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W/APP

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CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CARLA GLADFELTER)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 80508

PETITIONER'S BRIEF OF JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the Defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Indian River, Florida, and the appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and appellee in the lower courts. The parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE AND FACTS

The Petitioner, Carla Gladfelter, appealed an order of Modification of Probation entered approximately fifteen months after the entry of the original sentence. The Petitioner was sentenced on August 23, 1990 to three years imprisonment followed by two years probation for DUI causing serious bodily injury. The special conditions of the probation order included restitution to the victim in an amount "to be determined." On November 13, 1991, the Circuit Court entered a modification order, inter alia, which provided that appellant pay restitution in the total amount of \$5,896.71.

Notice of Appeal was timely filed on November 25, 1991 by the Petitioner to the Fourth District Courts of Appeal.

In affirming the Order of Modification, the Fourth District Court of Appeals held in Gladfelter v. State, Case No. 91-3432 (Fla. 4th DCA September 16, 1992), "as long as the requirement to pay restitution is included in the sentence, setting the actual amount of restitution, even beyond sixty days from the sentence, is permissible." citing Savory v. State, 17 F.L.W. 756 (Fla. 4th DCA March 18, 1992), approved in part, corrected on other grounds Savory v. State, 17 F.L.W. 1286 (Fla. 4th DCA May 20, 1992); In the Interest of B.M., 580 So. 2d 896 (Fla. 4th DCA 1991); Stanley v. State, 580 So. 2d 349 (Fla. 4th DCA 1991). However the Fourth District noted that its opinion in Gladfelter conflicts with the First District opinion of State v. Martin, 577 So. 2d 689 (Fla. 1st DCA), rev. denied, State v. Martin, 587 So. 2d 1329 (Fla. 1991).

A timely Notice of Discretionary Review was filed by
Petitioner with the Fourth District Courts of Appeal.

SUMMARY OF THE ARGUMENT

The decision, at bar, expressly and directly conflicts with the First District Courts of Appeals in State v. Martin, 577 So. 2d 689 (Fla. 1st DCA), rev. denied, State v. Martin, 587 So. 2d 1329 (Fla. 1991). The Fourth District acknowledged its decision rendered in Gladfelter v. State, Case No. 91-3432 (Fla. 4th DCA September 16, 1992), conflicts with State v. Martin.

Both decisions were based upon substantially the same facts and the same rule of law which produced a different result. The Fourth District held as long as the lower court reserves jurisdiction at the initial sentencing hearing to determine the amount of restitution, then the lower court may modify the sentence by setting an amount for restitution after the elapsed on sixty days as provided by Fla. R. Crim. Proc. 3.800 (b). Contrary to Gladfelter, the First District in State v. Martin ruled that the lower court cannot modify probation by reserving jurisdiction beyond the sixty days as provided by Fla. R. Crim. Proc. 3.800(b).

Thus the Petitioner has properly invoked the conflict jurisdiction of this Honorable Court.

ARGUMENT

POINT

PETITIONER HAS PROPERLY INVOKED THE JURISDICTION OF THIS COURT SINCE THE OPINION OF THE FOURTH DISTRICT COURTS OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF FIRST DISTRICT COURTS OF APPEAL.

To properly invoke the "conflict certiorari" jurisdiction of this Court, Petitioner must demonstrate that there is "express and direct conflict" between the decision challenged herein, and those holdings of other Florida appellate courts or this Honorable Court on the same rule of law to produce a different result than other state appellate courts faced with the substantially same facts. Dodi Publishing v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980); Jenkins v. State, 385 So.2d 1356 (Fla. 1980); Article V §3(b)(3), Fla. Const. (1980); Fla. R. App. P. 9.030 (a)(2)(iv).

The Petitioner was sentenced on August 23, 1990 to three years imprisonment followed by two years probation for DUI causing serious bodily injury. The special conditions of the probation order included restitution to the victim in an amount "to be determined." On November 13, 1991, the Circuit Court entered a modification order, inter alia, which provided that appellant pay restitution in the total amount of \$5896.71. The Petitioner appealed the Order of Modification on the ground that the lower court lacked jurisdiction to order restitution after more than 60 days had elapsed from sentencing. Fla. R. Crim. P. 3.800(b).

The Fourth District held in Gladfelter v. State, Case No. 91-3432 (Fla. 4th DCA September 16, 1992), "as long as the requirement

to pay restitution is included in the sentence, setting the actual amount of restitution, even beyond sixty days from the sentence, is permissible." citing Savory v. State, 17 F.L.W. 756 (Fla. 4th DCA March 18, 1992), approved in part, corrected on other grounds Savory v. State, 17 F.L.W. 1286 (Fla. 4th DCA May 20, 1992); In the Interest of B.M., 580 So. 2d 896 (Fla. 4th DCA 1991); Stanley v. State, 580 So. 2d 349 (Fla. 4th DCA 1991).

However the Fourth District noted that its opinion in Gladfelter expressly conflicts with State v. Martin, 577 So. 2d 689 (Fla. 1st DCA 1991), rev. denied, State v. Martin, 587 So. 2d 1329 (Fla. 1991).

In State v. Martin, 577 So.2d 689 (Fla. 1st DCA 1991), a case indistinguishable from the instant case, the defendant was placed on probation and the trial court purported to reserve jurisdiction to later impose restitution as a condition of probation. After eight months passed, the trial court entered an order requiring the defendant to make restitution in the amount of \$6,208.47. The defendant moved to strike the restitution amount on the grounds that the trial court lacked jurisdiction to modify the sentence as more than sixty days had run since the sentence was imposed. The trial court granted the motion and the state appealed. In affirming the trial court's ruling, the appellate court stated even where the court purports to reserve jurisdiction to later impose restitution that reservation is valid only for 60 days from the date of sentencing.

The Fourth District opinion in Gladfelter v. State, directly and expressly conflicts with the First District opinion in State v. Martin based upon substantially the same facts and the same rule of law which produced a different result. The Fourth District held as long as the lower court reserves jurisdiction at sentencing for the amount of restitution to be determined, it is immaterial whether the amount of restitution is determined after the elapsed on sixty days as provided by Fla. R. Crim. Proc. 3.800 (b). State v. Martin directly and expressly conflicts with Gladfelter because the First District ruled that the lower court cannot reserve jurisdiction beyond the sixty days as provided by Fla. R. Crim. Proc. 3.800(b).

Petitioner respectfully requests this Honorable Court to grant her petition for review and reverse the decision of the lower court.

CONCLUSION

The Decision of the Fourth District herein expressly and directly conflicts with decisions of this Honorable Court and the First District on the same question of law. This Honorable Court should grant Petitioner's request for jurisdiction and hear this cause on the merits.

Respectfully submitted,

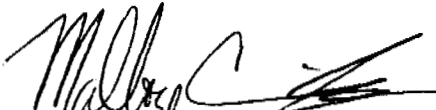
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Michelle Smith, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401 by courier this 17th day of September 1992.


Of Counsel

P E T I T I O N E R ' S A P P E N D I X

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JULY TERM 1992

CARLA GLADFELTER,)
)
 Appellant,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
 _____)

CASE NO. 91-3432.

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

Opinion filed September 16, 1992

Appeal from the Circuit Court
for Indian River County;
Joe A. Wild, Judge.

Richard L. Jorandby, Public
Defender, and Mallorye Cunningham,
Assistant Public Defender,
West Palm Beach, for appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and
Michelle A. Smith, Assistant
Attorney General, West Palm Beach,
for appellee.

PER CURIAM.

Carla Gladfelter appeals an Order of Modification of Probation entered approximately fifteen months after the entry of the original sentence. On August 23, 1990, Ms. Gladfelter was sentenced to three years imprisonment to be followed by two years probation for DUI causing serious bodily injury. The special conditions of the probation order included restitution to the victim in an amount "to be determined." The modification order entered November 13, 1991, provided, inter alia, that appellant

pay restitution in the total amount of \$5896.71. We affirm the Order of Modification, except as noted below.

Appellant first contends it was error for the trial court to modify the August 23, 1990, sentence by setting the amount of restitution more than sixty days after the sentence was imposed. Fla. R. Crim. P. 3.800(b). We have repeatedly held, however, that as long as the requirement to pay restitution is included in the sentence, setting the actual amount of restitution, even beyond sixty days from the sentence, is permissible. Savory v. State, 17 F.L.W. 756 (Fla. 4th DCA Mar. 18, 1992), approved in part, corrected on other grounds Savory v. State, 17 F.L.W. 1286 (Fla. 4th DCA May 20, 1992); In the Interest of B.M., 580 So. 2d 896 (Fla. 4th DCA 1991); Stanley v. State, 580 So. 2d 349 (Fla. 4th DCA 1991). We affirm as to this point, and to the extent we are in conflict with State v. Martin, 577 So. 2d 689 (Fla. 1st DCA), rev. denied, State v. Martin, 587 So. 2d 1329 (Fla. 1991), we note such conflict.

Appellant's second point is that the Order of Modification is erroneous in providing a term of probation of three years, when the original sentence provided for a two-year term of probation. Appellee/state agrees this was a scrivener's error, and we therefore reverse and remand for correction of this portion of the Order of Modification.

AFFIRMED IN PART AND REVERSED IN PART.

HERSEY, STONE and POLEN, JJ., concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CARLA GLADFELTER

Appellant.

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 91-3432

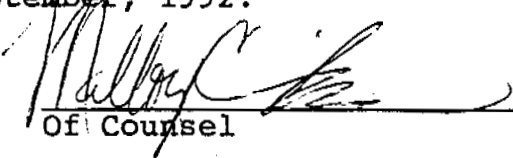
NOTICE OF INTENT TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN, that Petitioner/Appellant, CARLA GLADFELTER, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered September 16, 1992.

The decision is within the discretionary jurisdiction of the Florida Supreme Court because it is a decision that expressly and directly conflicts with the First District decision in State v. Martin, 577 So.2d 686 (Fla. 1st DCA), rev. denied, State v. Martin, 587 So.2d 1329 (Fla. 1991). The Fourth District acknowledged the conflict in its opinion rendered on September 16, 1992.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to MICHELLE SMITH, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida 33401, this 17th day of September, 1992.



Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Petitioner's Appendix has been furnished to MICHELLE SMITH, ESQ., Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, Florida, by courier, this 17th day of SEPTEMBER, 1992.



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