

IN THE SUPREME COURT OF FLORIDA

MELISSA HENRIQUEZ,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 85-2804

FILED
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DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON JURISDICTION

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SUMMARY OF THE ARGUMENT

This Honorable Court has jurisdiction to review this case. That jurisdiction is vested pursuant to Article V, section 3(b)(1), Florida Constitution, and a conflict in decisions between the Second District Court of Appeal and Florida Fifth District Court of Appeal.

STATEMENT OF THE CASE

A three-count information was filed in the Circuit Court for Highlands County, Florida on May 24, 1985; charging Appellant, MELISSA HENRIQUEZ, and two co-defendants, with three counts of robbery with a firearm, contrary to sections 812.13 and 775.087, Florida Statutes. (R158)

Jury trial was held before Circuit Judge Thomas Langston on October 14-15, 1985. Henriquez was represented by Robert Gray, and the State was represented by Olin Shinholser.

Following deliberation, a verdict of guilty of three counts of petit theft was returned. (R146, 147).

At sentencing hearing on November 27, 1987, Appellant was sentenced to county jail and ordered to pay a fine and assessments. (R151)

Notice of Appeal was filed on December 4, 1985.

The Second District Court issued their decision on September 11, 1987. A motion for rehearing was filed on September 17, 1987, and denied on October 23, 1987.

STATEMENT OF THE FACTS

Henry Stewart, a co-owner of Highlands Jewelers, testified as a prosecution witness. He stated that on July 6, 1984, he was at the jewelry store doing paperwork, when two persons entered and announced a hold-up. (R4) Those persons took the jewelry and the witness's wallet and glasses. (R5, 13) Money was also taken. (R14) The witness said that both of the persons who entered his store were men. (R16, 17)

State witness Mabel Rhoades testified that she was working at Highlands Jewelry store on July 6, 1984. (R18) Two men entered the store. They had guns and said: "This is a goddamned holdup." One of the men hit her on the head. (R19) She was placed in the store's restroom. (R19) She said she had never seen the woman seated at trial counsel's table prior to the trial. (R24)

Erica Dunn testified as a state witness. She said she was working at the Highlands Jewelry on July 6, 1984. (R25) An armed robbery occurred on that day. (R25) She was told to go into a back room by one of the robbers. (R26) The robbers were caucasian. (R26-27) The robbers put the jewelry in a garbage can. (R30) The witness's wallet was taken, and never recovered. (R31) Dunn testified that both robbers were men. (R33)

State witness Sarah Gilbreath stated that she was at the Highlands Jewelry on July 6, 1984. (R34) She testified that she saw two guys running out of the store as she approached. (R35) They were carrying a garbage can and bag. She felt something unusual was happening. (R35) She said she also saw a black guy sitting in a van. (R39) She said she was certain both perpetrators were men. (R41)

Hugh Hines was a State witness. He was a Deputy Sheriff on July 6, 1984 and responded to a call at the Highlands Jewelry store. (R42) He secured the crime scene, preserving it for investigation. (R42)

Betty Worthington, as a witness for the prosecution, testified that she is an investigator and crime scene investigator for Highlands County. (R43) She checked the store's door for fingerprints, finding no identifiable latents. (R43) No prints belonging to Henriquez were found. (R44)

Judy Rhodes testified as a State witness on July 6, 1984, she was employed at the jewelry store. Two men entered the store. They had guns and pushed her into the restroom. (R47) Some of her property, including a wallet and pay check were taken. (R47) She said no woman was involved in the robbery. (R49)

Catherine Rodriguez testified on behalf of the State. She said that Joe Rodriguez had been her husband in July, 1984. (R50) She said that she had been a participant in robberies, and had been arrested. (R51) She testified that she had knowledge as to what participants were in the robbery of the Highlands Jewelry store. (R52) She became aware of the robbery when Henriquez, Jack and Joe came back to her house, entered a bedroom and sorted jewelry. (R53) She testified that she saw jewelry, cases, and a garbage can. (R54) Petitioner Henriquez said that she should have something for help. (R54)

Kenneth Kruelen was a State witness. As crime scene technician and investigator for the Sheriff's Department, he assisted in processing the crime scene Highlands Jewelry. He found no prints

belonging to Petitioner. (R70-71)

State witness Joe Rodriquez admitted participation in the robbery of the Highlands Jewelry on July 6, 1984. He said Melissa Rodriquez's role in the robbery was that of driver. (R73)

William Matthew testified on behalf of the State. As an agent for the F.D.L.E., he was familiar with a multi-page document between the State and Joe Rodriquez.(R107) He stated that the primary consideration was testimony in regard to a murder in Hillsborough County. (R109) Mr. Rodriquez was able to give information that led to the solution of that case. (R111)

The State rested, and James Gilliard testified as a defense witness. He said he was with Sarah Gilbreath and her two daughters on July 6, 1984. (R113) They went to Highlands Jewelers, and saw two people come out of the jewelry store, carrying a garbage can and trash bags. (R113-114) They got into a Transam, and it left. He testified that the person sitting at the table was not the person he saw with long blonde hair in the vehicle. (R121)

Helen Waite testified. She is a cashier at the Southgate Theatre. On July 6, 1984, she saw two men around it, carrying a bag and a waste basket. (R123) The men got into a car and left. She said she only saw those two men in the car.

At sentencing, the trial judge imposed a county jail of 60 days per count on Petitioner, and ordered payment of: a fine, costs of \$76.00, and a lien of \$1,200.00. (R152)

No notice, nor waiver of right to object to costs was on Petitioner's Affidavit of Indigency. (R164)

ARGUMENTUM

THE DECISION OF THE SECOND
DISTRICT COURT OF APPEAL IS
IN CONFLICT WITH THE DECISION
OF THE FIFTH DISTRICT COURT
OF APPEAL ON THE IDENTICAL
QUESTION OF LAW, AND SUCH
CONFLICT WAS EXPRESSLY
ACKNOWLEDGED BY THE SECOND
DISTRICT COURT IN ITS OPINION.

In their decision, rendered September 11, 1987, the District Court of Appeal for the Second District stated:

Recently we considered a case in which the trial judge did not pronounce the imposition of cost at...sentencing... the written judgment in that case imposed court costs...we held that since the trial judge made no mention of costs during the sentencing hearing, but later imposed them in his written judgment, the trial judge erred...In the present case... we hold that the failure to object when the trial judge orally stated his intention to impose those assessments constituted a waiver...We acknowledge that our holding in this respect conflicts with the decision of our sister court in *Outar v. State*...

The decision of the Second District Court of Appeal in the instant case conflicts with the decision of the Fifth District Court of Appeal in *Outar v. State*, 508 So.2d 1311, F.L.W. (Fla. 5th DCA June 18, 1978).

It is the position of Petitioner that it was improper for the trial court to impose costs and fees upon the defendant absent basic procedural fairness, including opportunity to question, or object to those costs.

The Second District Court ruled that the failure of the defendant to object to imposition of costs constituted a waiver, noting that amount of a lien was "suggested by the [assistant]

public defender." On rehearing motion, it was noted that such a factual situation could clearly give rise to a conflict of interest.^{1/}

In Outar, supra, the Fifth District Court ruled that a defendant cannot waive this fundamental error by failing to object, and that due process requires judicial determination of ability to pay court costs, citing Jenkins v. State, 444 So.2d 947 (Fla. 1984).^{2/}

The decision of the Second District Court of Appeal in this case is in direct, specific conflict with the Fifth District Court's decision as referred to supra. This Honorable Court has jurisdiction to review the matter. Art. V, §3(b)(1), Fla.Const.

^{1/}See Cannon 5, 7, 9, Code of Professional Responsibility, Rules of Florida Bar.

^{2/}See also, Bull v. State, 507 So.2d 744 (Fla. 2d DCA 1987).