

IN THE SUPREME COURT OF FLORIDA

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BY _____

JOHN WINDH,)
APPELLANT)

VS.)

CASE No. SC13-1250
LT. 2011-776

STATE OF FLORIDA,)
APPELLEE)

APPELLANT'S JURISDICTIONAL BRIEF

Original

JOHN WINDH
REGIONAL MED. CENTER
P.O. Box 628
LAKE BUTLER, FLORIDA
32054

APPELLANT PRO SE

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STATEMENT OF CASE AND FACTS

On January 11-13, 2011, Appelbunt stood trial for second degree murder in the death of a homeless man in Pinellas County, Florida. The State presented two 'eyewitnesses' to the murder, one being a participant (DEL ADAMS) and the other, Betizew Mallet, Adams' girlfriend. She stated she witnessed a fight between the victim (Michael Piccola) and Mr. Adams earlier that day. Her and Adams got in an argument, and Adams had 'spit' on Mallet. Mr. Piccola then 'smacked' Adams around. Ms. Mallet then went to Piccola's 'camp' and went to sleep in Piccola's tent. She was awoken sometime in the middle of the night, and observed Adams, Craig Kennedy, and Brian Kennedy beating Mr. Piccola. When asked if Appelbunt was present, she stated he was not.

Adams took the stand and testified Appelbunt Windh was the one who killed Mr. Piccola, even though he had never met or had problems with the victim.

Adams claimed to have "seen" Windh strike Mr. Piccola "with an ax", even though it was dark and he claimed he was at his own tent, 75 to 100' away. (Note: There were no 'ax wounds' identified on the body, nor did the ax test positive for blood or D.N.A.)

Appellant took the stand in his own defense, and told the jury he had been with his 'boss' most of the day, and then went to see his friend Kevin Carbonette at the camp. He arrived between 5 - 5:30 pm. Around 6:00 pm., Adams came to the camp and complained of being 'beat up' by Mr. Piccola, but that he didn't look like he had been hurt. He wanted Piccola "out", and instigated that all go over and tell Piccola to "find a new camp." At that point Craig Kennedy picked up an ax, threatening to harm Piccola. Adams then left Carbonette's camp, and Windh tried to 'calm' the situation, and took the ax from Mr. Kennedy, and threw it in the bushes.

Then, Windh (Appellant), both Kennedy brothers, and Kevin Carbonette all walked over to Piccola's camp to let him know he would need to find a new camp. It was noted that Appellant had never met any of these people except Carbonette, whom he had known several years.

When they arrived at Piccola's camp, Piccola was out behind his tent, and suddenly Adams came running into the camp threatening Piccola with an ax handle. Windh and Brian Kennedy got between them, and Piccola hit Windh with a 5-foot long, 3"-thick oak tree branch, knocking him unconscious. When Appellant wakes up, Piccola is lying on the ground. Windh then goes over to see who it was, falls to the ground beside him. As Windh turns to expect a "hand up" from Brian Kennedy, he feels the victim "grab him" and turns and punches Piccola twice, then gets up and exits the scene, as his hand was cut.

Windh stated he never went back to Piccola's camp, but the next morning Adams and Mallet came back to Carbonette's camp the next morning stating Piccola was 'dead' and Adams needed help "carrying Piccola to the hole" Adams said he dug. The Kennedy's, Windh, and Carbonette all thought it was a 'joke'. An hour later police showed up and arrested Windh and Adams and charged both with First Degree Murder. Craig Kennedy was charged with 'Tresspass'. Brian and Craig Kennedy were never charged in the murder, nor was Mallet or Carbonette.

The jury acquitted on Murder, but found Windh guilty of Manslaughter. Windh recieved 15 years. He appealed, and conviction was affirmed. Windh then filed with Supreme Court, asking the Court to review the entire case on appeal, and rule on the merits of his Pro se appeal Brief.

JURISDICTION

Article 5, section 3(b)(3), the Supreme Court of Florida "may review any decision of the Dist. Cts. of Appeal that expressly declares valid a state statute or provision of State or Federal Constitution, or expressly affects a class of constitutional or State Officers, or that expressly and directly conflicts with a decision of another D.C.A. or the Supreme Court on a question of law."

Article 5, section (7) states (in part), "... may issue writs of Prohibition and all writs necessary to complete exercise of its jurisdiction ..."

Article 1, section (9) provides "No person shall be deprived of life, liberty, or property without Due Process of law..."

The Supreme Court of Florida has jurisdiction over all constitutional issues and fundamental error if Courts of Appeal fail to do so.

CONCLUSION

In this case, the 2ND Dist. Ct. reversed an order of restitution, but failed to give an opinion on other issues Appellant brought on his 'pro se' brief. Appellant claimed (3) five issues he believes to rise to the level of "fundamental" errors, as well as some violations of his rights and privileges under the U.S. Constitution. For "unobjected to" errors to be fundamental, they must deprive a defendant substantial rights. The accumulation of the errors of the five issues in his pro se brief should show relief is due, and failure of the District Court to rule on these issues shows prejudice, as several of the issues must be brought on appeal.

Continued
from Page 6

One of the issues involves prosecutorial misconduct such as manufacturing trial testimony, suggesting appellant lied on the stand, and placing "burden of proof" on the defendant.

Another issue involves the disparate sentence of co-defendant. This was raised in a pro se 3,800 (B)(2) motion and denied by the Circuit Court, stating "failure to consider mitigating circumstances at sentencing is not cognizable in a B-2 motion," and citing Jackson v. State, 983 So.2d - 562, (Fla. 2008). Appellant cited Mapp v. State, 71 So.3d 276 (Fla. 2011), where this Court overturned Jackson, Id., and overturned the 2nd D.C.A.'s decision. This issue was not addressed, though co-defendant —

Adams recieved a sentence of 9 years,
(Appellant recieved 15 yrs.) even though his (Adams')
culpability was greater.

None of Appellant's issues were ruled
on, and he feels he was deprived his Due
Process guarentees under both the U.S.
and the Florida Constitutions. He would
invoke jurisdiction of this Honorable
Court, and prays the Court will hear and
rule on his pro se issues, in the interest
of Judicial Justice.

Appellant begs the Court will excuse all the
errors in this brief, as Appellant was denied
adequate Law Library access and access to the
materials Needed to research and affect this
appeal.

Respectfully Submitted

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John W. Adams, Pro Se

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of this
Jurisdictional BRIEF has been placed in
the hands of D.O.C. Officials for delivery
via U.S. Mail, postage paid to: OFFICE
OF THE ATTORNEY GENERAL, PL-01 THE
CAPITOL, TALLAHASSEE, FL. 32399, ON
this 23RD day of September, 2013.

/s/ John Windh Pro Se

JOHN Windh # C05225
RMC, P.O. Box 628
LAKE BUTLER, FL. 32054

IN THE SUPREME COURT,
STATE OF FLORIDA

2013 SEP 26 PM 2:09

CLERK OF THE COURT

STATE OF FLORIDA,
APPELEE

BY _____

v.

CASE No. SC 13-1250

JOHN WINDH,
APPELLANT

APPELLANT'S APPENDIX

CONTAINING THE SECOND DISTRICT COURT OF
APPEALS' DECISION ON CONVICTION FOR
MANSLAUGHTER, CASE No. 2D11-776, SIXTH
JUDICIAL CIRCUIT FOR PINELLAS COUNTY IN
CASE No. CRC07-06455

JOHN WINDH, PRO SE,
D.O.C. No. C05225
P.O. Box 628
LAKE BUTLER, FLORIDA
32054

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EXHIBIT "A";

SECOND DISTRICT COURT OF APPEAL DECISION page 1
FILED CASE NO. 2011-776, ON MAY 22, 2013 (A' & B')

EXHIBIT "B"

MANDATE, ISSUED JUNE 11, 2013 page 2
(A)

CERTIFICATE OF SERVICE

III

EXHIBIT A

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

Appellee.

Case No. 2D11-776

John E. Windh appeals his conviction and sentence for one count of manslaughter. We affirm Windh's conviction and fifteen-year prison sentence without

further comment; however, we reverse the restitution order and remand for further proceedings because nothing in the record shows that Windh waived his right to be present at the restitution hearing.¹

At the conclusion of Windh's sentencing hearing, the State requested that the trial court award restitution in favor of the victim's family to cover the victim's burial expenses. The trial court stated that it was "not sure whether that would be an appropriate item of restitution," so it scheduled a "restitution status check" for several weeks later. On the date of the scheduled status check, Windh's counsel appeared in court, but the record shows that Windh was not present. No explanation was given for Windh's absence, and the State offered no evidence to establish that Windh had waived his presence at the restitution "status check."

Despite Windh's unexplained absence, the trial court proceeded to address the State's request for restitution. The prosecutor told the court that he had spoken with the victim's father, who told the prosecutor that he had paid \$3000 for funeral expenses. The State offered no testimony or documentary evidence to support its claim for this amount of restitution. Defense counsel responded only that he did not "have anything to dispute that figure." The trial court then entered an order that required Windh to pay \$3000 in restitution to the victim's family.

Pursuant to the Sixth Amendment, a criminal defendant has a right to be present " 'at any stage of the criminal proceeding that is critical to its outcome if [the defendant's] presence would contribute to the fairness of the procedure.' " Donaldson v.

¹Windh's counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967); however, counsel identified Windh's absence from the restitution hearing as a minor sentencing issue that could be raised in such a brief. See In re Anders Briefs, 581 So. 2d 149, 152 (Fla. 1991).

State, 985 So. 2d 63, 64 (Fla. 2d DCA 2008) (quoting Kentucky v. Stincer, 482 U.S. 730, 745 (1987)); see also Coney v. State, 653 So. 2d 1009, 1013 (Fla. 1995); Baker v. State, 979 So. 2d 453, 455 (Fla. 2d DCA 2008). A restitution hearing is considered such a critical stage of criminal proceedings. Donaldson, 985 So. 2d at 64; Baker, 979 So. 2d at 455; M.W.G. v. State, 945 So. 2d 597, 600 (Fla. 2d DCA 2006). Hence, " 'unless the State can show that a defendant knowingly and voluntarily waived his right to be present at his restitution hearing, it is error to proceed in his absence.' " Thar v. State, 8 So. 3d 1204, 1205 (Fla. 2d DCA 2009) (quoting Baker, 979 So. 2d at 455); see also J.A. v. State, 46 So. 3d 1191, 1191 (Fla. 5th DCA 2010) (noting that "[a] juvenile has a constitutional right to be present at hearings to determine the imposition and amount of restitution absent a voluntary and intelligent waiver of that right" (quoting I.M. v. State, 955 So. 2d 1163, 1164 (Fla. 1st DCA 2007))).

Here, Windh was in custody at the time of the restitution status check and thus was at the mercy of jail and/or prison officials to arrange for his appearance at the restitution hearing. Apparently no arrangements were made, and Windh was not present for this critical stage of the proceedings. The trial court made no inquiry as to the reason for Windh's absence; hence, nothing in the record establishes that Windh knowingly and voluntarily waived his right to be present at that hearing. It was therefore reversible error for the trial court to proceed with the hearing and award restitution in Windh's absence. Accordingly, we reverse the order imposing restitution and remand for a new restitution hearing at which Windh must either be present or the State must present evidence that Windh's presence has been knowingly and voluntarily waived.

Finally, we also note that should the State again choose to seek restitution on remand, it must present admissible evidence to support the amount of the award. See Glaubius v. State, 688 So. 2d 913, 916 (Fla. 1997) (holding that an award of restitution "must be based on competent evidence"); Justice v. State, 944 So. 2d 538, 540 (Fla. 2d DCA 2006) (" 'Representations by an attorney for one of the parties regarding the facts . . . do not constitute evidence.' " (quoting Eight Hundred, Inc. v. Fla. Dep't of Revenue, 837 So. 2d 574, 576 (Fla. 1st DCA 2003))); T.J.N. v. State, 977 So. 2d 770, 773-74 (Fla. 2d DCA 2008) (holding that hearsay evidence may not be used to determine the amount of restitution over a defendant's objection).

Affirmed in part, reversed in part, and remanded for further proceedings.

NORTHCUTT and WALLACE, JJ., Concur.

EXHIBIT B

M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

SECOND DISTRICT

THIS CAUSE HAVING BEEN BROUGHT TO THIS COURT BY APPEAL,
AND AFTER DUE CONSIDERATION THE COURT HAVING ISSUED ITS OPINION;

YOU ARE HEREBY COMMANDED THAT SUCH FURTHER PROCEEDINGS
BE HAD IN SAID CAUSE , IF REQUIRED, IN ACCORDANCE WITH THE OPINION OF
THIS COURT ATTACHED HERETO AND INCORPORATED AS PART OF THIS
ORDER, AND WITH THE RULES OF PROCEDURE AND LAWS OF THE STATE OF
FLORIDA.

WITNESS THE HONORABLE MORRIS SILBERMAN CHIEF JUDGE OF THE
DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT,
AND THE SEAL OF THE SAID COURT AT LAKELAND, FLORIDA ON THIS DAY.

DATE: June 11, 2013

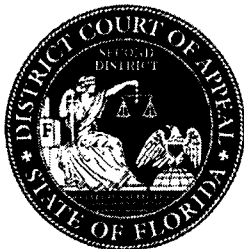
SECOND DCA CASE NO. 2D11-776

COUNTY OF ORIGIN: Pinellas

LOWER TRIBUNAL CASE NO. CRC 07-06455

CASE STYLE: JOHN E. WINDH

v. STATE OF FLORIDA



James Birkhold
James Birkhold
Clerk

cc: (Without Attached Opinion)

John E. Windh

Susan M. Shanahan, A.A.G.

Carol J.Y. Wilson, A.P.D.

me

CERTIFICATE OF SERVICE

I hereby CERTIFY, an exact copy of Appellant's Appendix, has been mailed via U.S. Mail, postage paid, to:

OFFICE OF THE ATTORNEY GENERAL, PH-01
The Capitol, Tallahassee, FLORIDA 32399, ON
this 23RD day of September, 2013.

/s/ John W. Wingo

CLERK —

2013 SEP 26 PM 2:09

CLERK SUPREME COURT

BY _____

PLEASE find Original,
and 5 copies each, of
Brief and Appendix —

Mailed on 9/23/2013

(DEADLINE was extended to
9/26 PER Court's Order.

— Thank you —