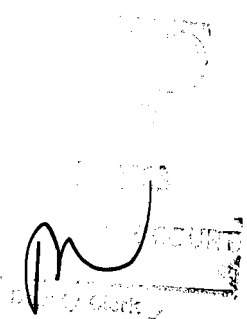


IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,)
)
 Petitioner,)
)
 vs.)
)
 JERRY LEE GORDON, JR.,)
)
 Respondent.)
 _____)

CASE NO. 69,330

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

KENNETH WITTS
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ATTORNEY FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent hereby accepts the Statement of the Case and Facts as presented by Petitioner in Petitioner's Brief on the Merits.

SUMMARY OF THE ARGUMENT

The lower court applied Florida Statutes, Section 27.3455 at Respondent's sentencing. The crime involved was committed prior to July 1, 1985. Application of this statute thus constituted a violation of ex post facto doctrine. The Fifth District Court of Appeal reversed that portion of Respondent's sentence imposing costs under Section 27.3455, and certified the question of whether or not application of this statute is merely procedural. Respondent urges this Court to answer the certified question by holding application of Section 27.3455 is substantive and thus violates the ex post facto doctrine. The decision of the Fifth District Court of Appeal should be affirmed.

POINT

THE TRIAL COURT ERRED BY APPLYING SECTION 27.3455, FLORIDA STATUTES (1985), TO AN INDIGENT DEFENDANT, FOR A CRIME COMMITTED PRIOR TO THE EFFECTIVE DATE OF THE STATUTE, OVER TIMELY OBJECTION.

ARGUMENT

The issue in this case is presented by the question certified by the Fifth District Court of Appeal:

Does the application of Section 27.3455, Florida Statutes (1985), to crimes committed prior to the effective date of the statute violate the ex-post facto provisions of the constitutions of the United States and of 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)?

Before moving to the answer to this question Respondent will deal with the preservation and ripeness arguments made by Petitioner. The Petitioner raises preservation on the basis of Trushin v. State, 425 So.2d 1126 (Fla. 1983). The Petitioner asserts that "no objection to the assessment of costs on the basis of financial status", was raised in the trial court. The timely objection was to the application of Chapter 27, and was made on ex post facto grounds. The defense attorney's objection did challenge the constitutional application of 27.3455 to a particular set of facts. The statement by the defense attorney " This offense occurred in February and we feel that ex post facto application", challenges the statute as it is applied to

this crime, since the crime was committed before the statute was in effect. The requirement of Trushin was satisfied here.

The Petitioner next argues that this case is not ripe for a decision at this point in time. The argument here is that Respondent will not be adversely affected by 27.3455 until he is to be released if he received gain time. Petitioner argues that at that point the proper remedy would be a petition for writ of habeas corpus, and cites Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

First, Weaver does not stand for the proposition that habeas corpus is the proper remedy in ex post facto sentencing cases. That case did arise on a petition for habeas corpus, but it certainly does not suggest that such a writ is the only way to cure ex post facto violations. Petitioner's argument here concedes that at some point while serving his sentence, Respondent will suffer for the application of 27.3455. Respondent would argue that the issue is ripe when the Department of Corrections time is imposed. At that point Respondent is receiving a longer sentence than he would if 27.3455 did not apply, and the issue is ripe at that point.

The Petitioner's next ripeness argument is somewhat confusing. The Petitioner first cites a federal case from the Second Circuit which stands for the proposition that financial obligations can be imposed on a defendant who is indigent at sentencing. The Petitioner states that since this Court can not determine Respondent's future inability to pay, the issue is not ripe. Respondent would argue, in response to the Petitioner,

that the retention of jurisdiction allowed by 27.3455 does not make this point unripe or moot. Respondent reiterates that the issue is repeat sentencing. Even with the retention of jurisdiction and possibility of community service, Respondent is adversely affected by the sentence. No community service is unimposed under Florida Statutes, Chapter 939 (1985), or Florida Statutes, Section 944.275 (1985). The sentence imposed is more severe with 27.3455 even if community service is imposed in lieu of costs.

Finally, turning to the certified question itself, the Petitioner concedes that the subject statute is being applied retroactively (Petitioner's brief on the merits, page 8). The question is thus is Respondent disadvantaged by application of the statute.

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); Article I, Section 9, Cl. 3, United States Constitution. 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 the statute in that case was not merely procedural simply because it did not alter punishment prescribed for the offense. Likewise, the application of Section 27.3455(1), 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.

Petitioner argues that since, under Florida Statutes, Section 944, gain time could be forfeited by the prisoner if he committed crimes or infractions, therefore Respondent is not being adversely affected by application of the new statute.

Petitioner argues that because of the pre-existence of provisions for forfeiture of gain-time, in Sections 944.275(5) and 944.28, Section 27.3455(1) imposes no new penalty or additional punishment. Petitioner says that, by the enactment of Section 27.3455(1), it is not gain-time which is changed but only the procedure by which it is credited. This contention overlooks the very clear and material distinction between the pre-existing 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. Section 944.275(4)(a), Florida Statutes (1983), 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 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 withholding of gain-time awards 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, Section 944.275(5), Florida Statutes (1983), and that a particular method for declaring a forfeiture

of gain-time be followed. Section 944.28(2)(c), Florida Statutes (1983). Petitioner also cites the pre-existing law that refusal to obey a court order may constitute contempt, in order to argue that failure to pay court costs pursuant to Section 27.3455(1), being the nonpayment of a court-ordered fee, is the equivalent of a violation of the law of this State. Section 944.28(2)(a), Florida Statutes (1985). Again, this argument fails to distinguish between a finding that a prisoner has violated a law, with its attendant procedural safeguards, and Section 27.3455(1)'s automatic withholding of gain-time. See, Section 38.22, Florida Statutes (1985), (Power and proceeding to punish contempt); Rules 1.570(c), 1.982, Florida Rules of Civil Procedure, (Civil contempt power and proceeding).

Section 27.3455(1) is not procedural, and its application constitutes ex post facto legislature, even under the Jackson case cited in the certified question. Accordingly, this Court is asked to affirm the decision of the Fifth District Court of Appeal in this case.

CONCLUSION

BASED UPON the argument made and authorities cited herein, Respondent asks this Honorable Court to affirm the Fifth District Court of Appeal's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, in his basket at the Fifth District Court of Appeal; and mailed to Jeffy Lee Gordon, Jr., Inmate No.909024, Reception & Medical Center, Post Office Box 628, Lake Butler, Florida 32054-0628, on this 3rd day of November, 1986.

Kenneth Witte

KENNETH WITTS
ASSISTANT PUBLIC DEFENDER