IN THE SUPREME COURT OF FLORIDA

JEAN CLAUDE NOEL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC14-274; SC14-1952

ON DISCRETIONARY REVIEW FROM THE
THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT OF FLORIDA

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

This brief will refer to Petitioner as such, Defendant, or by proper name, e.g., "Noel." Respondent, the State of Florida, was the prosecution below; the brief will refer to Respondent as such, the prosecution, or the State. The following are examples of other references:

IB = Initial Brief

R = Record on Appeal

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations.

STATEMENT OF THE CASE AND FACTS

Respondent generally accepts Petitioner's Statement of the Case and Facts, but makes the following additions and clarifications:

At sentencing, the trial court asked the prosecutor about the co-defendants in this matter and how their cases were resolved (R31, 2688-2691). The court asked Petitioner if he was in a position to make any up-front restitution (R31, 2691-2692). It noted that the chart prepared by the State showed that Petitioner received $205,356.02, or 16.73 percent of the proceeds (R31, 2691-2692).

Petitioner responded that he had been incarcerated for three years (R31, 2691-2692). He said that his ability was limited, but "there would be an amount that could be negotiated" (R31, 2692). The trial court said that it was not looking for a negotiation but wanted to know if there was a reasonable amount that he could pay without having his family starve (R31, 2692). Defense counsel told the court that by negotiate, Petitioner meant with his family members to raise money (R31, 2692). The trial court told Petitioner that if he had an idea, to give it a range (R31, 2693). Petitioner responded that a lump sum would be "somewhere between twenty to forty thousand dollars plus other things" (R31, 2693).

Defense counsel then continued with argument distinguishing this case from Co-Defendant McNamara's, as well as the other co-defendants'(R31, 2693-2708). Counsel contended that Petitioner's role was significantly less than the others (R31, 2708). The prosecutor replied with argument that Petitioner was as culpable and that he was the one who had the skill in the operation (R31, 2709-2714). The trial court asked during this argument what monetary amounts on the chart admitted into evidence did Petitioner receive (R31, 2701). The prosecutor went through the amounts, and the trial court added them. Defense counsel then agreed that Petitioner received about $189,795 from the predicate acts (R31, 2704-2705).

The State asked for a term of at least fifteen years in prison (R31, 2713). The defense asked for the low end of the guidelines - 3.8 years (R31, 2714-2715). The prosecutor argued that Petitioner is responsible in terms of restitution for amounts that were obtained in the overall scheme and not just the portion directly received (R31, 2716-2726). After Petitioner's wife spoke on his behalf to the court, there was a discussion of Petitioner's prior offenses (R31, 2728, 2733).

The trial court introduced the sentence as follows:

> Okay. All right. Here's the sentence with – and I'm hoping that this is a fair sentence. And I'm hoping it accomplishes something for the victims that have lost so much as a result of this whole incident. And I hope it gives Mr. Noel a chance to restart his life, as well, without continuing problems.

(R31, 2734).

It announced the sentence as 10 years in prison followed by 10 years probation, but said that if Petitioner made restitution of $20,000 within sixty days, the prison portion of his sentence would be mitigated to 8 years (R31, 2734). It also ordered as a condition of probation, restitution in the amount of $650,000 based on predicate acts for which Petitioner was convicted (R31, 2734). It also ordered as a condition of probation that 15% of Petitioner's net pay go towards restitution (R31, 2734).

Defense counsel only asked about the time period in which to pay the $20,000 (R31, 2734-2735). The trial court reiterated 60 days, and said that Petitioner would receive credit towards the total amount of restitution (R31, 2735).

SUMMARY OF ARGUMENT

Petitioner's rights were not violated when the trial court sentenced him to ten years incarceration, followed by ten years probation, but extended him an opportunity to mitigate the sentence to eight years by payment of restitution. Petitioner explicitly told the trial court that he could make up-front restitution in the amount of $20,000 to $40,000. At the time of the statement, the trial court was making a general inquiry, and was not pressuring Petitioner or indicating that sentencing depended on his response. Instead, the trial court continued with the sentencing hearing, and considered defense counsel's

arguments and Petitioner's wife's statements. At the conclusion of the hearing, it announced Petitioner's sentence, but offered him an incentive to pay up-front restitution. The actual sentence, though, was not conditional, but was firm unless Petitioner brought the matter of modification before the court.

ARGUMENT

PETITONER'S RIGHTS WERE NOT VIOLATED WHEN THE TRIAL COURT SENTENCED HIM TO TEN YEARS INCARCERATION, FOLLOWED BY PROBATION, BUT EXTENDED HIM AN OPPORTUNITY TO MITIGATE THE SENTENCE TO EIGHT YEARS BY PAYMENT OF RESTITUTION, WHICH PETITONER EXPLICITLY ASSERTED THAT HE COULD MAKE.

A. Due Process is the appropriate analysis by which to consider the impact of a defendant's indigency on sentencing.

In Bearden v. Georgia, 461 U.S. 660, 662 (1983), the trial court withheld adjudication in a burglary and theft case and sentenced the defendant to probation conditioned on the defendant paying a $500 fine and $250 in restitution, with $100 to be paid that day, $100 to be paid the next day, and $500 to be paid in the next four months. Before the balance was due, the defendant notified the probation office that he was going to be late in making the payment because he could not find work. Bearden, 461 U.S. at 663. The State filed a petition to revoke the probation, and, after a hearing, the trial court revoked the probation and sentenced the defendant to serve the remaining portion of the probationary period in prison. Id.

Ultimately, the Supreme Court determined that the trial court had sentenced the defendant to imprisonment because of his

inability to pay without first considering the reasons for the inability or the propriety of reducing the fines or extending the time for payment, and that this violated fundamental fairness. Id. at 574.

In footnote 7 of the opinion, the Court stated that it had previously applied considerations of procedural and substantive due process to probation and parole revocation proceedings. It noted that it had addressed in an earlier opinion, Gagnon v. Scarpelli, 411 U.S. 778 (1972), "fundamental fairness - the touchstone of due process -. . . ." Id. at 666, n. 7. It stated that it was addressing in the case before it whether a court can revoke probation for the failure to pay a fine or restitution when there was no evidence that the defendant was at fault for the failure to pay or that alternate means of punishment are inadequate. Id. In footnote 10, the Court stated that numerous decisions have recognized that basic fairness forbids the revocation of probation when the probationer is without fault for his failure to pay. Id. at 669, n. 10.

By "fundamental fairness" and "basic fairness," the United States Supreme Court was obviously referring to the principles of substantive and procedural due process. In footnote 8 of the opinion, the Court explained:

> A due process approach has the advantage in this context of directly confronting the intertwined question of the role

> that a defendant's financial background can play in determining an appropriate sentence. When the court is initially considering what sentence to impose, a defendant's level of financial resources is a point on a spectrum rather than a classification. Since indigency in this context is a relative term rather than a classification, fitting "the problem of this case into a equal protection framework is a task too Procrustean to be rationally accomplished." [citation omitted]. The more appropriate question is whether consideration of a defendant's financial background in setting or resetting a sentence is so arbitrary or unfair as to be a denial of due process.

In the body of the opinion, the court recognized that past precedent, including Williams v. Illinois, 399 U.S. 235 (1970) and Tate v. Short, 401 U.S. 395 (1971), had rested primarily on an equal protection analysis. 461 U.S. at 665. However, it stated that the question asked under such analysis, the circumstances under which a defendant's indigent status might be considered, is substantially similar to asking the due process question of whether and when it is fundamentally unfair for the State to revoke probation when an indigent defendant is unable to pay a fine. Id. at 666. This is where "[d]ue process and equal protection principles converge in the Court's analysis in these cases." Id. at 665.

In the decision below, the majority properly recognized that the Bearden decision "suggested that a due process analysis was superior to an equal protection approach for evaluating the impact of a defendant's indgency in the sentencing context." Noel v. State, 127 So. 3d 769, 773 (Fla. 4th DCA 2014). Other

courts have similarly recognized this point. See, e.g., State v. Todd, 208 P.2d 303, 305 (Idaho App. 2009); State v. Farrell, 676 P.2d 168, 176 (Mont. 1984).

B. The sentence in this case is not conditional, and up-front restitution was not ordered.

When the trial court did announce the sentence, it made clear that it was thinking of the victim's injury and that it was hoping to structure a sentence that would allow Petitioner to move forward. It first announced the sentence, and then offered the opportunity for mitigation. Obviously, the ten year sentence was the sentence that the trial court deemed appropriate in this case. It was not a penalty for poverty, but, instead, mitigation was an incentive for up-front restitution.

Hence, Petitioner's sentence was not a conditional sentence. In Hunt v. State, 983 N.E.2d 196 (Ind. App. 2013), the court articulated:

> Only after imposing an executed sentence did the trial court inform Hunt that if he paid the victim back, the trial court would reconsider how much executed time Hunt would serve. [citation omitted]. We do not consider this to be a conditional sentence. Hunt's sentence was explicit and unconditional: 545 days executed, with credit for time served, and 270 days suspended to probation. The trial court simply informed Hunt that if he ever did pay the restitution, it could modify his sentence.

The court in Patton v. State, 458 N.E2d 657, 660 (Ind. 1st Dist. 1984) observed, "[c]onversely, in the instant case, there was no implicit determination by the sentencing court, as in Bearden,

that imprisonment is not required. That determination is apparently the cornerstone of the Bearden decision."

Here, the trial court set out the sentence it deemed to be warranted, and only then offered a means of mitigation based on Petitioner's representation that he could pay up-front restitution. The trial court did not order Petitioner to pay up-front restitution. It just stated that it would recognize it if Petitioner did. If Petitioner had paid the restitution, he would have had to bring this act before the trial court by way of a motion to mitigate sentence or some other vehicle.

C. The trial court properly considered the victims' financial injury in sentencing, and any restitution as a mitigating factor. It did not need to consider Petitioner's ability to pay at the time of sentencing because it did not order up-front restitution, and, therefore, was not later enforcing restitution.

The Supreme Court has never held that there may not be differences in punishments between defendants. "The mere fact that an indigent in a particular case may be imprisoned for a longer time than a non-indigent convicted of the same offense does not, of course, give rise to a violation of the Equal Protection Clause." Williams v. Illinois, 399 U.S. 235, 243 (1970). "The Constitution permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical

sentences." Id. Courts may consider a variety of factors in sentencing defendants.

One factor that a court may permissibly consider is the degree of irreparable harm that the defendant has caused the victims. United States v. Nathanson, 948 F. Supp. 2d 1055, 1062-1066 (C.D.Calif. S.D. 2013)(trial judge stated in sentencing that it was troubling that there was no possibility of restitution). In United States v. Rangel, 697 F. 3d 795, 803 (9th Cir. 2012), the court held that a sentencing court is empowered to consider whether a victim will receive restitution from a defendant. It held that the sentencing court in that case did not err in considering lack of restitution because its focus was on the impact on the victims due to the crime and not on the defendant's inability to pay. Rangel, 697 F. 3d at 804.

The Florida Legislature clearly contemplated the degree of injury to victims who have been subjected to theft and other offenses, as well as the need to try to compensate for some of the damage. Section 775.089(1)(a), Florida Statutes (2009) mandates that the trial court order the defendant to make restitution. Under the White Collar Crime Victim Protection Act, section 775.0844, Florida Statutes (2009), which applies to this case, the Legislature emphasizes that a person convicted of an aggravated white collar crime is liable for all court costs and shall pay restitution to each victim of the crime. It

provides that the court may order continued probation for a defendant convicted under the section for up to 10 years or until full restitution is made. See 775.0844(8)(a), Florida Statutes (2009).

Section 921.185, Florida Statutes (2009), specifically provides in part that the trial court, in its discretion, shall consider any degree of restitution a mitigation of the severity of an otherwise appropriate sentence. A victim who does not receive restitution for years may not be truly compensated, even when paid in "full." See State v. Whitaker, 797 P.2d 275, 282 (N.M. App. 1990). When the sentencing court encourages a defendant to pay restitution, it awakens a defendant's sense of responsibility, thereby aiding in the defendant's rehabilitation. See State v. Palmer, 957 P.2d 71,75 (N.M. App. 1998)(rehabilitative purpose of restitution).

Not considering a defendant's ability to pay was a change to section 775.089(6), Florida Statutes, in 1995. See, e.g., Owens v. State, 679 So. 2d 44, 45 (Fla. 1st DCA 1996)(noting that 1995 amendment to statute provides that ability to pay "is to be considered only when there is an attempt to enforce the restitution order"). Any ability of appellant "to pay restitution is a nonissue when the court is weighing the need for restitution versus the need for imprisonment." Banks v. State, 732 So. 2d 1065, 1069 (Fla. 1999). Any ability to pay

determination is made at the time of enforcement, not when the court is weighing the respective needs. Id. at 1070; see also State v. Shields, 31 So. 3d 281, 282 (Fla. 2d DCA 2010)(ability to pay amounts ordered is factor considered at enforcement, not at imposition).

D. Due process was honored, and is not at issue, because petitioner expressly told the court that he had the ability to make an up-front restitution payment of $20,000 to $40,000.

In this case, due process was honored when the trial court asked Petitioner if he could make any up-front restitution, and, if so, what that amount would be. Petitioner, who had not been declared indigent at the time, responded that he could make restitution of $20,000 to $40,000. At the time of the interaction, the trial court did not indicate in any way that it was thinking in terms of mitigation. It did not place pressure on Petitioner to respond a particular way. Rather, it continued to conduct the sentencing hearing after the discussion.

Respondent contends that by stating an amount of up-front restitution that he could pay, Petitioner agreed to an amount, making the instant situation similar to a plea agreement. In State v. Jacobsen, 746 N.W.2d 405, 410 (N.D. 2008), the court stated that Bearden does not apply to a plea agreement. It reasoned that defendants have control over agreements. 746 N.W. 2d at 410.

The court in Dickey v. State, 570 S.E.2d 634, 701-702 (Ga. 2003) also emphasized the defendant's control. It stated that the defendant agreed to up-front restitution for a probated sentence. 570 S.E.2d at 636. It stated that if Petitioner had any doubt about his ability to make the payment, then he should have articulated it. Id. Accord Polly v. State, 748 S.E.2d 696, 701-702 (Ga. 2013). In United States v. Mitchell, 51 M.J. 490 (A.F. 1999), the court stated that the Due Process Clause does not protect a defendant who offers to make restitution when he cannot.

E. The trial court in this case did not exceed a statutory maximum or guideline in sentencing Petitioner

In the equal protection cases relied on by Petitioner and the dissent in the Fourth District, the United States Supreme Court addressed the fact that the sentences imposed exceeded the maximum otherwise set for sentencing. It was concerned that the defendant who was unable to pay a fine was sentenced beyond the ceiling set for the offenses. This concern is not present in the instant case.

In Williams v. Illinois, 399 U.S. 235 (1970), the defendant was ordered to serve time beyond the maximum term, which he had already served, because he was unable to pay the fine for petty theft. The Court held that the statutory ceiling placed on imprisonment for any offense should be the same for all

defendants irrespective of their economic status. 399 U.S. 244. It stated in footnote 20 of the opinion, "Thus inability to pay court costs cannot justify imprisoning an indigent beyond the maximum statutory term since the Equal Protection Clause prohibits expanding the maximum term specified by the statute simply because of inability to pay." Id. at 244 n. 20. The Supreme Court extended this holding to traffic offense fines in Tate v. Short, 401 U.S. 395, 398 (1971), in which the defendant was committed to a municipal prison farm when he was unable to pay the fines for his traffic offenses because of his indigency.

In this case, the trial court did not surpass the statutory maximum in sentencing Petitioner. As the Fourth District noted, Petitioner faced 30 years imprisonment, but the trial court sentenced him to 10 years imprisonment, followed by 10 years probation. Noel, 127 So. 3d at 771. What the trial court offered was an incentive for Petitioner to pay a lump-sum portion of the restitution up-front to benefit the victims prior to Petitioner proceeding to probation by stating that it would mitigate the sentence to 8 years if Petitioner paid the agreed–upon restitution amount within 60 days.

In other words, unlike in Williams and Tate, Petitioner was provided a means of mitigating the sentence. When Petitioner did not pay the restitution, his sentence was not mitigated. On the other hand, unlike in Williams and Tate, it was also not

aggravated because of the failure to pay. Instead, the sentence remained the same – the one imposed by the trial court after the sentencing hearing.

Many of the other cases relied on by Petitioner fall into the category of Williams and Tate because they involve sentences that were aggravated, either beyond the statutory maximum or the guideline range, because of the failure to pay, rather than just remaining the same and not being mitigated, as in this case. In United States v. Burgum, 633 F. 3d 810, 814 (9th Cir. 2011), the district court specifically referred to the defendant's financial status as a factor aggravating the severity of his conduct for sentencing purposes. The court stated that while the Constitution does not forbid all consideration of a defendant's financial resources, it prohibits imposition of a longer prison term based on the defendant's poverty. 633 F. 3d at 815.

In Reddick v. State, 608 A. 2d 1246, 1248 (Md. App. 1992), the trial court sentenced the defendant to five years beyond the indicated guidelines sentence, but offered the opportunity to bring the sentence down to the guidelines by paying restitution. In State v. Farrell, 676 P.2d 168, 174 (Mont. 1984), the trial court sentenced the defendant to the maximum possible suspended sentence because it did not believe that the defendant would be able to pay restitution in any less time.

F. Cases relied on by Petitioner are distinguishable

The cases relied on by Petitioner are distinguishable from this case. In Barnett v. Hopper, 548 F.2d 550 (5th Cir. 1977), vacated as moot, 439 U.S. 1041 (1978), the defendant entered a guilty plea in return for a recommendation that the court impose a ten-year probated sentence conditioned on the payment of a fines. When the defendant was unable to pay the fine, he was sentenced to ten years probation. Here, Petitioner was sentenced at the onset to ten years imprisonment.

In Moody v. State, 716 So. 2d 562 (Miss. 1998), the defendant was given the option of paying a fine plus restitution and having his bad check case nolle prossed. The fine was automatically imposed pursuant to Mississippi Bad Check Law. The court determined, "[t]he automatic nature of the fine is what makes it discrimination to the poor, in that only the poor face jail time." 716 So. 2d at 565. In this case, there was no automatic procedure applied. After adjudication, the trial court considered the factor of injury to the victims, and fashioned an appropriate sentence, from which Petitioner could have sought mitigation if he paid up-front restitution.

In People v. Collins, 607 N.W. 760 (Mich. App. 2000), the court sentenced the defendant to forty-eight months probation including a year in county jail, and provided for suspension of 270 days of jail time if he paid a certain restitution amount.

On appeal, the appellate court disagreed with the trial court's finding, made after an evidentiary hearing, that the defendant had willfully failed to make payments toward the restitution so that the jail-time should not be suspended. 607 N.W. 764-765. As such, it determined that the sentencing order violated equal protection. Id. at 765-766. In this case, though, Petitioner did not obtain a ruling on a request for hearing. In addition, the trial court did not enter a sentencing order with a conditional suspension.

The court in V.H. v. State, 498 So. 2d 1011 (Fla. 2d DCA 1986) specifically stated that it would grant community control but only if the defendant paid restitution, and when defense counsel said that the defendant had no money, it committed the defendant. This decision was rendered when ability to pay was still a factor in imposing restitution in Florida. In Smith v. State, 933 So. 2d 723 (Fla. 2d DCA 2006), the trial court announced that it would sentence the defendant to eighteen months incarceration if restitution was paid in a specific time period. When restitution was not paid in full in that time, the trial court sentenced the defendant to three years incarceration. In this case, though, the court set out at the beginning the sentence it deemed appropriate in this case, and only offered an incentive of mitigation.

G. The facts of the instant case are distinguishable from Nezi v. State, 119 So. 3d 517 (Fla. 5th DCA 2013), with which the Fourth District certified conflict.

In Nezi v State, 119 So. 3d 517 (Fla. 5th DCA 2013), the court asked the defendant what she could pay right then in restitution. After the defendant responded, the trial court said that they were talking about $70,000, and asked if she had 10 or $20,000. Defense counsel pointed out that the defendant had a public defender. Defense counsel said that the defendant could pay about $500 a month, and he said that it would take about ten years to get to $70,000. The defendant said that she had no assets and that she made about $900 a month at Sam's Club. She could not get the money from her family.

The trial court sentenced the defendant to ten years in prison followed by twenty years of probation, and ordered her to pay restitution in the amount of $70,000. It said that it would consider a modification if the Petitioner came up with some monies.

Nezi is different than this case because the defendant in Nezi repeatedly said that she could only come up with limited funds on a monthly basis, not in an amount anywhere close to restitution, and stated without hesitation that she did not have any assets or any means to acquire additional money. In this case, on the other hand, Petitioner stated the amounts that he could pay up-front in restitution, and the trial court stated

that if he paid the low-end of that range, $20,000, then it would mitigate his sentence.

In addition, the Fifth District in Nezi considered the case in terms of the Equal Protection Clause. As the majority below noted, and as discussed above, the effect of a defendant's inability to pay restitution on sentencing should be analyzed in terms of due process.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court approve the majority opinion of the Fourth District's decision in this case.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been e-filed at the Florida e-Portal, and served to Tatjana Ostapoff through the e-Portal, as well as furnished to her by e-mail at appeals@pd15.state.fl.us; tostapof@pd15.state.fl.us; cgload@pd15.state.fl.us, on January 20th, 2015.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

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