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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner,

v. FSC NO. 81,454

RICKEY FAYE SANDERSON,

Respondent.

_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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SUMMARY OF THE ARGUMENT

The state's view is that restitution, as a condition of probation, is more analogous to the ancillary matters mentioned in McGurn v. Scott, infra. McGurn is therefore consistent with Gladfelter v. State, infra. Moreover, it cannot be said that McGurn overruled McLaughlin v. State, infra, which was decided by the Second District, not this court as the respondent argues. The respondent then misstates the facts of the case by stating that restitution was imposed more than sixty days after the imposition of the sentence. Restitution was imposed at the initial sentencing. Under Gladfelter and Savory v. State, infra, it was permissible to set restitution more than sixty days after imposition of the sentence. Finally, as a matter of policy the rights of crime victims to restitution should outweigh the rights of criminal defendants.

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 ANYTIME AND DID NOT CONSTRUE CRIMINAL PROCEDURE RULE 3.800 AS REQUIRING THE AMOUNT OF RESTITUTION TO BE SET WITHIN SIXTY DAYS.

The Petitioner, the State of Florida, continues to maintain that the Second District Court of Appeal improperly denied its petition for writ of certiorari. In this reply brief the state responds to the arguments presented by the Respondent, Rickey Faye Sanderson.

The respondent first relies on McGurn v. Scott, 596 So. 2d 1042 (Fla. 1992), arguing that if a trial court cannot reserve jurisdiction to impose prejudgment interest in the civil context, then it also cannot reserve jurisdiction to impose jurisdiction in the criminal context. In McGurn this court found that prejudgment interest is another element of pecuniary damages and is directly related to the cause at issue and is not incidental to the main litigation. The state's view is that restitution, as a condition of probation, is more analogous to the ancillary matters mentioned in McGurn, i.e., costs and attorney fees. Thus, McGurn is consistent with Gladfelter v. State, 618 So. 2d 1364 (Fla. 1993).

The respondent next argues erroneously that 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) citing McLaughlin v. State, 573 So. 2d 419 (Fla. 2d DCA 1991) which is a Second District case. Moreover, it can hardly be said that McGurn overruled McLaughlin to the extent that a trial court has sixty days from imposition of sentence to modify that sentence. In Gladfelter this court determined that fixing the amount of restitution is a modification of the terms and conditions of probation, not a case in which a new condition of probation is added.

The respondent then misstates the facts of the case by stating that restitution was imposed more than sixty days after imposition of sentence and was therefore illegal even under McLaughlin. To the contrary, the record indicates that restitution was imposed at the initial sentencing hearing May 17, 1991. (R. 2, 3, 5, 6, 36, 37) Consequently, under Gladfelter and Savory v. State, 600 So. 2d 1 (Fla. 4th DCA 1992) it was permissible to set the amount of restitution more than sixty days from the imposition of the sentence. In Gladfelter this court expressly disapproved State v. Martin, 577 So. 2d 689 (1st DCA), review denied, 587 So. 2d 1329 (Fla. 1991).

The respondent argues that sound policy reasons require the imposition of restitution immediately. Certainly, it can be assumed that trial courts will impose restitution at the earliest possible date. Yet competing policy considerations require that trial courts have the flexibility to set the amount of restitution at any time. For example, insurance coverage may not be de-

termined at the time of sentencing; crime victims may still be calculating their loss or receiving care; crowded court calendars might impede resolution of the issue at the time of the plea. State v. Bober, 16 Fla. L. Weekly C113, C114 n.3 (12th Cir. 1991).

Justice requires that the rights of crime victims take precedence over the rights of those who violate the criminal law to the detriment of others. The court should feel little pity if a criminal defendant loses gain time or does not enjoy his right to finality. Such problems are the foreseeable result of the commission of criminal acts which injure others. The terms and conditions of probation may be modified at any time and this rule is not an exception as the respondent argues. Restitution would have been fixed within sixty days in the instant case, but the respondent would not accept the state's figure. (R. 9)

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

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, Esq., Assistant Public Defender, P.O. Box 9000-Drawer PD, Bartow, Florida 33830, on this 20th day of July, 1993.

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