

827

4-19

IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

MAR 25 1993

CLERK SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

TERRY GLISPY, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )

---

CASE NO. 81,029

PETITIONER'S INITIAL BRIEF ON THE MERITS

RICHARD L. JORANDBY  
 Public Defender  
 15th Judicial Circuit of Florida  
 301 N. Olive Avenue/9th Floor  
 West Palm Beach, Florida 33401  
 (407) 355-2150

GARY CALDWELL  
 Assistant Public Defender  
 Florida Bar No. 256919

MARCY K. ALLEN  
 Assistant Public Defender  
 Florida Bar No. 332161

Attorneys for Terry Glispy

TABLE OF CONTENTS

STATEMENT OF THE CASE . . . . .	1
SUMMARY OF THE ARGUMENT . . . . .	2
ARGUMENT . . . . .	2
CONCLUSION . . . . .	3
CERTIFICATE OF SERVICE . . . . .	3

AUTHORITIES CITED

<u>CASES</u>	<u>PAGE</u>
<u>Crosse v. State</u> , 511 So. 2d 688 (Fla. 4th DCA 1987) . . . . .	2
<u>Glispy v. State</u> , 17 Fla. L. Weekly D2699 (Fla. 4th DCA Dec. 2, 1992) . . . . .	1
<u>Smith v. State</u> , 471 So. 2d 1347 (Fla. 2d DCA 1985) . . . . .	2

FLORIDA STATUTES

Chapter 948 . . . . .	2
-----------------------	---

FLORIDA RULES OF CRIMINAL PROCEDURE

3.800(b) . . . . .	2
--------------------	---

### STATEMENT OF THE CASE

On October 21, 1991, Terry Glispy pled no contest to a charge of aggravated battery. Pursuant to a plea agreement, the trial court sentenced him to 2 1/2 years of incarceration followed by five years on probation. R 9, 56-58, 62-63, 65-68. He agreed to pay restitution as part of his plea. R 3. At the plea conference, the state was not prepared to proceed on the issue of restitution because the prosecutor had not tallied the medical bills and confirmed the total with the alleged victim. R 4, 8. The court indicated that it would set a restitution hearing the following Wednesday. R 8. Mr. Glispy waived his right to be present at that hearing. R 8-9.

For reasons not shown by the record, the state waited until March 1992 to move for an order of restitution. R-72. The motion was heard on April 1, 1992, nearly six months after sentencing. R 11. At the April 1 hearing, Mr. Glispy's counsel objected that the matter had not been brought up within the 60-day period required by law. R 12, 13, 16. The court overruled the objection and ordered restitution in the amount of \$8,534.95 as a condition of probation. R 16, 17, 73. An order of modification of probation was filed April 15, 1992, requiring payment of \$8,534.95 in restitution. R 76. On appeal, the District Court of Appeal, Fourth District of Florida, approved the order of restitution notwithstanding Mr. Glispy's argument on appeal that the order was untimely. Glispy v. State, 17 Fla. L. Weekly D2699 (Fla. 4th DCA Dec. 2, 1992). At Mr. Glispy's instance, this Court accepted the case in the exercise of its discretionary jurisdiction.

### SUMMARY OF THE ARGUMENT

Because the state was dilatory in moving for restitution, the trial court lacked jurisdiction to enter the order of restitution.

### ARGUMENT

Rule 3.800(b), Florida Rules of Procedure provides that a trial court may "reduce or modify to include any of the provisions of chapter 948, Florida Statutes, a legal sentence within 60 days after such imposition" or within 60 days of the end of appellate proceedings in the case. It has generally been held that the 60-day time limit is jurisdictional, so that the court may reduce or modify the sentence only within the 60-day period except in unusual circumstances where a party has sought relief within the time period, and, through no fault of that party, the trial court has delayed ruling on the motion. Compare Smith v. State, 471 So. 2d 1347 (Fla. 2d DCA 1985) with Crosse v. State, 511 So. 2d 688 (Fla. 4th DCA 1987).

The record does not show the sort of due diligence on the part of the state required by cases such as Smith and Crosse. The transcript of the sentencing hearing shows that the state had all the relevant bills in its possession at that time, and had simply failed to add them up. R 6. The transcript of the restitution hearing does not show that any expense was incurred by the victim after August 1991, R 14-15, well before the October 1991 sentencing hearing. Despite the defense objection to its tardiness, the state made no attempt to show any exceptional circumstances that would justify going outside the rule's 60-day deadline.

Given the foregoing, the district court of appeal erred in approving the trial court's untimely modification of the sentence and probation.

CONCLUSION

This Court should disapprove the decision of the district court of appeal and grant such relief as may be appropriate.

Respectfully submitted,

RICHARD L. JORANDBY  
Public Defender  
15th Judicial Circuit of Florida  
421 Third Street  
West Palm Beach, Florida 33401  
(407) 355-2150



---

GARY CALDWELL  
Assistant Public Defender  
Florida Bar No. 256919

MARCY K. ALLEN  
Assistant Public Defender  
Florida Bar No. 332161

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to John Tiedemann, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401, by courier March 23, 1993.



---

Of Counsel