

IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT

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Case No. 70,166

MICHAEL SPIVEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

APPEAL FROM THE SIXTH JUDICIAL CIRCUIT  
IN AND FOR PINELLAS COUNTY, FLORIDA

BRIEF OF RESPONDENT ON JURISDICTION

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TABLE OF CONTENTS

	<u>PAGE</u>
STATEMENT OF THE CASE AND FACTS	1
ISSUE	2
WHETHER THE DECISION OF THE LOWER COURT CONFLICTS WITH <u>TURNER V. STATE</u> , 431 So.2d 1017 (Fla. 4 DCA 1983).	
ARGUMENT	2-3
CONCLUSION	4
CERTIFICATE OF SERVICE	4

TABLE OF CITATIONS

	<u>PAGE</u>
Gilmore v. State, 479 So.2d 791 (Fla. 2 DCA 1985)	3
Lucas v. State, 376 So.2d 1149 (Fla. 1979)	2
Turner v. State, 431 So.2d 1017 (Fla. 4 DCA 1983)	1,2,3

FLORIDA STATUTES:

§775.089	2,3
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STATEMENT OF THE CASE AND FACTS

Petitioner Spivey was charged by information with robbery. He entered a plea of guilty and the factual basis included a recitation that Spivey and a co-defendant tied up the victim and used weapons (R 22). The victim was handcuffed and locked up in the bathroom and laundry room. She was threatened with knives and a chopping axe to tell where the cash was hidden (R 24). They threatened to slit her throat and kill her (R 24). The victim had been terrorized (R 37). At sentencing the prosecutor asked the court to order full restitution in the amount of \$13,850 (R 39). Petitioner did not object or complain; rather, defense counsel acquiesced with the observation that if the question of amount comes up again, they would be able to ascertain the amount (R 40).

On appeal, the Second District court of Appeal affirmed the order of restitution. Spivey now seeks discretionary review.

## ISSUE

WHETHER THE DECISION OF THE LOWER COURT CONFLICTS WITH TURNER v. STATE, 431 So.2d 1017 (Fla. 4 DCA 1983).

## ARGUMENT

The decision of the Second District Court of Appeal in the instant case does not directly and expressly conflict with Turner v. State, 431 So.2d 1017 (Fla. 4 DCA 1983). In Turner the court reversed the trial court's denial of a motion to withdraw guilty plea because the requirement of restitution was not raised during the plea negotiations and the appellant had no notice or opportunity to be heard on the issue. Moreover, there the trial court has not complied with Florida Statute §775.089 (1981) in determining the defendant's ability to pay, his financial resources or the burden that payment would impose on him.

Unlike Turner, the decision of the Second District Court of Appeal does not involve an attempt by the defendant to have his guilty plea set aside in the trial court. In fact at sentencing when the prosecutor requested a full order of restitution in the amount of \$13,850, defense counsel acquiesced with an observation that if a question came up they would be able to ascertain the exact amount (R 39-40). Cf. Lucas v. State, 376 So.2d 1149 (Fla. 1979). Appellant was not denied an opportunity to be heard.

Gilmore v. State, 479 So.2d 791 (Fla. 2 DCA 1985).<sup>1/</sup>

In dicta the Turner court opined that the state did not show what portion of the victim's damages arose from appellant's acts rather than those of the co-defendants. However, in context, it must be remembered that Florida Statute §775.089 (1985) had been amended in 1984 and was different from the earlier statute considered in Turner. Under the earlier law an order of restitution was discretionary; after the amendment the restitution requirement became mandatory unless the trial court found reasons not to order the restitution.

The Turner decision was rendered obsolete by legislative enactment with the elimination of the advance notice requirement.

This Court should decline to exercise its jurisdiction in the instant case because of alleged conflict with dicta in the Turner decision, especially in light of the fact that the pertinent statute has been amended since Turner.

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<sup>1/</sup>Petitioner argues that the instant case does not present the question of his ability to pay, his financial resources or the burden imposed by restitution; rather he complains there was no hearing to determine the co-defendant's culpability or ability to pay. (Petitioner's Brief, P.3). Not only was there no adequate objection in the trial court to preserve the issue for appellate review, but also Spivey lacks standing to assert a hearing on behalf of the co-defendant.

CONCLUSION

Based on the foregoing reasons, argument and authorities, this Court should decline to exercise its jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail to Brad Permar, Esquire, Assistant Public Defender, 5100 144th Avenue North, Clearwater, FL 33520 on this 26<sup>th</sup> DAY OF March, 1987.

  
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Of Counsel for Respondent