IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 69,633

RICHARD LEE BOWMAN,

Respondent,

_____/

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF CASE AND FACTS

On December 6, 1982, the Respondent was charged by information with robbery (Count I) and tampering with evidence (Cout II), (R.9-10) He pled no contest to the charges by written agreement, dated April 21, 1983, in which it was stipulated that Respondent's sentence would be seven years in state prison and would be suspended. Respondent was placed on probation for five years and ordered to complete the TASC drug abuse program. (R.23-24) The plea was accepted and Respondent was sentenced accordingly. (R.25-26)

Two years later, on April 9, 1985, the Respondent was arrested in Venice, Florida. (R.42-44) On May 16, 1985, he was charged by information with aggravated assault (Count I), second time petit theft (Count II), and felonious possession of a concealed weapon (Count III), based upon the above incident. (R.54-55) A violation of probation affidavit and warrant were filed May 22, 1985, based upon the same incident. (R.85-59)

On July 12, 1985, Respondent again plead guilty or no contest to the new charges (R.91) and to the violation of probation.(R.92) Pursuant to the written stipulation, Respondent was sentenced to concurrent terms of four years in state prison with credit for time served. (R.81-85, 91-92)

The court imposed additional court costs of $200 pursuant to Section 27.3455(1) of the Florida Statutes. (R.102) The court determined that Respondent was indigent and ordered

him to perform community service work in lieu of the $200 court costs. (R.85) Respondent filed a "Motion to Correct Illegal Sentence," alleging that to impose court costs under §27.3455(1) is unconstitutional under both Florida and federal law. (R.109) The motion was never ruled upon. (R.112-13)

An appeal was taken to the Second District Court of Appeals which certified the question herein.

SUMMARY OF THE ARGUMENT

Respondent is procedurally barred from raising this argument. Despite procedural default, the State contends respondent has failed to rebut the presumption of the constitutionality of the "additional court costs" statute. Application of the statute of respondent does not violate ex post facto principles since the statute has not increased the quantum of punishment. Many of the provisions are, in effect, restatements of the law as it existed at the time of respondent's offense. Forfeiture of gain-time for failure to pay a court ordered fee is provided for in other pre-existing statutes. The only possible change with the gain-time provision is merely a procedural change and not violative of ex post facto doctrine. Imposition of community service has always been an available statutory sentencing option; therefore, the community service aspect of the statute does not pose ex post facto problems.

The State also contends respondent's complaint with the imposition of costs is premature. An appropriate time to allege error with the fine is at respondent's tentative release date. At that point, respondent may request the trial court to find him indigent, to substitute community service in lieu of payment of the costs, grant him his accrued gain-time, and release him subject to the community applied. The court properly imposed the fee on respondent, regardless of whether he is indigent for the purposes of this statute. Properly applied, the statute

does not offend equal protection principles.

Finally, the State contends that this costs is not a penalty and therefore,the principles of ex post facto do not apply.

ARGUMENT

ISSUE I

SECTION 27.3455, FLORIDA STATUTES (1985) DOES NOT VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST EX POST FACTO LAWS BECAUSE THE IMPOSITION OF COSTS IS NOT PENALTY, AND THE STATUTE MERELY ALTERS THE PROCEDURE BY WHICH COURT COSTS ARE IMPOSED: GAIN TIME COMPUTATION IS UNAFFECTED BY THIS STATUTE

Section 27.3455, Florida Statutes (1985) became effective July 1, 1985.[1]/ This statute provides for the mandatory imposition of court costs of two hundred dollars for every felony conviction, in addition to any other fines or costs. The costs are to be forwarded to the Local Government Criminal Justice Fund to compensate victims of crime and witnesses called to testify. The statute in effect at the time of Bowman's sentencing provided that:

> All applicable fees and court costs shall be paid in full prior to the granting of any gain time accrued. 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, and such indigent persons shall be eligible to accrue gain time...

The district court determined that impostition of two hundred dollars court costs at Bowman's sentencing is an ex post facto violation. Art. I, § 10, Fla. Const.

The threshold question is whether this issue is preserved for review and is properly before this court. "The constitutional application of a statute to a particular set of facts...must be raised at the trial level." Trushin v.

1/ This statute has been substantially revised. Ch. 86-154, Laws of Fla.

State, 425 So.2d 1126 (Fla. 1982). In Slaughter v. State, 11 F.L.W. 1948 (Fla. 1st DCA Sept. 11, 1986) the court had occasion to consider whether it could reach the merits of an ex post facto attack on the application of this section. The court correctly concluded that such a claim does not amount to fundamental error and that as such it is not reachable on direct appeal absent a proper and timely objection in the lower court. See also, Johnson v. State, No. 85-2166 (Fla. 2d DCA July 9, 1986)[11 F.L.W. 1539](refusing to reach merits of ex post facto claim on grounds that issue not preserved by objection in court below on rehearing) 11 F.L.W. 2107 (October 3, 1986). But see Freeny v. State, 85-1531 (Fla. 5th DCA July 10, 1986),(noticing ex post facto application of section sua sponte and reversing without mention of whether error preserved in court below)[11 F.L.W. 1529]. Examination of the record in this case shows that Respondent made no claim in the court below that this statute assessing costs could not be applied to him because of the prohibitions against the ex post facto application of criminal statutes. (R. 85) Accordingly, the claim is not properly before the court in this case. And, the court should reject Respondent's ex post facto attack on the assessment of these costs for this reason.

The State also contends that Respondent's ex post facto allegation will not become an issue suitable for judicial resolution unless Respondent refuses to pay the $200 before his "tentative release date." See §944.275(3)(a), Fla. Stat.

(1985) (date on which Respondent would otherwise be entitled to be released through the normal accrual of gain-time.). At that time Respondent could file a petition for writ of habeas corpus. Even more appropriate, Respondent could move at that time, pursuant to the "additional costs" statute itself, for the court to determine his indigency status. Upon a finding of indigency, the court would grant the gain-time, release appellant, and sentence him to a term of community service in lieu of paying the $200.

Appellate courts should refrain from issuing advisory opinions. See, State v. Kinner, 398 So.2d 1360 (Fla. 1981). Moreover, respondent could pay the $200 by his tentative release date, thereby rendering his challenge to this assessment moot. See, Curtis v. State, 350 So.2d 1142 (Fla. 1st DCA 1977).

On the merits, petitioner advances several arguments in support of the proposition that there is no ex post facto violation in this case. First, this statute does not alter the penal provisions because court costs are not a penalty.

In a well reasoned special concurrence to the majority opinion in Stone v. State, Case No. 85-2750 (Fla. 2DCA 1986), Judge Ryder stated:

> "I concur to avoid conflict with another panel of this court. I specially concur because had I been writing on a clean slate, I would have upheld the statute against an ex post facto attack. The reasoning for my position is set forth below.
>
> The Yost decision - and all the subsequent cases following it - begins with an assumption.

> The assumption is that the costs imposed by section 27.3455, Florida Statutes (1985), constitute a penalty. I believe the assumption to be incorrect."

Judge Ryder's opinion was based on analysis of both federal and Florida law. He noted that even under the United States Supreme Court's tests for purpose of a statute that the characterizations of costs is hard to achieve. Costs do not fall in the traditional notion of punishment as to fines or imprisonment. The United States Supreme Court has noted that the problem of the characterization of sanctions "has been extremely difficult and elusive of solution" at times. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963). The Supreme Court has listed the tests traditionally applied to determine whether a statute is penal or regulatory in nature:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of Congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face. [Footnotes omitted]
>
> Id at 168, 169.

Section 27.3455 imposes costs of $200 upon anyone who pleads guilty or nolo contendere or is found guilty of a felony. Guilty ajudications for misdemeanors and criminal traffic offenses have costs imposed of $50.00 The statute is self-enforcing in that gain time accrued is not granted or awarded until the costs are paid in full. In addition, the statute provides that persons found indigent can "work off" the costs imposed by performing community service. The hours worked in community service are multiplied by the minimum wage and that amount is subtracted from the costs imposed until the costs are paid in full. Gain time is not withheld from indigents. An indigent must "work off" the costs imposed immediately after being released from incarceration.

The funds collected are to be distributed to specific state agencies in the following priority: (1) to the governmental unit which provides services as outlined by statute to the state attorney and public defender; (2) through the medical examiner's commission to the Board of County Commissioners to supplement the actual cost of operations and services of medical examiners; and (3) through the Bureau of Crimes Compensation to counties with a comprehensive victim witness program which meets the Bureau's standards. §27.3455(2), Fla. Stat. (185). The fact that the bulk of the funds generated by this statutory section go to support the services of the state attorney and public defender indicates that the costs are not imposed as punishment but are levied

to support those specific programs in the criminal justice system. In contrast, a fine imposed as punishment pursuant to section 775.083, Florida Statutes (1985), is placed into a government's general operating fund. The distribution of the proceeds of a fine need only "further a legitimate public purpose" to be proper. State v. Champe, 373 So.2d 874, 878 (Fla. 1978)(upholding as constitutional the Crimes Compensation Act).

The contrast between costs and fines is illustrated further by their placement in Florida Statutes. The costs provision is found in Chapter 27, a chapter dealing with state attorneys, public defenders and related offices. On the other hand, the fines provision is located in Chapter 775, a chapter dealing with the state of Florida's penalties for crimes committed in its jurisdiction.

Another kernel of intent can be gleaned from the law as it was enacted. By constitutional mandate, "every law shall embrace but one subject and the matter properly connected therewith. . . ." Art. III, § 6, Fla. Const. Chapter 85-213, Laws of Florida, is the enacting law for the statute in question. It amends certain sections of Chapter 27 by requiring the county to pay for certain services for state attorneys and public defenders. It creates the section before us today as a means for the county to generate revenue to pay for these increased services.

Even under the other tests listed by the Supreme Court in its Mendoza-Martinez opinion, the imposition of costs cannot be viewed as "an affirmative disability of restraint." The sanction is a mere loss of $200.00 or an equivalent amount of community service. The imposition of costs has not "historically been regarded as a punishment."

The next test "whether it comes into play only on a finding of scienter,"points toward a finding that costs are a penalty. Under the statute, costs are only assessed against convicted defendants. Innocents have always been excused from paying the costs of criminal prosecutions. This is probably based on the assumption that innocents have paid enough "social costs' prior to their acquittal. But a review of the cases cited in support of this test indicate that this test is traditionally used to distinguish between a penalty and tax. Accordingly, Judge Ryder attributed less weight to this test in his analysis.

The next test is whether the imposition of costs will promote the traditional aims of punishment - retribution and deterrence. Viewed technically, costs are used to retribute the county for the expense of prosecuting the individual. But retribution should be used in a much broader sense. It is to reprimand the wrongdoer and make him pay society for violating its laws. Paying costs are not sufficient retribution to society. Furthermore, the imposition of costs would not have a deterring effect. An easy way to to determine possible

deterremce is to view the sanction as the sole punishment for a crime. For example, a person would be deterred from committing a felony in the first degree by knowing that if convicted, he could serve up to thirty years in prison. Also, a person would be deterred from committing a felony of the first degree knowing the sole punishment was a fine of $10,000.00. Clearly, few people would be deterred from committing a first degree felony if the sole punishment was the imposition of $200.00 costs.

Next, the behavior to which the statute applies is already a crime. Punishment for those crimes - both imprisonment and fines - has been laid out by other statutory sections. Imposing costs does not add to that punishment.

As set out above, an alternative purpose to which it is rationally connected is assignable to the imposition of costs. It is to provide revenue to the counties for services the counties are required to provide. The amount imposed is not excessive in relation to this purpose but is clearly relative to the seriousness of the offense adjudicated.

After looking at the statute itself, the law enacting it, and the several tests traditionally used by the United States Supreme Court to determine whether a sanction is punishment, Judge Ryder came to the conclusion that the costs imposed by this section are not a penalty. The legislative intent gleaned from the statute itself points to that conclusion. Nearly every traditional test points to that conclusion. To conclude otherwise would go against years of United States

Supreme Court opinions: the primary elucidator of this country's ex post facto constitutional provision.

The conclusion that costs are not a penalty is consistent with Florida Supreme Court case law as well. In Ivory v. Wainwright, 393 So.2d 542 (Fla. 1980), this court upheld a statute against ex post facto attack. The statute under attack, section 944.485, Florida Statutes (Supp. 1978),"requires, as a condition of parole eligibility, that prisoners disclose their assets and income, and that they be assessed the costs of their subsistence in prison." Ivory at 543. This Court rejected the ex post facto argument and stated that the argument presumes that the section increases punishment, but that presumption is mistaken because the purpose of the statute is not punitive. Ivory at 544 (citing Flemming v. Nestor, 363 U.S. 603 (1960)). Likewise, the purpose of section 27.3455 is not punitive. Its purpose is to fund programs directly related to the administration of justice in our state.

The State also contends that even if the imposition of this cost were a penalty that it, nevertheless, does not violate principals of ex post facto because the statute is not a change of law.

Respondents argued pursuant to Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), that since the statute changes the amount or availability of gain-time, it is disadvantageous, and therefore ex post facto. The State disagrees with Respondent's arguments. If a criminal defendant

is not indigent for the purposes of this statute, gain-time will still accrue, but it will be forfeited if the money is not paid by the defendant's tenative release date. Forfeiture of gain-time for failure to pay a certain sum ordered by the court has always been proper pursuant to sections 944.275(5) and 944.28 of the Florida Statutes. Gain-time may be forfeited if a "a prisoner is found guilty of an infraction of the laws of this state or the rules of the department." §944.275(5), Fla. Stat. (1985) (applies to sentences imposed for offenses committed on or after July 1, 1978). Moreover, "all or any part of the gain-time earned by a prisoner according to the provisions of law shall be subject to forfeiture if such prisoner shall. . . by action or word refuse to carry out any instruction duly given to him. . . or violate any law of the state or any rule or regulation of the department or institution." §944.28(2)(a) (applied prior to date of respondent's offense). Failure to obey a court order of any kind constitutes contempt, and thus subjects the violator to forfeiture of gain-time. See, §38,23 Fla. Stat. (1985)(defining contempts). As these statutes indicate, the provision of section 27.3455 prohibiting the granting of accrued gain-time for nonpayment of a court-ordered fee is nothing but a restatement of the law as it existed prior to the commission of respondent's offense. Consequently, unlike the facts in Weaver, supra, the forfeiture of gain-time in section 27.3455 does not change the amount or availability of

gain-time. If any change at all, section 27.3455's gain-time. forfeiture provision is automatic for nonpayment, absent a finding of indigency, and seemingly alleviates the procedural steps required for declaring forfeiture under section 944.28 (2)(a) and (b). See, §944.28 (b)(c) This change, however, can only be considered a procedural change, not requiring the application of the ex post facto doctrine. 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); Malloy v. South Carolina, 237 U.S. 180, 35 S.Ct. 507, 59 L.Ed. 905 (1915).

Even the indigent defendant cannot argue the statute imposes a greater quantum of punishment than previously authorized. An indigent does not lose gain-time, nor does an indigent pay fees. Instead, pursuant to section 27.3455, an indigent must perform community service at the termination of incarceration. Again, prior to the date of Respondent's offense, the court had authority in two different sections to impose a split sentence, imposing incarceration and then a period of community service. Section 775.091 of the Florida Statutes provides "in addition to any punishment, the court may order the defendant to perform a specified public service," and section 921.187 of the Florida Statutes provides in pertinent part:

> (1) The following alternatives for the disposition of criminal cases shall be used in a manner which will best serve the needs of society, which will punish criminal offenders, and which will provide the opportunity for rehabilitation. A court may:

* * * *

(g) Impose a split sentence whereby the offender is to be placed on probation upon completion of any specified period of such sentence, which period may include a term of a year or less.

* * * *

(i) Make any other disposition that is authorized by law.

(2) The court shall require an offender to make restitution pursuant to s.775.089, unless the court finds reasons not to order such restitution as provided in that section. . .

(Emphasis supplied)

It is a cardinal rule of statutory construction that an act of the legislature is presumed valid and will not be declared unconstitutional unless it is patently invalid. Kinner, supra at 1363.

In sum as the statute was merely a procedural change and the costs are not a penalty the statute is constitutional.

CONCLUSION

Based upon the foregoing reasons, arguments and authorities, the judgment and sentence of the trial 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 has been furnished by U.S. mail to Anne Owens, Assistant Public Defender, Hall of Justice Building, P.O. Box 1640, Bartow, Florida 33830 on this _____ day of December, 1986.

OF COUNSEL FOR APPELLEE