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IN THE SUPREME COURT OF FLORIDA

CARLA GLADFELTER

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 80,508

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Appellant in the Fourth District Court of Appeal and the Defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For Indian River County. The Respondent, the State of Florida, was the Appellee and the prosecution respectively in the lower courts. In the brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "R" will denote Record on Appeal.

STATEMENT OF THE CASE AND FACTS

The Petitioner entered a guilty plea to the charge of driving while intoxicated causing serious bodily injury and guilty to a violation of probation for grand theft. (R 2). On August 23, 1990 the Petitioner was sentenced by the Honorable Joe Wilde, Acting Circuit Court Judge in Indian River County for both offenses. (R 1). A sentencing guidelines scoresheet was prepared where the Petitioner scored 12 to 30 months incarceration. The Circuit Court adjudicated the Petitioner guilty of DUI causing serious bodily injury. The Circuit Court ordered the Petitioner to serve three years incarceration in the Department of Corrections with sixty five days credit for time served. The incarceration portion of Petitioner's sentence was followed by two years probation. As a condition of probation, the Petitioner was ordered to make restitution only to Melissa VanCure, obtain a full-time job within sixty days of being release from incarceration, obtain a substance abuse evaluation and follow any recommendations from the evaluation. The Circuit Court ordered the Petitioner's driver's license suspended for five years. (R 6-7). No restitution amount was orally pronounced during the sentencing hearing. However the Circuit Court's order placing the Petitioner on probation states restitution "to be determined" (R 55). The Petitioner's probation for the grand theft was revoked and terminated. (R 7).

On November 13, 1991 a restitution hearing was held before the Circuit Court. Defense counsel informed the Circuit Court that her office failed to notify the Appellant of the restitution hearing.

(R 8). Notice of the restitution hearing was served on defense counsel on November 5, 1991. (R 56). Three witnesses were called by the State Attorney who presented evidence of restitution. Elizabeth Lau of the Indian River Memorial Hospital testified that restitution was owed to them in the amount of $2,257.21. (R 12). Susan Leiskand of the Vero Orthopedics representing Dr. James Can testified that a bill was outstanding with her office in the amount of $2,761.51. (R 14). Mr. O'Connor of Doctors Clinic testified that restitution was outstanding in the amount of $878.00. (R 16). However he did not submit any written proof of the outstanding balance but referred to microfilm to obtain the outstanding balance owed to Doctors Clinic. (R 17). Nevertheless the Circuit Court ordered restitution for the three parties totalling $5,896.72. (R 18). An Order of Modification of Probation was filed with the Clerk of Court on November 26, 1991 ordering the Petitioner to pay restitution payments to Indian River Memorial Hospital, Dr. James Can, and Doctors Clinic at a minimum rate of $75.00 per month to the Department of Corrections. Notice of Appeal was timely filed (R 58-59).

On September 16, 1992, the Fourth District Court of Appeal affirmed the Circuit Court's Order of Modification of probation but noted its decision was in conflict with State v. Martin, 577 So. 2d 689 (Fla. 1st DCA), rev. denied, State v. Martin, 587 So. 2d 1329 (Fla. 1991). Gladfelter v. State, 604 So. 2d 929 (Fla. 4th DCA 1992).

Petitioner filed a notice to invoke this Court's discretionary jurisdiction on September 17, 1992. On January 5, 1993, this Court accepted jurisdiction of this case and ordered Briefs on the Merits. This Brief follows.

SUMMARY OF THE ARGUMENTS

POINT I

During the Petitioner's sentencing hearing, the Circuit Court ordered restitution payments should only be made to Melissa VanCure (R 6-7). The Circuit Court's order placing the Petitioner on probation states restitution "to be determined". (R 54-55). Subsequent to fifteen months after the sentencing hearing, the Circuit Court ordered the Petitioner to pay restitution to three different parties not previously named during the sentencing hearing (R 12, 14, 16). The Circuit Court lacked jurisdiction to order restitution after more than 60 days had elapsed from sentencing. 3.800 (b), Fla. R. Crim.P.. Additionally the Circuit Court made no requirement at the sentencing hearing for the Petitioner to pay restitution to the three parties named in the Order of Modification of Probation. The Fourth District's opinion in Gladfelter v. State, 604 So. 2d 929 (Fla. 4th DCA 1992) must be reversed and remanded with instructions to strike the Order of Modification of Probation.

POINT II

The Circuit Court failed to consider the Petitioner's present and potential future financial needs and earning ability prior to imposing restitution. Fla. Stat. 775.089 (6) (1991) mandates that the court determines these factors prior to imposing restitution. Moreover the trial court failed to give the Petitioner notice prior to ordering restitution. Imposition of restitution without notice to the Petitioner is reversible error.

ARGUMENT

POINT I

THE TRIAL COURT LACKED JURISDICTION TO SET THE AMOUNT OF RESTITUTION MORE THAN SIXTY DAYS AFTER PETITIONER WAS SENTENCED.

The Petitioner was adjudicated guilty of driving while intoxicated causing serious bodily injury and was sentenced on August 23, 1990. The Petitioner was sentenced to three years incarceration followed by two years probation. As a condition of probation the Petitioner was ordered to pay restitution only to Melissa Vancure (R 7). At the time of sentencing on August 23, 1990, the Circuit Court did not set any amount for restitution nor did the Circuit Court order that jurisdiction would be retained until restitution is determined. However the order placing the Petitioner on probation states that restitution "to be determined" (R54-55).

Subsequent to 15 months, on November 13, 1991, a restitution hearing was held before the Circuit Court. Petitioner objected to restitution being imposed over a year subsequent to the initial sentencing hearing. Additionally, the appellant lacked notice of the restitution hearing (R10). Over objection, the Circuit Court held the restitution hearing (R10). The state offered three witnesses to testify. Ms. Lau of Indian River Memorial Hospital testified that the outstanding balance for restitution was $2,257.21 (R12). Ms. Leiskand, representing Dr. James Cain testified the outstanding balance for restitution was $2,761.50 (R14). Mr. O'Connor, representing Doctor's Clinic testified the

outstanding balance for restitution payment was $878.00 (R 16). The Circuit Court entered an Order of Modification of Probation and ordered the Petitioner to pay the restitution for each party at a minimum rate of $75.00 per month (R 57).

The Fourth District affirmed the Circuit Court's order of modification of probation in Gladfelter v. State, 604 So. 2d 929 (Fla. 4th DCA 1992). The Fourth District held "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." at 930. 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. DCA 1991). However the Fourth District did acknowledge its opinion in Gladfelter, is in conflict with the opinion of the First District Court of Appeal in State v. Martin, 577 So. 2d 689 (Fla. 1st DCA), rev. denied 587 So. 2d 1329 (Fla. 1991).

The order modifying probation setting the amount of restitution, entered more than sixty days after Petitioner was sentenced is void as the Circuit Court's jurisdiction over the case had expired. Fla.R.Crim.P. 3.800(b) specifically states in pertinent part:

> A court may reduce or modify to include any of the provisions of chapter 948, Florida Statutes, a legal sentence imposed by it within sixty days after such imposition,..... (Emphasis Supplied).

The Fourth District's opinion in Gladfelter, supra, is contrary to Fla.R.Crim.P. 3.800(b) since it ruled that a legal sentence could be modified beyond sixty days after imposition of the sentence.

In State v. Butz, 568 So.2d 537 (Fla. 4th DCA 1991), a defendant was sentenced for aggravated battery and, though the court file contained a statement showing the cost of the victim's medical bills, no order of restitution was entered. Within 60 days the state sought restitution but the hearing was held outside the time frame. The trial court ruled it was without jurisdiction and the state appealed. The Fourth District agreed with the trial court and held that the sentence as imposed was incomplete and subject to modification, but only within the 60 day window. The Fourth District affirmed finding the trial court lacked jurisdiction to modify the sentence. Id. at 538.

The First and Second Districts are in accord with Butz. In State v. Martin, 577 So.2d 689 (Fla. 1st DCA 1991) citing State v. Butz, 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 $5,896.72. 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 (something the Circuit Court at bar specifically did not do (R7)), that reservation is valid only for 60 days from the date of sentencing. Additionally in McLaughlin v. State, 573 So.2d 419 (Fla. 2d DCA 1991), the court held that a trial court lacks jurisdiction to imposed restitution after 60 days after sentencing.

Likewise in the case at bar, the trial court lost jurisdiction on October 23, 1990 to modify the Petitioner's probation. The trial court's "Order of Modification of Probation" entered on November 13, 1991 more than 15 months subsequent to Appellant's sentencing must be stricken.

Furthermore the Petitioner notes that at the sentencing hearing on August 23, 1990, the Circuit Court ordered restitution should only be paid to Melissa Vancure (R 7). However the Circuit Court subsequently ordered the Petitioner to pay restitution to three different parties who were not previously named by the Circuit Court at the sentencing hearing on August 23, 1990. Therefore the Circuit Court imposed no requirement on the Petitioner at the sentencing hearing to pay restitution to Indian River Memorial Hospital, Dr. James Can, and Doctors Clinic. Thus the Circuit Court was without jurisdiction to require the Petitioner to pay restitution to Indian River Memorial Hospital, Dr. James Can, and Doctors Clinic since it was not ordered at the sentencing hearing. Gladfelter, supra.

Accordingly, the Order of Modification of Probation must be stricken since the Circuit Court was without jurisdiction to order restitution after the elapse of 60 days.

POINT II

THE CIRCUIT ERRED IN ORDERING RESTITUTION WITHOUT FIRST CONSIDERING THE PETITIONER'S FINANCIAL RESOURCES AND PRESENT AND POTENTIAL FINANCIAL NEEDS.

The Circuit Court ordered the Petitioner to pay $5,896.71 in restitution without first considering the Petitioner's financial resources. The Petitioner contends this is reversible error.

It is well settled that prior to a trial court awarding restitution to a victim from a criminal defendant, the defendant is entitled to a hearing and the trial court must consider the defendant's financial resources. Thomas v. State, 517 So.2d 132 (Fla. 4th DCA 1987); Amison v. State, 504 So.2d 473 (Fla. 2d DCA 1987); Dinkens v. State, 560 So. 1222 (Fla. 4th DCA 1990); Oropesa v. State, 555 So. 2d 389 (Fla. 3d DCA 1989) review denied, 562 So. 2d 346 (Fla. 1990); Fla. Stat. 775.089 (6) (1991). Fla. Stat. §775.089 (6) and (7) (1991) mandates that the court consider the financial resources of the defendant, and the present and potential future financial needs and earning ability of the defendant and his dependents. Burch v. State, 18 F.L.W. D141 (Fla. 4th DCA December 30, 1992).

In the instant case, the trial court failed to comply with Fla. Stat. 775.089 (6) (1991) in that it did not determine Petitioner's financial resources, her present and potential future financial needs and earning ability. Additionally the Circuit Court failed to give the Petitioner notice and an opportunity to be heard during the restitution hearing. Imposition of restitution

without notice is reversible error. Burch, Id., Mounds v. State, 526 So. 2d 1084 (Fla. 4th DCA 1988).

Accordingly, the restitution order requiring Petitioner to pay $5,896.71 must be reversed and remanded for a hearing to determine appellant's ability to pay restitution.

CONCLUSION

Based upon the foregoing arguments and authorities cited therein, Petitioner respectfully requests this Court to reverse the Fourth District Court of Appeal's opinion in Gladfelter v. State, 604 So. 2d 929 (Fla. 4th DCA 1992) and remand this cause with instructions to strike the circuit court's "Order of Modification of Probation".

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereto 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 15th day of January, 1993.

Of Counsel

047

IN THE SUPREME COURT OF FLORIDA

CARLA GLADFELTER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 80,508

APPENDIX

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I HEREBY CERTIFY that a copy hereof has been furnished to Michelle Smith, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida 33401, this 25th day of January, 1993.

Mallory C...

Of Counsel

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.