

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JEAN CLAUDE NOEL,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
)
)
 _____)

CASE NO. SC14-274
 CASE NO. SC14-1952

PETITIONER’S REPLY BRIEF

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PRELIMINARY STATEMENT

Petitioner was the Appellant in the Fourth District Court of Appeal and the defendant in the lower tribunal. Respondent, the state of Florida, was the Respondent and the prosecution, respectively. In the brief, the parties will be referred to by name.

The following symbols will be used:

- | | |
|-----------|---|
| “R” | Record on appeal, followed by the appropriate volume and page numbers |
| “SRMay18” | Supplemental record, consisting of transcript of hearing held on May 18, 2010 |

STATEMENT OF THE CASE AND FACTS

Mr. Noel relies on the statement of the case and facts contained in his initial brief on the merits before this Court.

ARGUMENT

THE TRIAL COURT VIOLATED MR. NOEL'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION WHEN IT IMPOSED A HARSHER SENTENCE BECAUSE HE WAS UNABLE TO MAKE AN IMMEDIATE RESTITUTION PAYMENT OF \$20,000.

The State argues that the sentence imposed in the instant case was not conditional, and states that the trial judge “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.” ” Answer brief at 8.

But the trial court's disposition on its face revealed that the court believed that an eight-year sentence would be an appropriate disposition. The sentence was announced as a single integral unit:

It's going to be ten years Florida State Prison followed by ten years probation. If he makes restitution of twenty-thousand dollars within sixty days, his sentence will be mitigated – the jail time portion will be mitigated to eight years.

(R31/2734). This sentence can only be interpreted as a ten-year sentence which *will* (not “may,” *compare* Hunt v. State, 983 N.E.2d 196 (Ind. App. 2013) cited in answer brief at 8) be reduced to eight years upon the defendant's fulfillment of a condition that he pay \$20,000 restitution within sixty days. Stated otherwise, but with the identical meaning, Mr.Noel was told that he *will* be sentenced to eight years in prison

if he pays immediate restitution but that he will be sentenced to ten years in prison if he does not. Thus, the “appropriate” sentence for a defendant with the financial resources to pay is eight years; the “appropriate” sentence for a defendant who cannot make a large up-front payment is ten years. Such disparity in sentence based on financial status is constitutionally impermissible.

The State argues that the trial court’s sentencing scheme did not require the court to determine whether Mr. Noel had the ability to immediately pay restitution because “it did not order up-front restitution.” Answer brief at 9, 12. But up-front restitution is exactly what the court was ordering: unless Mr. Noel could come up with \$20,000, he would be denied the reduction of sentence which a more financially gifted defendant would obtain. Thus, the time for enforcement was at sentencing, since that (with a 60-day time period for compliance) was when Mr. Noel was expected to make the payment. The penalty for nonpayment accrued when he received a greater sentence based on his failure to make payment. That was when the determination of his ability to pay should have been undertaken.

Finally, it cannot be suggested that Mr. Noel invited or acceded in the trial court’s error by his optimistic estimate of what he would be able to pay, unlike the defendant in Nezi v. State, 119 So.3d 517 (Fla. 5th DCA 2013), who complained from the beginning that she did not have the funds to pay restitution. *See* answer brief at

18. The fact that Mr. Noel mistakenly thought when sentence was imposed that his family would be able to assist him in providing \$20,000 does not ultimately place him in any different a position than that of the indigent Ms. Nezi, who never had any doubt about her inability to make such a payment. Both Mr. Noel and Ms. Nezi were in the final analysis equally unable to come up with the funds required to pay for their freedom. In both cases, therefore, the question before the appellate court was whether defendants without ample financial resources should be treated more harshly than those with such resources.

Nor was it Mr. Noel who suggested that he be given the option of paying to avoid an increase in his sentence. Review of the sentencing transcript reveals that it was after being told that one codefendant, Warren Berkle, was placed on a term of ten years probation – avoiding any prison term whatsoever – when he provided “up-front restitution” of \$210,000 (R31/2693-94), that the court unilaterally initiated an inquiry with Mr. Noel as to whether he would be able to make any immediate restitution (R31/2691-93) “because it’s going to be based on your ability to tell me that” (R31/2692).

Thus, it was the trial court which was from the start focussed on payment of “up-front” restitution as a condition to avoid a sentencing increase. It said as much when it announced, just prior to imposition of sentence, that “I’m hoping it

accomplishes something to these 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 any continuing problems” (R31/2734, emphasis added).

Accordingly, from the trial court’s initiation of the questioning about up-front payment of restitution, its concern about accomplishing something for the victims, and the terms of the sentence, it is evident that it considered its disposition as a way to require Mr. Noel to pay restitution immediately or, if he did not, suffer the consequence of spending two more years in prison. Due process and equal protection dictate that such a penalization for indigency must be rejected.

CONCLUSION

Based on the foregoing argument and the authorities cited, Mr. Noel requests that this Court reverse the decision of the Fourth District Court of Appeal below and remand this cause for resentencing to a term not greater than eight years in prison.

Respectfully submitted,

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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief has been prepared in 14 point Times New Roman font, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Tatjana Ostapoff
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been electronically filed in this Court and furnished to Melynda Melear, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by e-mail at CrimAppWPB@myfloridalegal.com this 9th day of FEBRUARY, 2015.

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