

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

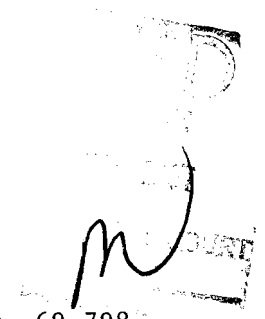
v.

PATRICK MORGANTI,

Respondent.

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CASE NO. 69,798

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the prosecution and Respondent the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Petitioner may also be referred to as the State.

The following symbol will be used:

"R"                      Record on Appeal.

All emphasis has been added by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent was placed on probation for two years for the offense of robbery. (R 262). Three months later, the Department of Corrections filed an affidavit charging that Respondent violated his probation by: possession of PCP, a controlled substance; failure to pay \$40 in costs of supervision; failure to submit to an evaluation for substance abuse treatment; and failure to pay \$80 towards his Public Defender fee. (R 266).

After a hearing, the trial court found Respondent to be an habitual offender (R 294), and sentenced him to 30 years in prison (R 291). The sentencing guidelines called for a sentence of eight years in prison. (R 290).

Respondent appealed, and the Fourth District Court of Appeal affirmed the conviction, holding that Respondent's probation was properly revoked based on the charge of possession of PCP. However, the district court ordered that Respondent be sentenced within the guidelines, pursuant to Whitehead v. State, 11 FLW 553 (Fla., October 30, 1986). In addition, the district court reversed the order assessing \$200 costs, pursuant to §27.3455, but certifying the following question as one of great public importance:

DOES THE APPLICATION OF SECTION 27.3455,  
FLORIDA STATUTES (1985) TO CRIMES COM-  
MITTED 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 EF-  
FECT A PROCEDURAL CHANGE AS IS PERMITTED  
UNDER STATE v. JACKSON, 478 So.2d 1054  
(Fla. 1985)?

Morganti v. State, 11 FLW 2473, 2474 (Fla. 4th DCA, November 26, 1986).

(Exhibit "A").

This same question has been certified in Signorelli v. State, 491 So.2d 349 (Fla. 4th DCA 1986), and in Yost v. State, 487 So.2d 131 (Fla. 5th DCA 1986).

Notice to Invoke the discretionary jurisdiction of this Honorable Court was timely filed on December 16, 1986.

POINT ON APPEAL

WHETHER SECTION 27.3455 VIOLATES THE CONSTITUTION PROHIBITION AGAINST EX POST FACTO LAWS AS APPLIED IN THE PRESENT CASE?

SUMMARY OF ARGUMENT

The application of Section 27.3455 Florida Statutes (1985) to crimes committed prior to the effective date of the statute does not violate the ex post facto provisions of the United States and Florida Constitutions. The section does not disadvantage an offender affected by it.



ARGUMENT

SECTION 27.3455 DOES NOT VIOLATE THE CONSTITUTION PROHIBITION AGAINST EX POST FACTO LAWS AS APPLIED IN THE PRESENT CASE.

Section 27.3455, Florida Statutes (1985) became effective July 1, 1985.<sup>1</sup> 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 Respondent'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 imposition of two hundred dollars court costs at Respondent's sentencing violated the ex post facto provision of the Florida constitution. Art. I, §10, Fla. Const.

On its face, Section 27.3455 is constitutional. Those defendants with an ability to pay are credited and awarded gain time exactly as before, provided they comply with the procedure for collection of the court ordered costs. Indigent defendants are also credited and awarded gain time exactly as before. The statute provides for alternate payment of the court costs by performing community service upon motion by the defendant.

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

On its face, the statute is not retroactive, but Petitioner recognizes the retroactive application in this case.

For a criminal law to be ex post facto, two factors must be present; it must be retrospective and it must disadvantage the offender affected by it. Even if a statute merely alters 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 that date of the offense.

Weaver v. Graham, 450 U.S. at 964-965. It is clear that this statute is being applied retroactively, that is, to offenses committed before its effective date. However, this statute does not alter penal provisions.

Weaver v. Graham, supra, concluded a statute that changed the gain time is unchanged, only the procedure by which it is credited. The change in the way court costs are collected is not related to either the crime or the penalty. The statute does not alter the penal provisions, so it is not an ex post facto violation.

The computation of gain time is unaffected by this statute. 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) and 944.28, Florida Statutes (1985). Gain time may be forfeited if 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 gain time earned by a prisoner according to the provisions of law shall be subject to for-

feiture 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) Fla.Stat. (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 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. Any change is merely procedural, which does not violate ex post facto. State v. Jackson, supra. Dobbert v. Florida, 432 U.S. 292, 97 S.Ct 2290, 53 L.Ed.2d 344 (1977).

In Dobbert 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. Section 27.3455, Florida Statutes (1985) is also clearly procedural.

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, an indigent must perform community service at the termination of incarceration. Again, prior to the date of Respondent's offense, the court had the authority to impose a split sentence, imposing incarceration and then a

period of community service. §775.091, Fla.Stat. (1985). Alternative dispositions include split sentences, public service, or any other disposition authorized by law. §921.187, Fla.Stat. (1985).

Section 27.3455 is plain in its meaning: all persons who are found guilty of any felony or misdemeanor shall have additional costs imposed at the time of sentencing. In imposing costs under section 27.3455, the courts cannot distinguish between indigent defendants and nonindigent defendants; the language of the statute is mandatory.

However, a distinction is made between indigent and nonindigent defendants with regard to collection of such costs. The language of the statute is 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. Such a finding can be made at the time of sentencing upon proper motion to the court, or at any time thereafter. This feature of the statute recognizes that a person's circumstances can change after conviction. Monetary resources available to the defendant at the time of conviction may be exhausted, or conversely, time in prison can be converted into money, for example, by writing a book. Failure to pay those costs forfeits accrued gain time; yet, due to the court's retention of jurisdiction, a defendant may still seek a determination of indigency to avoid payment of the costs and avoid forfeiture of his gain time resulting from his failure to obey a court order requiring payment. In exchange, the defendant must perform community service, something he could have been

required to do in the first place under preexisting law.

The imposition of the monetary payment of \$200 simply does not violate ex post facto doctrines since it is not an increase in the quantum of punishment but is merely a procedural change.

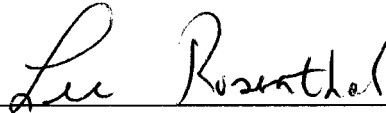
This Honorable Court should reverse the Fourth District Court's ruling that the application of section 27.3455 violates the constitutional prohibitions against ex post facto laws. Since it appears that notice pursuant to Jenkins v. State, 444 So.2d 947 (Fla. 1984) was not given prior to the imposition of the cost, this Honorable Court should remand the case to the trial court with the instruction that Respondent be afforded notice and an opportunity to be heard as to the imposition of costs pursuant to section 27.3455.

CONCLUSION

Based upon the arguments and authorities cited herein, Petitioner respectfully requests this Honorable Court to answer the certified question by finding that section 27.3455, Florida Statutes (1985) does not violate the ex post facto provisions of the Constitutions of the United States and the State of Florida.

Respectfully submitted,

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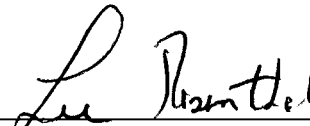


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on the Merits has been furnished, by courier delivery, to GARY CALDWELL, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 North Olive Avenue, West Palm Beach, Florida 33401, on this 20th day of February, 1987.



Of Counsel