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IN THE SUPREME COURT
STATE OF FLORIDA

FILED
SID J. WHITE
JAN 16 1987
CLERK, SUPREME COURT
By
Deputy Clerk

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 69,770

CLIFFORD WEBBER,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The defendant was charged by two informations filed on September 5, 1985, with the offenses of lewd and lascivious assault upon a child occurring on or before June 30, 1985, and capital sexual battery occurring on or before November 30, 1982 (R 1-2). Trial by jury commenced on September 9, 1985, and the jury found the respondent/defendant guilty of both counts as charged (R 32-33).

The court adjudicated the respondent guilty and respondent appeared with his counsel on January 9, 1986, for sentencing. The court sentenced the respondent to life imprisonment with a minimal mandatory 25 years imprisonment on the capital sexual battery conviction and a ten year concurrent sentence on the lewd assault conviction (R 34-39). The court also assessed statutorily authorized court costs against the respondent in the amount of $228 (R 55). At the sentencing hearing no motion was made by respondent's counsel to declare respondent an indigent at the time of sentencing, so there was no determination by the court that respondent was indigent, nor was there any objection raised as to the assessment of these costs at the sentencing hearing.

On February 10, 1986, respondent filed his notice of appeal to the Fifth District Court of Appeal, seeking, among other things, an order of the appellate court vacating that portion of the sentence which imposed court costs pursuant to section 27.3455, Florida Statutes (1985) (R 34).

On November 20, 1986, the district court of appeal rendered

its order affirming respondent's conviction and vacating that portion of respondent's sentence which imposed $200 in court costs on the ground that the statute violates constitutional ex post facto restrictions, and certifying the issue as being of great public importance.

This appeal by the state followed.

SUMMARY OF ARGUMENT

The district court of appeal should not have addressed the issue of court costs here since it was not yet ripe for review and since the issue was not properly preserved for review by being raised at the trial level.

Application of section 27.3455, Florida Statute (1985) to this case in not in violation of any ex post facto prohibition since it provides merely for a procedural change regarding the collection of costs and does not disadvantage the respondent by increasing the quantum of punishment where the same costs could be imposed under the law existing at the time of the offense, and where respondent's accrual of gain time will not be affected by the statute.

POINT ONE

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

When the trial judge indicated that he was ordering respondent to pay "the statutorily imposed fines", 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 55). 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). Respondent did raise this issue, however, in a direct appeal, but the constitutional application of a statute to a particular set of facts is a matter which must be raised at the trial level before it can be considered on appeal. Trushin v. State, 425 So.2d 1126 (Fla. 1982). The application of the ex post facto doctrine to statutes has been held not to be fundamental error and that 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), Slaughter v. State 493 So.2d 1109 (Fla. 1st DCA 1986).

Interestingly, respondent raised no objection on any grounds in the trial court to the imposition of $228. The subsequent reversal by the Fifth District Court of Appeal based upon Yost v. State, 439 So.2d 131 (Fla. 5th DCA 1986), was therefore in error

since respondent failed to preserve this issue for appellate review.

POINT TWO

APPLICATION OF SECTION 27.3455, FLORIDA STATUTES (1985) TO CRIMES COMMITTED PRIOR TO THE EFFECTIVE DATE OF THE STATUTE DOES NOT VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST EX POST FACTO LAWS.

Appellant/respondent was sentenced at a hearing on January 9, 1986, for crimes committed on or before June 30, 1985 and November 30, 1982. In the interim between the offense date and sentencing date, section 27.3455(1), Florida Statutes (1985), came into effect on July 1, 1985.[1] This statute provides for the mandatory imposition of court costs of $200 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 for compensation for crime victims and witnesses called to testify. The district court of appeal determined that assessment against Webber at the sentencing on January 9, 1986, of $200 court costs as set forth by that statute is a violation of ex post facto restrictions. Art. I, § 10, Fla. Const.

Despite the district court's holding that this type of sentencing error may be raised on appeal notwithstanding the respondent's failure to object at sentencing, petitioner contends, based on its Point One argument, that this issue has not been preserved for review and is not properly before this court. See, Trushin v. State, 425 So.2d 1126 (Fla. 1982).

On its face, the statute is constitutional. The statute in

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

effect at the time of Webber's sentencing provides:

> 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. . . .

Those defendants with an ability to pay are credited and awarded gain time just as they were before the effective date of this statute, provided they comply with the procedure for collection of court ordered costs. Indigent defendants are also credited and awarded gain time exactly as before. This statute provides for an alternative to the payment of the court costs in the performance of community service. This issue will not be ripe for review unless and until respondent refuses to pay the $200 before his tentative release date. At that time, Webber should file a petition for writ of habeas corpus since he would essentially be attacking the legality of his detention. See, Weaver v.Graham, 450 U.S. 28, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). More appropriately, Webber could move at that time, pursuant to the statute itself, for the court to determine his indigency status. Upon a finding of indigency, the court would grant the gain time, release respondent, and sentence him to a term of community service in lieu of paying the $200. However, since the Fifth District Court of Appeal determined that the entire section of the statute was a violation of constitutional restrictions against ex post facto laws, to remand for imposition of community service in lieu of costs would be a futile gesture in light of

its ruling in Yost, supra.It is possible though that Webber might pay the $200 by his tentative release date thus rendering his challenge to this assessment moot. Nevertheless, appellee/petitioner will proceed with its brief on the merits and advance several arguments in support of the proposition that there is no ex post facto violation in this case.

Statute 27.3455 does not alter the penal provisions, nor does it impose a more onerous penalty since court costs, not penal in nature, could always be imposed at the time of respondent's offense. §§ 939.01, 943.25, Fla. Stat. (1985). Trial courts could always impose split sentences which included incarcertion followed by community service, restitution, fines or any other disposition authorized by law. See, §§ 775.083, 775.989, 775.071, and 921.187, Fla. Stat. (1985). This statute involves a mere procedural change by which costs are extracted from criminal defendants and does not require application of the ex post facto doctrine. 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).

The United States Supreme Court has held that in order to establish an ex post facto clause violation, two elements must be present: it must be retrospective, and it must disadvantage the offender because it may impose greater punishment. Even if a statute merely alters the penal provisions accorded by the grace of the legislature, it is ex post facto if it is retroactive and more onerous than the law in effect on the date of the offense. Weaver v. Graham, 450 U.S. at 964-965. Although the statute is

not retroactive on its face, petitioner recognizes the retroactive application in this case where the offenses were committed prior to its effective date. However, this statute does not alter penal provisions. Weaver v.Graham, supra, concerned a statute that changed the gain time that would be awarded to prisoners. Here, computation of gain time is uneffected by this statute, only the procedure by which it is credited is changed. The change in the way court costs are collected is not related to either the crime or the penalty. 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 tentative 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), which applies to sentences imposed for offenses committed on or after July 1, 1978, and 944.28, Florida Statutes (1985). 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). The provision of section 27.3455 prohibiting the granting of accrued gain time for non-payment of a court ordered fee is nothing but a statement of the law as it existed prior to the conviction of Webber's offense. Unlike the facts in Weaver, supra, the forfeiture of gain time provided by section 27.3455 does not change the amount or availability of gain time. In Dobbert, supra, the Florida death penalty statute was upheld against an ex post facto attack because the change in the statute was "clearly procedural." "Even

though it may work to the disadvantage of a defendant, a procedural change is not ex post facto." Dobbert v. Florida, 432 U.S. at 293.

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 costs. Instead, an indigent must perform community service at the termination of incarceration. Again, prior to the date of Webber's offense, the court had the authority to impose a split sentence. It is clear under this statute, that all persons who are found guilty of any felony or misdemeanor shall have additional costs imposed at the time of sentencing. In imposing those costs, the court's cannot distinguish between indigent and non-indigent defendants. However, a distinction is made between indigent and non-indigent defendants with regard to collection of such costs. It is also clear that immediate payment of these costs is not mandatory as the enforcement procedures in the statute provide an alternative to payment capable of being exercised in the future, upon a determination of indigency. A determination of indigency for purposes of this section can be made at any time, as the court retains jurisdiction expressly for that purpose. This feature of the statute recognizes that a person's financial circumstances can change after conviction. Upon proper motion to the court, a determination of indigency can be made at any time, and in lieu of the payment of the costs the defendant may perform community service so that gain time would not be forfeited by a failure to pay the costs. Performing

community service was something the defendant could have been required to do under pre-existing law.

Under section 939.01, Florida Statutes (1985), there appears to be no limit, excepting that set by the reasonable discretion of the trial court, to the costs which might be imposed upon conviction. Similarly, as in the case of May v. Florida Parole and Probation Commission, 435 So.2d 834 (Fla. 1984), respondent had, at best, nothing more than a tenuous expectancy regarding his punishment under the law existing when he committed his crimes. Respondent's sentence under any law 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 respondent committed his crime, he was on fair notice that any sentence he might receive would be subject to the discretion of the court. Any alleged right to less "punishment" was vitiated by such notice.

The assessment of court costs against Webber does not violate ex post facto doctrines since it is not an increase in the quantum of punishment, but is merely a procedural change. Since under the costs and penalty statutes in effect at the time of respondent's offense, either costs or community service could be imposed, there can be no application of a subsequent costs provision which would defeat the concept of the ex post facto law. See, Lee v. State, 294 So.2d 305, 307 (Fla. 1974). Consequently, the Fifth District Court of Appeal erred in finding

§ 27.3455(1) unconstitutional as applied to respondent.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully prays this honorable court reverse the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petitioner's Brief on the Merits has been furnished by mail to James R. Wulchak, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, and counsel for the respondent, this 13th day of January, 1987.

PAMELA D. CICHON
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