IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

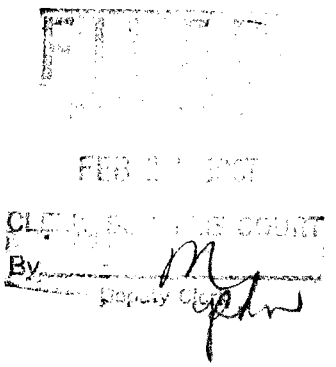
Petitioner

vs.

TED FITTE

Respondent

Case No. 69, 853



DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF RESPONDENT ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Respondent was charged by informations with committing three counts of lewd and lascivious acts in the presence of children on or between August 15, and September 13, 1984. Respondent was also charged by information with having, between July 16 and September 10, 1984, handled and fondled a child. (R8-10) In Sixth Judicial Circuit Court in Pasco County before the Honorable Lawrence E. Keough on May 23, 1985, Respondent entered pleas of guilty. (R14,33-43) Respondent was then adjudicated guilty of all four offenses as charged. (R15,16,19,20,24,25)

On July 15, 1985, before the self-same court and magistrate, Respondent was sentenced to seven years imprisonment for each count to be served concurrently, (R17,18,21-23,26,27,50) The sentence was within the sentencing guidelines recommendation. (R45) The court imposed court costs as per §27.3455,F.S. (1985). (R50)

A timely Notice of Appeal was filed August 13, 1985. (R28) The Public Defender's Office was appointed for the purpose of appeal. (R29) The Second District Court of Appeal reversed the imposition of court costs in the amount of $200.00, and certified the question as follows:

> DOES THE APPLICATION OF SECTION 27.3455, FLORIDA STATUTES (1985) TO CRIMES COMMITED 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)?

Notice of intent to invoke discretionary jurisdiction was filed by Petitioner. This case was consolidated with case no. 69, 633, State v. Bowman, on January 29, 1987. Petitioner was permitted to adopt the Petitioner's brief on the merits filed in Bowman. Repondent files this brief in response thereto. A copy of the District Court's decision is attached hereto.

SUMMARY OF THE ARGUMENT

Section 27.3455 of the Florida Statutes authorizes the imposition of additional court costs of $200.00 for the commission of a felony. This law became effective July 1, 1985. LAWS OF FLORIDA, Ch. 85-213 (H.B. 1023)(1985) [currently codified at FLA. STAT. §27.3455 (1985)] Although Respondent was convicted of crimes which occurred prior to July 1, 1985, the court costs authorized by that law were imposed. Section 27.3455 of the Florida Statutes was unconstitutionally applied to Respondent because his crimes were committed prior to its effective date and Respondent was disadvantaged by the imposition of the costs.

CERTIFIED QUESTION

DOES THIS 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 UNTIED 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)?

ARGUMENT

At sentencing, the trial court imposed $242.50 court costs. The court did not determine that Respondent was insolvent for purposes of court costs and rule that community service could be substituted therefor and Section 27.3455, Florida Statutes (1985) court costs were imposed when the court entered its written judgment. An objection was not required. Although some courts have held that a timely objection is required to preserve such an issue for appeal, see e.g., Johnson v. State, 11 F.L.W. 1539 (Fla. 2d DCA July 9, 1986), the better view if that the ex post facto application of such a statute constitutes fundamental sentencing error. In State v. Whitfield, 487 So.2d 1045 (Fla. 1986), this Court held that no contemporaneous objection was required when the sentence imposed was an illegal sentence, and that the absence of statutory authority for a sentence renders the sentence illegal. In the case at hand, because of the constitutional prohibition against ex post facto laws, there was no statutory authority for the imposition of the court costs. Thus, the sentence was illegal. See also Freeney v. State, 11 F.L.W. 1529 (Fla. 5th DCA July 10, 1986) (reversing ex post fact application of same statute sua sponte);

Ramsey v. State, 462 So.2d 815 (Fla. 2d DCA 1985) (failure of trial counsel to contemporaneously object to the sentence imposed does not vitiate right to appeal).

Petitioner also argues that Respondent's ex post facto allegation will not become an issue suitable for judicial review unless Respondent refuses to pay the court costs before his "tentative release date." Petitioner suggests that Respondent wait until then to file a writ of habeas corpus or move the court to determine his indigent status so the court could sentence him to community service work.

Respondent had not been found insolvent by the trial court, and would suffer a loss of gain-time if he had failed to pay the court costs. The deprivation of gain-time is a great disadvantage because he would have had to spend a considerably longer time in prison. Petitioner's suggestion that a defendant calculate his tentative release date, then file a motion or writ, is highly impractical at best. It would not only be difficult for an incarcerated defendant without counsel to file such a pleading, but burdensome, time-consuming, and costly for the trial court in which such a pro se motion would be filed long after the case was closed and, in most cases, forgotten.

Section 27.3455 of the Florida Statutes authorizes the imposition of additional court costs in the amount of $200.00 for the commission of a felony. It provides further that no gain-time will be granted until the costs are paid. If a defendant is found

to be indigent, community service work may be substituted for the payment of the court costs. The effective date of the statute was July 1, 1985. LAW OF FLORIDA, Ch. 85-213 (H.B. 1023) (1985) [currently codified at FLA. STAT. §27.3455 (1985)].

Article I, section 10, of the Florida Constitution and Article I, sections 9 and 10, of the United State Constitution prohibit ex post facto laws. Florida follows the rule that in the absence of a clear legislative expression to the contrary, a law is presumed to apply prospectively. Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985); State v. Lavazzoli, 434 So.2d 321 (Fla. 1983). The exception to this general rule is when a statute does not alter a substantive right but is merely procedural. Id. at 323; see State v. Jackson, 478 So.2d 1054 (Fla. 1985) (sentencing guidelines are procedural).

In Lavazzoli, 434 So.2d 321, the Florida Supreme Court held that an amendment to Articel I, section 12, of the Florida Constitution, which took away the right of a Florida citizen to be free from unreasonable search and seizures, independant of the United State Constitution's Fourth Amendment right, could not be applied retrospectively as it unquestionably altered a substantive right. Similarly, prior to the enactment of §27.3455, a Florida citizen had the right to gain-time, not conditioned upon the payment of these court costs.

In the recent Florida Supreme Court case of Young v. Altenhaus,

472 So.2d 1152, the court held that a statute requiring the non-prevailing party to pay attorney fees in a medical malpractice case could not be applied retrospectively because the statute created "a new obligation or duty." Absent the statute, each party would be required to pay his/her own attorney fees. Id. at 1154. Similarly, in our case, court costs could not be imposed absent the statute. Thus, the statute creates a new obligation and cannot be applied retroactively.

In State v. Williams, 397 So.2d 663 (Fla. 1981), the Florida Supreme Court adopted the United States Supreme Court's "two-fold test" as to what constitutes an invalid ex post facto law relative to criminal proceedings: (1) does the law attach legal consequences to crimes committed before the law took effect, and (2) does the law affect the prisoners who committed those crimes in a disadvantageous fashion? If the answer to both questions if yes, then the law constitutes an ex post facto law and is void as applied to those persons. Id. at 665 [citing Weaver v. Graham, 450 U.S. 24 (1981)].

In the case at hand, the crime occurred prior to the effective date of the law. The law attaches legal consequences to the crime. The court ordered Respondent to pay court costs which he would not have had to pay absent application of the statute. Respondent would lose his gain-time because he could not pay -- a definite disadvantage. Thus, he was affected in a disadvantageous fashion

by the application of the law. Accordingly, application of section 27.3455 (1) to the Respondent, whose offense occurred prior to the statute's effective date, violated the constitutional prohibition against ex post fact laws. See Yost v. State, 489 So.2d 131 (Fla. 5th DCA 1986), rev. pending, No. 68,949 (Fla.).

In Yost, the court determined that the court costs statute was not merely procedural. The penalty imposed, the additional court costs, and in the case of declared indigent defendants, the substituted community service work, did not exist prior to the enactment of the statute. Thus, the statute did not merely provide a new method of collecting pre-existing court costs. Id. at 132. Citing Weaver, 450 U.S. 24, 101 S. Ct. at 965, the Yost court noted that "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 if it is both retrospective and more onerous than the law in effect on the date of the offense." Id.

Petitioner argues that these court costs do not constitute a penalty. Petitioner's argument is based on Judge Ryder's specially concurring opinion in the very recent Second District case of Stone v. State, Case No. 85-2750 (Fla. 2d DCA Dec. 3, 1986). In fact, pages 7-13 of Petitioner's brief is nearly an exact reproduction of Judge Ryder's argument, word for word. Although

Judge Ryder concurred in the court's opinion to avoid conflict with another panel of the same court, he disagreed with the court's conclusion that the retroactive application of the statute constitutes an ex post facto violation. His disagreement stems from his belief that an ex post facto violation can occur only if the statute is penal rather than regulatory and that the costs imposed by §27.3455 do not constitute a penalty.

First of all, the constitutional prohibition against ex post facto laws does not require that the statute be specifically characterized as a penalty. Article I, Section 10, of the Florida Constitution provides that "No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed." Article 1, Section 10, of the United States Constitution forbids the States from passing "any ex post facto law." Nowhere does it say that the law must be intended as a punishment. Case law has defined an ex post facto law as one which aggravates, rather than mollifies, the law. Cummings v. Missouri, 4 Wall. 277, 18 L.Ed. 356 (1867). It includes changes in the rules of evidence which make it easier to convict. Id. The Lavazzoli and Young cases, discussed supra, provide examples of ex post facto laws which were not be characterized as penal laws, although they penalize a person is a manner in which the person would not have been penalized prior to their enactment.

"The critical question is whether the law changes the legal consequences of acts completed before its effective date." Weaver v. Graham, 450 U.S. 24, 32 (1981). Section 27.3455 increases the penalty for the commission of a crime completed before its effective date. Although the court costs imposed increase the penalty, the potential deprivation of gain-time or imposition of community service work subsequent to incarceration are much more serious deprivations. The deprivation caused by a loss of gain-time is obvious.

Petitioner argues, as did Judge Ryder, that the fact that the court costs go to support the services of the state attorney and and public defender indicates that they are not levied as punishment but rather, to support these programs, as opposed to fines which need only further a legitimate public purpose. Additionally, these court costs are in Chapter 27 of the Florida Statutes, rather than Chapter 775, which includes fines. As we have stated above, it is not necessary for a law to be classified as penal if it disadvantages the defendant. Chapter 27 relates to criminal law and the court costs are only levied on those convicted of crimes. Additionally, the provision allowing the substitution of community service indicates that the intent of the statute is not only to support those programs, but to but to punish the defendant. The same is true of the provision depriving the defendant of gain-time if the costs are not paid. Loss of gain-time is surely a punishment

and does nothing to support the programs under Chapter 27. In fact, it results in increasing the cost of keeping the defendant incarcerated because the incarceration is for a much longer time.

Fines go into the government's general operating fund. Thus, they are levied to support the government. Does this mean that a fine is not a punishment? Petitioner asserts that the court costs "sanction" is "a mere loss of $200.00 or an equivalent amount of community service" and thus not "an affirmative disability of restraint." We disagree. $200.00 is not a samll amount when one is incarcerated an unable to work, and a loss of gain-time is clearly affirmative disability and restraint.

Petitioner next asserts, as did Judge Ryder, that court costs alone would not be a deterrence to crime. This conclusion is reached by looking at the sanction as the sole punishment? It is not the sole punishment. Many crimes are punished by both a fine and imprisonment. Does this mean that each one considered alone must provide a sufficient deterrence? If so, the defendant would be receiving a doulbe amount of punishment for the crime. Imposing costs does add to the punishment.

Petitioner notes, as does Judge Ryder, that Florida Law 542 (Fla. 1980). This case is clearly distinguishable because disclosing assets and income is not a punishment and the assessment of the cost of subsistance in prison is not enforced by deprivision

of gain-time or other punishment. Additionally, this case was decided prior to Weaver v. Graham, 450 U.S. 24 (1981), which found that a law changing the gain-time provisions was an ex post facto violation.

Petitioner's assertion that this statute is not a change of law is frivilous. Clearly, the addition of more costs, and provisions enforcing it, change the law from when the provisions did not exist.

In Weaver, the United States Supreme Court held that a Florida Statute changing the calculation of gain-time, so that a prisoner would obtain less gain-time for the same conduct, constituted an ex post facto violation. Although other laws provided that prisoners could get more gain-time for a satisfying extra conditions, the new law restricted the inmate's opportunity to earn an early release for the same conduct as before -- performing satisfactory work and avoiding disciplinary violations. Thus, the new law made "more onerous the punishment for crimes committed before its enactment." 450 U.S. at 35-36.

The case at hand is precisely the same. The new statute imposes additional conditions upon the earning of gain-time. In fact, the law states that the inmate will lose all gain-time if he or she does not pay the court costs. Petitioner has argued that forfeiture of gain-time for failure to pay a court ordered sum has always been proper because §944.275(5) and §944.28 of the Florida Statutes provide that gain-time may be forfeited if

a prisoner is found guilty of an infraction of the law. Petitioner reasons that failure to obey a court order constitutes the crime of contempt, an infraction of the law.

We find this argument to be rather far-fetched. For such a scenario to occur, the inmate would need to be charged with the crime of contempt, taken to court, and convicted. This conviction would then need to be brought before the disciplinary committee, in accordance with §944.28(2)(c). Even if this were to occur, it is doubtful that the inmate would loss all of his/her gain-time. We do not believe that the gain-time provisions were intended to, or are, used to enforce court orders for the payment of court costs.

Petitioner's further suggestion that, if anything, the statute makes the forfeiture provisions automatic and alleviates procedural steps required by §944.28(2), is tantamount to the suggestion that the new law deprives inmates of due process, another constitutional guarantee. It would not only eliminate the administrative hearing required, but also the judicial determination of guilt as to contempt, at which the prisoner might have been found to be insolvent and, therefore, innocent of contempt. Certainly, §27.3455 should not be construed in this manner.

Petitioner's argument that the statute does not impose a greater quantum of punishment on an indigent defendant because he can substitute community service assumes that community service is not a punishment. Petitioner argues that two other statutes

already authorize the imposition of a split sentence -- with community service following a period of incarceration. §§775.091, 921,187, Fla.Stat. (1985). Although this is true, §27.3455 adds to the amount of community service which could have been imposed and thus makes the punishment more onerous. The fact that community service is authorized as a punishment elsewhere in the law supports our argument that community service work is a punishment and does disadvantage the Respondent.

CONCLUSION

It seems clear that §27.3455 chages the law, makes it more onerous, and is an ex post facto violation when applied to Respondent whose crime was committed prior to its enactment. Thus, the trial court's ex post facto application of §27.3455 of the Florida Statutes violated the United States and the Florida constitutions. The district court's holding should therefore be affirmed and the certified question answered -- that the ex post facto application of section 27.3455 violates the provisions of the constitutions of the United States and Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished to the Attorney General's Office, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, FL 33602, by mail on this 9th day of February, 1987.

John T. Kilcrease

JOHN T. KILCREASE, JR.