime victims throughout the district. The due process analysis the district court engaged in is fatally flawed because the due process concerns articulated in the case law from other states on which the district court rested its decision do not arise under the Florida restitution scheme. The district court's conclusion that the restitution is not reasonably related to Respondent's rehabilitation is, likewise, without merit. Respondent displayed, with her offense, that she was unwilling to take responsibility for herself and her actions. Obliging her to accept responsibility for her own acts is imperative for her rehabilitation.

In J.S.H., this Court found that the conduct for which J.S.H. was being ordered to make restitution had ". . . resulted directly from [J.S.H.'s] actions which were necessary to perpetrate his crime." Id. at 738 In ruling on why this was covered by the restitution statute this Court said:

> It is not necessary that the offense charged describe the damage done in order to support a restitution order, but only that the damage bear a significant relationship to the convicted offense. Id. at 738.

This court therefore upheld the district court's decision affirming a trial court's restitution order for losses that had not flowed from the convicted offense. The child had stolen items of personality affixed to a boat, damaging the boat in the process. The victim recovered most of the items stolen. And, the convicted offense was grand larceny. The restitution was for the damage done to the boat.

It therefore follows that if damage results from actions or conduct an offender necessarily took to perpetrate an offense, there is a "significant relationship" between the damage and the convicted offense if that action or conduct causing the damage formed any part of the chain of events leading to the convicted offense. Under such circumstances, the statute makes it incumbent on the trial court to either order restitution or find

reasons not to order restitution.[2]

Decisions of other districts illustrate this principal in operation as well as giving rise to the conflict that supports this Court's jurisdiction. In Bowling v. State, 479 So.2d 146 (Fla. 5th DCA 1985), the court correctly recognized that the relationship is a significant one if the offender had to engage in the conduct giving rise to the damages in the course of the episode in which the convicted offense occurred. The state had charged Bowling with two counts of failure by one involved in an auto accident to stop and render aid to an injured person. He entered a plea of no contest to one of the counts and the trial court directed him to make restitution for the injuries.

On appeal, Bowling advanced the same argument that this Respondent advanced below, that the injuries were not a result of the crime charged so restitution was not proper. The court affirmed. It relied on this Court's decision in J.S.H. And, it observed that there was no question about Bowling's having caused the accident and the injuries resulting from it. The case is virtually indistinguishable from this one.

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2 Section 775.089(1)(a), Florida Statutes provides:

> In addition to any punishment, the court shall order the defendant to make restitution to the victim for damage or loss caused directly or indirectly by the defendant's offense, unless it finds reasons not to order such restitution. (emphasis supplied)

Likewise, in Jones v. State, 480 So.2d 737 (Fla. 1st DCA 1985), the court upheld an order directing restitution for losses to individuals occationed by Jones' burglary of their home although Jones had pled only to dealing in property from their home. The information charging the burglary involving the goods for which he was to make the restitution at issue in that had been nolle prossed as part of a plea agreement. It relied on J.S.H. in doing so.

The court below should have followed the Florida precedent and given the restitution statute the liberal construction this court illustrated and mandated with its decision in J.S.H. The Florida approach, as illustrated by the above is also in keeping with the liberal construction of the restitution provisions of the United States Code.

Federal courts interpreting both the provisions of the probation act regarding restitution, 18 U.S.C. §3651, and 18 U.S.C. §§3579 & 3580, and the restitution provisions of the Victim and Witness Protection Act have not limited restitution to amounts charged as lost in the indictment. See United States v. Hawthorne, 806 F.2d 493, 497 (3d Cir. 1986) (collecting cases) Although the federal courts have not used the "significant relationship" test articulated by this Court, it is plain that the federal cases look to the whole of the conduct embracing the charged offense in setting restitution. See e.g. United States v. Sleight, 808 F.2d 1012, 1018 - 19 (3d Cir. 1986) (looking to evidence to establish amount of restitution and not limiting it

to amounts charged in indictment); United States v. Wood, 775 F.2d 82 (3d Cir. 1985)(restitution for unitary scheme appropriate despite offender's plea to only two of 35 counts of indictment).

The one federal decision to speak on the matter, United States v. Palma, 760 F.2d 475, 477 (3d Cir. 1985) rejected a due process attack on Sections 3579 and 80 because, like the statute at issue in this case, they provide for an opportunity to challenge the claim for restitution.[3]

The Florida statute provides the requisite notice that restitution will be an issue at sentencing. See e.g. Petteway v. State, 502 So.2d 1366 (Fla. 2d DCA 1987); Spivey v. State, 501 So.2d 698 (Fla. 2d DCA 1987); Gilmore v. State, 479 So.2d 791 (Fla. 1985). Sub-section 775.089(7) provides the offender with the opportunity to challenge both the type and amount of restitution ordered in terms virtually identical to the federal statute. And, sub-section 775.089(2) provides the measure of restitution in the case of death or bodily injury.

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[3] 18 U.S.C. §3580(d) provides:

> Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

The existence of the procedural mechanisms and the limitation to acts or events with a "significant relationship" to the convicted offense as well as the statutory measure of restitution in the event of bodily injury or death serve to meet the due process concerns articulated in the state cases to which the district court's decision made reference. At least one of those cases offers support for the result reached in the trial court.

Commonwealth v. Cooper, 319 Pa. Super. 351, 466 A.2d 195 (1983) was a guilty plea case and involved a statute limiting restitution for personal injury to those "directly resulting from the crime." It made reference to other cases taking the strictly limited approach to restitution and expressed concern about a denial of due process when there is an imposition of restitution for losses for which the offender has not been found to be criminally accountable. The case really does not explain why such a limitation should exist. It just makes that conclusion.

Unlike our statute which provides restitution for losses caused either directly or indirectly by the convicted offense, that state expressly limits restitution to losses "directly resulting from the crime."

The decision does not purport to address situations where the offender has admitted his guilt or there is a "significant relationship" between the convicted offense and the acts or conduct that resulted in the loss for which restitution is ordered. Nor, does it address the existence of any due process limitations on conditions of probation designed for rehabilitation.

The court below erred in finding this case persuasive. It is not so much a reasoned decision as much as one of those decisions which simply embodies conclusions.

In People v. Becker, 349 Mich. 476, 84 N.W.2d 833 (1957) the court found restitution for medical and hospital bills to victims of defendant's driving was improper where the convicted offense was leaving the scene. This is another one of those sad affairs offering facts and attaching conclusions offered as an opinion. To the extent that there is any analytical basis for its conclusions, it expressed the concern that there had been no fixing of liability in the constitutional sense for anything other than the offense at conviction.

In so doing, it overlooked and failed to consider that a fact finder has every right to look to the facts that develop during trial in setting the appropriate sanction. If this were not the case, then Lockett v. Ohio, 438 U.S. 586 (1978) certainly would not be the law.

The concerns articulated in Becker are not legitimate concerns in this case. The statute and this Court's construction of it in J.S.H. clearly put an offender on notice that he may be held to make restitution of all losses with a "significant relationship" to the convicted offense. And, our statute plainly rejects any distinction between reparation and restitution as subsection 775.089(2) provides for the elements of damages that are authorized in a case involving bodily injury to the victim. Becker provides no authority for the district court's decision not to follow J.S.H.

In People v. Richards, 17 Cal. 3d 614 131 Cal. Rptr. 537, 552 P.2d 97 (1976) a sharply divided court addressed the question of whether a rehabilittative purpose would be served by requiring the offender to make restitution for damages arising from a crime for which he had been acquitted. The California court expressed no concern that there might be due process limitations restricting restitution to direct consequences of the convicted offense. Thus, the decision does not support the district court's analysis, but undercuts it on this ground. California, unlike some of the other states, does not limit restitution to losses arising from the offense charged. 552 P.2d at 100. The court framed the question as whether a rehabilitative purpose would be served by the restitution order. 552 P.2d at 102.

Proceeding from there, the majority reasoned that "unless the act for which the defendant is ordered to make restitution was committed with the same state of mind as the offense with which he was convicted, this salutary rehabilitative effect can not take place." Id. The majority then went on to distinguish People v. Lent, 15 Cal.3d 481, 124 Cal. Rptr. 905, 541 P.2d 545 (1975), a case in which it had approved restitution for losses occationed by a crime for which there had been an acquittal, on the ground that there had been a two day sentencing hearing in that case which showed the acquittal did not absolve him of false statements he had made regarding the disposition of the funds involved on the ground that there had been no such hearing in the case under review to determine facts other than those that led to

the acquittal. The dissent found the rehabilitative limitation to the same state of mind an unsupportable innovation in the law that had not been present in Lent.

Rather than supporting the result below, Richards undermines not only on the district court's due process analysis, but also on its conclusion that restitution was not reasonably related to the offender's rehabilitation for the convicted offense. The convicted offense in this case, leaving the scene, punishes the offender for not taking responsibility. When Respondent chose to drink and drive, she chose not to take responsibility for herself. The same state of mind is involved in the convicted offense. And, enforcing restitution will go a long way in promoting this offender's rehabilitation.

Finally, in State v. Reese, 124 Ariz. 212, 603 P.2d 104 (Ariz. Ct. App. 1979), the principal case the district court relied on, the Arizona court recognized that restitution for offenses other than a convicted offense may be proper, but limited its rule to situations in which the offender had either admitted the offense or responsibility for the offense had been established in accordance with due process. 603 P.2d at 107. It therefore rejected an order requiring restitution for losses sustained by victims of charges that had been dismissed as part of a plea agreement.

The case simply does not help Respondent's position. Her responsibility for the victim's injuries was established of necessity in the state's case against her. She had notice of the

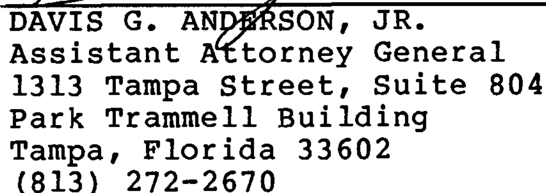
evidence the state would be offering. It is not as though this respondent is being forced to make restitution for offenses totally unrelated to the convicted offense. She had notice that restitution would be an issue at her sentencing. She knew the issues and the respective burdens of proof and persuasion. She did not object in the trial court. Thus, she did not preserve any issue for review on appeal with regard to restitution. The due process limitation found by the court below was illusor. Thus, it erred in finding it to exist and in addressing any issues regarding restitution.

CONCLUSION

WHEREFORE, Respondent ask this Court to reaffirm J.S.H., find that assuming, arguendo, to the extent there are due process limitations on restitution they do not bar the restitution in this case, that it was error for the district court to find to the contrary and remand to the district court with instructions to find that Respondent's restitution claim is procedurally barred on the basis of the above and foregoing reasons, arguments and authorities.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



DAVIS G. ANDERSON, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Public Defender, Second Judicial Circuit, P. O. Box 671, Tallahassee, Florida 32302, this 22d day of October, 1987.

OF COUNSEL FOR PETITIONER.