IN THE SUPREME COURT OF FLORIDA

GARY KENT KIRBY,

Petitioner,

v. Case No. SC02-1511

Fifth DCA Case No. 5D01-2567

STATE OF FLORIDA,

Respondent.
______________________________/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERIT ANSWER BRIEF OF RESPONDENT

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

JUDY TAYLOR RUSH
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 0438847
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(386) 238-4990 (Phone)
(386) 238-4997 (FAX)

COUNSEL FOR RESPONDENT

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STATEMENT OF FACTS

The relevant facts are set forth in the opinion of the district court:

> Gary Kent Kirby was found guilty by a jury of driving under the influence resulting in serious bodily injury to another on February 23, 2001. Kirby was adjudicated guilty and sentenced to five years of probation, a downward departure.
>
> Independent of the criminal case, the victim in this case executed a release of his claim for damages in exchange for $25,000.00 on April 7, 2001. [FN1]
>
> > FN1. The release reads in pertinent part:
> >
> > For the sole consideration of twenty-five thousand dollars & xx/100 dollars ($25,000.00), the receipt and sufficiency whereof is hereby acknowledged the undersigned hereby releases and forever discharges Lori Jo & Gary K. Kirby his/her/their heirs, executors, administrators, agents, assigns, employers, employees, firms and corporations (hereinafter all referred to as "releasees") liable or who might be claimed to be liable, none of whom admit any liability to the undersigned but all expressly deny any liability, from any and all claims, demands, damages, actions, cause of action or suits of any kind or nature whatsoever, and particularly on account of all injuries, known and unknown, both to person and property, which have resulted or may in the future develop from an accident which occurred on or about the 20th day of November, 1999 at or near Hwy 17, Pomona Park, FL.
> >
> > Except for the above stated releasees, the undersigned reserves his/her/their right to bring legal action against and recover

> damages from any other person, firm, corporation or organization, inclusive but not limited to any personal injury protection insurance carrier, medical payment coverage insurer, group health insurance carrier or health care provider. This reservation does not include the parties released herein who are given a full and final release from any and all claims, demands, damages, actions, including all past, present and future claims for subrogation arising out of the above referenced accident.
>
> Undersigned hereby declares that the terms of this settlement have been completely read and are fully understood and voluntarily accepted for the purpose of making a full and final compromise adjustment and settlement of any and all claims, disputed or otherwise, on account of the injuries and damages above mentioned, and for the express purpose of precluding forever any further or additional claims arising out of the aforesaid accident against the releasees.
>
> * * * * *
>
> Undersigned hereby accepts draft or drafts as final payment of the consideration set forth above,
> In witness whereof, Harold E. Baxley [has] hereunto set hand(s) and seal(s) this 7 day of April, 2000.
> /s/ Harold E. Baxley.

> Based on that release and > State v. Vandonick, 800 So.2d 239 (Fla. 2d DCA 2001), the trial court denied restitution after a hearing on August 13, 2001.

State v. Kirby, 818 So. 2d 689, 689-90 (Fla. 5th DCA 2002).

The Fifth District Court of Appeal agreed “with the well-reasoned dissent of Judge Northcutt” in *State v. Vandonick,* and

noted that "a number of other state appellate courts take the same position." 818 So. 2d at 690-91 (citations omitted). The court noted the reasons underlying Judge Northcutt's conclusion that "the sentencing court was not bound by the civil settlement and release between the defendant and the victim." *Id.* at 690. These included: (1) "[T]he state was not a party to the settlement transaction nor were its interests represented," (2) "[R]estitution is only partially founded on the victim's right to be compensated;" the State has the "right to have the victim made whole by the perpetrator," (3) "The societal purposes of restitution are "broader than simply compensating the victim–it is a deterrent, it is rehabilitative, retributive, and it requires the perpetrator, rather than the taxpayers, to absorb some or all of the financial aspect of the victim's injuries," and (4) Where "the settlement was for a sum which was less than the victim's damage or loss, an order imposing restitution based solely on the amount of the settlement would violate the clear requirements of the statute." *Id.*

The district court concluded that a "settlement between the victim and the defendant in a civil proceeding did not bar the state from seeking restitution, as it was not a party to the settlement and its interests go beyond the interests at stake in the civil settlement." *Id.* at 691. Thus, the trial court's order

was reversed, and the case remanded for an evidentiary hearing and an appropriate award of restitution under the statute. *Id.*

SUMMARY OF ARGUMENT

This Court should affirm the decision of the Fifth District Court of Appeal which upheld the State's right to recover restitution from a criminal defendant. The State was not a party to the settlement of a civil proceeding entered into between the victim and the defendant. The State's interests extend beyond those of the victim in the civil proceeding. The law clearly provides for the recovery of restitution in the instant case, and the victim cannot bargain away this statutory requirement. Neither can the victim relieve the criminal court of it's statutory duty to impose restitution. To the extent that the holding in *State v. Vandonick*, 800 So. 2d 239 (Fla. 2d DCA 2001) is to the contrary, it should be quashed.

ARGUMENT

THIS COURT SHOULD AFFIRM THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL THAT THE STATE, WHO WAS NOT A PARTY TO A CIVIL SETTLEMENT BETWEEN THE VICTIM AND THE DEFENDANT, MAY RECOVER RESTITUTION FROM THE DEFENDANT.

Kirby contends that the trial court's order dismissing the claim of entitlement to restitution from him as a result of his criminal offense should be reinstated by this Court. (MIB 6). He is incorrect. This Court should affirm the decision of the Fifth District Court of Appeal which upheld the State's right to recover restitution from a criminal defendant. *See State v. Kirby*, 818 So. 2d 689, 691 (Fla. 5th DCA 2002).

The State submits that the standard of appellate review of the instant claim is *de novo*. The restitution statute, § 775.089, mandates that "the court shall order the defendant to make restitution to the victim . . .." § 775.089, Fla. Stat. (1999). In the instant case, the trial judge did not order restitution because he believed that the only district court of appeal to consider the question of applicability of a civil proceeding settlement to the criminal restitution statute had held that the civil settlement precluded an award of restitution. (R 132-33) (Appendix A at 1-2). The trial court did not exercise any discretion it had in ruling on the

restitution issue, but felt bound to, and did, follow the authority of the incorrectly decided appellate decision in *State v. Vandonick*, 800 So. 2d 239 (Fla. 2d DCA 2001). *Id*. Thus, the issue is whether the *Vandonick* court correctly applied the law in reaching its decision in regard to the criminal restitution statute.

Appellate courts are not required to defer to trial judges on issues of law; rather, the standard of review of legal issues is merely a determination whether the trial judge decided the issue correctly. *See Bose Corporation v. Consumers Union of U.S., Inc.,* 466 U.S. 485 (1984); *Smith v. Russell*, 456 So. 2d 462, 464 (Fla. 1984), *cert. denied*, 470 U.S. 1027 (1985)[refusal to give instruction on malice standard incorrect determination of legal issue by trial court]. Thus, in deciding *Kirby*, the Fifth District Court of Appeal was not required to review the trial court's decision on the restitution statute under an abuse of discretion standard, as Kirby claims in his initial brief. *See* MIB at 4. Rather, the court was required to, and did, review the failure to comply with the statutory mandate to order restitution - a legal issue - under a *de novo* standard.

Kirby relies solely upon the holding in *State v. Vandonick*, 800 So. 2d 239 (Fla. 2d DCA 2001). Therein, the court concluded

that an agreement entered into by the parties to a civil suit for damages sustained by Alice Berry when Vandonick "intentionally" touched or struck her precluded an award of restitution in the criminal case in which Vandonick was then "charged with reckless driving and third-degree felony battery . . .." 800 So. 2d at 239. After an agreement as to damages was reached, Vandonick entered a plea to reduced charges of "reckless driving and . . . culpable negligence." *Id.* at 240. The *Vandonick* court expressly premised its holding denying restitution in the criminal case on two factors: "[T]he explicit language in the release . . . and the fact that it was executed before Vandonick entered his plea . . .." *Id.*

In the instant case, the release was not as broad as that in *Vandonick*, but more importantly, Kirby did not enter a plea after reaching an agreement on damages in the civil suit. Rather, he went to trial by jury and was convicted of the crimes out of which the restitution claim arose.[1] 818 So. 2d at 689. Thus, Kirby can not be said to have forgone his right to a jury

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[1]Although the Fifth District Court of Appeal's decision states that the agreement in the civil case was executed on "April 7, 2001," 818 So. 2d at 689, and this date was relied upon by the State in its jurisdictional brief, the Undersigned has recently noticed that the release filed in the record indicates that it was signed on April 7, 2000. (R 112) (See Appendix B).

determination in reliance on the agreement limiting damages, since he did, in fact, have his jury trial. (R 97) (Appendix C).

Moreover, in the instant case, when the trial judge sentenced Kirby, the court entered a downward departure, foregoing all incarceration in favor of a five-year term of probation. 818 So. 2d at 689. From this it appears that the trial judge wanted to maximize restitution and was willing to give Kirby a break on incarceration in order to make greater restitution possible. Thus, Kirby not only did not enter a plea based on the limitation of damages in the civil settlement, he received a benefit in the form of a lighter sentence in anticipation that he would pay greater restitution. (*See* R 102, 106) (Appendix D at 1, 2). Such greater restitution was not ordered ultimately only because the trial judge was convinced that the *Vandonick* holding required him to deny the restitution sought in Kirby's case. 818 So. 2d at 690. *See* R 123-33 (Appendix E at 1-11).

In *J.O.S. v. State*, 689 So. 2d 1061, 1063 (Fla. 1997), this Court said:

> Section 775.089 is a restitution statute which is part of Florida's Criminal Code. Subsection (1)(a) requires a court to order a defendant to make restitution to the victim for damage or loss: (1) caused directly or indirectly by the defendant's offense; and (2) related to the defendant's criminal episode. Therefore, once . . . an adult defendant

> [is] found guilty, restitution is . . . a mandatory sanction for criminal defendants under section 775.089(1)(a).

Clearly, restitution is a mandatory sanction for criminal defendants under Florida law. *Id.* Indeed, the failure to impose restitution in sentencing a criminal defendant renders the sentence incomplete and subject to modification. *See Bunch v. State*, 745 So. 2d 400, 402 (Fla. 5th DCA 1999), *rev. denied,* 766 So. 2d 220 (Fla. 2000). Thus, the duty of the trial court to award restitution under the criminal statute is clear.

In *Vereen v. State*, 703 So. 2d 1193, 1194 (Fla. 4th DCA 1997), a contractor, charged with criminal misappropriation of construction funds, "executed promissory notes in favor of many of the subcontractors." At sentencing for the criminal offense, the State sought restitution under Florida Statutes § 775.089 for all victims, including those subcontractors who held the notes. *Id.* The court rejected the contractor's claim that his civil contracts - the promissory notes - precluded an award of restitution to those with whom the contracts had been entered. *Id.* In so doing, the court said that a "purpose of the statute is to provide the victim full compensation," and added that when restitution is made a condition of probation, it "contains coercive elements not available in civil court." *Id.* Noting that the restitution statute "provides that any restitution paid

'shall be set off against any subsequent independent civil recovery,'" the court affirmed the restitution order entered in the criminal case, specifically holding that "[t]he fact that a victim has an enforceable civil obligation covering a loss does not divest the court of the power to order restitution under section 775.089." *Id.*

Thus, the fact that Kirby's victim has an enforceable civil settlement covering some of his loss does not divest the court of the power to order restitution under Florida Statute § 775.089 (1999).[2] *Vereen*, 703 So. 2d at 1194. One purpose of the restitution statute is to have the criminal make the victim whole, not impose that burden on the State or society where a cunning criminal manages to wrangle an inadequate settlement from an injured victim.

In *Glaubius v. State*, 688 So. 2d 913 (Fla. 1997), a case cited by Judge Northcutt in his dissent in *Vandonick*, this Court said that "the purpose of restitution is two-fold: It acts to (1) compensate the victim and (2) serve the rehabiliative, deterrent, and retributive goals of the criminal justice system." 688 So. 2d at 915. This Court emphasized: "[T]he

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[2]The crime occurred on November 20, 1999; thus, the 1999 version of the restitution statute applies. *See Glaubius*, 688 So. 2d 913, 916 n.1. (Fla. 1997).

purpose of restitution is to **adequately** compensate a victim and to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system." *Id.* at 916 (emphasis added). It is clear that one of this Court's overriding concerns was that the victim be compensated for all losses actually incurred.[3]

In *State v. Hitchmon*, 678 So. 2d 460, 462 (Fla. 3d DCA 1996), the court said: "It is not permissible to deny restitution because the victim intends to file, or has actually filed, a civil lawsuit for the same loss." The court added: "The restitution statute was adopted for the benefit of crime victims. It is intended to provide an additional alternative to reimburse a crime victim," and "[a] crime victim is allowed to pursue *both* a restitution remedy *and* a civil remedy." *Id.* (emphasis in original). The court re-emphasized: "The statute is very clear that the remedies of restitution and civil suit are not mutually exclusive; the crime victim may pursue both." *Id*. at 462-63.

In the instant case, it is clear that Kirby's victim was not compensated for all of the losses actually incurred. An award of

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[3]Although in *Glaubius*, this Court struck an award which appeared excessive based on the record evidence, the principles underlying that decision apply to the instant situation where the amount awarded under the restitution statute - none - is woefully inadequate.

restitution is available to provide adequate compensation, independent of any civil settlement. *Glaubius; Hitchmon*. There is no danger that Kirby will be required to pay his victim twice for the same damages or losses, for it is just as true in Kirby's case, as it was in *Vereen*, that any restitution paid shall be set off against the "independent civil recovery." *See* 703 So. 2d at 1194. An award of restitution, to be off set by any amounts paid under the civil agreement, is essential to adequately compensating Kirby's victim. Anything less "would violate the clear requirements of the statute." *State v. Vandonick*, 800 So. 2d at 241 (Northcutt, J., dissenting). *See* § 775.089(1)(a) & (8), Fla. Stat. (1999).

Moreover, the State's interest in retribution, rehabilitation, and deterrence are independent of the victim's interest in adequate compensation for his injuries. Therefore, "a victim . . . is not empowered to foreclose the State's demand that the perpetrator pay full restitution." *Vandonick*, 800 So. 2d at 241 (Northcutt, J., dissenting). It is the responsibility of the trial court to set an adequate amount of restitution in each criminal case. § 775.089(1)(a), Fla. Stat. (1999). The State submits that the victim cannot relieve the court of that duty, and certainly not through the settlement of any civil claim. *See Vandonick*, 800 So. 2d at 241 (Northcutt, J.,

dissenting).

A victim's attempt to waive restitution does not bar an award under the restitution statute by a criminal trial court; rather, restitution is mandated by law. *See Cheatham v. State*, 593 So. 2d 270, 271-72 (Fla. 4th DCA 1992)[criminal defendant sought to avoid restitution award, informing the court "that the victim had waived restitution" and contesting "the payment of restitution to two insurance companies." Nonetheless, the trial court imposed restitution, and its ruling was upheld on appeal where defendant claimed his ability to pay was not fully considered. The district court said in pertinent part: "[S]ection 775.089(1)(a) makes the imposition of restitution mandatory . . ..."]. The State's interest in an award of restitution under § 775.089 extends well beyond the interests of the victim in a civil proceeding.

The victim cannot bargain away the statutory right to restitution, much less the court's statutory obligation to impose it. In *Vandonick* and *Kirby*, there existed a vested, statutory right to restitution at the time the civil agreements were made, subject to the contingency of a subsequent conviction in the criminal cases.[4] The State's interest in full and complete

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[4]A conviction followed in both cases, *Vandonick* via a plea, and *Kirby* via a jury trial.

compensation for the victim's losses and in retribution from the criminal, as well as deterring such future conduct by him and rehabilitating him are well-recognized and vital components of restitution under Florida law. *Glaubius*.

Moreover, the obligation under the statute is mandatory. *J.O.S.*, 689 So. 2d at 1063. The burden was on Kirby to make the State a party to any agreement affecting an award of restitution under the criminal law, and the failure to obtain the State's agreement to the civil settlement can not defeat the vested statutory interest in restitution.[5] To the extent that *Vandonick* held otherwise, it was incorrectly decided.

Under the statute, restitution adequate to compensate the victim must be imposed "to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system." *Glaubius*, 688 So. 2d at 916. Where, as here, the settlement was for less than the amount needed to fully compensate the victim for his damages and losses, any order of restitution based on the amount of the civil settlement would violate the restitution statute. *See Vandonick*, 800 So. 2d at 241 (Northcutt, J., dissenting). Once the amount mandated by the statute is determined and

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[5]Moreover, it appears that under the statute, any waiver of restitution could be valid only where "clear and compelling reasons" existed which would authorize the judge "not to order such restitution." § 775.089(1)(a), Fla. Stat. (1999).

imposed by the criminal court, Kirby will be entitled to an offset for any amounts he has paid under the civil settlement agreement. *Vereen*. To the extent that the holding in *State v. Vandonick*, 800 So. 2d 239 (Fla. 2d DCA 2001) is to the contrary, it should be quashed.

CONCLUSION

Based on the foregoing argument and authority, Respondent respectfully requests that this Honorable Court affirm the decision of the Fifth District Court of Appeal and remand this case for a trial court hearing at which restitution adequate to compensate the victim and to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system shall be awarded.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

____

JUDY TAYLOR RUSH
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 0438847

____

KELLIE A. NIELAN,
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 618550
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(386) 238-4990
(386) 238-4997 (FAX)

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing brief on jurisdiction has been furnished to Lyle Hitchens, Assistant Public Defender, Attorney for Petitioner, 112 Orange Ave., Ste. A, Daytona Beach, FL 32114, by delivery to the basket of the Office of the Public Defender at the Fifth District Court of Appeal, on this ____ day of February, 2003.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

____
JUDY TAYLOR RUSH,
COUNSEL FOR RESPONDENT

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________________________________/

APPENDIX

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

JUDY TAYLOR RUSH
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 0438847
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(386) 238-4990 (Phone)
(386) 238-4997 (Fax)

COUNSEL FOR RESPONDENT