IN THE SUPREME COURT OF FLORIDA

TIMOTHY WOOD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 71,913

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

BRIEF OF PETITIONER ON MERITS

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PRELIMINARY STATEMENT

Petitioner, TIMOTHY M. WOOD, was the Appellant in the Second District Court of Appeal and the defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeal. The record on appeal, which was utilized on the District Court level and in contained in one volume, will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

From July 24, 1986, through September 5, 1986, the State Attorney for the Twentieth Judicial Circuit in and for Lee County, Florida, filed twelve informations against the Appellant, TIMOTHY WOOD, charging Mr. Wood with thirteen counts of Grand Theft contrary to Florida Statute 812.014 and 812.015 and seven counts of Uttering Worthless Checks contrary to Florida Statute 832.04. These offenses occurred in March, May, and June of 1986 (R1-17). On October 6, 1986, Mr. Wood plead guilty to all counts with the understanding that he would receive the recommended guidelines sentence (R42-58). The scoresheet recommended Community Control or 12-30 months incarceration (R72-83); and on December 2, 1986, was sentenced as follows: on fourteen counts Mr. Wood received thirty months incarceration, all to run concurrent, with 96 days credit for time served given; and on six counts Mr. Wood received five years probation on each count with three of the counts running concurrent and three running consecutive for a total of fifteen years probation, said probation to run consecutive to the prison sentences. In addition all of the sentences reflect court costs imposed, including $200 under Florida Statute 27.3455 (R96-43). On December 29, 1986, Mr. Wood timely filed his Notice of Appeal on all twenty counts/twelve cases (R144, 145).

On appeal the only issue of merit argued by Mr. Wood was the imposition of court costs inasmuch as Mr. Wood was indigent (R18-27), and there was no notice as to the imposition of these court costs. The Second District Court of Appeal affirmed these court costs on

the grounds that failure to object to the imposition of court costs on an indigent at sentencing constituted a waiver. The court then certified the question as one of great public importance as to whether or not a contemporaneous objection is needed to preserve a Jenkins court costs issue. See Barker v. State, Case No. 86-3077 (Fla. 2d DCA Jan 13, 1988) [13 F.L.W. 217].

SUMMARY OF THE ARGUMENT

Imposing court costs on an indigent defendant without proper notice is an illegal sentence on the face of the record and constitutes fundamental error. No objection is necessary to preserve the issue for appeal purposes.

ARGUMENT

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

In its Barker, supra, opinion, the Second District Court of Appeal states that a contemporaneous objection is necessary in order to preserve the issue of imposing court costs on an indigent defendant when no prior notice is given. Although the court certified the above-stated issue as a question of great public importance, it is also to be noted that at least two other District Court of Appeals conflict directly with the Second District Court of Appeal on this issue. In Outar v. State, 508 So.2d 1311 (Fla. 5th DCA 1987), the court held that failure to follow the Jenkins requirement is fundamental error and may always be raised on appeal; and in Bellinger v. State, 514 So.2d 1142 (Fla. 1st DCA 1987), the court held that failure to follow Jenkins requirements produces an illegal sentence as to costs and the contemporaneous objection rule does not apply. The Second District Court of Appeal disagreed with these cases on the grounds that failure to object and allow the judge the opportunity to correct a problem at an early stage of the proceedings and then raising the issue for the first time on appeal resulted in delay and an unnecessary, wasteful use of the appellate process. The court also stated that it would not apply the fundamental error rule except in rare cases, and would

not apply it where it was difficult to see the prejudice caused by failure to receive prior notice before imposition of court costs.

As pointed out in the dissent of Barker, it is impossible to see how Barker's position differs from that in Jenkins, supra, where this court reversed court costs imposed on an indigent defendant when no prior notice was given but no objection was made. This court pointed out in Jenkins, supra at 950, that: "To ensure compliance with due process, section 27.56 requires 'adequate notice' to the defendant that the county is seeking recovery of those costs and an opportunity for the defendant to be heard on that issue." This due process requirement, as pointed out in Outar, makes the error fundamental and cannot be waived by failing to object. Thus, the facts in Jenkins, which consisted of a non-objecting indigent defendant, and the reasoning in Jenkins, which sets forth a due process requirement, refute the Second District Court of Appeal's opinion that fundamental error is not applicable.

The Second District Court of Appeal's argument that it could not see the prejudice in imposing court costs on an indigent without proper notice flies, of course, in the face of Jenkins' holding and the legislature's intent. The statute and due process requires proper notice before imposing court costs on an indigent defendant. Ambushing an unprepared defendant and then finding he should have objected to preserve the record is not in keeping with either the due process or statutory requirements. This type of "gottcha" tactics should not be approved by this court.

Finally, the Second District Court of Appeal argues that the issue of court costs should be pointed out in the trial court level and corrected at an early stage to avoid delay and wasting the appellate process. Although this would be the best way to handle court costs on an indigent in the best of all possible worlds, reality is that sentencing errors do take place that can be but are not easily handled on the trial level. The trial court level is not perfection, it is not the best of all possible worlds. This lack of perfection, however, has not precluded the raising of such a sentencing error which is apparent from the face of the record in the past. As pointed out in Brown v. State, 508 So.2d 776 (Fla. 1st DCA 1987), a contemporaneous objection is not needed to preserve a sentencing error which is apparent from the record and involves no factual dispute. Brown the lists five Florida Supreme Court cases which held various sentencing errors apparent from the record to be fundamental error.

Other than a basic desire to avoid a wasteful use of the appellate process,[1/] the Second District Court of Appeal's opinion in Barker is factually and legally unsupported. The Barker decision, therefore, and all of its progeny--which includes Mr. Wood's case--must be reversed.

[1/] The desire in Barker to avoid a wasteful use of the appellate process does not necessarily correlate to a cutting back of appeals or a less wasteful use of the appellate process should the Barker opinion be followed. Obviously, the trial attorney was not aware of the sentencing error when he appealed the case; thus, an appeal would still be litigated with or without the sentencing issue.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, Petitioner respectfully asks this Honorable Court to reverse the Second District Court of Appeal's opinion finding the imposition of court costs on an indigent to not be fundamental error.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished to the Attorney General's Office, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, FL 33602, by mail on this 9th day of March, 1988.

Deborah K. Brueckheimer
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