IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. FSC NO. 81,454

RICKEY FAYE SANDERSON,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

On May 16, 1991 the respondent (appellee in the lower court) was charged by information with grand theft. (R. 31) On May 17, 1991 the respondent was arraigned. (R. 34) He pled nolo contendere to the crime charged, judgment was entered, and the sentence was imposed. (R. 34,35) The respondent's sentence was imprisonment for a period of six (6) months to be followed by a probationary period of one (1) year. (R. 36,37) The court also ordered the respondent to pay restitution and reserved jurisdiction for sixty (60) days. (R. 37)

The state filed a notice of hearing on May 20, 1991. (R. 38) The hearing on the state's motion for restitution was set for June 20, 1991. (Id.) On that date, however, the victim was unable to attend the hearing due to a family emergency. (R. 9) The respondent did not consent to the payment of the restitution figure given by the victim. As a result the state requested a continuance. (Id.) The trial court granted the continuance on the condition that the state reset the restitution hearing within sixty (60) days of the date the respondent's judgment and sentence were imposed. (R. 10,11)

The state filed its second notice of hearing on June 25, 1991. (R. 40) The continued restitution hearing was set for August 8, 1991. (R. 40) On August 8, 1991 the trial court, sua sponte, determined that it had lost jurisdiction to impose resti-

tution. (R. 15) Nevertheless, the parties held the hearing to perfect the record for purposes of appeal. (R. 16) At the end of the hearing the trial court determined that restitution could not be ordered. The court interpreted 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) as requiring the restitution hearing itself be held and restitution ordered within sixty (60) days of sentencing. (R. 24,25)

The trial court entered its order departing from the essential requirements of the law August 13, 1991. (R. 42) The state then petitioned the Second District Court of Appeal for a writ of common law certiorari. (App. A) The Second District ordered counsel for respondent to answer the petition. Following submission of the response and the state's reply to the response, the Second District denied the petition for writ of certiorari on May 27, 1992 relying on Martin and McLaughlin. (App. B)

The state then filed a motion for rehearing, clarification, or certification of conflict between district courts of appeal. (App. C) On March 12, 1993 the Second District granted the state's motion for rehearing, withdrew its previous opinion, and substituted its opinion again denying the petition for writ of certiorari but acknowledging conflict with Savory v. State, 600 So. 2d 1 (Fla. 4th DCA 1992) and Smith v. State, 589 So. 2d 387 (Fla. 1st DCA 1991). See State v. Sanderson, 615 So. 2d 275 (Fla. 2d DCA 1993) (App. D)

The state sought discretionary review in this court and after jurisdictional briefs were filed an order was entered on April 30, 1993 accepting jurisdiction and dispensing with oral argument.

SUMMARY OF THE ARGUMENT

It was error for the Second District Court of Appeal to deny the state's petition for writ of certiorari. In denying the state's petition that court relied on McLaughlin v. State, 573 So. 2d 419 (Fla. 2d DCA 1991) and State v. Martin, 577 So. 2d 689 (1st DCA), review denied, 587 So. 2d 1329 (Fla. 1991). However, this court recently disapproved Martin, and McLaughlin by implication, in Gladfelter v. State, 18 Fla. L. Weekly S308 (Fla., May 27, 1993). In light of Gladfelter the state's petition for writ of certiorari should have been granted.

Certiorari is the proper remedy because the state has no right of appeal and the trial court's failure to impose restitution departed from the essential requirements of the law. Section 775.089, Florida Statutes (1989) makes the imposition of restitution a mandatory part of every sentencing. It is a requirement of the law and the failure to order it in the instant case was a departure from that legislative requirement. This court should enter an order reversing the order of the Second District denying certiorari relief.

ARGUMENT

IT WAS ERROR FOR THE SECOND DISTRICT TO DENY THE STATE'S PETITION FOR WRIT OF CERTIORARI BECAUSE MORE THAN SIXTY DAYS HAD ELAPSED AFTER SENTENCE WAS IMPOSED BECAUSE THIS COURT RECENTLY DETERMINED THAT THE TERMS AND CONDITIONS OF PROBATION CAN BE MODIFIED AT ANY TIME AND DID NOT CONSTRUE CRIMINAL PROCEDURE RULE 3.800 AS REQUIRING THE AMOUNT OF RESTITUTION TO BE SET WITHIN SIXTY DAYS.

This case is on appeal from the order of the Second District Court of Appeal denying the State of Florida's petition for writ of certiorari. The court has jurisdiction pursuant to art. V, §3(b)(3), Fla. Const.

The question at bar is whether it is permissible for a trial court, which required restitution as part of the sentence, to set the actual amount of restitution beyond sixty days after the sentence was imposed. This court recently answered the question affirmatively in Gladfelter v. State, 18 Fla. L. Weekly S308 (Fla., May 27, 1993). In Gladfelter the court recognized that section 948.03 (8), Florida Statutes (1989) authorizes the modification of the terms and conditions of probation at any time. The court did not construe criminal procedure rule 3.800 as requiring the amount of restitution to be set within sixty days. In addition, the court disapproved State v. Martin, 577 So. 2d 689 (1st DCA),

review denied, 587 So. 2d 1329 (Fla. 1991) to the extent of conflict with Gladfelter.[1]

In light of Gladfelter it was error for the Second District to deny the state's petition for writ of certiorari. As the state pointed out in its original petition for writ of certiorari, common law certiorari is the proper vehicle to review the trial court's departure from the essential requirements of the law because the state has no right of appeal. The first, second, and fourth districts have determined that the failure to order restitution does not make a sentence illegal, but merely incomplete. See State v. McLeod, 583 So. 2d 701 (1st DCA), approved, 600 So. 2d 1096 (Fla. 1992); Dailey v. State, 575 So. 2d 237 (Fla. 2d DCA 1991); State v. Butz, 568 So. 2d 537 (Fla. 4th DCA 1990); Grice v. State, 528 So. 2d 1347 (Fla. 1st DCA 1988). Consequently, the state had no right of appeal under Fla. R. App. P. 9.140 (c)(1)(I).

Review of a trial court's departure from the essential requirements of the law in failing to impose restitution because it erroneously thought it lacked jurisdiction to do so is a proper subject for certiorari. See e.g. State v. Rhodes, 554 So. 2d

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[1] In disapproving Martin the court by implication also disapproved McLaughlin v. State, 573 So. 2d 419 (Fla. 2d DCA 1991) which held that the trial court lacked jurisdiction to modify the restitution award more than sixty days after the imposition of sentence. The Second District relied on both Martin and McLaughlin in denying the petition for writ of certiorari.

1229 (Fla. 2d DCA 1990); Marsh v. State, 497 So. 2d 954 (Fla. 1st DCA 1986); Smith v. State, 471 So. 2d 1347 (Fla. 2d DCA 1985); Hudson v. Hoffman, 471 So. 2d 117 (2d DCA), review denied, 480 So. 2d 1294 (Fla. 1985); Bridges v. Williamson, 449 So. 2d 400 (Fla. 2d DCA 1984).

Certiorari relief was warranted in the instant case because the trial court departed from the essential requirements of the law in failing to order restitution more than sixty days following sentencing. Section 775.089 (1)(a), Florida Statutes (1989) plainly states:

> In addition to any punishment, the court shall order the defendant to make restitution to the victim for damage or loss caused directly or indirectly by the defendant's offense, unless it finds reasons not to order such restitution. Restitution may be monetary or non-monetary restitution. The court shall make the payment of restitution a condition of probation in accordance with s. 948.03.[2] (e.s.)

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[2]This court pointed out in Neal v. Bryant, 149 So. 2d 529 (Fla. 1962) that the normal meaning of the word "shall" is mandatory by nature:

> Upon full consideration of the provisions of the statute in question, it is our determination that the provisions thereof regarding a preliminary investigation as to probable cause are mandatory in nature. This construction is compelled by the use of the word "shall" in the statute in question which, according to its normal usage, has a mandatory connotation.

Id. at 532. Accord State ex rel. Gillespie et al. v. County of Bay et al., 112 Fla. 687, 151 So. 10 (1933); White v. Means, 280

This statute, as amended in 1984, requires the court to consider restitution and to make a record of its determination by order or by statement into the record in every sentencing. Grice v. State, 528 So. 2d 1347 (Fla. 1st DCA 1988); Gilmore v. State, 479 So. 2d 791 (Fla. 2d DCA 1985).

The only possible conclusion one can elicit from the foregoing is that the Second District improperly denied the state's petition for writ of certiorari. The state adopts its arguments presented to the Second District in favor of granting the writ and incorporates those arguments herein by reference.

The state respectfully requests that this court enter an order reversing the order of the Second District which denied the writ of certiorari.

So. 2d 20 (Fla. 1st DCA 1973); Florida Tallow Corporation v. Bryan, 237 So. 2d 308 (Fla. 4th DCA 1970). This statutory construction of the word "shall" bolsters the state's argument that in failing to order restitution the trial court departed from the essential requirements of the law.

CONCLUSION

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

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 U.S. Mail to Cecilia A. Traina, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer P.D., Bartow, Florida, 33830 on this 23rd day of June, 1993.

OF COUNSEL FOR PETITIONER