IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. : Case No. 81,454

RICKEY FAYE SANDERSON, :

Respondent. :

:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's Statement of the Case and Facts as a generally correct overview of the sequence of events concerning the trial court's denial to grant restitution and the Second District's denial of the State's petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal did not err in denying the State's petition for writ of certiorari where the trial court did not depart from the essential requirements of the law in refusing to impose restitution. Because restitution is directly related to the cause at issue, it must be included in the sentence. It is not an ancillary matter which can be determined at some future date. Because the trial court did not order an amount of restitution in the final judgment, and more than 60 days passed since sentencing, it no longer had jurisdiction to order restitution. The decision of the Second District Court of Appeal must be approved.

ARGUMENT

ISSUE

THE SECOND DISTRICT DID NOT ERR IN DENYING THE STATE'S PETITION FOR WRIT OF CERTIORARI WHERE MORE THAN SIXTY DAYS HAD ELAPSED AFTER SENTENCE WAS IMPOSED AND THUS THE TRIAL COURT DID NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF THE LAW.

Respondent was sentenced to six months imprisonment to be followed by a probationary period of one year (R36,37). The original sentencing order on May 17, 1991, ordered restitution and the trial court reserved jurisdiction for 60 days at which time a hearing would be held to determine the amount of restitution (R37). At the restitution hearing on August 8, 1991, the trial court, sua sponte, determined that it had lost jurisdiction to impose restitution (R15). However, a hearing was held to perfect the record for purposes fo appeal (R16). At the conclusion of the hearing, the trial court determined that restitution could not be ordered because more than sixty days had elapsed since the respondent was sentenced (R24,25). Pursuant to State v. Martin, 577 So. 2d 689 (1st DCA), review denied, 587 So. 2d 1329 (Fla. 1991) and McLaughlin v. State, 573 So. 2d 419 (Fla. 2d DCA 1991), the trial court did not depart from the essential requirements of the law in refusing to order restitution.

For two reasons, the trial court lacked jurisdiction to impose this restitution. First, McGurn v. Scott, 596 So. 2d 1042 (Fla. 1992), held that a trial court could not reserve jurisdiction to

impose prejudgment interest. Prejudgment interest is like restitution because it "is awarded as just compensation to those who are damaged by having their property withheld from them or destroyed." Id. at 1044. If a trial court cannot reserve jurisdiction to impose prejudgment interest in the civil context, then it also cannot reserve jurisdiction to impose restitution in the criminal context. McGurn thus was squarely inconsistent with cases such as Savory v. State, 600 So. 2d 1 (Fla. 4th DCA 1992), which held that the trial court may reserve jurisdiction for as long as two years to impose restitution.

Second, this Court has held that the trial court has jurisdiction to impose restitution only for sixty days after the sentence was entered, pursuant to Fla. R. Crim. P. 3.800(b). McLaughlin v. State, 573 So. 2d 419 (Fla. 2d DCA 1991). Respondent strongly disagrees with McLaughlin that a trial court has even as much as sixty days to add restitution, not only because McGurn overruled McLaughlin but also because Rule 3.800(b) applies only to modifications or reductions of the sentence, and imposing restitution is patently an increase in the sentence, not a mere modification. Judge Scheb's reasoning in McLaughlin that the added restitution was a mere modification was similar to his reasoning in Clark v. State, 559 So. 2d 1272 (Fla. 2d DCA 1990), which this Court rejected in Clark v. State, 579 So. 2d 109 (Fla. 1991). Just as an added probation condition of residence in a probation and restitution center is an illegal increase in the sentence and is not a "mere modification" which a judge can willy-nilly impose in the

absence of an affidavit of violation, Clark, so also the imposition of restitution after sentencing is an illegal increase in the sentence and not a mere modification.

In any event, the restitution in this case was imposed more than sixty days afterward, and it was illegal even under McLaughlin. Savory distinguished McLaughlin because the restitution in McLaughlin was not originally imposed while the restitution in Savory was originally imposed but in an undetermined amount. This Court should disagree with Savory in that respect and agree with the result of State v. Martin, 577 So. 2d 689 (Fla. 1st DCA 1991), review denied, 587 So. 2d 1329 (Fla. 1991), which had facts similar to Savory and yet reached a different result. No substantive difference exists between not initially imposing restitution at all and imposing it but in an amount to be determined two years later.

Sound policy reasons require an imposition of restitution immediately. Piecemeal sentences create piecemeal appeals, which are clearly undesirable. Moreover, defendants who wish to contest the restitution have to remain in the county jail after sentencing and thereby lose their gain time in the state prison system. Finally, defendants in Florida have a basic right to finality and certainty in sentencing that is reasonably expeditious. Clark v. State, 572 So. 2d 1387 (Fla. 1991); Woodland v. Lindsey, 586 So. 2d 1255 (Fla. 4th DCA 1991). They should not have to wait for an indeterminate period of time with their sentence hanging over their heads until the court decides to impose it. Certainly, this Court

would disapprove an indeterminate sentence of incarceration with a length "to be determined two years later." Restitution is not different in this respect.

Perhaps in some cases, medical expenses and similar forms of restitution as in Gladfelter v. State, 18 Fla. L. Weekly S308 (Fla. May 27, 1993) upon which Petitioner relies, cannot be determined immediately. If an exception is made for restitution of this sort, then the trial court should be required to justify and limit it in a written order entered at the time of sentencing. In any event, even if this exception might be valid in rare cases, it did not apply below because the restitution for grand theft in this case should have been readily determinable. In most cases, no valid excuse can exist for a prosecutor's failure to be prepared for the imposition of restitution at sentencing.

It is axiomatic that a lack of jurisdiction is fundamental error and can be challenged at any time. Sentences imposed without jurisdiction are void. Milliken v. State, 398 So. 2d 508 (Fla. 5th DCA 1981); Malone v. Meres, 91 Fla. 709, 109 So. 677 (Fla. 1926). Therefore, the trial court in this case did not commit error in refusing to impose restitution and did not depart from the essential requirements of the law. This Court should affirm the decision of the Second District in denying the Petitioner's request for certiorari relief.

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority the state requests that this Honorable Court enter an order approving the denial of the writ of certiorari.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Dale E. Tarpley, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 12th day of July, 1993.

Respectfully submitted,

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