10-3

IN THE SUPREME COURT OF FLORIDA

ROBERT LEE MCDOWELL,

Petitioner,

v. CASE NO. 69,113

STATE OF FLORIDA,

Respondent,

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 69,156

ROBERT LEE MCDOWELL,

Respondent,

_____/

RESPONDENTS ANSWER BRIEF ON THE MERITS

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AUTHORITIES CITED

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SUMMARY OF ARGUMENT

POINT I

The assessment of the $200.00 court costs fee recently mandated by the legislature did not constitute an ex post facto violation inasmuch as it was not punitive in nature and involved amendment of a purely collateral procedural matter. McDowell's secondary challenge to the assessment because of his alleged indigent status is not ripe for review in that he has suffered no deprivation at this time and given the legislatively mandated retention of jurisdiction by the sentencing court to determine at the appropriate time, i.e., when he would be entitled to release because of gain time accrued, whether McDowell is in fact indigent.

POINT II

The judgment for Count I does appear to erroneously indicate a conviction for robbery with a deadly weapon when the jury verdict returned found McDowell guilty of only robbery with a weapon.

POINT III

No reversible error has been demonstrated in the refusal to give the lesser included offense instruction on grand theft since that charge is two steps removed from the offense for which McDowell was actually convicted.

POINT IV

The apparent error in point totals utilized in the score-sheet tabulation does not require reversal or remand for re-sentencing since the sentences actually imposed also fall within

the next lower cell and given the sentencing court's clear intention to impose those sentences even if departure was necessary.

Inasmuch as the sentence imposed by the lower court was not in fact a departure sentence under the guidelines the reasons for departure given are inconsequential and no basis for reversal is demonstrated.

POINT I

THE TRIAL COURT'S IMPOSITION OF LEGISLATIVELY MANDATED COURT COSTS UPON PETITIONER DID NOT CONSTITUTE AN EX POST FACTO VIOLATION.

ARGUMENT

There is no constitutional bar against merely assessing the $200.00 court costs legislativley mandated by section 27.3455, Florida Statutes (1985).[1] Under that section the sentencing court must assess the $200.00 court costs against all convicted felony defendants; however, jurisdiction is retained by the sentencing court to determine if a defendant is in fact indigent before the assessment is enforced through payment or community service at minimum wage if the defendant is indigent. Furthermore, despite the assertion of the district court of appeals and McDowell to the contrary the imposition of those costs in its case does not violate the ex post facto provisions of the United States or Florida constitutions.[2]

The court costs involved are not a fine or penalty intended to punish a defendant. Rather, as identified by the statute the $200.00 fee is the amount legislatively determined to have been incurred and to be repaid for the felony prosecution at issue made necessary by the defendant's criminal conduct. The authorization and assessment of court costs by the legislature

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[1]The portion of that section at issue has been repealed effective October 1, 1986, by Chapter 86-154(1), Laws of Florida.

[2]This issue is also pending upon certified question in State v. Yost, (Fla.S.Ct. No. 68,949).

in such a manner and the simple periodic review by that legislative body of those costs to keep pace with law enforcement and judicial expenditures does not constitute an increase in punishment and has no punitive purpose such that no ex post facto violation is demonstrated. See, Ivory v. Wainwright, 393 So.2d 542 (Fla. 1980), appeal dismissed, 102 S.Ct. 79 (1981). The statutory change does not make the punishment for any specific crime more burdensome, it simply amends the cost of the legal process to comport with legislative evaluations. The state submits that the periodic legislative analysis and determination of appropriate court costs is not a substantive but a collateral procedural matter of no independent punitive significance such that retroactive application of such legislative changes does not run afoul of the ex post facto prohibition. See, State v. Jackson, 478 So.2d 1054 (Fla. 1985); Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977).

Furthermore, the state submits that this issue is not ripe for review unless and until McDowell refuses to pay the $200.00 before his tentative release date (i.e., the date when he might otherwise be entitled to release through gain time accrued) and at that time he could challenge by petition for writ of habeas corpus any community service time ultimately imposed. See, State v. Champe, 373 So.2d 874 (Fla. 1978); State v. Hagers, 387 So.2d 943 (Fla. 1980).

To the extent that McDowell's argument can be read as an attempt to raise for the first time other vague constitutional challenges upon "equal protection" or "due process" grounds "as applied to indigents" the state notes that no constitutional

challenge on these unspecified constitutional basis was presented to or determined by the state trial court or the district court of appeals. Accordingly, respondent submits that any effort to create such an issue in this court by improperly bootstrapping new constitutional challenges to a different constitutional question certified on the state's behalf at the district court level should be rejected both as an affront to the lower courts and as an improper effort to present issues not adequately preserved for appellate consideration. Although this court has the discretionary authority to consider all issues "appropriately raised in the appellate process" as though the case had originally come to this court on appeal that authority should be exercised only when these other issues had been properly briefed and argued and are dispositive of the case. Savoie v. State, 422 So.2d 308,312 (Fla. 1982). McDowell's belated constitutional challenges to the now defunct costs provision at issue have never been briefed and argued before any other court and are certainly not dispositive of this entire case; furthermore, the respondent submits that these type of challenges to the statute at issue as applied (e.g. McDowell's apparent equal protection claim) may not be raised initially on appeal inasmuch as they do not challenge the facial validity of this statute and should likewise not be considered initially by this court so as to bypass the state trial court and the district court of appeals. See, Trushin v. State, 425 So.2d 1126,1129-1131 (Fla.1982).

Alternatively, the respondent notes that at least one district court of appeal has twice upheld the statute section at issue against constitutional challenges. See, Noland v. State,

11 F.L.W. 1302 (Fla. 1st DCA June 10, 1986); Lawton v. State, 11 F.L.W. 1439 (Fla. 1st DCA June 27, 1986); Johnson v.State, 11 F.L.W. 1539 (Fla. 2d DCA July 9, 1986); State v. Castro, 11 F.L.W. 1548 (Fla. 2d DCA July 9, 1986). Should this court determine it necessary to reach this issue notwithstanding the petitioner's failure to preserve it or present it to the lower state courts whose judgment this court now reviews, McDowell's unspecific constitutional allegation should nevertheless be rejected inasmuch as none of the cases cited by the petitioner preclude the state from seeking to enforce payment of costs legislatively mandated to reimburse the state in criminal prosecutions. As noted by the court in Williams v. Illinois,399 U.S. 235,245, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970):

> The state is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for non-payment whereas other defendants must always suffer one or the other conviction.

The constitutional flaw condemned by the United States Supreme Court in Williams, as well as in Tate v. Short, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 133 (1971) is the automatic conversion of a fine into a jail sentence while such additional time in jail is not suffered by those with the means to pay the fine. However, both Williams and Tate clearly demonstrate that the state may seek reimbursement of costs from an indigent through a number of "plans" including payment in installments or recoupment at a point in time at which the former indigent has the means to pay. Here, there is not automatic conversion of a fine into a

jail sentence; rather, an indigent defendant is simply afforded the opportunity to partake of community service in order to pay for those court costs legally imposed, however, the defendant is not required to do so.

POINT II

THE WRITTEN JUDGMENT RENDERED BY THE TRIAL COURT DOES NOT ACCURATELY REFLECT THE CRIME OF WHICH THE APPELLANT WAS FOUND GUILTY IN COUNT I.

ARGUMENT

As correctly noted by the petitioner the jury's verdict on Count I convicted him only of robery with a weapon, a lesser included offense of the original charge of robbery with a deadly weapon. (R 464) Accordingly, the written judgment rendered by the lower court indicating that McDowell had been found guilty in Count I of robbery with a deadly weapon does appear erroneous although that offense is properly identified as a first degree felony. (R 479)

POINT III

ANY ERROR IN REFUSING TO GIVE A REQUESTED JURY INSTRUCTION ON GRAND THEFT AS A LESSER INCLUDED OFFENSE OF ROBBERY WITH A DEADLY WEAPON WAS HARMLESS UNDER THE CIRCUMSTANCES.

ARGUMENT

McDowell argues that the trial court's failure to instruct the jury on grand theft as a necessarily lesser included offense of the robbery with a deadly weapon charge requires reversal under the "controlling" case of State v. Bruns, 429 So.2d 307 (Fla. 1983). In his brief to the district court of appeals petitioner overlooked the holding of State v. Abreau, 363 So.2d 1063 (Fla. 1978), specifically cited in Bruns, that in fact controls the instant case and precludes reversal. Although McDowell now pays lip-service to Abreau he does not address its import to this case.

In Abreau, this court held that the failure to instruct on a lesser included offense which was two steps removed from the crime for which the defendant was actually convicted did not require reversal and was in fact harmless error. Here, the offense charged was robbery with a deadly weapon and the jury was also instructed as to the lesser included offenses of robbery with a weapon and simple robbery. After deliberation, McDowell was convicted under Count I of the lesser included offense of robbery with a weapon. (R 464)

The lesser included offense of robbery with a weapon for which McDowell was convicted is a first degree felony while

simple robbery is a second degree felony. §812.13(2)(b),(c), Fla. Stat. (1983). Grand theft - for which the appelant requested an instruction - is a third degree felony. §812.014(1)(b), Fla. Stat. (1983). Accordingly, grand theft is two steps removed from the offense for which McDowell was convicted such that any error in refusing the requested instruction must be considered harmless under the Abreau analysis. See also, Acensio v. State, 477 So.2d 38 (Fla. 2d DCA 1985); Williams v. State, 461 So.2d 1010 (Fla. 5th DCA 1984); Cannon v. State, 456 So.2d 513 (Fla. 5th DCA 1984); Jackson v. State, 449 So.2d 411 (Fla. 2d DCA 1984); Butler v. State, 379 So.2d 715 (Fla. 5th DCA 1980).

By convicting McDowell of robbery with a weapon despite the lesser included offense alternative of simple robbery the jury clearly reached a factual conclusion that McDowell utilized a weapon in stealing the money and property as charged in the information such that there is no possibility that they would have further exercised their inherent jury pardon power to convict the petitioner of grand theft even if that instruction has been given. Accordingly, McDowell's claim that an instruction on grand theft as a necessarily lesser included offense[3] requires

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[3]Although petit theft is a necessarily lesser included ofense of robbery, the petitioner is in error in asserting that grand theft is likewise necessarily included in that offense; rather, grand theft is a category two offense of robbery such that an instruction may be appropriate given the allegations in the information and the evidence adduced at trial. Pina v. State, 468 So.2d 475 (Fla. 2d DCA 1985); Schedule of Lesser Included Offenses, Standard Jury Instructions in Criminal Cases, page 266.

reversal is without basis. Since the jury's verdict, after instruction that they could only convict if they find all elements of the crime proven beyond a reasonable doubt, necessarily indicates a factual determination that all of the elements of robbery with a weapon had been proven it is clear that a mere grand theft conviction would not have been returned such that any error was necessarily harmless. Indeed, defense counsel's closing argument emphasized this aspect of proof vis-a-vis lesser included offenses and in a very telling admission counsel conceded the appropriateness of at least a robbery and mere battery conviction in an attempt to convince the jurors that the beer bottle wielded by McDowell was not a deadly weapon to avoid the enhanced robbery with a deadly weapon and aggravated battery convictions. (R 345-352) The jurors obviously were swayed at least in part by that argument; how then can it be said that McDowell was prejudiced given the concessions of counsel and the jurors' clear factual decision (in conjunction with those concessions) that force (although not as great as that originally urged by the state) was utilized by McDowell? Under these circumstances the jury would obviously not have entertained a verdict for mere grand theft which would have required a finding, clearly unsupported by the record, that no force had been applied in the taking.

POINT IV

NO RESENTENCING IS REQUIRED DUE TO THE ALLEGED ERROR IN THE POINT TOTAL CONTAINED ON THE GUIDELINES SCORESHEET SINCE THE SENTENCE ACTUALLY IMPOSED WOULD BE AUTHORIZED EVEN UNDER THE CORRECTED GUIDELINES MATRIX AND THE SENTENCING COURT CLEARLY INDICATED ITS INTENT TO IMPOSE THE SENTENCE AT ISSUE EVEN IF DEPARTURE WERE NECESSARY.

ARGUMENT

Even assuming that McDowell's allegations as to improprieties in the tabulation of his guidelines scoresheet point total are correct no basis for vacating the sentences imposed by the sentencing court and remand is demonstrated since the term of imprisonment actually imposed (four and one-half years) would still be authorized under the guidelines matrix cell which McDowell asserts to be the proper one.

As conceded by the petitioner even if the point total were corrected as he asserts the recommended incarcerative sanction under the guidelines would be three and one-half to four and one-half years imprisonment. The incarcerative sentence actually imposed by the lower court in this case was only four and one-half years such that even under the next lower cell urged by McDowell the incarcerative portion of the sentence would be proper. Furthermore, the fact that the sentencing court felt it necessary to impose the four and one-half year term of imprisonment and consecutive fifteen year probationary term even if it was necessary to depart from the recommended

guidelines sentence is certainly indicative of his intent to impose the four and one-half year term of imprisonment even if the point totals were incorrect and the next lower matrix cell should have been utilized. In addition, the state notes that the decisions cited by the petitioner in support of remand for resentencing are clearly factually distinguishable and of no import in this cause, for here the sentencing judge was presented with a recommended guidelines sentence scoresheet and still chose to enter what he believed to be a departure sentence although it was not in fact a departure sentence at all.

Although apparently all parties concerned labored under the misconception that the sentences imposed by the lower court at sentencing on September 4, 1985, constituted a departure from the recommended guidelines sentence, such was not the case. McDowell was convicted of robbery with a weapon (Count I), battery (Count II), and dealing in stolen property (Count III). He was sentenced to four and one-half years imprisonment on Count I with a concurrent time served sentence on Count II and a consecutive fifteen year probationary term on Count III. (R 481-484) Even under the corrected guidelines matrix urged by the petitioner and applied by the district court in its decision (three and one-half to four and one-half years) a four and one-half year term of imprisonment and consecutive fifteen year probationary term did not constitute a departure from the recommended guidelines sentence under Florida Rule of Criminal Procedure 3.701(d)(12) since the "split sentence" imposed did not exceed that authorized by general law. McDowell v. State, 11 F.L.W. 1572 (Fla. 5th DCA July 17, 1986); Bell v. State, 479 So.2d 309 (Fla.

5th DCA 1985); O'Brien v. State, 478 So.2d 497 (Fla. 5th DCA 1985). Furthermore, since the four and one-half years of imprisonment actually imposed would be proper under either the fourth or fifth guidelines cell it is clear that McDowell's sentence was not illegal and therefore provides no proper basis for appellate consideration. (R 485) Fla. R. Crim. P. 3.988(c); §921.001(5), Fla. Stat. (1985). In addition, since the sentence imposed is not illegal and does not constitute an "unauthorized departure from the sentencing guidelines" the lack of any specific contemporaneous objection to the sentencing court upon the basis now urged by the petitioner demonstrates that McDowell's attack on the guideline sentence has not been preserved for appellate review. State v. Whitfield, 487 So.2d 1045,1046 (Fla. 1986).

The state submits that no basis for remand for resentencing has been presented given the trial court's imposition of what is clearly a proper and legal sentence. Indeed, even if the petitioner's argument presents an issue properly cognizable before this court and preserved for appellate consideration, there is no logical need to require resentencing especially given the available mechanism for correction, reduction and modification of sentences provided by Florida Rule of Criminal Procedure 3.800(b), hereby the sentencing court could if it deems it necessary reconsider the appropriateness of its otherwise legal sentencing decision in light of the argument advanced by the petitioner. This would certainly present a more efficient manner of addressing this type of question and would alleviate the necessity for appellate courts to evaluate what a trial court

might or might not do under a given factual scenario in deciding whether resentencing was necessary. By leaving this decision to the trial court upon a motion to correct or modify sentence the appellate court need not engage in such speculation and can avoid requiring unnecessary resentencing proceedings taking up the time and resources of the lower court when the sentencing court can just as easily evaluate the necessity for such a hearing by rule 3.800 motion. Obviously, a simple change in numerical scoring in a guidelines scoresheet should not require resentencing where the change does not affect the guidelines cell, despite the fact that a defendent might argue that a lower point total within the cell might have affected the sentencer's exercise of discretion in sentencing within that cell, and that analysis should be no less appropriate in this case where the sentence imposed was proper and legal under either guidelines matrix. To determine otherwise would improperly infringe upon the discretion still provided sentencing courts and would open an appellate can of worms not authorized by the limited right of appellate review granted by the legislature.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully prays this honorable court affirm the decision of the District Court of Appeal of the State of Florida, Fifth District except that the respondent urges this court to reverse the determination that the court costs at issue were imposed in violation of the ex post facto provisions of the federal and state constitutions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Answer Brief on the Merits has been furnished, by delivery, to Larry B. Henderson, Assistant Public Defender for petitioner, at 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 8th day of September, 1986.

OF COUNSEL