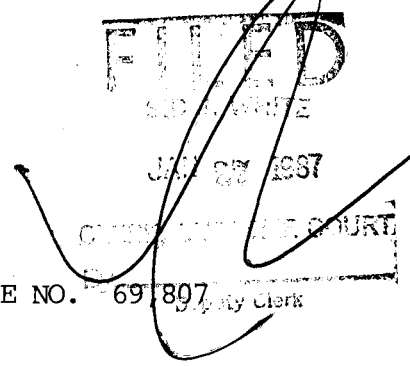
IN THE SUPREME COURT OF FLORIDA



MICHAEL H. LIVINGSTON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 69,807

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
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ATTORNEY FOR PETITIONER

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STATEMENT OF THE CASE

Petitioner was arrested on May 11, 1981, as the result of his involvement in a traffic fatality. (R 4-5, 26-27, 29) On August 12, 1981, an information for vehicular homicide was filed against him. (R 2, 106) On July 2, 1984, his motion for discharge was denied. (R 111-112, 128-130) On October 5, 1984, the trial court granted Petitioner's motion for discharge, which order was reversed by the Fifth District Court of Appeal in State v. Livingston, 475 So. 2d 1328 (Fla. 5th DCA 1985). (R 135-137, 138-140) Petitioner entered a plea of nolo contendere, reserving his right to appeal the July 2, 1984, denial of his motion for discharge, and was sentenced on March 12, 1986, to spend two and a half years in prison, to be followed by two years on probation. (R 92, 93-95)

Petitioner's conviction was affirmed on November 20, 1986, by the Fifth District Court of Appeal, but the portion of the sentence imposing community service in lieu of court costs was reversed and the following question was certified to this Honorable Court:

> 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)?

Petitioner's notice to invoke this Honorable Court's jurisdiction herein was timely filed on December 19, 1986, in the Fifth District Court of Appeal.

STATEMENT OF THE FACTS

Petitioner was arrested on May 11, 1981, in connection with a traffic fatality. (R 4-5, 26-27, 29) He had been living in an apartment complex which was being renovated and which was not rented to tenants until October 1981. (R 7, 20, 34, 35, 36, 37) Thereafter, and at times prior to May 11, 1981, he lived with Dana Hopfer whom he later married. (R 9, 11, 44, 52) He and Ms. Hopfer lived at several addresses during the time between his initial arrest and his subsequent arrest on a capias which was issued upon the filing of an information for vehicular homicide on August 12, 1981. (R 8, 11, 19, 20, 49, 6) The utilities at their various addresses were in Ms. Hopfer's name, and the post office box address which he gave at the time of his arrest was in her name. (R 12, 14, 13, 28, 34, 35) Petitioner never left the state of Florida or changed his name and, for most of the time between May 11, 1981, and his 1984 arrest, he worked for Paul Putnam as a bricklayer and was in frequent contact with his employer. (R 8, 43, 50)

A Brevard County deputy attempted to serve the capias on Petitioner in August of 1981, finding the apartment complex address to be a vacant building, and finding no utilities in Petitioner's name. (R 33-37) He did not check the jail's records for any further information on Petitioner. (R 35, 36) Petitioner's employer testified that at the time of his release from jail in 1981, Petitioner discussed with him his intention to move in order to avoid being sued by the deceased's family. (R 49, 53) Mr. Putnam told an Assistant State Attorney in 1981 about his relationship with Petitioner as his employer. (R 51)

SUMMARY OF ARGUMENT

POINT I: Although the State of Florida could not locate Petitioner after an information had been filed against him for vehicular homicide, there was no showing that he was "unavailable" for trial where the State had knowledge of his employment which was maintained throughout the one hundred and eighty days following his 1981 arrest and for much of the years thereafter; where Petitioner never left the county in which he was arrested or changed his name; and where an announcement that no information would be filed was made by the State and there was no evidence that Petitioner had knowledge or any way of knowing that an information was subsequently filed under a new case number and a capias issued for his arrest.

POINT II: Because the crime for which Petitioner was sentenced occurred in 1981, the imposition of community service in lieu of court costs was an ex post facto application of a statute which did not become effective until 1985.

ARGUMENT

POINT I

THE TRIAL COURT ERRED BY DENYING PETITIONER'S MOTION FOR DISCHARGE PURSUANT TO RULE 3.191(a) WHERE THE STATE FAILED TO BRING HIM TO TRIAL WITHIN 180 DAYS OF HIS ARREST DURING WHICH PERIOD OF TIME HE WAS CONTINUOUSLY AVAILABLE FOR TRIAL.

Prior to its 1985 amendment, Rule 3.191(a) provided that if a person charged with a felony is not brought to trial within 180 days of his arrest, upon his motion he shall be discharged from the crime. Because the State did not establish that Petitioner had been unavailable for trial between the time of his initial arrest, May 11, 1981, and his second arrest in 1984, the trial court should have granted his motion for discharge under the speedy trial rule.

At the June 20, 1984, hearing on Petitioner's motion for discharge, the State presented evidence that he gave the arresting officer three addresses, including his then girl friend's post office box number. (R 28-29, 30) A Brevard County deputy was then called to testify that he was not able to locate Petitioner at one of the addresses, which had been a vacant apartment building at the time of his arrest. (R 34, 35, 36, 37) The deputy also determined that there were no utilities being furnished in Brevard County in Petitioner's name. (R 34, 35) Checking with the apartment address and with the utility companies was the deputy's only effort to locate Petitioner in 1981; he did not check the Brevard County Jail's booking records, which were available to him, and which would have revealed Petitioner's employer with whom he was in regular contact

throughout most of the time that the State wished to say that he was unavailable for trial. (R 35, 36, 8, 43, 50, 51) At the time the deputy was seeking Petitioner's arrest in 1981, moreover, an announcement that no information would be filed had been made by the State Attorney's Office. (R 6) Petitioner's employer testified that Petitioner and his future wife intended to change their residence in order to avoid being sued by the family of the person killed in the accident, but there was no evidence whatsoever that Petitioner knew or had any reason to know that an information had been subsequently filed against him. (R 49, 53) Rule 3.191(h)(2) provides that the State may not extend the speedy trial period by its manner of filing charges or subsequent charges arising out of the same criminal episode. In Fyman v. State, 450 So. 2d 1250 (Fla. 2d DCA 1984), the District Court held that the delay in Fyman's trial was not attributable to him because Fyman had no duty to remain available for trial on new charges of which he had no knowledge. The defendant in Winfield v. State, 11 F.L.W. 2557 (Fla. 2d DCA December 3, 1986), had been discharged pursuant to an adversary preliminary hearing at which no probable cause had been found. Since there was no information pending, the District Court found that Winfield had no obligation to notify the court of his change of address or otherwise keep in touch with the court, and ordered him discharged.

Likewise, there is no showing in this case that Petitioner knew, or had any way of knowing, that an information--with a new case number--was filed against him, after the State had announced that no information would be filed in the case. (R 2, 6, 106) His employer's testimony indicated that Petitioner wished to avoid civil suit arising from the traffic accident. (R 49, 53) His testimony also showed, however, that he was in regular contact with Petitioner during most of the time between the two arrests and that, because he was personally interviewed about the matter by an Assistant State Attorney, the State of Florida was

aware of Petitioner's employment with him. (R 50, 51, 53) The single attempt by the deputy to locate Petitioner did not include a check of the jail's booking records or what information Petitioner had given regarding his employment. (R 35, 36) There was no evidence that Petitioner was deliberately attempting to evade prosecution on the August 12th information.

Because Petitioner was in fact available for trial, had the State been diligent in using the information in its possession, and because Petitioner did nothing to delay the prosecution of this cause, his motion for discharge under the speedy trial rule in 1984 should have been granted.

POINT II

THE TRIAL COURT'S IMPOSITION OF COMMUNITY SERVICE WORK IN LIEU OF COURT COSTS CONSTITUTED AN EX POST FACTO APPLICATION OF SECTION 27.3455, FLORIDA STATUTES, TO A CASE WHICH AROSE FROM AN INCIDENT PRECEDING THE STATUTE'S EFFECTIVE DATE.

In addition to two and a half years in prison and two years on probation, the trial court imposed on Petitioner a requirement that he perform community service in lieu of two hundred dollars in statutory court costs. (R 21) Section 27.3455, Florida Statutes, which authorizes such action, became effective on July 1, 1985. The offense for which Petitioner was being sentenced, however, occurred on May 11, 1981. (R 4-5, 106)

Article I Section 10 of the Florida Constitution prohibits the passage of any ex post facto law. 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); Art. I §9 Cl. 3, U. S. Const. 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 United States 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.

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. Whereas these pre-existing conditions provided for the forfeiture of accrued gain-time, the new law does not allow gain-time to be granted until the new requirements are met. The withholding of gain-time under the new statute is automatic so long as Section 27.3455(1) is not complied with, whereas the former provisions for gain-time forfeiture required that there be findings of guilt made, and that a particular method for declaring a forfeiture be followed. §§944.275(5), 944.28(2)(c), Fla. Stat. (1983).

As the District Court found in Yost v. State, 489 So. 2d 131 (Fla. 5th DCA 1986), Section 27.3455(1), Florida Statutes (1985), clearly violates the constitutional prohibitions against ex post facto laws because it does not permit gain-time to accrue while the costs remain unpaid or, as to indigent defendants, it requires the court to impose a sentence of community service after incarceration. It is not merely procedural because an additional penalty is being imposed by the new statute against defendants who do not or cannot pay these costs. The elements which render a penal law ex post facto--that it apply to events occurring before its enactment and that it disadvantage the offender affected by it--are present in this case. Weaver v. Graham, supra. The District Court's decision to reverse that portion of the trial court's judgment imposing community service in this case should be affirmed.

CONCLUSION

For the reasons expressed in Point I herein, Petitioner respectfully requests that this Honorable Court reverse the District Court's affirmance of the trial court's denial of Petitioner's amended motion to dismiss filed May 14, 1984, and remand this cause to the trial court with directions that he be discharged. In the alternative, and for the reasons expressed in Point II herein, Petitioner respectfully requests that this Honorable Court affirm the District Court's vacation of that portion of the judgment and sentence imposed herein which requires that he perform community service in lieu of court costs.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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112-A Orange Avenue
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904-252-3367

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert Butterworth, Attoreny General, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014, by hand delivery to his basket at the Fifth District Court of Appeal, Daytona Beach, Florida; and by mail to Mr. Michael Livingston, 1150 S. W. Allapattah Road, Indiantown, Florida 33456, this 26th day of January, 1987.

ATTORNEY