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IN THE SUPREME COURT OF FLORIDA

CHERYL SHIPLEY

Petitioner

v.

STATE OF FLORIDA

Respondent

Case No. 71,371

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

Resp's

BRIEF OF ~~PETITIONER~~ ON MERITS

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TABLE OF CONTENTS

	PAGE NO.
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
CONCLUSION	10
CERFIFICATE OF SERVICE	10

TABLE OF CITATIONS

	PAGE NO.
Barker v. State, No. 86-3077 (Fla. 2d DCA January 13, 1988)	4
Clark v. State, 363 So.2d 331, 333 (Fla. 1978)	8
Engle v. Issac, 456 U.S. 107, 102 S.Ct. 1558 71 L.Ed.2d 783 (1982)	7
Harris v. State, 498 So.2d 1371 (Fla. 1st DCA 1986)	3
Henriquez v. State, 513 So.2d 1285 (Fla. 2d DCA)	3
513/1285 Henriquez v. State, Fla. Case No. 71,414	3
Mays v. State, Fla. 70,330 (Fla. February 4, 1988)	7
Merling v. State, No. 86-649 (Fla. 2d DCA January 15, 1988) [13 Fla. 217]	3
Outar v. State, 508 So.2d 1311 (Fla. 4th DCA 1987)	3
Reed v. Ross, 468 U.S. 1, 16, 104 S.Ct. 2901, 2910, 83 L.Ed.2d 1 (1984)	7
Sescon v. State, 506 So.2d 45 (Fla. 2d DCA 1987)	3
Shipley v. State, 512 So.2d 1135 1136 (Fla. 2d DCA 1987)	3
Singletary v. State, No. 86-2147 (Fla. 2d DCA February 17, 1988)	3
Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 53 L.Ed.2d 594 (1977)	7
Wood v. State, No. 86-3312 (Fla. 2d DCA February 5, 1988) [13 F.L.W. 353]	7

STATEMENT OF THE CASE AND FACTS

Respondent accept the statement of the case and statement of facts as presented by petitioner except where specifically otherwise pointed out by respondent in this brief.

ISSUE

Miss Shipley's failure to object to "community service" in her sentencing is procedurally defaulted as this is not a fundamental error which goes either to the foundation of her prosecution or to the merits of her prosecution.

(As Stated by Respondent)

SUMMARY OF THE ARGUMENT

Fundamental error goes to the foundation of the case or goes to the merits of the cause of action. Miss Shipley failed to object to imposition of "community service" in her sentencing. The Second District did not find plain error and elected to enforce Florida's procedural default rule. This Court is asked to approve the action of the Second District so as to foreclose review of the "community service" issue. This Court must indicate that as a matter of policy it wants the procedural default fule enforced. Otherwise, as the Supreme Court has stated, "if...the state courts (do not) indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim." See, County Court of Ulster County v. Allen, 442 U.S. 140, 154, 99 S.Ct. 2213, 2223, 60 L.Ed.2d 777 (1979).

ARGUMENT

In footnote one of Shipley v. State, 512 So.2d 1135, 1136 (Fla. 2d DCA 1987), Judge Frank points out the pragmatic abstraction of the holding. There he notes: "The statute has been amended to delete the provision allowing community service to be imposed in lieu of costs. §27.3455, Fla.Stat. (Supp. 1986)." See Merling v. State, No. 86-649 (Fla. 2d DCA January 15, 1988) [13 Fla. 217]; and, Singletary v. State, No. 86- 2147 (Fla. 2d DCA February 17, 1988).

The "State" would urge this Court to adopt the reasoning and holding of the Second District; and, furhter decline to adopt the reasoning and holding published in Outar v. State, 508 So.2d 1311 (Fla. 4th DCA 1987) and Harris v. State, 498 So.2d 1371 (Fla. 1st DCA 1986).

There are two opinions in support of the holding undereview In Sescon v. State, 506 So.2d 45 (Fla. 2d DCA 1987), Judge Scheb pre-empted the "contemporaneous objection" bar to imposition of costs. Why? Because there was an "ex post facto" state and federal constitutional deprivation. However, in Henriquez v. State, 513 So.2d 1285 (Fla. 2d DCA) review on merits granted in Henriquez v. State, Fla. Case No. 71,414 (pending), Chief Judge Danahy affirmed a trial court's finding of "waiver" where the trial public defender failed to object to a trial judge's oral pronouncement of his intention to impose assessments. For purposed of brevity and clarity, the "State" would adopt the argument presented by the Respondent before this Court in Henriquez v. State, Fla. Case No. 71,414 (pending).

In Barker v. State, No. 86-3077 (Fla. 2d DCA January 13, 1988) [13 FLW 217] Chief Judge Danahy certified the following question to this Court:

> WHETHER A CONTEMPORANEOUS OBJECTION IS NECESSARY TO PRESERVE FOR APPELLATE REVIEW THE PROPRIETY OF IMPOSING COSTS ON AN INDIGENT DEFENDANT AT A SENTENCING HEARING WITHOUT PRIOR NOTICE REQUIRED BY Jenkins v. State, 444 So.2d 947 (Fla. 1984).

Your undersigned is informed that the mandate issued in the Barker appeal; and, that the Public Defender has not prosecuted the certified question. However, both Chief Judge Danahy and Judge Schoonover felt strongly about the issue. Judge Danahy writes:

> As in numerous cases preceding this one, we are asked to declare improper the imposition of costs on the appellant, an indigent criminal defendant, because the procedural requirements of Jenkins v. State 444 So.2d 947 (Fla. 1984), were not followed. The scenario here is one which has been repeated many times in this district. The appellant and his attorney, an assistant public defender, appeared before the trial judge at a sentencing hearing. The trial judge announced that he would impose costs on the appellant in a specific amount. Counsel for the appellant stood mute; he made no objection whatsover to the imposition of costs on any ground, specifically not on the ground that there was no prior notice as required by Jenkins.
>
> Now, on appeal, the assistant public defender representing the appellant has asked this court to reverse the imposition of costs because the Jenkins requirements were not followed. Three months ago we issued an opinion in a similar case in which we held that the failure to object when the trial judge orally stated his intention to impose assessment constituted a waiver of the right to assert objections to

to the assessments on appeal, including the objection that the procedural requirements of Jenkins v. State were not followed. Henriquez v. State, No 85-2804 (Fla. 2d DCA Sept. 11, 1987) [12 F.L.W. 2224]. Notwithstanding, the issue continues to be a troubling one. We acknowledged in Henriquez that our holding there was in conflict with the holding in Outar v. State, 508 So.2d 1311 (Fla. 5th DCA 1987), which declared that failure to follow the Jenkins requirements is fundamental error and may always be raised on appeal. But see Reynolds v. State, No. 87-259 (Fla. 5th DCA Dec. 17, 1987) [12 F.L.W. 2887] (En Banc). Recently, the First District Court of Appeal held that failure to follow the Jenkins requirements produces an illegal sentence as far as costs are concerned, so that the issue can be addressed on appeal without a contemporaneous objection. Bellinger v. State, No. BP-252 (Fla. 1st DCA Nov. 5, 1987) [12 F.L.W. 2538]. We disagree with that holding also, and express conflict with Bellinger.

Upon consideration, we believe that we should take this opportunity to explain more fully our decision in Henriquez, and certify the question to the supreme court. First we observe that as a general matter, a reviewing court will not consider points raised for the first time on appeal. Castor v. State, 365 So.2d 701 (Fla. 1978). The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him with an opportunity to correct it at an early state of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually Castor.

The cases which have come to this court involving the Jenkins issue illustrate the importance of a contemporaneous objection. We estimate that this court has issued approximately 100 opinions citing Jenkins. When we have reversed the imposition of costs for failure to meet the Jenkins requirements, we have done so without prejudice to the reimposition of those costs upon notice to the defendant and a hearing, as required by Jenkins. Certainly, this is not the most expeditous use of this state's judicial system. It would be far better for defense counsel to bring to the trial judge's attention that Jenkins requires notice and hearing prior to the imposition of costs on an indigent defendant, and give the

trial judge and the state the opportunity to meet the Jenkins requirements. Appealing to this court to obtain that result is wasteful.

Our supreme court has consistently held that even constitutional errors, other than those constituting fundamental error, are waived unless timely raised in the trial court. Clark v. State, 262 So.2d 331 (Fla. 1978). Fundamental error, which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action. Clark. Our supreme court has cautioned appellate courts to exercise their discretion concerning fundamental error "very guardely." Sanford v. Rubin, 237 So.2d 134 (Fla. 1970). The court has said that the doctrine of fundamental error should be applied only in the rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application. Ray v. State, 403 So.2d 956 (Fla. 1981). The failure to object is a strong indication that, at the time and under the circumstances, the defendant did not regard the alleged fundamental error as harmful or prejudicial. Ray. Parenthetically, we observe that when the Jenkins issue has been presented to us, there has been no suggestion of a particular defense desired to be raised which was forclosed by lack of prior notice. Since neither indigency nor ability to pay is an issue at imposition of costs, we can only speculate as to possible defenses or objections to the imposition of costs. To state it otherwise, no appellant raising the Jenkins issue has made any effort to show prejudice by failure to receive prior notice before imposition of costs.

For the foregoing reasons, we do not feel that the failure to follow the Jenkins requirements is fundamental error which excuses the failure of an indigent defendant to object to the imposition of costs at a sentencing hearing; therefore, a nonobjecting defendant should not be permitted to raise the issue on appeal. Of course, where an indigent defendant does not have an opportunity to object because no mention of costs is made during the sentencing hearing, but costs are later imposed in a written judgment, the error may be raised on appeal. Sescon v. State, 506 So.2d 45 (Fla. 2d DCA 1987).

(Text of 13FLW at 217,218)

The issue is still subject to litigation. In Wood v. State, No. 86-3312 (Fla. 2d DCA February 5, 1988) [13 F.L.W. 353] the question is again certified. That case is pending before this Court as Wood v. State, Fla. 71,913 (cerfified question pending).

This Court has spoken to the issue of due process in Mays v. State, Fla. 70,330 (Fla. February 4, 1988) [13 F.L.W. 70]. Justice Ehrlich in writing for the Court holds that due process requires notice and an opportunity to be heard prior to the assessment of costs under section 27.3455. However, this opinion does not address the question as to whether the failure to follow the Jenkins protocol is fundamental error; and, if not fundamental error, then defense counsel is not excused for failing to object to the imposition of community service. At bar, the costs have been stricken; and, that aspect of the opinion is in conformity with this Court's opinion im Mays.

The "State" asserts that Cheryl Shipley has failed to establish "cause" for her default; and, further she fails to establish "actual prejudice" sufficient for state appellate review of this imposition of community service pursuant to the principles established in Engle v. Issac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) and Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). With these cases as foundation, the Supreme Court held in Reed v. Ross, 468 U.S. 1, 16, 104 S.Ct. 2901, 2910, 83 L.Ed.2d 1 (1984)

"that were a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with acceptable state procedures." This is exactly the basis the Second District holds to in Shipley. Both this Court and the lower state appellate courts consistently hold that error are waived unless timely raised in the trial court. See, e.g., Clark v. State, 363 So.2d 331, 333 (Fla. 1978).

However, Florida appellate courts do not enforce the contemporary objection rule if they find "fundamental error." See, Clark v. State, 363 So.2d 331, 333 (Fla. 1978). This Court answered the question as to what constitutes "fundamental error" in Clark. Fundamental error is "error which goes to the foundation of the case or goes to merits of the cause of action." id. Miss Shipley was charged by various informations in Polk County with 7 counts of obtaining property by worthless check and 1 count of grand theft. She was placed on probation in 1982 for these offenses. (R 1-4; 9-16; 24-17; 36). The term of probation was for ten years; regretfully, her criminal spree did not end. Miss Shipley again began passing bad checks and further, as a convicted felon, she possessed a firearm. Pursuant to plea negotiations, she pleaded guilty to the firearm possession; the grand theft charge; and, probation violation. (R 57-61). Miss Shipley's penal history indicates that she had previously been convicted over a hundred times, including 20 theft and bad check offenses. (R 143-144). The "guidelines" scoresheet reflects a sentence of life imprisonment. (R 83; 143)

The "State" poses one question. In light of these facts and circumstances, does failure to object to a "community service" service go to either the foundation of the case or to the merits of the cause of action? This is not a claim for this Court or the Second District to exaimine the record for plain error. Procedural default was an issue before the Second District; and, it continues as an issue before this Court. The Second District has correctly elected to enforce a procedural default rule so as to foreclose review of the "community service" issue.

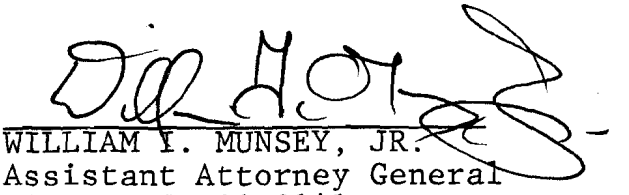
Florida courts must continue to apply procedural default to bar review of claims like thos Miss Shipley asserts here. Why? Because there is no plain and/or fundamental error.

CONCLUSION

WHEREFORE, based on the foregoing reasons, argument, and authority, the State would pray that this Honorable Court make and enter an Order approving and affirming that aspect of the Second District Shipley opinion in conflict with its sister court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of Stephen Krosschell, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000-Drawer PD, Bartow, FL. 33830 this 25th day of February, 1988.

COUNSEL FOR PETITIONER