

IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,144

FILED  
SEP 19 1986

THE STATE OF FLORIDA,

Petitioner,

-vs-

BERNARD MOSELEY,

Respondent.

SEP 19 1986  
CLERK SUPREME COURT  
Deputy Clerk

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ON APPLICATION FOR DISCRETIONARY REVIEW

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RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

Petitioner was the prosecution in the trial court and appellee in the Third District Court of Appeal. Respondent was the defendant in the trial court and the appellant in the appellate court. In this brief, the parties will be referred to as they stand in this Court. References to the record on appeal will be made by use of the symbol "R."

STATEMENT OF THE CASE AND FACTS

The statement of the case and facts in petitioner's brief is acceptable to the respondent and needs no further elaboration here.

POINT INVOLVED ON CERTIORARI

THE APPLICATION OF SECTION 27.3455, FLORIDA STATUTES (1985) TO CRIMES COMMITTED PRIOR TO THE EFFECTIVE DATE OF THE STATUTE VIOLATES THE EX POST FACTO PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES AND THE STATE OF FLORIDA.

SUMMARY OF ARGUMENT

The application of the statute in question to crimes committed prior to the statute's effective date violates the ex post facto provisions of the state and federal constitutions because the statute authorizes the imposition of the additional penalty of community service hours.

ARGUMENT

THE APPLICATION OF SECTION 27.3455, FLORIDA STATUTES (1985) TO CRIMES COMMITTED PRIOR TO THE EFFECTIVE DATE OF THE STATUTE VIOLATES THE EX POST FACTO PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES AND THE STATE OF FLORIDA.

The statute in question empowers trial courts to impose \$200 costs against a person found guilty of a felony. The statute also provides that

"However, the court shall sentence those persons whom it determines to be indigent to a term of community service in lieu of the costs prescribed in this section. . ."

The foregoing statute took effect July 1, 1985. The crime with which the respondent was charged was alleged to have been committed on May 18, 1985. (R. 1). It is submitted, therefore, that that portion of the sentence imposing community service hours in lieu of costs was illegal, for the law in Florida is clear that a defendant is subject only to the penalty in effect at the time he committed the offense. Castle v. State, 330 So.2d 10 (Fla. 1976); Ward v. State, 433 So.2d 1221 (Fla. 3d DCA 1983).

Petitioner's reliance on Ivory v. Wainwright, 393 So.2d 542 (Fla. 1981) is misplaced. That case dealt with a statute which required, as a condition of parole eligibility, that prisoners disclose their assets and that they be assessed the cost of their subsistence in prison. In rejecting an ex post facto argument, this Court ruled that

"procedural due process arguments presume a deprivation of liberty or property, but parole is neither."

Nor is State v. Jackson, 478 So.2d 1054 (Fla. 1985), applicable. There, this Court ruled as follows:

"We agree with the state that the presumptive sentence established by the guidelines does not change the statutory limits of the sentence imposed for a particular offense. We conclude that a modification in the sentencing guidelines procedure, which changes how a probation violation should be counted in determining a presumptive sentence, is merely a procedural change, not requiring the application of the ex post facto doctrine."

The statute in the case at bar is easily distinguishable from the statute construed in Ivory and Jackson. Here, the statute imposes an additional penalty of community service hours which is clearly a deprivation of the respondent's liberty. This was the reasoning employed by the Court in Yost v. State, 489 So.2d 131 (Fla. 5th DCA 1986) a decision which should be controlling in this case. In Yost, the Court answered the question before this Court in the affirmative, and reasoned as follows:

"Two critical elements must be present for a penal law to be ex post facto: it must apply to events occurring before its enactment (retrospective), and it must disadvantage the offender affected by it. Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). Thus, even if a statute merely alters penal provisions accorded by grace of the legislature, such as gain-time, it violates the ex post facto clause if it is both retrospective and more onerous than the law in effect on the date of the offense. Weaver, 101 S.Ct. at 965. As applied to crimes which were committed prior to its effective date, the statute in question here clearly violates these constitutional provisions because it does not permit gain-time to accrue while the costs remain unpaid, or as to indigent defendants, it requires the court to impose a sentence of community service after incarceration. Thus the statute after July 1, 1985 imposes a burden and an additional penalty upon a defendant which did not exist prior to its enactment."

It is important to note that Section 948.01(4)(a), Florida Statutes (1985) defines community service as one of many "community-based sanctions" and the word "sanction" has been defined as follows:

"something that gives binding force to a law,  
as the penalty for breaking it."

Webster's New World Dictionary, College Edition, p. 1290.



CONCLUSION

Based on the foregoing argument and authorities cited, the first portion of the certified question should be answered in the affirmative and the opinion of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Suite 820, 401 N.W. 2nd Avenue, Miami, Florida 33128, this 16th day of September, 1986.

N. Joseph Durant, Jr.  
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