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**MAR 12 1992**

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

HARRY BATTLES,

Petitioner,

v.

CASE NO. 79,468

STATE OF FLORIDA,

Respondent.

\_\_\_\_\_

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT

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IS A GOOD FAITH PURCHASER FOR VALUE OF STOLEN PROPERTY A "VICTIM," OR "AGGRIEVED PARTY," WITHIN THE MEANING OF §§ 775.089(1)(a) AND (c), FLORIDA STATUTES (1989) SO THAT A PERSON CONVICTED OF DEALING IN STOLEN PROPERTY PURSUANT TO § 812.019(1) MAY BE ORDERED TO PAY RESTITUTION TO THAT PURCHASER IN THE AMOUNT PAID FOR THE STOLEN PROPERTY?	
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IN THE SUPREME COURT OF FLORIDA

HARRY BATTLES, :  
Petitioner, :  
v. : CASE NO. 79,468  
STATE OF FLORIDA, :  
Respondent. :  
\_\_\_\_\_ :

PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner seeks review from the decision of the First District Court of Appeal in Battles v. State, 17 FLW D427 (Fla. 1st DCA Feb. 7, 1992) (copy attached as an appendix). A one volume record on appeal will be referred to as "R" followed by the appropriate page number in parentheses. A one volume trial transcript will be referred to as "T". A one volume sentencing transcript will be referred to as "S."

## II STATEMENT OF THE CASE

By information filed September 27, 1990, petitioner was charged with burglary of a conveyance while armed and dealing in stolen property (R 3). The cause proceeded to jury trial on January 4, 1991, and at the conclusion thereof petitioner was found guilty as charged of dealing in stolen property and not guilty of burglary (R 20; 22).

On January 7, 1991, petitioner was adjudicated guilty and sentenced to 30 months in state prison, with credit for time served, and with restitution in the amount of \$45.00 (R 23-31; S 5-8). On January 31, 1991, a timely notice of appeal was filed (R 32). On February 4, 1991, the Public Defender of the Second Judicial Circuit was appointed to represent petitioner (R 34).

On appeal, petitioner challenged the imposition of restitution to a third party who had purchased the stolen property from petitioner. The lower tribunal affirmed the imposition of restitution and certified the question.

Timely notice of discretionary review was filed.

### III STATEMENT OF THE FACTS

Kelvin Jordan testified that on August 17, 1990, he went to Bud's Lounge in Quincy at 5:00 in his father's pickup truck. His pistol, a .38 Rossi, was on the front seat. He returned to the truck to get some money, and the gun was still on the seat. Petitioner and James pulled up and the three conversed. When Jordan returned to his truck 10 minutes later, the gun was gone, as were petitioner and James. He reported the incident to the police. He ran into petitioner and James later that night at another lounge (K.D.'s), but they denied taking his gun. The police later returned his gun to him (T 22-33).

Officer Scott Poppell took the report from Jordan and turned the case over to Investigator Hughes (T 43-46). Gary Murphy testified that he arrived in Quincy from Perry on August 17 and got off the bus at 7:15 p.m. He walked around to Bud's and saw petitioner and another man in a car. Petitioner called to Murphy and offered to sell him a gun for which he had papers for \$60.00. He got into the car and the three rode around the block while he gave petitioner \$45.00 for the gun. Petitioner handed the weapon to him in a paper bag (T 47-52).

The following Monday, he received word that the police wanted to see him, so the next day he took the gun to the police department (T 53-54).

Investigator James Hughes testified that he recovered the gun from Gary Murphy and it was identified by Kelvin Jordan and returned to him (T 66-69).

The state rested (T 78), and petitioner's motion for acquittal was denied (T 80-83).

Loletha Thomas testified that she saw James Hodges at Bud's Lounge, walking through the parking lot. She saw him take the gun out of the truck and put it under the seat of petitioner's car, all while petitioner was not present. She saw petitioner and James Hodges later at the other bar, K.D.'s, where Hodges was trying to sell the gun (T 84-96).

Petitioner testified that he had seen the gun in Kelvin Jordan's truck in 1988 but not since that time. While at Bud's Lounge, he drank with Kelvin but did not know where James Hodges had gone. He then drove James to K.D.'s, where Kelvin came up and asked about the gun. Petitioner heard James talking about a gun. He saw Gary Murphy that night but denied selling him a gun that night (T 97-104).

The next day, at around noon, he saw James Hodges again at Bud's. He had a gun in a paper bag, which James wanted petitioner to buy. Petitioner thought the gun belonged to James' uncle. Petitioner told Gary Murphy that James had a gun for sale, and James sold it to Gary while petitioner was standing in front of the car. Petitioner then drove James to Gretna, and received no money for the sale of the gun (T 105-10).

Petitioner's renewed motion for acquittal was denied (T 124).

At sentencing, the court ordered restitution of \$45.00 to Gary Murphy, an "indirect victim," since that was the amount he had paid for the gun (S 8). This appeal follows.



#### IV SUMMARY OF ARGUMENT

Petitioner will contend that he should not have been ordered to pay \$45.00 restitution to Gary Murphy, because Murphy was not a "victim" of the crime or an "aggrieved party" within the meaning of the restitution statute. The legislature has not provided for restitution under these circumstances. No other appellate court has approved the award of restitution to third parties. The certified question must be answered in the negative.

V ARGUMENT

CERTIFIED QUESTION/ISSUE PRESENTED

A GOOD FAITH PURCHASER FOR VALUE OF STOLEN PROPERTY IS NOT A "VICTIM," OR "AGGRIEVED PARTY," WITHIN THE MEANING OF §§ 775.089(1)(a) AND (c), FLORIDA STATUTES (1989) SO THAT A PERSON CONVICTED OF DEALING IN STOLEN PROPERTY PURSUANT TO § 812.019(1) MAY BE ORDERED TO PAY RESTITUTION TO THAT PURCHASER IN THE AMOUNT PAID FOR THE STOLEN PROPERTY.

At sentencing, the court ordered restitution of \$45.00 to Gary Murphy, an "indirect victim," since that was the amount he had paid for the gun (S 8). Restitution to him was required by written order (R 30-31). Restitution could not be ordered to Kelvin Jordan, the true victim, the owner of the gun, since he had the gun returned to him by the police. Petitioner contends that the court could not find Murphy to be an "indirect victim" and order payment to him.

The restitution statute, Section 775.089(1)(a), Florida Statutes, provides that the "victim" of a crime is to receive restitution from a defendant convicted of that crime, but does not use the term "indirect victim" or otherwise authorize restitution to third parties:

(1)(a) 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 clear and compelling reasons not to order such restitution. Restitution may be monetary or nonmonetary restitution. The court shall make the payment of restitution a condition of probation in accordance with s. 948.03.

In fact, the statute defines "victim" as follows:

(c) The term "victim" as used in this section and in any provision of law relating to restitution includes the aggrieved party, the aggrieved party's estate if the aggrieved party is deceased, and the aggrieved party's next of kin if the aggrieved party is deceased as a result of the offense.

Section 775.089(1)(c), Florida Statutes.

The law is clear that restitution is available only to victims or their insurance companies, and is not available to third parties or to victims for incidental expenses not directly related to the crime charged. In Watson v. State, 579 So.2d 900 (Fla. 4th DCA 1991), the defendant was convicted of attempted lewd assault on a child. The trial court ordered restitution to the child's mother as an "aggrieved party" to compensate her for her divorce, lost wages, and other expenses she incurred while caring for the child. The appellate court reversed the order and found that she was not a victim and therefore not an "aggrieved party."

In Ocasio v. State, 586 So.2d 1177 (Fla. 4th DCA 1991), the trial court again ordered restitution to a sexual battery victim's mother to compensate her for her own psychological injuries suffered vicariously as a result of the crime on her child. The appellate court adhered to Watson, cited the restitution statute quoted above, reversed the order, and found that she was not a victim and therefore not an "aggrieved party:"

Based upon the foregoing statute, we hold that the award of restitution in favor of the mother of the child is erroneous. We empathize with the trial judge's views

on the subject; however, the statute simply has not extended an award of restitution to a person in the mother's posture here. She is not a victim within the meaning of section (1)(c), since the aggrieved party [the child] is not deceased.

586 So.2d at 1179.

In Eloshway v. State, 553 So.2d 1258 (Fla. 4th DCA 1989), the defendant plead guilty to DUI manslaughter; the victims were college baseball players. The judge ordered her to pay \$7,000 to the college athletic fund. The court found the order to be unauthorized by statute:

We do not believe the courts should become involved in ordering payments directly to third parties not authorized by statute.

553 So.2d at 1260.

See also Pulwicz v. State, 571 So.2d 65 (Fla. 1st DCA 1990) (defendant not liable for expenses attendant to leaving the scene of an accident); Ahnen v. State, 565 So.2d 855 (Fla. 2nd DCA 1990) (defendant not liable for expenses of private investigator hired by victim to recover stolen property); and F.J.O. v. State, 548 So.2d 306 (Fla. 2nd DCA 1989) (defendant not liable for cost sexual battery victim to seek treatment for venereal warts).

The victim of a dealing in stolen property offense is the person to whom the property legally belongs. For example, in United States v. Shackelford, 777 F.2d 1141 (6th Cir. 1985), two truck drivers were hired by Arrow Truck Lines to deliver a load of food products to Jacksonville, Florida. When the truck broke down in Middlesboro, Kentucky, they raised money by

selling 80 cases of the food products to Shackelford, who was a local store owner. Shackelford was convicted of buying and receiving stolen goods, and assessed restitution for the 80 cases. The court held:

In ordering that restitution payments be made to Arrow Trucking Lines, Inc., the district judge selected the proper recipient. Arrow is the aggrieved party under [18 U.S.C.] §3651 because it was responsible for the stolen food products and suffered injury as a result of the offenses involved in the indictment.

777 F.2d at 1146-47; emphasis added.<sup>1</sup>

In the instant case, the "victim" or the "aggrieved party" was the owner of the gun, Kelvin Jordan. But he is not due any restitution because the gun was returned to him. Gary Murphy was not a "victim" or an "aggrieved party."

It would seem that the old legal maxim, caveat emptor, must apply to a third party who buys a gun on the street for \$45.00, and he should not be permitted to recover the money from petitioner, since petitioner committed no crime against him.

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<sup>1</sup>The former federal restitution statute, 18 U.S.C §3651 (repealed) provided:

While on probation and among the conditions thereof, the defendant ... May be required to make restitution or reparation to the aggrieved parties for actual damages or loss caused by the offense for which conviction was had ... .

Since the present restitution statute does not allow payment to third parties, this Court must reverse the decision in the instant case and declare Eloshway, Watson and Ocasio to be the correct statement of the law in this state.

VI CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court answer the certified question in the negative, reverse the decision of the First District Court of Appeal below, and hold that restitution is not due to one who purchases stolen property.

Respectfully submitted,

NANCY A. DANIELS  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT



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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Amelia L. Beisner, Assistant Attorney General, The Capitol, Tallahassee, Florida, this 12<sup>th</sup> day of March, 1992.

  
P. DOUGLAS BRINKMEYER



✓

IN THE DISTRICT COURT OF APPEAL  
FIRST DISTRICT, STATE OF FLORIDA

HARRY BATTLES,	)	
Appellant,	)	NOT FINAL UNTIL TIME EXPIRES TO
v.	)	FILE MOTION FOR REHEARING AND
STATE OF FLORIDA,	)	DISPOSITION THEREOF IF FILED.
Appellee.	)	CASE NO. 91-423

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Opinion filed February 7, 1992.

An Appeal from the Circuit Court for Gadsden County.  
Philip Padovano, Judge.

Nancy A. Daniels, Public Defender, and P. Douglas Brinkmeyer,  
Asst. Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Amelia L. Beisner,  
Asst. Attorney General, Tallahassee, for Appellee.

**RECEIVED**  
FEB 7 1992  
PUBLIC DEFENDER  
2nd JUDICIAL CIRCUIT

JOANOS, Chief Judge.

Harry Battles has appealed from his conviction of dealing in stolen property, and from the imposition of restitution. We affirm.

With regard to his conviction, Battles contends that the trial court erred in denying his motion for judgment of

acquittal, in that the state failed to prove that he knew, or should have known, that the property was stolen. The evidence presented by the state clearly refutes this argument, and we affirm Battles' conviction without further discussion.

Battles also contends that the trial court erred in requiring payment of restitution to the individual who purchased the stolen property from him. Section 775.089(1)(a), Florida Statutes (1989), provides that "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" (emphasis supplied). Section 775.089(1)(c) defines "victim," in pertinent part, as "the aggrieved party."

Battles argues that the only victim of the crime of dealing in stolen property is the person from whom the property is stolen, and that by ordering that restitution be paid to the purchaser of that property, the trial court is impermissibly requiring restitution to a third party. See, e.g., Watson v. State, 579 So.2d 900 (Fla. 4th DCA 1991); Eloshway v. State, 553 So.2d 1258 (Fla. 4th DCA 1989), rev. den. 564 So.2d 486 (Fla. 1990). We disagree.

While the original owner involved in a dealing offense usually has the property returned, the good faith purchaser of that property from the dealer loses not only the property but the purchase price as well. Thus, that purchaser must be classified as a victim of a dealing offense. Further, we agree with the state that there is an element of unjust enrichment in allowing a

convicted dealer in stolen property to retain money obtained from innocent purchasers. We therefore hold that, as to the crime of dealing in stolen property, a bona fide purchaser for value of that property is a "victim" or "aggrieved party" within section 775.089(1)(a) and (c), so that the trial court must require payment of restitution in the amount paid for the property by that purchaser.

Pursuant to Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure, we certify the following question as one of great public importance:

Is a good faith purchaser for value of stolen property a "victim," or "aggrieved party," within the meaning of ss. 775.089(1)(a) and (c), Florida Statutes (1989) so that a person convicted of dealing in stolen property pursuant to s. 812.019(1) may be ordered to pay restitution to that purchaser in the amount paid for the stolen property?

The conviction and restitution order are affirmed.

MINER and WEBSTER, JJ., CONCUR.