IN THE SUPREME COURT OF FLORIDA

CHERYL SHIPLEY, :

Petitioner, :

vs. : Case No.
DCA Case No. 86-1796

STATE OF FLORIDA, :

Respondent. :

:

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

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

On May 21, 1986, Petitioner, CHERYL SHIPLEY, was convicted for the commission of crimes occurring in 1982 and 1985. She was sentenced to 25 years in prison. Costs pursuant to sections 960.20 and 943.25(4), Florida Statutes (1985), were imposed in nine different judgments for a total of $202.50. The court also ordered Shipley to perform 80 hours of community service, pursuant to section 27.3455, Florida Statutes (1985). Finally, the trial court directed the probation officer to determine the amount of restitution.

Timely notice of appeal was filed June 19, 1986. In an opinion dated September 23, 1987, the second district decided that the trial court had improperly delegated to the probation officer its duty to determine the appropriate amount of restitution. The second district also found that the trial court had also improperly imposed the court costs without notice or hearing. The defendant had no opportunity to object because the costs were not orally announced. The second district, however, determined that the defendant's failure to object when the hours of community service were announced foreclosed this issue from appellate review.

Petitioner now appeals to the Supreme Court of Florida.

SUMMARY OF ARGUMENT

The instant decision holds that, absent a contemporaneous objection, the lack of notice and hearing for court costs and community service is not an issue that can be raised on appeal. This decision expressly and directly conflicts with other Florida cases which hold that (1) lack of notice and hearing is a fundamental due process error, and (2) sentencing errors apparent from the face of the record can be raised on appeal without objection below.

ARGUMENT

THE INSTANT DECISION CONFLICTS WITH OTHER FLORIDA CASES WHICH HOLD THAT (1) LACK OF NOTICE IS FUNDAMENTAL ERROR AND (2) SENTENCING ERRORS APPARENT FROM THE FACE OF THE RECORD CAN BE APPEALED WITHOUT OBJECTION BELOW.

The instant opinion holds that, absent a contemporaneous objection to the imposition of community service without notice and a hearing, the lack of notice and hearing cannot be reviewed on appeal. The opinion expressly notes conflict with Outar v. State, 508 So.2d 1311 (Fla. 5th DCA 1987) and Harris v. State, 498 So.2d 1371 (Fla. 1st DCA 1986).

Outar reasons that lack of notice and a hearing is a due process error which is therefore fundamental and does not require an objection. According to Castor v. State, 365 So.2d 701 (Fla. 1978), an error is fundamental if it amounts to a denial of due process. Obviously, the very purpose of the notice and hearing requirement is to give the defendant an opportunity and reason to prepare objections. If a defendant has had no chance to prepare his objections, he cannot be faulted for not making them.

Harris relies on this Court's decision in Jenkins v. State, 444 So.2d 947 (Fla. 1984). Although the majority opinion in Jenkins does not discuss the lack of objection, the dissenting opinion shows that the trial court orally imposed costs without objection from the defendant. Despite this absence of contemporaneous objection, however, this Court decided to vacate the costs because they were imposed without notice and hearing. This

Court's decision in Jenkins clearly means therefore that the issue of notice and hearing does not require a contemporaneous objection to be preserved.

Although it is not cited in the opinion, the instant decision also conflicts with the reasoning of Webber v. State, 497 So.2d 995 (Fla. 5th DCA 1986). Relying on State v. Whitfield, 487 So.2d 1045 (Fla. 1986), the court in Webber held that the ex post facto application of court costs could be addressed on appeal despite the lack of objection below because this error was a sentencing error apparent from the face of the record. In the instant case, the term of community service was a part of Petitioner's sentence, because it was announced at her sentencing hearing and was included in one of the written judgments against her. Consequently, the improperly imposed term of community service was a sentencing error apparent from the face of the record which could be appealed without objection below.

Thus, this Court may take jurisdiction because this case conflicts with Outar, Harris, Jenkins, and Webber. This Court should take jurisdiction because issues regarding the imposition of court costs are probably the most litigated issues in the Florida appellate system.

CONCLUSION

Based upon the preceding argument, Petitioner requests this Honorable Court to take jurisdiction of her case.

Respectfully submitted,

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