IN THE SUPREME COURT OF FLORIDA

GARY KENT KIRBY,	)	
	)	
Petitioner/Appellee,	)	
	)	
versus	)	S.CT. CASE NO. SC02-1511
	)	
STATE OF FLORIDA,	)	DCA CASE NO. 5D01-2567
	)	
Respondent/Appellant.	)	
_____)		

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERIT BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Gary Kent Kirby, the defendant/Appellee, was charged by an information with driving under the influence resulting in serious bodily injury to another, a third degree felony. (Vol. I, page 7) At the conclusion of the jury trial on February 23, 2001, the jury returned a verdict finding the defendant guilty, as charged in the information. (Vol. I, page 97)

There was a restitution hearing before the Honorable A.W. Nichols, III, Circuit Judge, on August 13, 2001. The State conceded that the victim already had signed a civil release and settlement agreement for $25,000. Additionally, there had been a payment to the victim of $6,900 or $7,900 as payment for the loss of his motorcycle. (Vol. I, pages 123-124)

Based on the authority of State v. Vandonick, 800 So. 2d 239 (Fla. 2d DCA 2001), the trial court entered an order which read in part: As in Vandonick, the victim in this case executed a release when insurance payments were made to him. The release specifically released the defendant and his wife from further liability. Accordingly [the trial] Court declined to enter any restitution in this case. (Supp. Record, page 136) The State filed a notice of appeal. (Vol. I, page 115).

In an opinion dated June 14, 2002, relying on the dissent in Vandonick, supra, the Fifth District Court of Appeal reversed the trial court's denial of

restitution and remanded the case for an evidentiary hearing. On July 2, 2002, a Notice To Invoke Discretionary Jurisdiction was filed with this court, and a jurisdictional brief was filed on July 10, 2002, by undersigned counsel. An order accepting jurisdiction and setting oral argument was issued January 9, 2003.

SUMMARY OF THE ARGUMENT

The trial court ruled correctly in denying additional restitution where the victim had executed a full and complete release. The trial court's rulings came to the appellate court with the presumption of correctness and should be affirmed if there is a valid reason to do so. Carraway v. Armour, 156 So. 2d 494 (Fla.1963). The valid reason for affirming the trial court's ruling is the majority opinion in State v. Vandonick, 800 So. 2d 239 (Fla. 2d DCA 2001) (The Second District Court of Appeal, Salcines, J., held that victim was precluded from recovering in restitution more than she agreed to accept in the civil action.)

ARGUMENT

THE TRIAL COURT'S ORDER ON RESTITUTION WAS PROPER.

Standard of Review: On appeal, a reviewing court examines a trial court's order of restitution for an abuse of discretion. Moore v. State, 664 So. 2d 343, 344 (Fla. 5th DCA 1995).

ARGUMENT

The record reads:

> THE COURT: Well, I think, as both of you say, this Court has indicated this is a case of first impression in Florida, and since it is pretty close, if not exactly close to the wording that we have-- our wording on the release says, releases to anyone who might be liable from any and all claims demanding damages, actions, causes of action, or suits of any kind and nature, whatsoever, and particularly for the injuries known and unknown, [to] both person and property, which resulted from the particular accident that was involved in this case, and I think that forecloses it.

(Vol. 1, page 132)

The trial court relied on State v. Vandonick, 800 So. 2d 239 (Fla. 2d DCA 2001), where:

> Vandonick was charged with reckless driving and third-degree felony battery for an incident which occurred on December 24, 1998. An amended information alleged that, while driving an automobile,

> Vandonick injured Alice Jane Berry by intentionally touching or striking her. On May 11, 1999, a release and settlement agreement was executed by the victim's father, James S. Berry, individually and for and on behalf of Ms. Berry, an incapacitated person. This agreement stated that for the sum of $50,000.00, Vandonick and his insurance company, Allstate Insurance Company, were released and forever discharged...

Similarly, at the restitution hearing herein, the State conceded there was a $25,000 release and settlement agreement. In addition to the $25,000 paid for medical bills, there was an additional $6900 or $7900 [paid] for the motorcycle. (Vol. 1, pages 123-125)

Vandonick, supra, reads:

> This is a case of first impression in Florida. However, we note that settlements are governed by the rules for the interpretation of contracts. Robbie v. City of Miami, 469 So. 2d 1384, 1385 (Fla.1985). Such agreements are highly favored and will be enforced whenever possible. Id. Upon entering into the release and settlement agreement, any rights and duties the parties had at that moment were merged into the agreement, unless otherwise stated. See J. Allen, Inc. v. Castle Floor Covering, Inc., 543 So. 2d 249, 251 (Fla. 2d DCA 1989).

There apparently was no reservation in the release to allow the sentencing court to impose additional restitution. As such, Vandonick, supra, is controlling. Vandonick was not wrongly decided, as argued by the State. (State's initial brief, page 7)

The State argues the medical expenses exceeded the $25,000 settlement. (State's initial brief, page 3) But, the court similarly noted in Vandonick that the victim's medical bills far exceeded the $50,000.00 [settlement] figure; however, the restitution amount was limited to that which Vandonick and Ms. Berry had previously agreed:

> Upon entering into the release and settlement agreement, any rights and duties the parties had at that moment were merged into the agreement, unless otherwise stated. See J. Allen, Inc. v. Castle Floor Covering, Inc., 543 So. 2d 249, 251 (Fla. 2d DCA 1989), as cited in Vandonick.

The opinion of the Fifth DCA should be reversed and the trial court's order should be reinstated.

CONCLUSION

Based on arguments and authorities cited herein, Appellee respectfully requests that this Honorable Court reverse the opinion of the Fifth District Court of Appeal, reinstating the trial court's ruling.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Charlie Crist, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, in his basket at the Fifth District Court

of Appeal, and mailed to Gary Kent Kirby, 219 Perry Street, Post Office Box 265, Pomona Park, Florida 32112, on this 3rd day of February, 2003.

_____
LYLE HITCHENS
Assistant Public Defender

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_____	)	

CERTIFICATE OF FONT

I CERTIFY that the size and style of the type used in this brief is 14 point TIMES NEW ROMAN, a font that is proportionately spaced.

Respectfully submitted,

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