OA 1-4-88

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

CASE NO. 70,580

ROXANNE WILLIAMS,

Respondent.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Respondent, Roxanne Williams, was the defendant in the trial court and appellant below. She will be referred to in this brief as Respondent or by her proper name. Petitioner, the prosecution in the trial court and appellee below, will be referred to as the State or Petitioner. The record on appeal will be referred to by use of the symbol "R," followed by the appropriate page number. All emphasis is supplied unless the contrary is indicated.

II STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts as accurate although partially irrelevant to the offense charged and subsequent issue raised in the instant case.

III SUMMARY OF ARGUMENT

It is uncontested that the injuries suffered by the McCraneys were not caused by or during Respondent's act of leaving the scene.

Existing statutes and case law make it clear that restitution shall be ordered in instances where the offense before the court caused the damage or loss to the aggrieved party, or the damage or loss sustained by any victim is a result of the offense. Secs. 948.03 and 775.089, Fla. Stat. (1985), Fresneda v. State, infra. That is, the damages must bear a "significant relationship" to the offense charged. J.S.H. v. State, infra.

The "significant relationship" test has been interpreted to mean that damages must be caused by the offense, K.M.C. v. State, infra, or during the offense, Roberts v. State, infra; Lawson v. State, infra. being heard by the court.

In the instant case, injuries sustained by the McCraneys were neither caused by, nor during, Respondent's act of leaving the scene of an accident. Consequently, the injuries were not "reasonably related" to the instant offense and the District Court acted properly in striking restitution as a condition of probation.

For an error to be so fundamental that it may be urged on appeal, though not properly preserved below, it must amount to a denial of due process. Castor v. State, infra.

In the case at bar, the McCraneys received a judgment against Respondent's boss' insurance company. Respondent was

ordered to pay restitution to the insurance company. She was not, however, a party to the action between the insurance company and McCraneys where damages were determined. Furthermore, the court, in ordering Respondent to pay restitution, left the amount to be paid up to the insurance company. The court informed Respondent "that you're going to have to pay the insurance company back the money they have paid to the McCraneys, or at least some portion of it" (R-180).

In Jenkins v. State, infra, this Court held that due process required the accused to be given adequate notice restitution would be sought; an opportunity for the accused to be heard on that issue; a judicial determination that the accused had the ability to pay, and judicial determination of the amount the accused must pay. Respondent was afforded none of these protections before either the civil judgment was entered in favor of the McCraneys or in the instant case when the trial court ordered her to pay restitution, "or at least some portion of it," to the insurance company.

It is fundamental error to convict a person of an offense which is not charged. Saskowitz v. State, infra. Certainly, the error would be compounded if a person were sentenced for an offense they were neither charged with nor convicted of. In the instant case, Respondent has been ordered to pay restitution for damages that were neither caused by nor during the offense she was charged with. Requiring Respondent to pay restitution was fundamental error and the District Court was

entirely correct in striking the requirement from the probation order.

In the alternative, Section 924.06, Florida Statutes and Florida Rule of Appellate Procedure preserve a defendant's right to appeal an order granting probation as a matter of right. See also, Donald and Bales exterminating, Inc. v. State, infra; DiOrio v. State, infra.

IV ARGUMENT

ISSUE PRESENTED

THE APPELLATE COURT ACTED PROPERLY IN STRIKING RESTITUTION AS A CONDITION OF PROBATION SINCE THE DAMAGES RESPONDENT WAS ORDERED TO PAY FOR DID NOT BEAR A SIGNIFICANT RELATIONSHIP TO THE OFFENSE FOR WHICH SHE WAS CONVICTED. FURTHERMORE, IMPOSITION OF RESTITUTION VIOLATED RESPONDENT'S RIGHT TO DUE PROCESS AS SHE WAS REQUIRED TO PAY FOR DAMAGES THAT WERE ESTABLISHED IN AN ACTION IN WHICH SHE WAS NOT A PARTY.

As a threshold matter, it should be noted Petitioner does not argue the injuries suffered by the McCraneys were caused by, or during Respondent's act of leaving the accident scene.

Section 948.03, Florida Statutes (1985), provides that:

> (1) The court shall determine the terms and conditions of probation or community control and may include among them the following, that the probationer or offender in community control shall:
>
> (e) Make 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.

In addition, Section 775.089, Florida Statutes (1985), reads in pertinent part:

> (1)(a) In addition to any punishment, the court shall order the defendant to make restitution to the victim for damages or loss caused directly or indirectly by the defendant's offense.
>
> (6) The court, in determining whether to order restitution and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense....

The long-standing rule established by this Court is that restitution is not applicable when one is convicted of leaving

the scene of an accident with injuries unless the injuries actually resulted from the conduct of leaving the scene. Fresneda v. State, 347 So.2d 1021 (Fla. 1977). In so ruling, this Court correctly noted the injuries were caused by the accident, not leaving the accident scene. Id. Both the applicable statutes and logic dictate this result since restitution, as a condition of probation, is a function of one's criminal conduct.

In Bowling v. State, 479 So.2d 146 (Fla. 5th DCA 1985), the District Court refused to follow this Court's precedent and awarded restitution for injuries sustained in an accident from which Mr. Bowling was convicted of leaving the scene. The court cited this Court's opinion in J.S.H. v. State, 472 So.2d 737 (Fla. 1985), as authority. Respondent believes the District Court's reliance on J.S.H. was misplaced.

In J.S.H., this Court affirmed a condition of community control that imposed restitution on a juvenile who cut wires, loosened screws and made a large hole in the bottom of a boat while committing a theft of items from the boat. The Court noted, "The damages were the result of the theft," J.S.H., at 738, and ordered restitution for both the stolen property and damage to the boat. The Court held that the damage to the boat bore a "significant relationship" to the convicted offense, i.e., the damage was caused in the course of committing the offense.

Clearly the result in J.S.H., does not apply in a situation where no damage or injury is obtained during or as a

result of criminal conduct. In the instant case, the District Court recognized and properly applied this principle. It is unrefuted that no injuries were caused by or during Respondent's act of leaving the scene of the accident. See also, Riner v. State, 389 So.2d 316 (Fla. 2nd DCA 1980), (District Court struck the condition of probation that appellant pay restitution for the damages caused in an accident from which he was convicted of leaving the scene).

Petitioner has relied on Roberts v. State, 467 So.2d 439 (Fla. 5th DCA 1985) for comfort in the case at bar. The principle this Court enunciated in J.S.H., clearly was applied in Roberts, however, Roberts, does not apply in the instant case. There, Roberts was convicted of burglary and ordered to pay restitution for fire damage that she caused by leaving a lit cigarette on a window sill during the course of her crime. The Roberts court correctly noted, "appellant's conduct in committing the grand theft directly caused or contributed to the damage to the victim's home." Roberts, at 441.

Sub judice, Respondent's conduct of leaving the scene of the accident neither caused nor contributed to the injuries sustained by the victims. Had the victims suffered additional injuries as a result of her leaving the scene, she could rightfully be ordered to pay those damages that her criminal conduct caused. That is not the case here, and Petitioner does not make that argument. Rather, Petitioner has incorrectly relied on the cases mentioned above and argued that this Court should recede from Fresneda, and, for policy purposes, expand

the holding in J.S.H., beyond all logic, reason and statutory authority. To do so would be to create confusion and ambiguity in place of the clear, workable legal principle that presently governs the issue.

While it is true an accused can negotiate and agree to pay restitution in return for a more favorable sentence, Pollock v. State, 450 So.2d 1183 (Fla. 2nd DCA 1984), in the absence of a plea agreement, the "significant relationship" test developed in J.S.H. controls. In Lawson v. State, 498 So.2d 541 (Fla. 1st DCA 1987), the court held appellant, charged with burglary, must pay restitution for money stolen during a burglary even though an accompanying theft charge had been nol prossed. The court found a "significant relationship" between the burglary and the missing money and noted, "the burglary charge appellant pled guilty to involved the same victim during the same incident in her home." Id.

Conversely, in Cliburn v. State, 12 FLW 1944 (Fla. 3rd DCA Aug. 11, 1987), the court refused to uphold a condition of probation that required appellant to pay restitution. There, appellant was convicted of dealing in stolen property, the property having been stolen during a burglary appellant did not commit. The trial court ordered him to make restitution for property that was stolen in the burglary and not recovered although all the stolen property appellant sold was eventually returned to it's rightful owner. The District Court struck the restitution requirement holding the damages and losses suffered

by the victim bore no significant relationship to the offense for which the defendant was convicted, citing J.S.H. v. State, supra, because the damages were not caused by the defendant's offense (Court's emphasis).

In K.M.C. v. State, 485 SO.2d 1296 (Fla. 1st DCA 1986), the District Court refused to uphold part of a restitution order where appellant pled guilty to one count of battery and was ordered to pay for a small claims court filing fee, medical expenses and lost wages of the victim's mother who, although not a witness, had an emotional reaction to the fight her child was in. The court held that restitution for medical expenses personally incurred by the mother in caring for injuries to the child were properly included in restitution; but the expenses and lost wages resulting from the mother's emotional reaction were not properly reimbursable anymore than such damages would be allowed in a civil suit. These expenses were not "caused by" (Court's emphasis) the fight. Id, at 1298.

The principle of J.S.H., was again applied where an accused was charged with 12 counts of grand theft of food commodities. The trial court ordered him to pay for all the commodities that an audit reflected were missing. The District Court struck the restitution order and opined:

> It is true that the words "caused by his offense" contained in section 948.03(1)(e) do not mean that, in order to support a restitution order, the offense charged must describe the damage caused, but mean that the damage must bear a significant relationship to the crime charged. J.S.H. v. State, supra. The acts appellant was (sic) charged

> with committing...did not necessarily cause the program to sustain all of those damages. Therefore, the entire amount of damage charged by the state did not bear a significant relationship to the crimes charged in the informations. See J.S.H.; Roberts v. State, supra.

Barnes v. State, 489 So.2d 1182 (Fla. 2nd DCA 1986).

In Anderson v. State, 502 So.2d 1289 (Fla. 1st DCA 1987), the defendant was charged with one count of grand theft and entered a plea to that charge. At the same time, she pled no contest in a separate case involving two counts of grand theft. She was sentenced in both cases at the same hearing. In the first case she was ordered, as a condition of probation, to make restitution in both cases. In striking the restitution order, the reviewing court noted there was no causal link between the defendant's criminal activity involved in the first case and the damages sustained by the victims in the other unrelated case. Id. citing Fresneda v. State, supra; Barnes v. State, supra.

In the case at bar, Respondent was ordered to pay for injuries that were not caused by or during the commission of her offense but which occurred prior to it. Although restitution may have been proper in a different case, Anderson, supra, the Second District Court of Appeal properly struck the restitution order here as the damages here were not caused by Respondent's offense as contemplated by Section 948.03(1)(e), and the applicable case law. Williams v. State, 505 So.2d 478 (Fla. 2nd DCA 1987).

Next, Petitioner urges this Court to reinstate the restitution order for policy reasons due to the "manifested growing concern for and interest in the victims of crime." (Petitioner's Initial Brief at p. 9). At first blush one may be tempted to view Petitioner's position as being one that would save court time by disposing of two issues during one hearing. Such a belief, however, fails to take into consideration the problems generated by dismantling the existing easily applied and equitable restitution scheme and replacing it with a rule that would permit restitution for damages not caused by or during the offense before the court. To permit restitution in a case where the damages were not caused by the criminal behavior or in the course of committing the criminal act would create a potential for endless confusion in trial and appellate courts as they attempted to determine just how far reaching the new restitution policy extended. The confusion (and appeals) that would result from such an undefined system might well exceed any benefits it produced.

It should be kept in mind that the court's authority to impose restitution as a condition of probation is derived from Sections 775.089(1)(a) and 948.03(1)(e) Florida Statutes (1985). Had the Florida Legislature desired to expand the these provisions for restitution it certainly could have done so. It is evident they feel the existing statutes are adequate.

The existing restitution scheme is fair to both the judges and the judged. Stated another way, the provisions are clear

as to when judges are to apply them, and payment is only required of an offender who causes damages during or as a result of the criminal act then before the court. Restitution in case #1 should be ordered for damages caused by or during the commission of act #1; restitution in case #2 should be ordered for damages caused by or during the commission of act #2, and so on.

Both statutes permit restitution for damages caused by the offense the offender is to be sentenced for. This Court has provided a liberal interpretation of the term "caused" in the existing case law. J.S.H. v State, supra; Fresneda v. State, supra. Nonetheless, it is clear the "significant relationship" test enunciated in J.S.H., permits restitution only for damages caused by or during the the offense then before the court. To rule otherwise would be to run afoul of due process protections provided by both the State and Federal Constitutions.

This Court has held for an error to be so fundamental it may be urged on appeal, though not properly preserved below, it must amount to a denial of due process. Castor v. State, 365 So.2d 701 (Fla. 1978), citing Smith v. State, 240 So.2d 807 (Fla. 1970). See also, Ray v. State, 403 So.2d 956 (Fla. 1981); Noble v. State, 353 So.2d 819 (Fla. 1978); McPike v. State, 473 So.2d 291 (Fla. 2nd DCA 1985); Simmons v. State, 457 So.2d 534 (Fla. 2nd DCA 1984); Young v. State, 438 So.2d 998 (Fla. 2nd DCA 1983); Warmble v. State, 393 So.2d 1164 (Fla. 1981); Gonzales v. State, 392 So.2d 334 (Fla. 3rd DCA 1981); Rodriquez v. State, 378 So.2d 7 (Fla. 2nd DCA 1979).

Article 1, Section 9, Florida Constitution (1968) provides in pertinent part: No person shall be deprived of life, liberty or property without due process of law.

A sentencing court is required to comply with due process requirements in a sentencing hearing before taxing costs against an indigent defendant. Jenkins v. State, 444 So.2d 947 (Fla. 1984). The state must provide adequate notice of such assessment to the defendant with full opportunity to object to the assessment of these costs. In addition, any enforcement of the collection of those costs must occur only after a judicial finding that the indigent defendant has the ability to pay in accordance with the principles enunciated in Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). Respondent asserts the same due process protections apply when the sentencing court requires a probationer to pay restitution as a condition of her supervision.

In Saskowitz v. State, 498 So.2d 598 (Fla. 2nd DCA 1986), the District Court, quite rightly, found it was fundamental error to convict a person of an offense which was not charged. Respondent asserts it is doubly egregious to impose restitution as a condition of probation when the damages did not flow from the case for which the probationer was then before the court. Respondent questions the court's jurisdiction to impose such an order and believes this is tantamount to being sentenced for an offense of which she was neither charged nor convicted. See, Booker v. State, 497 So.2d 957 (Fla. 1st DCA 1986); Christopher v. State, 397 So.2d 406 (Fla. 5th DCA 1981).

Moreover, Respondent was ordered to pay restitution to an insurance company, "pursuant to any subrogation claim that they make against you" (R-180). The court went on to add, "Let me assure you that you're going to have to pay the insurance company back the money they have paid to the McCraneys, or at least part of it" (R-180). Thus, it is clear Respondent has been required to pay restitution to an insurance company for damages that were determined in a proceeding she was not even a party to, and in an amount to be set by the insurance company. Imposing such a requirement on Respondent violated virtually every aspect of her right to due process. She did not get notice or a chance to call or cross-examine witnesses for or against her during the proceeding involving the insurance company and the McCraneys. In the sentencing hearing, the trial court made no determination of her ability to pay any damages. See Jenkins v. State, supra. Furthermore, the court left the question as to the amount of damages up to the insurance company, the payee, to determine.

Petitioner argues that Section 775.089 Florida Statutes provides the requisite notice that restitution will be an issue at sentencing, citing, inter alia, Pettway v. State, 502 So.2d 1366 (Fla. 2nd DCA 1987). Petitioner's reliance on this case is misplaced as Pettway, is readily distinguishable from the case at bar. First, unlike the instant case, the initial determination that Mr. Pettway was liable for restitution was made in the trial court. In the instant case, liability for restitution was established in an action that Respondent was

not a party to. Second, in remanding for a proper assessment of restitution, the District Court directed the following:

> Accordingly, on remand the trial judge is directed to hold a hearing, with notice to the defendant, for the determination of the matters required by section 775.089(6), Florida Statutes, (1985). We point out that our holding in this respect does not diminish in any way our prior holding that no advance notice (other than that provided by statute) is necessary for the imposition of restitution.... Id. at 1367.

Under Petitioner's theory, the statute alone is permanent, constructive notice to any person appearing before a court for sentencing that restitution may be imposed, even for damages not caused by or during the offense they are before the court on, including damages not "significantly related" to the offense they were haled into court for. This is a particularly vexing problem especially in view of the long-standing rule enunciated by Fresneda v. State, supra, in which this Court arguably put individuals similarly situated to Respondent on notice that restitution would not be applicable in leaving the scene cases.

In the case at bar, it should be kept in mind as the District Court noted below, "Not only could the restitution order be construed to require appellant to pay damages not flowing from her crime, but it could also be construed to require her to pay restitution to her employer for damages awarded in a civil action against the employer, an action to which she would not even be a party. This certainly does not comport with due process." Williams v. State, 505 So.2d 478 (Fla. 2nd DCA 1987) at 482. Respondent would further assert that, due to the contributory negligence

standard employed by Florida courts, she is entitled to present her case to a jury to make a determination of her degree of culpability, if any.

Respondent would, in the alternative, assert her right to be heard on the restitution issue is preserved, despite the lack of an objection to the condition in the trial court, by Florida Rule of Appellate Procedure 9.140(b)(1)(B). The rule reads: A defendant may appeal: An order granting probation, whether or not guilt has been adjudicated. A literal interpretation of this rule has been applied in Donald and Bales Exterminating, Inc. v. State, 487 So.2d 78 (Fla. 1st DCA 1986) and DiOrio v. State, 359 So.2d 45 (Fla. 2nd DCA 1978). In DiOrio, the District Court held appellant's right to appeal an order of probation is granted by Section 924.06, Florida Statutes (1977), and stated, " We hold that his right to appeal is not contingent upon the registering of objections at the time probation was granted." Citing Coulson v. State, 342 So.2d 1042 (Fla. 4th DCA 1977). But see Goodson v. State, 400 So.2d 791 (Fla. 2nd DCA 1981).

Petitioner also argues that Respondent had notice that restitution would be in issue as her responsibility for the victim's injuries was established of necessity in the state's case against her (Petitioner's Initial Brief, p. 17). Granted, there must be an accident before one can be charged with leaving the scene, but establishing which party caused the accident is irrelevant surplusage when the issue before the court is whether someone left the accident scene - after the accident.

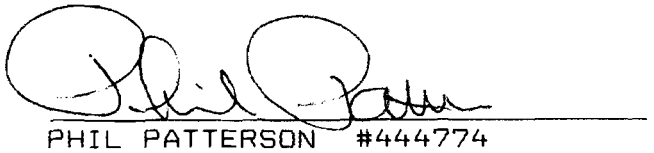
Finally, the District Court was entirely correct in holding that restitution was not reasonably related to Respondent's rehabilitation. Williams v. State, supra, at 482. Petitioner's position is that making Respondent pay an (undetermined) amount of money to the her employer's insurance company will cause her to be responsible for her actions. Apart from the argument above that the trial court lacked authority to impose restitution in this case, and the lack of a causal connection between the offense charged herein and the victims injuries, Respondent would assert that five years of probation with conditions that she not drink alcohol (and submit to random urinalysis) and that she obtain and pay for alcoholism treatment as well as mental health counseling, coupled with the requirement that she pay $1301, in a lump sum (no partial payments) is adequate to insure she is rehabilitated from any alcohol problem she may have. Petitioner does not explain how payment of the additional, unknown amount of money to an insurance company will add to the rehabilitative scheme devised by the court. It is pure speculation that the extra financial obligation urged by Petitioner will aid in rehabilitation. Respondent would submit that at some point, the extra economic burden on her could arguably result in the opposite, clearly a result contrary to that desired by everyone.

V CONCLUSION

Based on the foregoing argument, reasoning and citation of authority, Respondent respectfully requests this Court to affirm the ruling of the District Court in this case.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. mail to Davis G. Anderson, Jr., Assistant Attorney General, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida 33602, and to Ms. Roxanne Williams, 3068 Foxhill Circle, #202, Apoka, Florida 32703, on this 16th day of November, 1987

PHIL PATTERSON