

IN THE SUPREME COURT OF FLORIDA

TIMOTHY T. KOILE,)	
)	
Petitioner,)	
)	
vs.)	FSC CASE NO. SC05-132
)	
STATE OF FLORIDA,)	FIFTH DCA CASE NO. 5D04-91
)	
Respondent.)	
_____)	

**ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL**

PETITIONER’S REPLY BRIEF

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SEVENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The initials “IB” as used herein shall refer to the Initial Brief by Petitioner, with “AB” referring to the state's Answer Brief, both filed in this Court, and with the initials “RB” referring to the Appellant's Reply Brief filed in the Fifth District Court of Appeals.

ARGUMENT

ISSUE ONE: DOES SECTION 775.089, FLORIDA STATUTES (2003), AUTHORIZE A RESTITUTION AWARD FOR THE ESTATE OF A MURDER VICTIM OF AN AMOUNT CONSISTING OF THE LOST FUTURE INCOME OF THE VICTIM?

The state continues its reliance upon the per curiam affirmed opinion in Critsley v. State, 573 So.2d 167 (Fla. 4th DCA 1991). As mentioned below, Dept. of Legal Affairs v. Dist. Ct. of Appeal, 434 So.2d 310 (Fla. 1983) indicates “PCA” opinions should not be cited as binding authority. Furthermore, Critsley relied upon Oregon and Iowa cases for precedent, both of which were based upon very different state statutes, as discussed in Petitioner's Initial Brief (IB 17).

While the state cites two Florida cases¹ as “direct authority for the restitution

¹ State v. Williams, 805 So.2d 1082 (Fla. 5th DCA 2002); Graham v. State, 720 So.2d 294 (Fla. 5th DCA 1995)

award in this case,”² Petitioner has pointed out³ that the first case involved a living victim who had already lost wages after being beaten; the second case, where the \$500 restitution order was actually vacated for lack of documentation from the robbery victim, also appears to have involved past wages and a living victim.

The state also cites Nordgren v. State, 532 So.2d 552 (Fla. 4th DCA 1989) for support, but respectfully, the case does not indicate what the restitution was for, and does not indicate that an estate was the intended recipient, as opposed to medical providers, a funeral home, or some other provider authorized by statute.

Petitioner does not agree with the state's assertion that Mr. Koile would limit restitution in death situations to funeral expenses only or would insert the word “or” between the subparagraphs in Section 775.089(2)(a), Florida Statutes (2001) to reach that result. (AB 13) As argued in Mr. Koile's Reply Brief below, the legislature could well have intended that restitution in these instances be made to the parties owed the money for medical care before the death, or therapy, or prescription drugs or hospitalization, etc. (RB 13-14) Those were real, already-existing costs encountered by third parties or the individual victim before death that should be ordered, under subsections Section 775.089(2)(a) 1 and 2.

² (AB 18)

³ (RB 13)

However, subsection 3 changes the pattern of wording from “Pay the cost” to “Reimburse the victim for income lost by the victim...” and subsection 4 changes the wording yet again, to read “...death of a victim...”. Section 775.089(2)(a), Florida Statutes (2001)(emphasis added) These minor wording changes between subsections are small, but significant when determining legislative intent, and do not require the addition of words as the state suggests. (AB 13) The word “the” followed by victim, singular, suggests one entity is intended in subsection 3 regarding lost income. The word “a” in subsection 4 broadens the coverage again, so to speak, so that when a victim dies, the surviving persons suffering monetary expenses related to the funeral, may recover for monies paid out or services rendered.

The state argues these subsections are conjunctive, not disjunctive. (AB 14) Petitioner respectfully disagrees, and submits that while you must read them in *pari materia*, they are independent provisions, neither conjunctive nor disjunctive. There is no “or,” “and,” or comma following each subsection. This does not lead to the harsh result suggested by the Respondent, because of the clearly different wording of subsection 3. (AB 13-15)

Although the prosecution attempts to paint an “absurd” result that would be reached “under Petitioner's interpretation,” Mr. Koile does not adopt the state's

“all or nothing” interpretation in a reading of the statute. It may possibly serve the government's purpose of arguing that only its interpretation will avoid a collapse of the whole statute, but it is overly simplistic and does not appreciate the drafter's selection of wording for subsections 3 and 4 that is very different from that in the first two subsections.

It is notable that all subsections, except 3, are dealing with “costs” that have occurred. The words “pay” “costs” appear in each of those three subsections. They are reimbursements to the third party or the actual crime victim in the case of the first two subsections. If the crime victim is alive and participating in ongoing therapy or medical care, then the costs continue to accrue and conceivably, be reimbursed through restitution. Subsection 3's wording is different, as stressed above—it is the only provision using the word “reimburse.”

The word reimburse means to pay back someone for an expense encountered:

To pay back, to make restoration, to repay that expended;
to indemnify, or make whole.

BLACK'S LAW DICTIONARY 1452 (rev. 4th ed. 1968)

To repay (money spent); refund.
To pay back or compensate (another party) for money
spent or losses incurred.
-- re- + imburse, to put in a purse, pay (from French

embourser, from Old French : en-, in from Latin in-; see **in-** + borser, to get money from borse, purse, from Late Latin bursa, bag.)

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, (4th ed. 2000)

The prefix “re-” is used with the meaning “again” or with the meaning “back” or “backward.” THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (College ed. 1969) Therefore, the basic English used in this particular subsection makes it clear that the individual crime victim is to be reimbursed for the income “lost by the victim as a result of the offense.” To construe this short bit of wording to create, in essence, a wrongful death statute with a forward looking remedy which does not reimburse, but pays ahead based upon various projections and calculations not only assumes a lot, but should cause one to wonder why the Wrongful Death Act needs to be so wordy by comparison.

A look at one recent case where the defendant sought to set off his restitution responsibility for funeral costs against a civil recovery demonstrates both the forward-looking aspects of the Wrongful Death Act and the type of details missing from the criminal restitution statute. In discussing the set off provisions of Section 775.089(8), Florida Statutes (1997), the fourth district contrasted the general wording of the restitution statute and its coverage of funeral expenses with the Wrongful Death Act's provisions:

Of course by the plain terms of this statute, the amount of restitution is set off against the wrongful death recovery, while in this case defendant argues that the wrongful death recovery should be set off against the amount of the restitution. Nevertheless, the purpose of the statute is clear to us: to prevent the victim from forcing the defendant to pay twice for the same damages.

On the other hand, the wrongful death statute specifies precisely what damages may be recovered in a wrongful death action:

(1) Each survivor may recover the value of lost support and services from the date of the decedent's injury to her or his death, with interest, and future loss of support and services from the date of death and reduced to present value. In evaluating loss of support and services, the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered. In computing the duration of future losses, the joint life expectancies of the survivor and the decedent and the period of minority, in the case of healthy minor children, may be considered.

Weinstein v. State, 745 So.2d 1085, 1086 (Fla. 4th DCA 1999)

The criminal restitution provision at Section 775.089(2)(a)3, Florida Statutes is also notable for its lack of the word “future” in describing the income lost by a crime victim.

In summary, Petitioner agrees with Respondent that there does not appear to

be a logical reason why an offender should not be required to compensate a decedent's estate or family. (AB 19) It appears that the legislature has seen to this via the Wrongful Death Act, which has the avowed purpose of shifting “the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer.” § 768.17, Fla. Stat. (2004)

Its definition of “survivors” appears to be more precise concerning those a decedent leaves behind than the word “victims” in Chapter 775, which seeks to serve a variety of purposes. The argument that the restitution statute is not designed to saddle the criminal courts of this state with the complexities of calculating wrongful death benefits seems supported by the fact that in the instant appeal, the Fifth District has had to remand Mr. Koile's case for “reconsideration and recalculation” of the lost future wages—the trial court was operating in a statutory vacuum of sorts.

The Wrongful Death Act applies to felonious deaths⁴ and the body of caselaw and statutory support is so great, by comparison, that even the factual scenario in Mr. Koile's case, where the wife is the suspected murderess who could also benefit from certain death benefits, is not without precedent and remedies.⁵

⁴ § 768.19, Fla. Stat. (2004)

⁵ Anderson v. Anderson, 468 So.2d 528, 530 (Fla. 3d DCA, 1985)(“We note

Meanwhile, the wording in Chapter 775 could be made more precise, without a doubt, and this could be brought to the legislature's attention. However, as it stands, Petitioner maintains that it is clear enough what limited lost income was intended through the restitution statute, and any remaining doubt should be resolved in the defendant's favor.

ISSUE TWO: DOES SECTION 775.089, FLORIDA STATUTES (2003), AUTHORIZE A RESTITUTION AWARD FOR THE LOST WAGES OF A NEXT OF KIN VOLUNTARILY ATTENDING THE MURDER TRIAL OF THE PERSON ACCUSED OF KILLING THE VICTIM?

As Respondent notes, Mr. Koile agrees with the ruling of the district court where it concluded that the trial court erred in awarding restitution for the lost wages of the victim's parents for the time spent attending one or both codefendants' trial.⁶ The decedent's father testified he suffered travel expenses of \$370.33 and

at the outset that appellant is convinced in her own mind that appellee/widow was responsible for the murder of Lance Anderson. It is that settled belief which forms the basis for the petition for removal and for all of the issues raised here on appeal. Appellant asserts: 1. that appellee's interest in the estate of her deceased husband is subject to forfeiture because of her unlawful and intentional participation in his death, and 2. that the survivors have a wrongful death action against appellee, which action can only be brought by the personal representative of the estate.”)

⁶ Mr. Koile pled out at some point during the trial, while his codefendant proceeded to verdict.

parking expenses of \$88.00 to attend the trial and lost three weeks of income, or \$12,000.00. He said he testified only one day during the trial but watched the trial the remainder of the time, along with his wife who stated she suffered missed income of \$1,500.00 and also only testified one day. (R225-226; 234; 248; 250)

Mr. Koile's trial attorney objected and asked the trial judge to at least differentiate between the time before Mr. Koile entered his plea, and the time after, as the codefendant's trial continued. (R 351)

While the state is suggesting an “abuse of discretion” standard of review, Petitioner submits that at this point, where the issue involves the interpretation of statutes, the standard is de novo. B.Y. v. Department of Children and Families, 887 So.2d 1253, 1255 (Fla. 2004)

As with the first issue, the state is arguing the definition of 'victim' to be all things for all people. (AB 23) Conceivably, if trial security dictated a re-routing of traffic near the courthouse, an affected restaurant owner would be a 'victim', with this approach. The state piggybacks this broad definition with the constitutional right of certain relatives to attend trials, and then depends upon the courts' willingness to create an entitlement clause that would somehow be appended to the constitutional amendment which read simply:

(b) Victims of crime or their lawful representatives,

including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

Art. 1 §§ 16, Fla. Const. (1988) In support of its position, the state again cites to other jurisdictions with their variously worded statutes.

Having a constitutional right to be present in the courtroom is certainly not the same as creating a new funding program or cause of action and the provision cited by the state simply does not create the restitution “right” that the state suggests. The preamble to Chapter 88-96, Laws of Florida did not suggest this additional entitlement.

Nevertheless, the state also uses the simple amendment wording above to argue that this court should disregard caselaw⁷ unfavorable to its position because it predated this unrelated constitutional amendment of 1988.⁸ (AB 28) There is nothing in the amendment to suggest that this Court should engage in legislating new laws for victims or their families to be reimbursed by others for their exercise of constitutional rights.

⁷ Cliburn v. State, 510 So.2d 1155 (Fla. 3d DCA 1987) and supporting caselaw.

⁸ Appellant notes that the case of P.H. v. State, 774 So.2d 728 (Fla. 2d DCA 2000), denying lost wages to a victim's mother, does not predate the constitutional

The state cites Smith v. State, 801 So.2d 1043 (Fla. 5th DCA 2001) as one of the few Florida cases supportive of its position, but Smith only concerned reimbursement of the actual victims for their mileage and board and relied upon Neal v. State, 688 So.2d 392 (Fla. 1st DCA 1997) for authority, which only dealt with reimbursing an auto theft victim for her mileage in coming to testify. Likewise, Graham v. State, 720 So.2d 294 (Fla. 5th DCA 1998) also involved the actual victim and not family members. Finally, the state cites Hollingsworth v. State, 835 So.2d 373 (Fla. 1st DCA 2003)—however, that case involved a child victim whose mother missed work because of the emotional turmoil in the house caused by the defendant's offense. This bore a “significant relationship” to the crime, as the Fifth District noted, compared to the instant appeal.

Respectfully, Respondent is incorrect in suggesting that this court should disregard some adverse caselaw as “distinguishable” because they involved property crimes. (AB 27) If this were true, some of the state's own cited caselaw should likewise be ignored. However, such a limitation would be illogical: if a victim has to miss work income and pay travel expenses to testify at trial, why would it matter whether the crime involved bodily injury or not? However, Section 775.089(2)(b), Florida Statutes (2003) makes it clear that whatever lost

change or restitution statute change.

income can be ordered in bodily injury cases can also be ordered in non-injury cases.

It is interesting that the state was prepared to accept that limitation, however, for it demonstrates the fallacy in attempting to argue that this restitution statute can be all things to all people. Instead, for both this Issue, and Issue One, *supra*, Petitioner would submit it only makes a difference whether the actual crime victim was injured, as to whether that same individual actual victim either *shall* benefit from court-ordered restitution⁹ or *may* have the court order it.¹⁰ If the crime victim were injured by the offender and missed work because of that, then the legislature could have intended to force the trial judge to order reimbursement for the wages lost. However, if there was no injury causing the missed work, then the restitution became discretionary in the legislature's plan.

This makes some sense with regard to the actual crime victim. However, the distinction would appear irrelevant if the state is correct in arguing that “victim” can mean the actual sufferer at one point of a sentence and suddenly change to become anyone suffering direct or indirect monetary loss a few words later.

If the legislature decides to expand upon its restitution statute, there will be

⁹ § 775.089(2)(a), Fla. Stat. (2003)

¹⁰ § 775.089(2)(b), Fla. Stat. (2003)

a forum for the affected groups to lobby issues dealing with the need for limits on the type and duration of lodging, and the cost of meals consumed, etc. This is particularly true since the prosecution's position would also suggest that if there is a constitutional right to reimbursement for exercising a constitutional right, then the people of Florida should pay this where indigent defendants cannot, to ensure that everyone has equal access to view criminal trials, regardless of the defendant's financial situation.

Under the state's "but for the crime" test, and its proposed expansion of the restitution statute, it could be broadened to include paying travel and lost wages to the jury, for example, whose members had to leave paying jobs to appear for jury selection. And, if understandably, the decedent's cousins or aunts and uncles all wanted to attend, where would the state draw the line concerning restitution to those "next of kin" for their travel expenses and missed wages?

Appellant respectfully submits these kinds of determinations are properly left to the legislative branch.

CONCLUSION

Petitioner respectfully submits that both of the certified questions from the Fifth District Court of Appeals should be answered in the negative and the provisions of the trial court's restitution order which concern projected lost income and three weeks of lost wages and travel expenses should be stricken.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Charles J. Crist, Jr., Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to: Mr. Timothy T. Koile, Inmate # 443192, C2-123-S, New River Correctional Institution - East, 7819 N.W. 228th Street, Raiford, Florida 32026-3120, this 28th day of April 2005.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced Times New Roman.

MARVIN F. CLEGG
ASSISTANT PUBLIC
DEFENDER