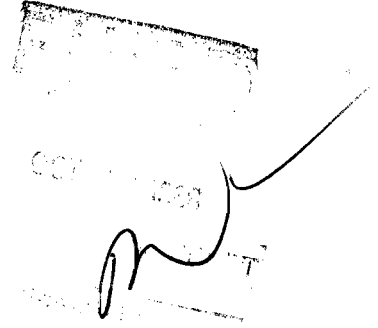


IN THE SUPREME COURT OF FLORIDA

BENNIE FRANK WILLIAMS,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 69,307



PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
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ATTORNEY FOR PETITIONER

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PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the Appellant and Respondent was the Appellee in the District Court of Appeal, Fifth District of the State of Florida. In this brief, the Respondent will be referred to as "the State" and the Petitioner will be referred to as he appears before this Honorable Court.

STATEMENT OF THE CASE

Petitioner was charged by an information filed in the Circuit Court of Orange County, Florida, and amended on the day of trial, with two counts of sexual battery on a child and one count of kidnapping. (R 520-521, 556-557, 106, 107, 108) He was tried by a jury on October 1 and 2, 1985, and found guilty as charged of each count. (R 443, 579-581) His motion to set aside the verdicts for sexual battery was denied, and he was sentenced on December 6, 1985, to spend his life in prison with no eligibility for parole for twenty-five years for each of two counts of sexual battery, and to spend nine years in prison for kidnapping, the three sentences to be served consecutively. (R 513, 593-398)

Appeal to the Fifth District Court of Appeal was timely taken and, on July 10, 1986, Appellant's convictions were affirmed but the portion of the sentence requiring the payment of two hundred dollars in costs was sua sponte vacated. (Appendix 1) On motion for rehearing, the following question was certified to the Supreme Court to be of great public importance:

DOES THE APPLICATION OF SECTION 27.3455,
FLORIDA STATUTES (1985) TO CRIMES COM-
MITTED PRIOR TO THE EFFECTIVE DATE OF
THE STATUTE VIOLATE THE EX POST FACTO
PROVISIONS OF THE CONSTITUTIONS OF THE
UNITED STATES AND THE STATE OF FLORIDA,
OR DOES THE STATUTE MERELY EFFECT A
PROCEDURAL CHANGE AS IS PERMITTED UNDER
STATE V. JACKSON, 478 So. 2d 1054 (FLA.
1985)?

Williams v. State, 11 F.L.W. 1888 (Fla. 5th DCA August 28, 1986). (Appendix 2)

Notice to invoke this Honorable Court's discretionary jurisdiction was given on September 3, 1986.

STATEMENT OF THE FACTS

██████████ testified that as she was playing in the back yard of her home in Winter Garden, Florida, on the afternoon of May 1, 1985, Appellant picked her up and placed her through the window of his sister's house which was next door to ██████████s. (R 128, 130, 131, 132, 147) Appellant entered the house through the back door. (R 132, 152, 240) ██████████ testified at trial that she did not open the door for Appellant but she told her sister that day that she had. (R 148, 173) She testified that Appellant placed her on a bed in the house and put his penis in her mouth and his finger in her vagina. (R 134, 136-137, 140, 142, 174, 175) She said he choked her and told her that if she told anyone about the incident he would do it again and kill her. (R 141, 177) ██████████ had been afraid of Appellant prior to May 1st, because he had dogs. (R 146-147)

Belinda Stevenson testified that she saw ██████████ near the house next door, crying; she said she then saw Appellant exit the house. (R 159, 161, 162)

A medical examiner testified that ██████████'s hymen exhibited a laceration of about three millimeters, and that there was fresh blood at the introitus to the vagina, indicating that the injury, caused by penetration of the introitus by a foreign body, had occurred within twelve to twenty-four hours of the examination. (R 267, 269, 270, 276, 278) There was no semen or sperm found, and no physical evidence linked Appellant to the charged crimes. (R 274, 328, 332)

Over objection, the State was allowed to introduce the testimony of ██████████ who said that four years earlier, when she was ten years old,

Appellant and two other boys had raped her. (R 288, 290-295, 280-281, 299, 300)

The defense presented testimony that Appellant was with friends from about eleven o'clock on the morning of May 1st until three-fifteen or three-thirty, when he parted their company saying he was going to the playground. (R 335, 336, 350, 352, 355, 363) Emma Greenwood testified that she saw Appellant at the playground about three-forty-five, where she had gone for track practice. (R 343, 344, 345, 346) Appellant testified that he went home from the playground by way of a store, and when he arrived at his house he was arrested. (R 359, 365, 366) The police officer who arrested him said that he had just completed issuing a BOLO for Appellant when he walked up; he said Appellant was cooperative. (R 180, 211, 223) Appellant denied committing the crimes he was charged with. (R 360) The State's witnesses testified that the incident had occurred by three-thirty, three-forty-five, or four o'clock, or during the time that Appellant's witnesses saw him elsewhere. (R 180, 186, 195)

Over objection, the State was allowed to play a tape recording of an interview with ██████████ at the hospital that evening, which was interrupted twice and during which she was not under oath. (R 233, 476, 478, 145, 148, 490, 257, 485, 486, 258-259) No videotape was made of the interview because, the detective said, the Orange County Sheriff's Office has no videotaping equipment available. (R 487, 488, 250, 251) ██████████'s guardian was present at the tape recording. (R 483) The guardian testified at trial that she had never known ██████████ to lie, but at Appellant's sentencing hearing she stated that her answer would be different if she were asked again. (R 183, 507-508)

SUMMARY OF ARGUMENT

The application of Section 27.3455, Florida Statutes (1985), to sentences imposed for crimes committed prior to the statute's effective date violates the ex post facto provisions of the United States and Florida Constitutions, because it applies to events occurring before its enactment and disadvantages those affected by it. Although provisions for the forfeiture of gain-time had been in existence prior to the enactment of Section 27.3455, the statute is not merely procedural because it authorizes the automatic withholding of gain-time.

ARGUMENT

POINT I

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
CONSTITUTIONS OF THE UNITED STATES
AND OF THE STATE OF FLORIDA.

Article I Section 10 of the Florida Constitution prohibits the passage of any ex post facto law. 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 of the United States Constitution if it is both retrospective and more onerous than the law in effect on the date of the offense. Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); Art. I §9 Cl. 3, U. S. Const. In Weaver, Section 944.275, Florida Statutes (1975), was declared unconstitutional because it reduced the amount of gain-time which could be earned by prisoners whose crimes occurred before the statute's effective date. The Supreme Court held that even though the statute in that case did not alter punishment prescribed for the offense, it was not merely procedural. Likewise, the application of Section 27.3455, Florida Statutes (1985), to defendants whose crimes occurred prior to July 1, 1985, the effective date of the new statute, violates the ex post facto provisions of the United States and Florida Constitutions.

Section 944.275(4), Florida Statutes (1983) (not amended in 1985), provided that the Department of Corrections shall grant basic gain-time at the rate of

ten days for each month of each sentence imposed on a prisoner. Sections 944.275(5) and 944.28 provided and provide that gain-time may be forfeited or shall be subject to forfeiture for violations of the laws of Florida or the rules of the Department of Corrections. The pre-existence of these provisions, however, does not mean that Section 27.3455 imposes no new penalty or additional punishment. There is a very clear and material distinction between the existent provisions for forfeiting accrued gain-time and the new law which does not allow gain-time to be granted until the new requirements are met. The withholding of gain-time awards, moreover, is automatic so long as Section 27.3455(1) is not complied with, whereas the former provisions for forfeiting gain-time required that there be findings of guilt made, and that a particular procedure for declaring a forfeiture of gain-time be followed. §§944.275(5), 944.28(2)(c), Fla. Stat. (1983).

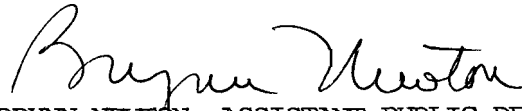
As the District Court found herein, Section 27.3455(1), Florida Statutes (1985), clearly violates the constitutional prohibitions against ex post facto laws because it does not permit gain-time to accrue while the costs remain unpaid or, as to indigent defendant, it requires the court to impose a sentence of community service after incarceration. It is not merely procedural because an additional penalty is being imposed by the new statute against defendants who do not or cannot pay these costs. The elements which render a penal law ex post facto--that it apply to events occurring before its enactment and that it disadvantage the offender affected by it--are present in this case. Weaver v. Graham, supra.. The District Court's decision to vacate that portion of the trial court's sentence imposing court costs of two hundred dollars should be affirmed.

CONCLUSION

For the reasons expressed herein, Petitioner Bennie Frank Williams respectfully requests that this Honorable Court affirm the District Court's decision to reverse that portion of the trial court's order which imposes court costs herein, and answer the certified question in the affirmative by finding that the application of Section 27.3455, Florida Statutes (1985), to crimes committed prior to July 1, 1985, violates the ex post facto provisions of the Constitutions of the United States and of the State of Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014, by hand delivery to his basket at the Fifth District Court of Appeal, Daytona Beach, Florida; and by mail to Mr. Bennie Frank Williams, P. O. Box 500, Olustee, Florida 32072, this 13th day of October, 1986.


ATTORNEY