5-10

IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,029

TERRY GLISPY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON CERTIORARI FROM THE FOURTH DISTRICT COURT OF APPEAL

****

ANSWER BRIEF OF THE STATE ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Terry Glispy, the criminal defendant and appellant below in the appended decision under review, Glispy v. State, 608 So. 2d 589 (Fla. 4th DCA 1992), review granted, Case No. 81,029 (Fla. March 26, 1993), will be referred to as "petitioner." Respondent, the State of Florida, the prosecuting authority and appellee below, will be referred to as "the State."

References to the one-volume record on appeal will be designated "(R:)."

Any emphasis will be supplied by the State unless otherwise specified.

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's "statement of the case[and facts]" as a relatively accurate depiction of the events below. However, the following factual augmentation may be necessary to resolve the narrow issue petitioner urges upon certiorari.

The defense has never disputed the prosecutor's assertion before the trial court that he had given petitioner's original counsel copies of the victim's $8,534.95 in medical bills for purposes of reaching a stipulation regarding petitioner's restitution on October 25, 1991. This was a mere four days after the judge had ordered restitution as a condition of petitioner's probation, in an amount to be expeditiously calculated. Nonetheless, the defense had not responded to the prosecutor's request as of March 10, 1992. The prosecutor finally tired of this inertia by the defense and scheduled a restitution hearing for April 1 (R 8, 72-76).

SUMMARY OF ARGUMENT

This Court cannot exercise its discretionary conflict certiorari jurisdiction to review the decision below, since no legal "conflict" exists between the decisions of the Fourth and First District Courts of Appeal on the question of when restitution must be stricken as tardily ordered by a trial court. Consequently, jurisdiction in this cause was improvidently granted.

Alternatively, the Fourth District did not reversibly err in concluding the judge below was correct in finalizing the amount of restitution in medical bills petitioner owed his aggravated battery victim on April 1, 1992. This is true even though more than 60 days had elapsed since the judge's October 21, 1991 imposition of restitution as a condition of petitioner's future probation in an amount to be determined. This ruling was not improper under petitioner's distinguishable cited cases, but rather was proper under the applicable statutes, rules and decisions cited herein. Moreover, petitioner clearly invited any error by not responding to the State prosecutor's October 25, 1991 documented request that petitioner correctly stipulate that the amount due the victim was $8,534.95.

ISSUE

THIS COURT SHOULD NOT REVERSE THE FOURTH DISTRICT'S AFFIRMANCE OF THE LOWER COURT'S AWARD OF RESTITUTION TO PETITIONER'S VICTIM

ARGUMENT

Petitioner successfully demanded that this Honorable Court exercise its discretionary conflict certiorari jurisdiction to review the Fourth District's decision in Glispy v. State pursuant to Article V, Section 3(b)(3) of the Constitution of the State of Florida and Fla.R.App.P. 9.030(a)(2)(A)(iv & vi). He now, naturally, demands that this Court reverse the Fourth District. The State firmly disagrees that this Court has jurisdiction to review this case. The State further disagrees with petitioner that, even if this Court did have jurisdiction, it would be required to reverse the decision below. These positions will be developed sequentially.

I. No Jurisdiction

The decision over which review was sought read, in its entirety, as follows:

> Affirmed on the authority of Gladfelter v. State, 604 So. 2d 929 (Fla. 4th DCA 1992)[, review granted, Case No. 80,508 (Fla. January 5, 1993)].

Glispy v. State, 608 So. 2d 589. In Gladfelter v. State, 604 So. 2d 929, 930 (Fla. 4th DCA 1992), review granted, Case No. 80,508 (Fla. January 5, 1993), the Fourth District had held, in pertinent part, as follows:

> [The defendant]....contends it was error for the trial court to modify....[her] 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 in included in the sentence, setting the actual amount of restitution, even beyond sixty days from the sentence, is permissible. Savory v. State, 600 So. 2d 1 (Fla. 4th DCA 1992)....We affirm as to this point, and to the extent that we are in conflict with State v. Martin, 577 So. 2d 689 (Fla. 1st DCA), review denied, State v. Martin, 587 So. 2d 1329 (Fla. 1991), we note such conflict.

Prudent readings of State v. Martin, 577 So. 2d 689 (Fla. 1st DCA 1991), review denied, 587 So. 2d 1329 (Fla. 1991) and Gladfelter v. State, however, will disclose that these decisions do not legally "conflict" with one another. Consequently, Glispy v. State cannot legally conflict with State v. Martin either.

In State v. Martin, 577 So. 2d 689, 690, the First District held that a trial court's imposition of a definite amount of restitution upon a convicted criminal defendant as a condition of a solely probationary sanction, after the 60-day period for the finalization of this sanction under Fla.R.Crim.P. 3.800(b) had passed, constituted an "illegal sentence" which could be thereafter corrected at any time by the trial court under Fla.R.Crim.P. 3.800(a). In Gladfelter v. State, 604 So. 2d 929, 930, in contrast, the Fourth District held that a trial court's order that a criminal defendant make restitution to his victim in an amount to be calculated as a condition of a probationary term which was to follow the defendant's sentence of imprisonment was proper under Fla.R.Crim.P. 3.800(b). The First District itself later implicitly accepted the State's view here that this distinction was dispositive. See Smith v. State, 18 F.L.W. D262 (Fla. 1st DCA December 31, 1992).

Again, since Gladfelter v. State cannot legally conflict with State v. Martin for purposes of establishing this Court's conflict certiorari jurisdiction, neither can Glispy v. State. It follows that this Court must deny certiorari in Glispy v. State as improvidently granted. Indeed, it should also deny certiorari in Gladfelter v. State as improvidently granted. Compare e.g. State v. Rhames, 494 So. 2d 205 (Fla. 1986).

II. The Merits

The State will now alternatively defend the merits of the Fourth District's resolution of Glispy v. State. The record reveals that on October 21, 1991, petitioner pled no contest in the Indian River County Circuit Court to a charge that he had committed an aggravated battery upon Victor Hart the previous May 8 (R 2-4, 26, 56-58). On that date, Judge Joe Wild sentenced petitioner to 2½ years of imprisonment, to be followed by 5 years of probation with a condition that he make restitution to his victim. The judge deferred finding the exact amount of restitution pending a subsequent but expeditiously-contemplated hearing (R 9-10, 60-68). Although both parties had agreed that such restitution was in order in this case, the defense never responded to the prosecutor's documented request of October 25 that it stipulate that the petitioner, correctly, owed Mr. Hart $8,534.95 (R 2-3, 11-12, 16, 24, 56-58, 72). On March 10, 1992, the prosecutor accordingly secured a hearing for April 1 to judicially finalize this tally (R 11-18, 72-74). Evidently, petitioner was still serving the 2½ year incarcerative portion of his sentence at the time of this hearing, so he had not yet commenced service of his probation (R 12, 75).

At the April 1 hearing, new defense counsel objected to any award of restitution for Mr. Hart, essentially arguing that the 60-day period in which the judge was allegedly required by Fla.R.Crim.P. 3.800(b) to finalize the amount due had expired on December 20, 1991, i.e., 60 legal days after October 21 (R 12-13, 16). Judge Wild disagreed and, accepting the prosecutor's calculation, affixed Mr. Hart's award as $8,534.95 (R 13, 16, 73, 76). The judge issued a contemporaneous written order modifying petitioner's then as-yet uncommenced probation to encompass his payment of restitution to the victim in this amount (R 73, 76). On April 14, 1992, petitioner unsuccessfully "appeal[ed his] final judgment of conviction and sentence" to the Fourth District (R 77-78).

Petitioner reargues here that, due to the time lapse between his October 21, 1991 sentencing and the trial court's April 1, 1992 modification of his as-yet uncommenced probationary term, the judge below lacked jurisdiction to compel him to redress Mr. Hart for his medical bills under State v. Martin, 577 So. 2d 689. See also State v. Butz, 568 So.2d 537 (Fla. 4th DCA 1990), Parks v. State, 595 So.2d 1056 (Fla. 4th DCA 1992), and State v. Sanderson, 18 F.L.W. D724 (Fla. 2nd DCA March 12, 1993). Petitioner's argument appears superficially compelling, but in truth is profoundly uncompelling, since all of these decisions are patently distinguishable. In State v. Martin, 577 So.2d 689, 690, the First District did rule in essence, as noted, that the unduly belated imposition of a definite amount of restitution upon a convicted criminal defendant as a condition of a solely

probationary sanction constituted an "illegal sentence" under Rule 3.800(a) ordinarily correctable by any court at any time.[1] In State v. Butz, 568 So.2d 537, 538, the Fourth District also ruled in essence that if a trial court judge does not originally order any restitution in conjunction with a prison sentence alone and the State does not bring this matter to his attention within 60 days following the defendant's original sentence, the judge thereafter lacks jurisdiction to award restitution upon motion of the State under Rule 3.800(b). In Parks v. State, 595 So.2d 1056, the Fourth District cursorily cited Martin and Butz to rule that a 3.800(b) motion to increase the amount of that defendant's restitution could not be entered more than 60 days following the judge's imposition of the original sentence. However, the court failed to specify whether that defendant had been sentenced solely to imprisonment, solely to probation, or to a term of imprisonment to be followed by a term of probation. See also State v. Sanderson.

Petitioner's position overlooks that his case, unlike Martin, involves a criminal defendant whose restitutionary obligation was affixed as a condition of a probationary term he had not yet begun to serve. This obligation would have been finalized in an indisputably timely fashion but for the defense's inexcusable failure to respond to the prosecutor's properly documented effort to swiftly dispose of the matter. Petitioner further overlooks that his case, unlike Butz, involves a trial

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[1] This rule, incidentally, authorized the direct defense appeal in this case. Compare State v. MacLeod, 600 So. 2d 1096 (Fla. 1992).

court judge who had originally ordered some restitution to his victim, albeit indefinite, which was subsequently finalized to modify a condition of probation to follow an as-yet unserved sentence of imprisonment. Petitioner finally overlooked that his case, unlike Parks, involves on its face the clear and unique factual and legal scenario described earlier. In sum, contrary to petitioner's implicit contention, hyper-technical readings of such distinguishable decisions do not dictate a prodefense result in his case.

Rather, a balanced reading of the applicable Florida statutes, rules and decisions concerning restitution dictated a proprosecution result both in the two courts below and in this Court. §§775.089(1)(a), 948.03(1)(e), and 948.032, Fla. Stat. collectively command every Florida trial court judge to order restitution from every convicted criminal defendant to every victim as a condition of the defendants' probations, if grounds for such awards exist. Watson v. State, 579 So.2d 900, 901 (Fla. 4th DCA 1991) provides that probational restitutionary levies may be augmented upon remand to the trial court judge under certain circumstances. §948.06(1), Fla. Stat. analogously provides that those who violate restitutionary conditions of their probations may suffer modification of such conditions as long as they are on probation. While the State realizes that Rule 3.800(b) authorizes judicial modification of the conditions of a defendant's probation only where the matter is brought before the trial court by an aggrieved party within 60 legal days of the original sentencing, see Sanchez v. State, 541 So. 2d 1140, 1141-

1142 (Fla. 1989), cf. State v. Scarantino, 543 So. 2d 399 (Fla. 4th DCA 1989), rather than any time before the defendant has completed his probation, it would submit that the statute should constitutionally prevail over the rule as the length and nature of a convict's restraint are obviously substantive rather than procedural matters by nature. See e.g. Miller v. Florida, 482 U.S. 423 (1988); compare e.g. Hart v. State, 405 So. 2d 1048 (Fla. 4th DCA 1981) and the cases cited therein.

Even if this Court rejects all of the State's foregoing arguments, and even if it reverses Gladfelter v . State, it would still be precluded from awarding petitioner the relief he seeks. As noted, on October 21, 1991, Judge Wild ordered the parties to expeditiously seek to finalize the precise amount of restitution due petitioner's victim so that he could then promptly impose same (R 8). The prosecutor did his part by promptly giving then-defense counsel a documented, correct tally of $8,534.95 (R 72). However the defense, presumably due to a change of counsel, did not accommodate the judge by responding to the prosecutor's submissions. After the now-alleged expiration of Judge Wild's jurisdiction to modify the restitutionary condition of petitioner's as-yet uncommenced probation on December 20, 1991, the defense continued its inaction in this cause. This finally led the prosecutor to successfully move the judge to properly modify petitioner's probation to affix the amount petitioner owed to Mr. Hart as $8,534.95 (R 16, 73, 76).

Assuming arguendo that this delay would have ordinarily divested Judge Wild of jurisdiction to award petitioner's

blameless victim appropriate restitution, this cannot be the situation here. Had the judge granted petitioner's disingenuous request to dismiss this cause below, his order, having been based on a "mistake" perpetrated by petitioner's counsels, would have been void and correctable at any time by any appropriate court. State v. Burton, 314 So.2d 136, 138 (Fla. 1975). Compare Hewett v. State, 18 F.L.W. S104 (Fla. February 4, 1993). Defense counsels cannot, therefore, fruitfully avoid their "important function....to assist the court" by silently permitting the commission of errors by judges, whether by inadvertence or a misguided blind loyalty to their clients, State v. Jones, 204 So.2d 515, 518-519 (Fla. 1967). Such conduct by attorneys bars their clients from thereafter fruitfully litigating such invited errors upon review by the appellate judiciary. Armstrong v. State, 579 So.2d 734 (Fla. 1991). It makes no difference whether the defense later classifies such putative errors as "constitutional," State v. Jones, or "fundamental," Armstrong v. State, or even "jurisdictional," Cochran v. State, 476 So.2d 207, 208 (Fla. 1985). Our system of justice will simply not flourish if its attorneys can, either through oversight as certainly happened here, or intentionally as could happen in similar cases in the future, silently but successfully encourage errors which benefit their clients.

In sum, this Court should not reverse the decision of the Fourth District against petitioner.

CONCLUSION

WHEREFORE respondent, the State of Florida, respectfully submits that this Honorable Court must leave the disposition under review standing.

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,029

TERRY GLISPY,

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vs.

STATE OF FLORIDA,

Respondent.

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ON CERTIORARI FROM THE FOURTH DISTRICT COURT OF APPEAL

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APPENDIX TO ANSWER BRIEF OF THE STATE ON THE MERITS

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SERIES

S.Ct. 2912, 115 L.Ed.2d 1075

POLEN and FARMER, JJ.,

KEY NUMBER SYSTEM

2

ale STARCHER, Appellant,

v.

TE of Florida, Appellee.

N 2–0694.

Court of Appeal of Florida,
Fourth District.

Dec. 2, 1992.

rom the Circuit Court for Bro-
ty; John A. Frusciante, Judge.

L. Jorandby, Public Defender,
Friedman, Asst. Public Defend-
alm Beach, for appellant.

. Butterworth, Atty. Gen., Talla-
Melynda L. Melear, Asst. Atty.
Palm Beach, for appellee.

RIAM.

. *Hodge v. State*, 603 So.2d
4th DCA 1992).

TEIN, C.J., and DELL and
., concur.

KEY NUMBER SYSTEM

1

Terry GLISPY, Appellant,

v.

STATE of Florida, Appellee.

No. 92–1241.

District Court of Appeal of Florida,
Fourth District.

Dec. 2, 1992.

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

Richard L. Jorandby, Public Defender, and Marcy K. Allen, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and John Tiedemann, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

Affirmed on the authority of *Gladfelter v. State*, 604 So.2d 929 (Fla. 4th DCA 1992).

GLICKSTEIN, C.J., and LETTS and POLEN, JJ., concur.

KEY NUMBER SYSTEM

2

Howard FAY, Appellant,

v.

STATE of Florida, Appellee.

No. 92–2266.

District Court of Appeal of Florida,
Fourth District.

Dec. 2, 1992.

Appeal from the Circuit Court for Broward County; Richard D. Eade, Judge.

Richard L. Jorandby, Public Defender, and Cherry Grant, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Sarah B. Mayer, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

Pursuant to rule 9.315(b), Florida Rules of Appellate Procedure, we summarily reverse the order and sentence of contempt in this case. The state concedes that appellant's conduct in writing letters to his children in violation of the order of probation was not a direct criminal contempt but could only serve as an indirect contempt. *See Deter v. Deter*, 353 So.2d 614 (Fla. 4th DCA 1977). Further, the state concedes that its motion for rule to show cause was insufficient as it was neither sworn to nor supported by an affidavit. *See* Fla. R.Crim.P. 3.840(a)(1). This is fundamental error. *Deter v. Deter*, 353 So.2d at 618; *Starchk v. Wittenberg*, 411 So.2d 1000 (Fla. 5th DCA 1982). In addition, the trial court's show cause order failed to allege the essential facts constituting the alleged contempt. *See Naylor v. Naylor*, 468 So.2d 398 (Fla. 4th DCA 1985). Finally, the trial court failed to follow the requirements of rule 3.840(a)(6), Florida Rules of Criminal Procedure, in that its order does not recite the acts of appellant which constitute the contempt.

Reversed and remanded.

STONE, WARNER, JJ., and OWEN, WILLIAM C., JR., Senior Judge, concur.

KEY NUMBER SYSTEM

3

Donnie Gene CRAIG, Appellant,

v.

STATE of Florida, Appellee.

No. 91–3516.

District Court of Appeal of Florida,
Fourth District.

Dec. 2, 1992.

Appeal from the Circuit Court for Okeechobee County; William L. Hendry, Judge.

Richard L. Jorandby, Public Defender, and Tanja Ostapoff, Asst. Public Defender, West Palm Beach, for appellant.

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been forwarded by courier to Ms. Marcy Allen & Mr. Gary Caldwell, Esq., Assistant Public Defenders, 421 3rd Street, West Palm Beach, FL 33401, this 15th day of April, 1993.

John Tuskan

Of Counsel