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FILED
SID J. WHITE
JAN 13 1993
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

TERRY GLISPY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 81,029
(DCA# 92-1241)

PETITIONER'S BRIEF ON JURISDICTION

RICHARD L. JORANDBY
Public Defender

MARCY K. ALLEN
Assistant Public Defender
Florida Bar No. 332161
15th Judicial Circuit
Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

Counsel for Petitioner

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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 County, 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

Nearly 6 months after appellant was sentenced, the circuit court of the Nineteenth Judicial Circuit set the amount of restitution over defense objection that the court lacked jurisdiction to do so. On appeal, the Fourth District Court of Appeal affirmed the order of restitution on the authority of Gladfelter v. State, 604 So. 2d 929 (Fla. 4th DCA 1992), juris. accepted Case No. 80,508 (Fla. Jan. 5, 1993). Gladfelter v. State, contains the District Court's acknowledgement that the decision conflicts with a decision from the First District.

Petitioner Glispy timely filed his notice of intent to invoke the discretionary jurisdiction of this Court. This brief on jurisdiction follows.

SUMMARY OF ARGUMENT

The decision of the district court in Glispy v. State, 17 Fla. L. Weekly 2699 (Fla. 4th DCA Dec. 2, 1992), was a per curiam opinion which cited Gladfelter v. State, 604 So. 2d 929 (Fla. 4th DCA 1992), juris accepted Case no. 80,508 (Fla. Jan. 5, 1993) (Appendix-2-3) as controlling authority. Gladfelter contains the district court's acknowledgement that the opinion conflicts with the decision of the First District in State v. Martin, 577 So. 2d 689 (Fla. 1st DCA), rev. denied 587 So. 2d 1329 (Fla. 1991). Consequently, this Court has jurisdiction in petitioner's case under Article V, Section 3(b)(3) of the Florida Constitution.

ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THE DECISION IN PETITIONER'S CASE BECAUSE THE DISTRICT COURT CITED AS CONTROLLING AUTHORITY A DECISION THAT IS NOW PENDING IN THIS COURT.

In affirming petitioner's judgement and sentence on the authority of Gladfelter v. State, 604 So. 2d 929 (Fla. 4th DCA 1992), the district court specifically ruled that it was lawful for the circuit court to enter an order of restitution nearly 6 months after sentencing. In Gladfelter, the Fourth District acknowledged 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). 604 So. 2d at 930 (Appendix-3).

Gladfelter filed for discretionary review based upon express conflict and jurisdiction was accepted by this Court on January 5, 1993 under Case No. 80,508.

This Court has jurisdiction to review the instant cause because the district court's per curiam opinion cited Gladfelter v. State as controlling authority. Jollie v. State, 405 So. 2d 418 (Fla. 1981); State v. Brown, 475 So. 2d 1 (Fla. 1985).

Accordingly, petitioner requests this Court to accept jurisdiction over his cause.

CONCLUSION

Based on the foregoing, the district court's citation PCA to Gladfelter v. State, which has been accepted for review in this Court constitutes a prima facie express conflict and allows this Court to exercise its jurisdiction.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender

MARCY K. ALLEN
Assistant Public Defender
Florida Bar No. 332161
15th Judicial Circuit
Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to JOHN TIEDEMANN, Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 8 day of JANUARY, 1993.

MARCY K. ALLEN
Assistant Public Defender

A P P E N D I X

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1992

TERRY GLISPY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 92-1241.

L.T. CASE NO. 91-541.

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

Opinion filed December 2, 1992

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

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

Robert A. Butterworth, Attorney General, Tallahassee, and John Tiedemann, Assistant Attorney General, 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., LETTS and POLEN, JJ., concur.

ERIES

⇐20

.aw ⇐982.9(1)

ɛfendant has allegedly violat-
f probation, exclusive method
and trying alleged violation is
in violation of probation stat-
han by indirect criminal con-
's F.S.A. § 948.06.

. Brummer, Public Defender,
. Rosenthal, Asst. Public De-
ıppellant.

Butterworth, Atty. Gen., and
ı Ash, Asst. Atty. Gen., for

JBBART, COPE and
, JJ.

:IAM.

ıdant, Vincent Cason, appeals
al court's order finding him in
court and sentencing him to
imprisonment. We reverse.

ndant entered a plea of nolo
to aggravated battery as a re-
ge under an information charg-
h the attempted second-degree
his ex-wife. The trial court ac-
plea, adjudicated the defendant
sentenced him to three and one-
h state prison, to be followed by
probation. His probation in-
special condition that the defen-
not associate in any way with
ed Cason [the defendant's ex-

prison, the defendant wrote sev-
to his ex-wife. It was undisput-
letters were of a non-threaten-
and primarily professed his love
wife. The state requested the
ve a hearing to determine if the
should be found in contempt of
violation of its order to have no
th the victim. The trial court

im. The requirement for no contact
endant with the former wife was an
condition of the plea agreement it-
ovious reasons, and was explained at
he time the plea was taken and sen-
imposed.

issued a rule to show cause against the defendant as to why he should not be adjudged in contempt of court. After a hearing, the trial court found the defendant in indirect contempt of court, and sentenced him to six-months imprisonment to run consecutively to his present sentence. The defendant appeals.

The defendant contends that the trial court lacked jurisdiction to conduct contempt proceedings against the defendant for sending letters to his ex-wife while he was in prison. Based on the circumstances of this case, we agree.

[1] It is plain that the defendant was found in indirect criminal contempt for allegedly violating a special condition of his probation—namely, that he not associate or have any contact with his ex-wife—because he wrote a number of letters to his ex-wife while in prison before the period of probation began. Where, as here, the defendant is given a split sentence of prison time followed by a probationary period and the defendant allegedly violates a condition of probation during the prison portion of the sentence before the probation begins, the trial court may revoke the defendant's probation based on such violation. *Stafford v. State*, 455 So.2d 385, 386 (Fla.1984) (approving *Martin v. State*, 243 So.2d 189 (Fla. 4th DCA) (defendant violated probation while in county jail), *cert. denied*, 247 so.2d 63 (Fla.1971)); *Russell v. State*, 487 So.2d 366 (Fla. 2d DCA) (violation while defendant in custody of Department of Corrections), *cause dismissed*, 492 So.2d 1334 (Fla.1986). *See also Williamson v. State*, 388 So.2d 1345 (Fla. 3d DCA 1980).

[2] In our view, where a defendant has allegedly violated a condition of probation, the exclusive method for charging and trying this alleged violation is provided for in section 948.06, Florida Statutes (1991), rather than by indirect criminal contempt. This is so because the above statute provides in detail the exact procedure to be followed in the event a probationer allegedly violates a condition of his/her probation. If the legislature had intended to allow the use of the court's contempt power to punish a violation of probation, then section 948.06 or chapter 948 would have specifically so provided; no such provision, however, is contained in either section 948.06 or in chapter 948. On the other hand, where a defendant violates a court order which is not a condition of probation, the court may be authorized to enforce the order through the contempt power. *See, e.g., R.M.P. v. Jones*, 419 So.2d 618 (Fla.1982), *quashed in part on other grounds, A.A. v. Rolle*, 604 So.2d 813 (Fla.1992).

The final judgment of conviction and sentence for indirect criminal contempt is reversed and the cause is remanded to the trial court with directions to discharge the defendant from this cause. This disposition, however, shall be without prejudice for the state to institute violation of probation proceedings against the defendant under section 948.06, Florida Statutes (1991).

Reversed and remanded.

Carla GLADFELTER, Appellant,

v.

STATE of Florida, Appellee.

No. 91–3432.

District Court of Appeal of Florida, Fourth District.

Sept. 16, 1992.

The Circuit Court, Indian River County, Joe A. Wild, J., entered order modifying defendant's probation, and defendant appealed. The District Court of Appeal held that court could modify sentence which included restitution as condition of probation to set amount of restitution more than 60 days after sentence was originally imposed.

Affirmed in part and reversed in part.

Criminal Law ⇐996(2)

Court could modify defendant's sentence of three years' imprisonment to be followed by two years' probation more than 60 days after sentence was imposed to require defendant to pay restitution where special conditions of original probation order included restitution to victim in amount to be determined.

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

Robert A. Butterworth, Atty. Gen., Tallahassee, and Michelle A. Smith, Asst. Atty. Gen., 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,* 600 So.2d 1 (Fla. 4th DCA 1992), *approved in part, corrected on other grounds Savory v. State,* 600 So.2d 1 (Fla. 4th DCA 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.

Gayle Deschaine WILLIAMS and Garris Williams, Petitioners,

v.

Hon. William F. EDWARDS, Circuit Court Judge, etc., et al., Respondents.

No. 92–1454.

District Court of Appeal of Florida, Fifth District.

Sept. 18, 1992.

Plaintiffs in medical malpractice action petitioned for mandamus after trial court entered order staying proceedings in the case pending Supreme Court review of unrelated case which raised same issue as was raised in instant case. After electing to treat petition as petition for writ of certiorari, the District Court of Appeal, Dauksch, J., held that trial court abused its discretion in staying proceedings.

Order quashed; cause remanded.

Cite

Action ⇐69(5)

Trial court abused its di staying medical malpractice act Supreme Court review of unr which involved identical issue case should be dismissed for fa vide corroborating expert opin notice of intent to sue was serv trial courts to stay cases until resolve pending issues are det the Supreme Court would lead t delay and confusion on trial

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Delia A. Doyle, Ormond Bea tricia A. Doherty of Wooten, H Kest, P.A., Orlando, for petitio

Shelley H. Leinicke of Wic Tutan, O'Hara, McCoy, Graha P.A., Fort Lauderdale, for John Campbell, M.D., Jackson M.D., P.A., and Jackson L. St P.A. d/b/a Citrus Radiology A

No appearance for responde ble William F. Edwards.

DAUKSCH, Judge.

This is a petition for manda we have elected to treat as a writ of certiorari. We quash t order.

The petitioners in the instant and Garris Williams, institute malpractice action against Dav ers, M.D., David W. Powers, John Campbell, M.D., individua L. Straub, M.D., P.A. d/b/a Cit gy Associates and Citrus Cou Board of Trustees d/b/a Citru Hospital. On January 22, 19 court granted defendant Citru Hospital's motion to dismiss f provide corroborating expert op

1. Although the parties here disc ment" of the proceedings and t entered an order "abating" the pr treat the order as a stay of the p light of the intent of the order. and "stay of proceedings" are si respects, but not identical. abatement terminated common la necessitated bringing the action when it became proper to do modern rules a stay simply postpo

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appendix has been furnished by courier, to JOHN TIEDEMANN, Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 8 day of January, 1993.

Marcy K. Allen

MARCY K. ALLEN
Assistant Public Defender