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IN THE SUPREME COURT OF FLORIDA

CASE NO 80,508

CARLA GLADFELTER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

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

The following symbols will be used:

"R" Record on Appeal

"PB" Petitioner's brief on the Merits

STATEMENT OF THE CASE AND FACTS

The State of Florida accepts the statement of the case and facts contained in Petitioner's brief on the Merits, to the extent that the facts represent an accurate, nonargumentative synopsis of the proceedings below. The State reserves the right to bring out additional facts as necessary in its argument.

SUMMARY OF THE ARGUMENT

Point I

The Fourth District Court of Appeal's decision, affirming the trial court's Order of Modification, must be upheld where the trial court reserved jurisdiction to impose restitution - the amount "to be determined". Accordingly, the trial court had jurisdiction to set the amount of restitution fifteen months later, since the requirement to pay was included in the sentence.

Point II

The trial court correctly imposed restitution where Petitioner had notice, an opportunity to be heard, the amount was not in dispute and Petitioner did not object. In addition, Petitioner has not demonstrated that she would not be able to pay in the present or the future.

POINT I

THE TRIAL COURT HAD JURISDICTION TO IMPOSE RESTITUTION WHERE IT WAS IMPOSED AS A SPECIAL CONDITION OF PROBATION AT SENTENCING

Petitioner argues that the trial court lacked jurisdiction to impose restitution upon her fifteen months after sentencing, and that the Fourth District Court of Appeal's opinion, affirming this decision, must be reversed. Respondent contends that both decisions must be upheld.

At the sentencing hearing held on August 23, 1990, Appellant was sentenced to three (3) years Department of Corrections followed by two (2) years community control. As a condition of probation, she was to make restitution to the victim, Melissa Vancure (R 7), the amount "to be determined" (R 55). Respondent maintains that the words "amount to be determined" were sufficient for the trial court to reserve jurisdiction to impose the restitution amount at a later date. See e.g. A.P. v. State, 558 So. 2d 519 (Fla. 5th DCA 1990). ("Restitution is to be made" was proper reservation of jurisdiction to set amount of restitution in event amount was not agreed upon). As such, the trial court did not need to use the magic works, "the court reserves jurisdiction", where the court ordered Petitioner to make restitution to the victim as soon as it was determined. The trial court also recognized that at the time it imposed this condition, Petitioner was unemployed, so special condition fourteen (14) required Petitioner to obtain full-time employment within sixty (60) days of release from incarceration," so Petitioner could pay the restitution" (R 6, 55).

The Fourth District has previously approved of the practice of reserving jurisdiction. In the Interest of B.M., 580 So. 2d 890 (Fla. 4th DCA 1991), the court construed the lower court's order as one retaining jurisdiction to determine the amount of restitution at a notice hearing after Appellant's release from detention, and affirmed the same. See also Stanley v. State, 580 So. 2d 349 (Fla. 4th DCA 1991). (Trial court properly reserved jurisdiction to determine amount of restitution at a later date when the victim's counseling was completed); McCaskill v. State, 520 So. 2d 664 (Fla. 1st DCA 1988). (Trial court did not abuse its discretion in leaving determination of the amount of restitution to the victim to be made at a future date, given fact that the victim had not fully recovered from injuries at time of sentencing).

Petitioner's assertion that under Fla.R.Crim.P. 3.800(b), the trial court would lack jurisdiction to impose additional restitution more than sixty (60) days after sentence has been entered, is inapplicable to this case. This is because Rule 3.800(b) governs the correction, reduction and modification of sentences. Subjudice, Petitioner's order of probation or sentence would remain intact. The restitution imposed in this case was merely a special condition of probation (R 9-10, 55). See Florida Statutes §775.089(1)(a) (1989); Johnson v. State 502

So. 2d 1291 (Fla. 1st DCA 1987). Terms and conditions of probation can be modified at any time by the trial court during the probationary term. Florida Statutes §948.03(8) (1989) provides in pertinent part:

Terms and conditions of probation or community control.

> (8) The enumeration of specific kinds of terms and conditions shall not prevent the court from adding thereto to such other or others at any time the terms and conditions theretofore imposed by it upon the probationer or offender in community control. . . .

As such, modification of conditions are not subject to the application of the sixty (60) day rule, while modification of sentences are. The rationale behind this rule makes sense when one considers that the "terms or conditions" of probation should be subject to flexibility so that they can be reduced or deleted when the need no longer arises. For example, a sentence to probation for four (4) years is governed by the sixty (60) day rule, while the special conditions not to move out of Broward County or to obtain random urinalysis testing are not.

Petitioner's reliance on State v. Butz, 568 So. 2d 537 (Fla. 4th DCA 1990) is misplaced. Butz merely stands for the proposition that where the trial court initially fails to order restitution as part of a sentence, the sentence is incomplete and has to be corrected or modified within sixty (60) days. The holding in Butz is inapplicable to the instant case, because it does not deal with probation, and the trial court in Butz initially failed to impose restitution as part of the sentence.

Therefore, the court lacked jurisdiction to impose restitution for the first time, once the sixty (60) days had elapsed. Here the restitution was initially imposed at sentencing, as a special condition of probation, and therefore, the sixty (60) day period did not govern any subsequent order determining the amount, since the trial court reserved jurisdiction to set the actual amount at a later date.

Furthermore, in Savory v. State, 17 FLW D756 (Fla. 4th DCA March 18, 1992), this court upheld the imposition on restitution two years after the initial sentence. In Savory, the trial court imposed restitution to the victim's family in an amount to be determined at a later date and reserved jurisdiction to do so. Appellant appealed only the departure sentence, because the court had not entered written reasons. On remand, Appellant was sentenced within the permissive range, and the trial court adjudicated restitution to be $50,817.00. Appellant argued that since the original sentence did not include restitution, to impose restitution "two years" after the fact was impermissible. Id. The court rejected that argument and specifically held that this was permissible, since the original sentence did impose restitution, and the court reserved jurisdiction to determine the amount at a later date. Id. It is only where restitution is not ordered at the original sentencing, but is sought to be imposed upon remand, that is forbidden. Id. at D757. Thus, "as long as the requirement to pay restitution is included in the sentence, setting the actual amount of restitution, even beyond sixty (60) days from the sentence, is permissible." Gladfelter v. State, 604 So. 2d 929, 930 (Fla. 4th DCA 1992)

The First District Court of Appeal has ignored this distinction in State v. Martin, 577 So. 2d 689 (Fla. 1st DCA 1991), wherein the court held that although the trial court reserved jurisdiction to impose restitution as a condition of probation, it had to do so within sixty (60) days. If the trial court had indeed imposed restitution on November 14, 1989, as a condition of probation and then on July 16, 1990, entered an order setting the actual amount, then the holding in Martin is incorrect. The court in Martin followed Butz, which is completely inapplicable to the facts of this case.

Petitioner also contends that the order of modification named parties who were not previously named in the sentencing hearing. Although this argument was not presented to the Fourth District Court of Appeal, it would not change the outcome of the court's decision for the following reasons. Petitioner was charged with driving while intoxicated causing serious bodily injury. At the sentencing hearing on August 23, 1990, the trial court ordered restitution to be paid to the victim, Melissa Vancure (R 7), the "amount to be determined" (R 55). At the restitution hearing held on November 13, 1991, three creditors who treated the victim based on the injuries she received as a result of the accident submitted bills. Indian River Memorial Hospital (R 11-12), Dr. Cain (R 14) and Doctor's Clinic (R 16). submitted bill after insurance. Their charges were caused directly or indirectly by Petitioner's offense and could not be determined until after the victim had obtained the necessary treatment.

Florida Statutes §775.089(2)(a)&(b) (1991) provides:

> (2) When an offense has resulted in bodily injury to a victim, a restitution order entered pursuant to subsection (1) shall require that the defendant: (a) Pay the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a recognized method of healing. (b) Pay the cost of necessary physical and occupational therapy and rehabilitation.

Therefore, these charges were clearly contemplated by the restitution statute. Moreover, the statute provides that the court shall order the defendant to make restitution for damage or loss caused directly or indirectly by the defendant's offense, unless it finds clear and compelling reasons not to do so. §775.089(1)(a).

Since the degree of proof, normally introduced in a restitution hearing is not as extensive as that required in a civil trial, Respondent only had to show, by a preponderance of the evidence, that the victim's loss was directly or indirectly caused by Petitioner's commission of the offense. Bianco v. State, 17 FLW D633 (Fla. 4th DCA March 4, 1992) citing State v. Williams, 520 So. 2d 276 (Fla. 1988); Fla. Stat. §775.089 (1989). Moreover, Petitioner did not object to these charges and the trial court ordered this balances to be paid to the victim and/or the parties (R 18, 19).

Accordingly, this Court must affirm the decision of the Fourth District Court, upholding the trial court's Order modifying restitution.

POINT II

THE TRIAL COURT CORRECTLY IMPOSED RESTITUTION AGAINST PETITIONER

Petitioner argues that the trial court imposed restitution against her without determining her ability to pay (PB 11). Respondent maintains that Petitioner has waived this issue because she failed to object to the imposition of restitution below. Although Florida Statutes §775.089(6)(1991) imposes an obligation upon the court to determine the defendant's present and future financial needs and earning ability, section (7) specifically provides that "[T]he burden of demonstrating the present financial resources is on the defendant." Since Petitioner did not object in the court below to the order of restitution or attempt to reduce the amount of restitution by citing her financial circumstances, she did not meet the burden the "statute places upon her." See Spivey v. State, 501 So. 2d 698, 699 (Fla. 2d DCA 1987); Goodson v. State, 400 So. 2d 791 (Fla. 2d DCA 1981) (when a defendant stands silent while trial court assesses restitution, the restitution award will not be reversed.)

In Cheatham v. State, 17 FLW D240 (Fla. 4th DCA January 15, 1991) the court affirmed the imposition of $20,000 in restitution against an Appellant who did not object at the hearing. When the court ordered the restitution, Appellant's counsel remarked, "Boy, I don't know if Mr. Cheatham is going to be able to afford to pay that money back, Your Honor." The court concluded that this remark was insufficient to satisfy Appellant's burden under section 775.087(7). Id. at D241.

The instant case is even more compelling because at no time did Petitioner or her counsel demonstrate clear and compelling reasons for the trial court not to order restitution. Petitioner did not dispute the total amount of restitution or demonstrate to the court, by a preponderance of the evidence, her inability to pay in the future, although she was given an opportunity by the court. Cf. Medina v. State, 17 FLW D136 (Fla. 3d DCA Dec. 31, 1991).

At the sentencing hearing, when the trial court imposed restitution, it also imposed a special condition or probation that Petitioner obtain a full-time job upon release from the Department of Corrections, so that she would be able to pay restitution (R 7). At the restitution hearing, on November 13, 1991, defense counsel told the court she had not served notice upon Petitioner because she was on vacation when the notice was served on her office (R 8-9). The trial court ruled for the record that notice of hearing was sent to Petitioner's attorney, the Public Defender's office (R 9-10). The only objection raised by defense counsel was that Petitioner did not receive notice and that the restitution hearing was being held over a year since the sentencing hearing (R 10). However, Petitioner did not object to the trial court's order of restitution, as a condition of probation, of $2,257.21 to Melissa Vancure and/or Indian River

Hospital; $2,761.50 to Melissa Vancure and/or Vero Orthopedics; and $878.00 to Melissa Vancure and/or Doctor's Clinic (R 18). The trial court also heard testimony from Petitioner's probation officer that Petitioner was employed at Hogan and Sons, making $198.00 per week, before imposing $50 - $75 per month in restitution (R 19)

In addition, Petitioner waived any notice claim by agreeing to the imposition of restitution when she entered her guilty plea to driving while intoxicated, causing serious bodily injuries. Arnold v. State, 17 FLW D835 (Fla. 2d DCA March 25, 1992). Petitioner cannot now contest the award of restitution merely because it was not in the plea agreement, because the amount of restitution was not the basis for her plea. Rather, the amount of restitution was obtained from the victim's damages and was an independent consideration from the punishment Petitioner was to receive.

If for some reason this Court determines the restitution award to be improper, then, in the alternative, Respondent respectfully request that this Court reverse the order of restitution without prejudice for Respondent to seek restitution and conduct a full restitution hearing. see Pellot v. State, 582 So. 2d 124 (Fla. 4th DCA) rev. denied, 591 So. 2d 183 (Fla. 1991)

CONCLUSION

Based upon the foregoing reasons and citations of authority it is respectfully requested that the lower court's conviction and sentence be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by courier to: **MALLORYE G. CUNNINGHAM, ESQUIRE**, Assistant Public Defender, The Criminal Justice Building, 421 3rd Street, West Palm Beach, Florida 33401 this 3rd day of February, 1993.

Michelle A. Smith

Of Counsel

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