W00A

reg APP

IN THE SUPREME COURT OF FLORIDA

DAVID M. HARRIEL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 70,852

PETITIONER'S BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
301 N. Olive Avenue, 9th Floor
West Palm Beach, FL 33401
(305) 820-2150

TANJA OSTAPOFF
Assistant Public Defender

Counsel for Petitioner

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
AUTHORITIES CITED	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
SUMMARY OF THE ARGUMENT	5
ARGUMENT	
POINT I THE TIRAL COURT ERRED IN OVERRULING PETITIONER'S OBJECTION AND DENYING HIS MOTION FOR MISTRIAL WHEN THE INVESTIGATING OFFICER TOLD THE JURY THAT WHEN PETITIONER WAS ARRESTED IN THE INSTANT CASE, HE WAS ALREADY IN THE STOCKADE.	6
POINT II SECTION 27.3455 FLORIDA STATUTES (1985) IS UNCONSTITUTIONAL.	8
POINT III THE EX POST FACTO IMPOSITION OF COSTS IS A FUNDAMENTAL SENTENCING ERROR WHICH MAY BE CORRECTED ON APPEAL EVEN ABSENT OBJECTION BELOW.	11
CONCLUSION	16
CERTIFICATE OF SERVICE	16

AUTHORITIES CITED

CASES	PAGE
Bates v. State, 422 So.2d 1033 (Fla. 3d DCA 1982)	6
Brooks v. State, 336 So.2d 647 (Fla. 1st DCA 1976)	10
Brown v. State, 508 So.2d 776 (Fla. 1st DCA 1987)	11
Dailey v. State, 488 So.2d 532 (Fla. 1986)	12
Gonzalez v. State, 392 So.2d 334 (Fla. 3d DCA 1981)	14
Harris v. State, 427 So.2d 234 (Fla. 3d DCA 1983)	6
Johnson v. State, 495 So.2d 188 (Fla. 2d DCA 1986)	13
Moldonado v. State, 498 So.2d 1057 (Fla. 2d DCA 1986)	13
Moosbrugger v. State, 461 So.2d 1033 (Fla. 2d DCA 1985)	10
Nevak v. State, 332 So.2d 701 (Fla. 1st DCA 1976)	10
Slaughter v. State, 493 So.2d 1109 (Fla. 1st DCA 1986)	11
State v. Champe, 373 So.2d 874 (Fla. 1979)	9
State v. Rhoden, 448 So.2d 1013 (Fla. 1984)	13
State v. Whitfield, 487 So.2d 1045 (Fla. 1986)	12,13
State v. Yost, 507 So.2d 1099 (Fla. 1987)	11
State v. Young, 238 So.2d 589 (Fla. 1970)	9

Webber v. State, 497 So.2d 995
(Fla. 5th DCA 1986) 11

Walcott v. State, 460 So.2d 915
(Fla. 5th DCA 1984) 14

OTHER AUTHORITY

United States Constitution

Eighth Amendment 10

Florida Statutes (1985)

Section 27.3455 11
Section 27.3455(2) 9

Florida Statutes (1986 Supp.)

Section 27.3455 11

Laws of Florida

Chapter 86-154(1) 11

Florida Rules of Criminal Procedure

Rule 3.800(1) 11

PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Nineteenth Judicial Circuit, in and for Martin County, Florida and the appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and appellee in the lower courts. In the brief, the parties will be referred to as they appear before this Court.

The following symbol will be used:

"R" Record on Appeal

STATEMENT OF THE CASE

Petitioner was informed against for sale (Count I) and possession (Count II) of cocaine allegedly committed on December 15, 1984 (R288). He was found guilty by a jury of each count charged (R299,300).

On October 9, 1985, Petitioner was adjudged guilty in accordance with the jury's verdicts (R304). He was sentenced within the sentencing guidelines (R310) to serve concurrent terms of four years in prison on each count, to run concurrently with the sentence imposed in consequence of his violation of probation in another case (R306,307). Petitioner was also ordered to pay $400.00 in court costs, as provided in Section 27.3455(1), Florida Statutes.

Notice of appeal was timely filed on October 29, 1985 (R312). In a decision rendered on June 10, 1987, the Fourth District Court of Appeal affirmed Petitioner's convictions and sentences, including the imposition of costs. This court accepted jurisdiction of the instant cause on October 20, 1987, finding conflict between the decision of the court below, which requires an objection to be made below in order to preserve an ex post facto sentencing violation for appeal, and decisions of other district courts of appeal finding fundamental error in such circumstances.

STATEMENT OF THE FACTS

On December 15, 1984, Detective Deckard of the Stuart Police Department met with Allen Bozeman, a confidential informant who had approached the police about helping them arrest others for drug sales after he himself was arrested for possessing $400.00-600.00 worth of cocaine, which he had intended to sell (R27,97-98,99,134). The police accepted his offer in exchange for a promise to help Mr. Bozeman in his case[1] (R29,100), and Deckard directed Bozeman to try to buy some cocaine at the Cherokee Lounge, near the Stuart Police Department (R36). Bozeman and his vehicle were searched (R34-35,103-104), and he was fitted with an electronic recording device (R35,103). Bozeman then drove to the Cherokee Lounge, where a black male sold him $25.00 worth of a substance (R54,108) which was determined to be cocaine (R162).

The jury heard a tape recording of the conversation between Bozeman and the man who sold him the cocaine (R188), and was also provided, over Petitioner's objection (R184-187), with a transcript of that recording. Bozeman identified Petitioner as this person (R113), although Bozeman had since made about twenty deals with some fourteen black males in two operations undertaken with Deckard (R129-130). Deckard also said the man at Bozeman's truck was Petitioner (R52), although he only saw him briefly in the darkness when the man turned to look at Deckard's car as it drove by (R79). Deckard said he recognized Petitioner's voice, but only after seeing him (R56). Petitioner was arrested on March 4,

---

1 The charges against Bozeman were ultimately dropped (R240).

1985, after the police "learned that he was in the stockade" (R68). Petitioner's objection to this remark was overruled, and his motion for mistrial denied (R68).

Petitioner's girlfriend, Dorothy Dooley, testified that Petitioner was home with her from before dark until shortly before 11:00 p.m., when she had to leave briefly to make a phone call about a new job at a home for retarded children (R196-198). She also stated that Petitioner had four brothers, two of whom lived nearby and looked very much like him (R201-202).

SUMMARY OF THE ARGUMENT

I. Evidence that Petitioner was already in custody on other charges was irrelevant to the State's proof in the present case. Admission of this evidence over Petitioner's objection was reversible error where the testimony in the instant case was conflicting.

II. The imposition of $400.00 in court costs against Petitioner pursuant to a statute which suffers from numerous constitutional defects is illegal and must be struck.

III. The ex post facto application of the statute authorizing imposition of costs against a defendant results in an illegal sentence. As such, it constitutes fundamental error which may be corrected on appeal even absent objection below.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN OVERRULING PETITIONER'S OBJECTION AND DENYING HIS MOTION FOR MISTRIAL WHEN THE INVESTIGATING OFFICER TOLD THE JURY THAT, WHEN PETITIONER WAS ARRESTED IN THE INSTANT CASE, HE WAS ALREADY IN THE STOCKADE.

During the prosecutor's examination of Detective Deckard, the investigating officer in the instant case, he elicited the following:

> Q. And [Petitioner] was arrested on the 4th of March?
>
> A. That's correct, we looked for him on the 2nd of March --
>
> Q. Okay --
>
> A. -- and then later learned he was in the stockade.

(R68). Petitioner immediately objected and moved for a mistrial, but the motion was denied (R69).

Admission of this totally irrelevant evidence that Petitioner was in custody on other charges when he was arrested was clearly erroneous. Harris v. State, 427 So.2d 234 (Fla.3d DCA 1983) [defendant had "prior felony past"]; Bates v. State, 422 So.2d 1033 (Fla.3d DCA 1982) [defendant in prison before].

Moreover, the evidence in the present case was conflicting. The State's entire case was one of identification and rested on the testimony of a police officer who only caught a quick glimpse of the perpetrator's face as he drove by on a dark night, and on the corroborating evidence of an informant whose own case -- which involved a far greater amount of cocaine than Petitioner

was charged with selling -- was dropped as a result of his cooperation with the police, and who therefore had a great incentive to conform his testimony to the police perception of what happened. On the other hand, Petitioner presented an alibi defense and testimony that he had four brothers, two of whom lived nearby and looked a great deal like him. Under the circumstances, the erroneous introduction of the irrelevant evidence that Petitioner was already in custody when arrested on the instant charges unfairly prejudiced his right to a fair trial, and his conviction must be reversed.

POINT II

SECTION 27.3455 FLORIDA STATUTES (1985) IS UNCONSTITUTIONAL.

Petitioner was ordered to pay $400.00 as "court costs" pursuant to section 27.3455(1), Florida Statutes (1985), which provides:

> When any person pleads guilty or nolo contendere to, or is found guilty of, any felony, misdemeanor, or criminal traffic offense under the laws of this state or the violation of any municipal or county ordinance which adopts by reference any misdemeanor under state law, there shall be imposed as a cost in the case, in addition to any other cost required to be imposed by law, a sum in accordance with the following schedule:
>
> (a) Felonies.....$200
>
> (b) Misdemeanors.....$ 50
>
> (c) Criminal Traffic Offenses.....$ 50
>
> The clerk of the court shall collect such additional costs and shall notify the agency supervising a person upon whom costs have been imposed upon full payment of fees. The clerk shall forward all but $3 for each misdemeanor or criminal traffic case and all but $5 for each felony case to the Treasurer. The Treasurer shall deposit such funds in the Local Government Criminal Justice Trust Fund to be administered by the Governor, following consultation with the chairperson of the appropriations committees of the Senate and the House of Representatives. Such funds shall be used exclusively for those purposes set forth in subsection (2). The clerk shall retain $3 for each misdemeanor or criminal traffic case, and $5 for each felony case of each scheduled amount collected as a service charge of the clerk's office. A political subdivision shall not be held liable for the payment of the additional cost imposed by this section. 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 and shall serve the term of community service at the termination of incarceration. Each hour of community service shall be credited against the additional cost imposed by the court at a rate equivalent to the minimum wage. The governing body of a county shall supervise the community service program. The court shall retain jurisdiction for the purpose of determining, upon motion, whether a person is indigent for the purpose of this section. In the event that the emergency release provisions of s.944.598 are initiated, any inmate who would have otherwise been eligible for release under a 944.598 shall not be denied release solely as a result of this section.

Ch. 85-313, Laws of Florida, effective July 1, 1985.

This statute is subject to numerous constitutional defects.[2] The $200.00 amount is unrelated to any real assessment of actual costs in the defendant's case, as demonstrated by the laundry list of uses to which the fees so collected are to be put under section 27.3544(2), Florida Statutes. Such an arbitrary assessment of costs amounts to an unlawful tax. See State v. Young, 238 So.2d 589 (Fla. 1970). Moreover, since the additional costs are imposed at the same rate against those who plead guilty at arraignment and those who are found guilty after months of pretrial discovery and a six-week jury trial, the statutory classifications bear no reasonable relationship to the purpose of the legislation, thus violating the Equal Protection Clause of the United States Constitution. See State v. Champe, 373 So.2d 874 (Fla. 1979). And, because the statute provides that indigents who cannot pay the fine will be required to

---

[2] The ex post facto violation involved in the present case is discussed in Point III, infra.

perform community service at a minimum wage rate to pay off the "costs", it also violates the prohibition against imprisonment for debt, see Brooks v. State, 336 So.2d 647 (Fla.1st DCA 1976); Nevak v. State, 332 So.2d 701 (Fla.1st DCA 1976), and the Eighth Amendment prohibition against cruel and unusual punishment, particularly since the $200.00 court costs amount, in relation to an indigent who may have been convicted of shoplifting $110 worth of food, to excessive punishment.

In short, the trial court erred in imposing $400.00 in court costs against Petitioner pursuant to Section 27.3455, because the statute is on its face unconstitutional.[3] Consequently that portion of Petitioner's judgment and sentence which assesses court costs must be stricken.

---

[3] An accused may challenge the facial validity of a statute on appeal even where it was not objected to below. Moosbrugger v. State, 461 So.2d 1033 (Fla.2d DCA 1985).

POINT III

THE EX POST FACTO IMPOSITION OF COSTS IS A FUNDAMENTAL SENTENCING ERROR WHICH MAY BE CORRECTED ON APPEAL EVEN ABSENT OBJECTION BELOW.

In State v. Yost, 507 So.2d 1099 (Fla. 1987), this Court held that application of Section 27.3455, Florida Statutes (1985),[4] to offenses committed prior to its effective date of July 1, 1985 is a violation of the ex post facto prohibition of both the United States and Florida Constitutions. The question presented in the present case is whether a defendant who fails to object to the imposition of costs pursuant to that statute at the time of sentencing waives his right to challenge the ex post facto nature of the costs on appeal.

In Webber v. State, 497 So.2d 995 (Fla. 5th DCA 1986), the Fifth District Court of Appeal held that the illegal imposition of costs was the type of fundamental sentencing error which may be raised on appeal notwithstanding the defendant's failure to object at the sentencing. The illegal costs render the sentence illegal, and an illegal sentence may be attacked at any time. Fla.R.Crim.P. 3.800(1). The First District Court of Appeal has reached the same conclusion. See Brown v. State, 508 So.2d 776 (Fla. 1st DCA 1987).[5]

---

[4] The Legislature has amended the statute, deleting the provision for loss of gain-time. Ch. 86-154(1), Laws of Florida; § 27.3455, Fla. Stat. (Supp. 1986).

[5] Apparently receding from Slaughter v. State, 493 So.2d 1109 (Fla. 1st DCA 1986).

Both appellate courts applied the reasoning of this court's decision in State v. Whitfield, 487 So.2d 1045 (Fla. 1986) in arriving at their result. In Whitfield, this Court determined that a computational error in arriving at a sentencing guidelines score is fundamental sentencing error requiring no objection on appeal. The computational error rendered the sentence imposed a departure sentence, which was illegal absent the written findings supporting such a sentence which are mandatorily required by the enabling statute. "[T]he absence of the statutorily mandated findings rendered the sentences illegal because, in their absence, there was no statutory authority for the sentences." Id., 1046 [emphasis added].

Under the circumstances presented by the instant case, the statute authorizing assessment of costs was not in effect at the time Petitioner committed the offenses for which sentence was imposed. Thus, there was equally "no statutory authority" for Petitioner's sentence.

Moreover, the defect which rendered Petitioner's sentence illegal is readily apparent from the face of the record: the information unblushingly sets forth the date the offense was allegedly committed, and the statute book demonstrates the effective date of the sentencing statute. No additional evidence need be taken: the error is nakedly there for all to see when the record is reviewed and cannot be disputed.

As this court stated in Dailey v. State, 488 So.2d 532 (Fla. 1986), sentencing errors, including those made in computing the guidelines sentence, must be objected to below if they are based

on underlying factual matters which are not readily apparent from the face of the record. Dailey expressly contrasts, for purposes of the contemporaneous objection rule, errors like that at bar which are apparent from the record and as to which no factual dispute can or does exist and errors which require further investigation to determine their presence. Only in the latter case is any legitimate purpose served by requiring the defendant to object to the matter at the trial level. This Court's observation in State v. Rhoden, 448 So.2d 1013, 1016 (Fla. 1984) that

> The purpose of the contemporaneous objection rule is not present in the sentencing process because error may be corrected by a simple remand to the sentencing judge

has special applicability here. See also State v. Whitfield, 487 So.2d at 1046, n.2.

Although the better practice is unquestionably for trial counsel to object at the time sentence is imposed, this is not always practicable. The Second District Court of Appeal, for instance, has generally required an objection to be interposed at the time of an ex post facto imposition of costs to preserve the issue for appeal. Johnson v. State, 495 So.2d 188 (Fla. 2d DCA 1986). But even that court has recognized that where the defendant had no notice that costs would be imposed pursuant to Section 27.3455, the objection requirement would be waived. See, e.g., Maldonado v. State, 498 So.2d 1057 (Fla. 2d DCA 1986).

By this holding relating to the contemporaneous objection rule, the Second District Court of Appeal appears to have recognized the special nature of sentencing errors which underlie this Court's decisions in Whitfield and Dailey. The sentence to which a criminal defendant is subjected constitutes the direct impact upon him of society's disapproval of his actions. But

> No one who believes in the role of law in our form of government believes that a citizen should be deprived of his liberty and confined as punishment except under a sentence imposed in accordance with all lawful requirements.

Walcott v. State, 460 So.2d 915, 920 (Fla. 5th DCA 1984), (Cowart, J., concurring). An illegally excessive or harsh sentence has an immediate adverse affect if for no other reason than that by its unlawful nature it cheapens the legitimacy of society's appropriate disapproval. Where such an illegality may be readily corrected on appeal, simple justice requires that it be done without regard to procedural niceties which have no practical purpose where the error is patent.

Judicial expediency is also served by immediate correction of obvious sentencing error. As Judge Pearson pointed out in Gonzalez v. State, 392 So.2d 334, 336 (Fla. 3d DCA 1981):

> If a defendant has sought our review of a sentencing error and, as here, has presented us with a record and briefs, whatever expediency might have been accomplished had the issue been presented to the trial court in the first instance will certainly not be accomplished by our refusal to review the error without prejudice to the defendant to begin again with a Rule 3.850 motion in the trial court.

Nor does the immediate resolution of readily apparent sentencing error promote the impression that the courts are concerned solely with the form of an objection rather than the substance of an error.

Consequently, the ex post facto application of the statute authorizing costs meets all the requirements of fundamental sentencing error and no policy reasons exist which would favor application of the contemporaneous objection rule in these circumtances. This Court should therefore reverse the contrary conclusion of the Fourth District Court of Appeal below and adopt the position of the First and Fifth District Courts of Appeal by holding that no objection is required to preserve this issue for appeal.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, Petitioner respectfully requests this Court to reverse the decision of the trial court and remand this cause with proper directions.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
301 N. Olive Avenue/9th Floor
West Palm Beach, Florida 33401
(305) 820-2150

Amy Eschwartz, Esq. for

TANJA OSTAPOFF
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to AMY LYNN DIEM, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 12 day of November, 1987.

Amy Eschwartz

Of Counsel