IN THE SUPREME COURT
STATE OF FLORIDA

FILED
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BENNIE FRANK WILLIAMS

Petitioner,

v. CASE NO. 69,307
5DCA Case No. 85-1858

STATE OF FLORIDA,

Respondent.
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STATE OF FLORIDA,

Petitioner,

v. CASE NO. CASE NO. 69,317
5DCA Case No. 85-1858

BENNIE FRANK WILLIAMS,

Respondent.
_______________________________/

ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

In this brief, the state is referred to as the "Respondent". Bennie Frank Williams is referred to as the "Petitioner".

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 eligiility 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, 593-598).

Notice of appeal to the Fifth District Court of Appeal was timely filed on December 12, 1985, and the Office of the Public Defender was appointed to represent petitioner on appeal (R 601, 599). On its own motion, without briefing by the parties, the district court of appeal reversed, on ex post facto grounds, that portion of petitioner's sentence requiring that costs of $200 be paid, citing Yost v. State, 489 So.2d 131 (Fla. 5th DCA 1986). On motion for rehearing, the court certified as a question of great public importance, the issue of the constitutionality of the retroactive application of section 27.3455 (1), Florida Statute (1985), to crimes committed prior to its effective date.

Appeal to this court followed.

STATEMENT OF THE FACTS

[redacted] [redacted] testified that as she was playing in the back yard of her home in Winter garden, Florida, on the afternoon of May 1, 1985, petitioner picked her up and placed her through the window of his sister's house which was next door to [redacted]s. (R 128, 130, 131, 132, 17). Petitioner entered the house through the back door (R 132, 152, 240). [redacted] testified at trial that she did not open the front door for petitioner, but she told her sister that day that she had (R 148, 1730. She testified that petitioner 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, 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).

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

A medical examiner testified that [redacted]'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).

Petitioner was convicted, as charged, of two counts of sexual battery on a child, and one count of kidnapping (R 520-521, 556-557, 106, 107, 108).

SUMMARY OF ARGUMENT

Section 27.3455(1), Florida Statutes (1985), represents a non-penal, procedural change in the method for imposition of court costs. A trial court, prior to the enactment of this section, could impose costs and community service under statutory provisions in effect at the time of the commission of petitioner's offense. As a result, this new statute does not violate the ex post facto laws. Additionally, since sentencing has always been a matter of judicial discretion and petitioner can demonstrate nothing more than a tenuous expectancy regarding the terms of his sentence under the law existing at the time of his offense, a critical element of th ex post facto doctrine (that the retroactively applied law disadvantages the offender by increasing the punishment prescibed for the offense) cannot be established.

POINT ONE

THE PETITIONER FAILED TO PRESERVE FOR APPELLATE REVIEW THE ISSUE OF THE EX POST FACTO APPLICATION OF SECTION 27.3455(1), FLORIDA STATUTES (1985).

ARGUMENT

Petitioner was sentenced on December 6, 1985 (R 496, 593-598). Section 27.3455(1), Florida Statute (1985) has been in effect since July 1, 1985. See, Ch. 85-213, §§ 2 and 8, Laws of Fla. When the trial judge indicated his intention to assess against petitioner, the costs "required to be imposed by statute", there was no contemporaneous objection interposed advising the judge of any alleged error with regard to ex post facto application of costs, pursuant to section 27.3455(1) (R 513), nor did petitioner assign this as error for review (R 604).

This court has made it clear that an appellate court may review only those questions presented to the trial court. Mariani v. Schleman, 94 So.2d 829 (Fla. 1957). Even constitutional errors, other than those constituting fundamental error are waived, unless timely raised in the trial court. Clark v. State, 363 So.2d 331 (Fla. 1978), Castor v. State, 365 So.2d 701 (Fla. 1978). Petitioner raised no objection on any grounds in the trial court to the imposition of $200 costs against him, pursuant to section 27.3455(1).

The application of the ex post facto doctrine to statutes has been held not to be fundamental error and a contemporaneous objection is required to preserve the issue for direct appellate review. Williams v. State, 414 So.2d 509 (Fla. 1982), Fredericks v. State, 440 So.2d 433 (Fla. 1st DCA 1983), Springfield v.

State, 443 So.2d 484 (Fla. 2d DCA 1984), Brown v. State, 428 So.2d 369 (Fla. 5th DCA 1983). As a result, the sua sponte reversal by the Fifth District Court of Appeal based upon Yost v. State, 489 So.2d 131 (Fla. 5th DCA 1986), decided over six months afer sentencing in the instant appeal, was error. Petitioner failed to preserve this issue for appellate review.

POINT TWO

THE APPLICATION OF SECTION 27.3455, FLORIDA STATUTE (1985) TO CRIMES COMMITTED PRIOR TO THE EFFECTIVE DATE OF THE STATUTE IS CONSISTENT WITH THE EX POST FACTO PROVISIONS OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

Petitioner was sentenced for crimes committed on May 1, 1985 (R 520-521). His sentencing hearing took place on December 6, 1985 (R 496-514, 593-598). In the interim between the offense date and date of sentencing, section 27.3455(1), Florida Statutes (1985), came into effect requiring the imposition of costs upon being found guilty of felonies, misdemeanors, or criminal traffic offenses and providing for disbursement of portions of these funds to various criminal justice funds and agencies.

Under section 27.3455(1), gain time is still accrued by indigents and non-indigents, alike. For non-indigents, however, the cost imposed by this section must be paid in full prior to the granting of any gain time accrued. Defendant's who are determined to be indigent are required to be sentenced to a term of community service in lieu of the costs imposed by section 27.3455(1), remain eligible to accrue gain time, and are required to perform the community service after release from incarceration, each hour of community service being credited against the costs imposed at a rate equivalent to the minimum wage. Retention of jurisdiction by the trial court is permitted for the purpose of determining any change in status regarding the indigency of a defendant as it relates to the payment of the costs imposed pursuant to this section.

At the outset, it would appear that petitioner, having been

determined to be indigent by the trial court (R 514), should have been sentenced to a term of community service, in lieu of the costs required by section 27.3455(1). The inquiry should not stop here, however, since the Fifth District Court of Appeal determined that the entire section was unconstitutional, so that remand for imposition of community service in lieu of costs would be a futile gesture in light of its ruling in Yost v. State, 489 So.2d 131 (Fla. 5th DCA 1986).

The United States Supreme Court has held that in order to establish an ex post facto clause violation, three critical elements must be present in a statute: it must be a penal or criminal law, retrospective, and it must disadvantage the defendant because it may impose greater punishment. Paschal v. Wainwright, 738 So.2d 1173, 1175-1176 (11th Cir. 1984); Weaver v. Graham, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981). This court recognized these critical elements in May v. Florida Parole and Probation Commission, 435 So.2d 834 (Fla. 1984).

In May, May was serving a prison sentence for several felony convictions. His parole release date (PPRD) was originally set for July 31, 1984. On May 30, 1981, May was convicted of an offense while still in prison. Based upon this conviction, the Parole Commission, using his present and previous conditions, recalculated his PPRD based upon new parole guidelines adopted September 10, 1981. His new PPRD was October 4, 1994, an extension of almost ten years beyond his original PPRD.

On appeal to this court, May contended that the parole date

guideline adopted _after_ the commission of his in prison offense could not be used to recalculate his PPRD for that offense and that doing so, was an unconstitutional application of more stringent guidelines saying:

> . . . [W]here a prisoner can establish no more than a tenuous expectancy regarding probable punishment under the law existing at the time of his offense, it becomes difficult or impossible to establish (a critical _ex post facto_ element)...that the retrospectively applied law disadvantages the offender affected by it.

403 So.2d at 836.

Similarly, in the instant case, petitioner had at best, nothing more than a tenuous expectancy regarding his punishment under the law existing when he committed his crimes. A trial court is not required to reveal to a defendant what his sentence will be. _See_, _Lepper v. State_, 451 So.2d 1020 (Fla. 1st DCA 1984), _Morgan v. State_, 414 So.2d 593 (Fla. 3d DCA 1983). Petitioner's sentence always has been a matter of judicial discretion.

As noted by the court in _Weaver v. Graham_ _supra_,:

> "Critical to relief under the _Ex Post Facto Clause_ is not an individual's right to less punishment, but the lack of fair notice...."

450 U.S. at 31, 101 S.Ct. at 965. When petitioner committed his crime, he was on fair notice that any sentence he would receive would be subject to the discretion of the trial judge. Any alleged right to less "punishment" was vitiated by such notice.

The accrual of gain time is unaffected by section 27.3455(1). For non-indigents, retention of jurisdiction by the

trial court permits the court to make adjustments in the order imposing costs where there is a change in circumstances causing indigency and to allow release for court ordered community service. Thus, for indigents and non-indigents, there is no loss of gain time. Petitioner cannot demonstrate the second ex post facto element--that the retrospectively applied law disadvantages him.

Although respondent contends that section 27.3455(l) is not a penal or criminal statute, consideration of the statutory scheme for criminal defendants in effect at the time of petitioner's sentencing, reveals that imposition of costs pursuant to section 27.3455(l), is not more burdensome than the laws (both penal and non-penal), in effect at the time of his sentencing. Court costs, not penal in nature, could always be imposed at the time of petitioner's offense. See, §§ 939.01, 943.25, Fla Stat. (1985). Under section 939.01 there appears to be no limit, excepting the sound discretion of the trial court, to the costs which might be imposed upon conviction. Trial courts could always impose split sentences, including incarceration followed by community service, public service, restitution, fines or any other disposition authorized by law. See, §§ 775.083, 775.089, 775.091, and 921.187, Fla. Stat. (1985). Section 27.3455(l), merely changes the procedure for imposition of costs and is, therefore, not ex post facto, even if it works to petitioner's disadvantage. Dobbert v. Florida, 432 U.S. 282, 293, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). State v. Jackson, 478 So.2d 1054 (Fla. 1985). Violation of court ordered payment of

costs or community service would be enforced pursuant to the contempt statute and procedure. See, § 38.23, Fla. Stat. (1985).

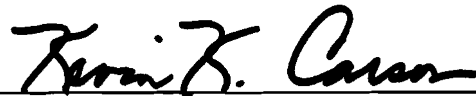
Since under the costs and penalty statutes in effect at the time of petitioner's offense, either costs or community service could be imposed, there can be no application of a subsequent costs provision which would do violence to the concept of of the ex post facto law. See, Lee v. State, 294 So.2d 305, 307 (Fla. (1974). As a result, the Fifth District Court of Appeal erred in finding section 27.3455(1), unconstitutional as applied to petitioner.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully prays this honorable court reverse the decision of the District Court of Appeal of the State of Florida, Fifth District, vacating imposition of costs pursuant to § 27.3455(1).

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Answer Brief on the Merits has been furnished by mail to Brynn Newton, Assistant Public Defender, and counsel for the petitioner, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 3 day of November, 1986.

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